FNP

A Policy Framework for Economic Self Determination

CHAPTER 2: USING THE ACQUIRED RIGHTS AND ASSETS

PRELIMINARY DRAFT ONLY

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First Nations Portfolio

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The Australian National University First Nations Portfolio acknowledges and values its partnership with the National Indigenous Australians Agency and extends its sincere gratitude for their generous support and assistance to deliver the *Murru waaruu* Economic Development Seminar Series in 2023.

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.[1]

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.[2]

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 the supports economic self-determination.

Paul 'Girrawah' House
Senior Community Engagement Officer, First Nations Portfolio
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All artworks and creative designs in this *Murru waaruu* Seminar Background Paper have been created by Rohit Rao. Rohit is a young artist and graduate students at the Australian National University Fenner School of Environment and Society.

Rohit is interested in using art and stories to challenge and communicate complex social and ecological issues and working with communities to imagine and implement alternatives to meet them.

[1] Grant, S. and Rudder, J. 2014, *A Grammar of Wiradjuri Language*, Restoration House, Canberra, page 4.
[2] Ibid.

Contents

Summary of draft policy options

	Area of Policy Reform		Policy Options
1.	Use of the Race Power and possibly External Affairs Power to integrate UNDRIP into Australian legislation and undertake other reform	a)	Application of Section 51 (xxvi) and possibly Section 51 (xxix) of the Australian Constitution to integrate UNDRIP into the Australian legislative framework and undertake the reform required to activate land, water, Sea Country, intellectual property and financial asset rights for the purposes of First Nations economic self-determination.
2.	Activation of land rights	a)	Increasing First Nations economic development certainty and capacity i. National First Nations Estate GIS-enabled Multi Objective Land Allocation (MOLA) assessment ii. Use of the proposed Regional Voice Structure to enhance First Nations economic collaboration
		b)	Improving the fungibility and value as collateral of First Nations tenure i. Government guarantee for financing to replace inalienability ii. New class of tenure: unique First Nations commercial lease iii. New class of tenure: freehold where native title and native title-like rights survive conveyance
		c)	Improving certainty of land use outcomes i. Special First Nations projects approval framework
3.	Activation of water rights	a)	National First Nations Water Rights Alliance to develop a First Nations Economic Water Allocation Policy i. Fully allocated resources: identify First Nations demand and design a voluntary, compulsory or market buy-back scheme ii. Unallocated resources: identify First Nations demand, regulatory approvals mapping, research roadmap and strategy for activation of water resource iii. First Nations Economic Water Allocation Policy that includes National standards for minimum First Nations water allocation, details of a buy-back scheme, roadmap for addressing knowledge gaps, roadmap to unlock unallocated water resources and benchmarks for water allocations in treaty and settlement arrangements
4.	Activation of Sea Country rights	a)	Recognition of Sea Country rights: a principles framework for operating in the marine environment
		b)	Establishing First Nations Sea Rangers as a primary custodian of the marine environment
		c)	First Nations commercial fishing and aquaculture rights tailored to each State's specific regulatory regime: i. Fully allocated fisheries: design a voluntary, compulsory or market buy back scheme where there is First Nations demand ii. New fisheries: establish standards for allocations to First Nations on a right of first refusal basis
		d)	National First Nations fishing and aquaculture peak body
5.	Activating cultural and intellectual property rights	a)	Promotion of the True Tracks Framework as base-level principles that third parties should abide by when dealing with First Nations cultural and intellectual property
		b)	Acceleration of Australian First Nations Cultural and Intellectual Property law reform: i. New Indigenous Knowledge right ii. Initiatives to prevent inauthentic product iii. National Indigenous Knowledge Authority iv. Supporting growth of Indigenous Knowledge Rights based enterprise v. Ratification of the Nagoya Protocol
		c)	Cultural knowledge transfer resourcing
6.	Activating financial assets	a)	Study into activating First Nations funds under management for self-determination
		b)	Growing the First Nations investment sector i. Improving the deal flow through review and refinement of existing enterprise support programs ii. Identifying and leveraging aligned capital: activating the 'I' in ESG and mandated First Nations allocations from mainstream program budgets

iii. First Nations Venture Financing Authority and Fund

Introduction

Nature and purpose of this preliminary draft

This document is a preliminary draft of a chapter in a policy position paper that will be prepared by the Australian National University First Nations Portfolio (ANU FNP) at the conclusion of the *Murru waaruu* seminar series. Its purpose is to socialise the outcomes of *Murru waaruu* Seminar 2: Using the Acquired Rights and Assets with participants in that workshop and other key stakeholders for their review and further input.

The discussion herein represents a synthesis of the *Murru waaruu* Seminar 2 Background Paper,[3], and the deliberations of the seminar that was facilitated by the ANU FNP on the 18th and 19th of April 2022 at the Australian National University in Canberra. The background paper will be an appendix or integrated into the final policy paper and should be read in conjunction with this preliminary draft chapter.

As a preliminary draft that remains subject to review and feedback, the discussion contained herein should not be considered comprehensive or final and is subject to change as the *Murru waaruu* seminar series progresses.

Further information on the *Murru waaruu* First Nations Economic Development Seminar Series and the *Marramarra murru* First Nations Economic Development Symposium that preceded the seminar series can be sourced from:

https://anufirstnations.com.au/murru-waaruu-on-track-seminar-series/

https://anufirstnations.com.au/first-nations-economic-development-symposium/

Rights as an economic asset

Any discussion on First Nations economic self-determination must, at the most fundamental level, revolve around a discussion on the legal concept of rights – property rights as a fundamental pillar of economic empowerment, the human right to economic self-determination, and the extent to which rights that pertain to Australian First Nations are deficient in this regard.

Property rights are a fundamental pillar of economic empowerment

The recognition and protection of an individual's or entity's legal rights in property – whether that be land, water, sea country, intellectual property, financial assets or any other kind of property – as against all others has been a driving force in democratic reforms and is a fundamental pillar that is recognised in the constitutional and other nation-forming documentation of modern liberal democracies. For example, Section 51(xxxi) of the Australian Constitution only allows property rights to be restricted or disturbed by the Commonwealth government for 'proper purpose' and if so, requires the state to provide 'compensation' on 'just terms'.

From the perspective of a lay person the notion of property is often considered to be binary – as in something is mine or it is not mine. However, from a legal perspective, property is a more

[3] The background paper can be sourced at https://anufirstnations.com.au/wp-content/uploads/2023/05/Seminar2_UsingTheAquiredAssets.pdf

complex concept, whereby property rights can more properly be considered as a continuum of proprietary interests ranging from mere permissions to absolute ownership. Property rights can, therefore, range from those that entitle the right holder to exclusive physical possession, to more intangible rights such as those encompassed in intellectual property, pastoral leases, mining leases, various forms of First Nations rights and other economic rights that might be derived from legislation or legal doctrine.

The Right to economic self-determination

Economic self-determination is one of two key facets of economic wellbeing and can be broadly defined as the capacity and space to determine the conditions of labour, production, acquisition and distribution. It is as much about participation in decisions pertaining to how to produce goods, secure other necessary and desirable acquisitions and redistribute material wealth as it is an outcome.[4]

Economic self-determination is a human right of all peoples that is recognised by Article 1(2) of the Charter of the United Nations, as well as articles of two specific United Nations covenants to which Australia is party – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

> *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
>
> *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.*
>
> *The States 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.*
>
> Article 1
> International Covenant on Civil and Political Rights
> International Covenant on Economic, Social and Cultural Rights

Further, and with reference to the subject matter of this paper, the extent to which processes of imperialism and colonisation have infringed on economic self-determination as a fundamental human right globally is reflected in the extent to which it is addressed by the United Nations Declaration on the Rights of Indigenous Peoples – the most comprehensive international instrument on the rights of Indigenous People which Australia endorsed in 2009. . As listed in Table 1 below, a full 11 (or around a quarter) of the 46 Articles of UNDRIP go specifically to the right of Indigenous Peoples to economic self-determination.

Table 1 – Articles of the United Nations Declaration on the Rights of Indigenous Peoples that pertain specifically 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…

[4] Lieanau, O. (2020), 'The multiple selves of economic self-determination', *The Yale Law Journal Forum*, 24 February 2020

UNDRIP Article	Relevant Text
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 *inter alia*, 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.

The Nature of Australian First Nation's rights

On face value, the Australian First Nations estate and other asset base appears significant, comprised of large areas of land, growing sea country and freshwater interests, unique intellectual property, and billions of dollars in legislative structures and trusts to which First Nations people are beneficiaries (see Seminar 2 Background Paper). In the context of Australia being a natural resource rich, modern, free market-oriented, rules-based economy with strong regional trading relationships, this asset base should, *prima facie*, present Australian First Nations with a world of opportunity.

However, as detailed in the Seminar 2 Background Paper, the economic utility of the Australian First Nations estate and asset base is highly constrained. For example:

- In the case of the majority of First Nations land tenure, the rights associated with that tenure are subordinate to those associated with other co-existing tenure;
- In either absolute or relative terms, First Nations land tenure lacks fungibility, whereby almost all grants of land (including grants of freehold title) incorporate caveats that restrict the land's use to mostly non-commercial purposes, including inalienability, which substantially hampers the ability of First Nations people to trade their lands or use their land as collateral for financing purposes;
- Where First Nations water rights are miniscule where they do exist, are almost exclusively 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 cultural and intellectual property, particularly that which pertains to traditional knowledge, is not adequately protected under Australian law leaving it vulnerable to non-First Nations exploitation and presenting challenges with respect to First Nations interests using and 'commercialising' that cultural and intellectual property;
- Funds held in various legislative structures have very prescribed purposes and management processes under which the First Nations interests have limited control; and
- 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 are perceived by many beneficiaries as paternalistic control over financial resources that belong to them.

> *'...we need to move toward a two-world's nation building philosophy, where Australian First Nations can use the rights they have and will continue to reclaim to build wealth in their ways for their peoples. Only then can economic equality and justice be achieved to an extent where Australia can truly consider itself a modern nation on the global stage.'*
>
> Paul Girriwah House
> Ngambri, Ngunnawal and Wiradyuri Custodian

This is not an asset base conducive to economic self-determination, but rather one that promotes a form of 'economic apartheid' (as some First Nations leaders have described it) whereby First Nations Australians are unable to use their rights and assets for economic development with the same protections and flexibility as other Australians. For First Nations Australians to be able to exercise their human right to economic self-determination this is a situation that must fundamentally change.

The role of the Constitution in enabling the reform

As alluded to in the previous section, detailed in the Seminar 2 Background Paper, and evidenced by many of the initiatives proposed in the subsequent section of this Chapter, much of the change that is required to activate Australian First Nations rights such that they can be used as the basis for economic self-determination requires significant reform – a notion that has been repeatedly identified by multiple stakeholders, including the Law Council of Australia (see adjacent text box).

> *'Given the systemic nature of the issues facing First Nations peoples, comprehensive legal and policy reform across all federal, state and territory jurisdictions is required. Without a legal and policy framework based on human rights, breaches of human rights in Australia, particularly of marginalised groups, are likely to remain disturbingly routine.'*
>
> Law Council of Australia
>
> Submission to the Australian Human Rights Commission - Free and Equal: An Australian Conversation on Human Rights (2019)

The complex mosaic and jurisdictional intersections of rights regimes, particularly as they relate to land, water and sea country means that reform will likely need to be driven by the Commonwealth under key heads of power provided to it in accordance with Section 51 of the Australian Constitution – specifically Section 51(xxvi) and potentially Section 51(xxix).

Section 51(xxvi) – The race power

As discussed in the Seminar Background Paper for the first *Murru waaruu* Seminar (Treaty and Settlement), up until the 1967 referendum, the original Section 51 (xxvi) of the Australian Constitution prohibited the Commonwealth Government from making laws with respect to First Nations people, with jurisdiction therefore defaulting to the States. As per the outcome of the 1967 referendum the words 'other than the Aboriginal race' were deleted from Section 51 (xxvi), thereby enabling the Commonwealth Parliament to legislate for people of any race, including First Nations people.

Public discourse and constitutional conventions leading up to the 1967 referendum generally suggest that the changes were enacted on the presumption that they were to confer powers on the Commonwealth to make laws for the benefit of First Nations People,[5], albeit there has been some earlier jurisprudence suggesting a different interpretation being to enable the Commonwealth to protect a race or protect the country from a race if needed.[6, 7] In 1988 the

[5] Pritchard, S. (2011), 'The race power in section 51(xxvi) of the Constitution', *Australian Indigenous Law Review*, Vol 15, No.2
[6] (1983) 158 CLR 1, 158 ('The Tasmanian Dam Case')
[7] (1982) 153 CLR 168

Constitutional Commission, drawing in part on other jurisprudence, concluded that laws made under Section 51(xxvi) may validly discriminate against, as well as be in favour of, the people of a particular race. However, at the same time concluded that it was inappropriate to retain Section 51 (xxvi) in its current form because Australia had 'joined the many nations which have rejected race as a legitimate criterion on which legislation can be based.'[8]

Ultimately, the Constitutional Commission recommended the insertion of a new paragraph (xxvi) that would give the Commonwealth Parliament express power to make laws with respect to those groups of people who are, or are descended from, Australian First Nations on the basis that the nation as a whole has a responsibility for First Nations Australians and the new power would avoid some of the apparent uncertainty associated with the current wording. In other words, it would retain the spirit of the amendment and make explicit the meaning of the alteration made in 1967.[9]

> *'...an affirmation of the will of the Australian people that the that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and the primary object of the power [Section 51(xxvi)] is beneficial.'*
>
> Sir Francis Brennan, AC, KBE, GBS, QC
> Chief Justice of Australia (1995-1998)
> Speaking on the proposed amendment to Section 51 (xxvi)

Regardless of these deliberations and their ultimate conclusion, the reality is that since Section 51(xxvi) was proclaimed in 1967, it has been used both to the detriment and benefit of First Nations Australians. For example, in the Hindmarsh Bridge Act Case,[10], the High Court upheld provisions in the *Hindmarsh Island Bridge Act 1997* (Cth) that specifically provided that the *Aboriginal and Torres Strait Islander Heritage Act 1984* (Cth) did not apply with regard to the construction of the Hindmarsh Island Bridge. It found that the Act was valid by virtue of interpretation of Section 51 (xxvi) of the Constitution. Section 51 (xxvi) has also allowed the Commonwealth Parliament to legislate to the benefit of Australian First Nations such as the *Aboriginal Land Rights (Northern Territory) Act 1976, World Heritage Properties Act 1983, Aboriginal and Torres Strait Islander Heritage Protection Act 1984, Native Title Act 1993 and Corporations (Aboriginal and Torres Strait Islander) Act 2006.*

The result of jurisprudence and parliamentary interpretation of Section 51 (xxvi) that it can be used both for and against the interests of First Nations Australians means the so called 'race-power' remains controversial. It is clear, however, that it provides a constitutional basis for the Commonwealth Parliament to make laws that are to the exclusive benefit of Australia's First Nations.

This positive application of discriminatory powers afforded to the Commonwealth is also consistent with other relevant national legislation and international instruments. For example, while the *Racial Discrimination Act 1975* (Cth) prohibits racial discrimination, Section 8 of the Act provides for 'special measures' to be taken to advance the human rights of certain racial or ethnic groups or individuals. The concept of 'special measures' is generally understood to apply to positive measures taken to redress historical disadvantage and confer benefits on a particular racial group so that they may enjoy their rights equally with other groups.[11]

Further, Article 1(4) of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination,[12], which is incorporated by the *Racial Discrimination Act,* specifically excludes discrimination that is in the form of '*special measures taken for the sole purpose of*

[8] Constitution Commission (1988), *Final Report of the Constitutional Commission*, Vol 2, Australian Government Canberra
[9] Pritchard, S. (2011), 'The race power in section 51(xxvi) of the Constitution', *Australian Indigenous Law Review*, Vol 15, No.2
[10] Kartinyeri v Commonwealth [1998] HCA 22
[11] Australian Human Rights Commission (2011), *Guidelines to understanding 'Special Measures' in the Racial Discrimination Act 1975 (Cth): Implementing Special Measures*
[12] United Nations General Assembly (1965), Resolution 2106 (XX): International Convention of the Elimination of All Forms of Racial Discrimination

securing advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms…'. In accordance with various United Nations conventions to which Australia is party, economic self-determination is a human right.

Such special measures provisions have been used as recently as 2021 by the Australian Government for this purpose.[13]

Therefore, given the entrenched and systemic nature of Australian First Nations socio-economic disadvantage that is the direct result of historical and albeit to a lesser extent, contemporary policies of Australian Governments, there is a clear legal basis for the Australian Government to use legislation that is beneficial to First Nations interests to give effect to economic self-determination for Australia's First Nations.

Given the sheer enormity of the reform that is required to give effect to a regulatory environment that optimally promotes and fosters economic self-determination, Section 51(xxvi) of the Australian Constitution will be a critical enabler of the necessary legislative reform.

Section 51(xxix): External affairs power

Section 51(xxix) of the Australian Constitution confers on the Commonwealth Parliament the power to make laws for the peace, order, and good government of the Commonwealth with respect to external affairs. Known as the 'external affairs power', this provision of the Australian Constitution provides the Commonwealth the power to make laws with respect to matters physically external to Australia and laws affecting Australia's relations with other nations. The High Court has determined this power to enable the Australian Parliament to legislate to implement Australia's obligations under international agreements irrespective of the subject matter of those agreements.[14]

According to the Law Council, Australian Courts appear to have settled the scope of the external affairs power as it extends to implementing standards around treaties, but not as it extends to implementing standards found in customary international law or in other international instruments. While UNDRIP is not a treaty, the High Court has not explicitly or implicitly confined the scope of the External Affair Power to treaties.[15] Indeed some case law has suggested that the External Affairs Power could extend to the implementation of recommendations or draft international conventions by international organisations on subject matter of concern to Australia as a member of those organisations.[16, 17]

While the External Affairs Power provides a less certain pathway than the Race Power (Section 51 (xxvi), it remains a legitimate option for enacting the legislative reform that is required to establish a framework conducive to Australian First Nations economic self-determination.

Domestic United Nations Declaration on the Rights of Indigenous Peoples legislation

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has comprehensive application in improving the social, cultural and political plight of Indigenous peoples. As discussed above, it also very significant in terms of providing a foundation for economic self-determination.

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[13] Pitt, K. (2021), *Northern Australia Infrastructure Facility Amendment (Extension and Other Measures) Bill 2021: Explanatory Memorandum,* The Parliament of the Commonwealth of Australia House of Representatives
[14] Australian Senate (1995), Senate Enquiry: Trick or Treaty? Commonwealth Power to Make and Implement Treaties, Australian Parliament, Canberra
[15] Law Council of Australia (2022), 'Submission to the Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia', *Senate Legal and Constitutional Affairs Reference Committee*, Australian Parliament, Canberra
[16] R v Burgess (1936) 55 CLR 608
[17] Koowarta v Bjelke-Petersen (1982) 153 CLR 168

The incorporation of UNDRIP and its principles into the legal framework of a nation state – through jurisprudence, legislation and constitutional reform – is becoming increasingly common. For example, in 2007, Bolivia was the first nation to incorporate key aspects of UNDRIP into its domestic laws by passing Law 3760 (a direct copy of UNPRIP) and then in 2009 establishing a new constitution that is based on fundamental principles of UNDRIP.[18] In Norway, the Supreme Court in its adjudication of the Nesseby Case,[19], stated that UNDRIP '*…must be regarded as a key document in Indigenous law, among others, because it reflects international law principles in the area and has been granted support from very many states.*'[20] Most recently, the Canadian *United Nations Declaration on the Rights of Indigenous Peoples Act* came into force in Canada in June 2021. The purpose of this critical legislative reform is to affirm UNDRIP as an international human rights instrument that is to assist with the interpretation and application of Canadian law. The main sections of the Act are summarised in the following Table 2 and in effect require the Canadian Government, in cooperation with First Nations, Inuit and Metis peoples to:

- Take all measures necessary to ensure the laws of Canada are consistent with UNDRIP;
- Prepare and implement an action plan to achieve UNDRIP's objectives; and
- Table and publish an annual report on progress as to aligning Canadian law with UNDRIP and the action plan.

Table 2 – Key provisions of the Canadian *United Nations Declaration on the Rights of Indigenous Peoples Act 2021*

Key Provision	Summary
4. Purpose of the Act	Affirms UNDRIP as a universal international human rights instrument with application in Canadian law and to provide a framework for its implementation.
5. Consistency	Obliges the Canadian Government to, in consultation and cooperations with First Nations, Inuit and Metes Peoples take all measures necessary to ensure the laws of Canada are consistent with UNDRIP.
6. Action Plan	Requires the responsible minister, in consultation and cooperation with First Nations, Inuit and Metes Peoples and other Federal Ministers, prepare and implement an action plan to achieve the objectives of UNDRIP, including specific prescribed content. The Action Plan must be ready for implementation within two years of the Act attaining legal force. The Action Plan must include mechanisms and process for measurement and must be tabled in each House of Parliament and published.
7. Annual Reporting	Each year the Responsible Minister must, in consultation and cooperation with First Nations, Inuit and Metes Peoples, prepare a report on measures taken and progress and table that report in each Houses of Parliament and published.

The heads of power afforded to the Commonwealth under Section 51 (xxix) and particularly 51 (xxvi) of the Australian Constitution provide a pathway for the Commonwealth to implement the reform that is required to create a legislative framework more conducive to First Nations self-determination. Further, legislation that embeds UNDRIP into Australian law would provide an important framework for those reforms.

However, each jurisdiction must adopt an UNDRIP implementation approach that is consistent with its own historical and current circumstance and its law making and political conditions. As discussed in the background papers for *Murru waaruu* Seminars 1 and 2, compared to contemporary jurisdictions, Australian constitutional and other law provides limited protections for First Nations rights and interests, presenting quite a different UNDRIP implementation environment compared to nations such as Bolivia, Norway and Canada.

[18] Rice, R. (2009), 'UNDRIP and the 2009 Bolivian Constitution: lessons for Canada', Centre for International Governance Innovation
[19] HR-2018-456-P
[20] Ravna, Ø. (2020), 'The duty to consult the Sāmi in Norwegian Law', *Arctic Review on Law and Politics*, 11:233

In August 2022, the Australian Senate referred the implementation of UNDRIP to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs for inquiry and report. The Terms of Reference for this inquiry are to explore the application of UNDRIP in Australia, with reference to:

- The international experience of implementing UNDRIP
- Options to improve adherence to the principles of UNDRIP in Australia
- How implementation of the Uluru Statement from the Heart can support the application of UNDRIP
- Any other related matters.

> *'The UNDRIP is a direct challenge to the marginalisation of Indigenous peoples. Its implementation into Australian law must therefore be aimed at changing the status quo and at making meaningful space for the protection and advancement of the rights of Indigenous peoples. It is a critical matter in the pursuit of a more equitable and harmonious Australia.'*
>
> Submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs
>
> Australian National University First Nations Portfolio

To date, the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs has received public submissions and held seven public hearings.

Certainly, *prima facie*, legislation similar to the Canadian *United Nations Declaration on the Rights of Indigenous Peoples Act 2021,* could have utility in Australia. However, the introduction of legislation to give effect to The Voice and Makarrata Commission (regardless of the outcome of the 2023 referendum) provides an opportunity to build UNDRIP into Australian legislation gradually, through the incorporation of key preambular statements and articles in relevant areas. The Declaration could progressively take effect across legislation impacting First Nations peoples and ultimately provide for enforceable rights at the domestic level.[21]

This reform pathway is summarised in the following Figure 1.

[21] First Nations Portfolio (2022), The Application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia: Submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Australian National University.

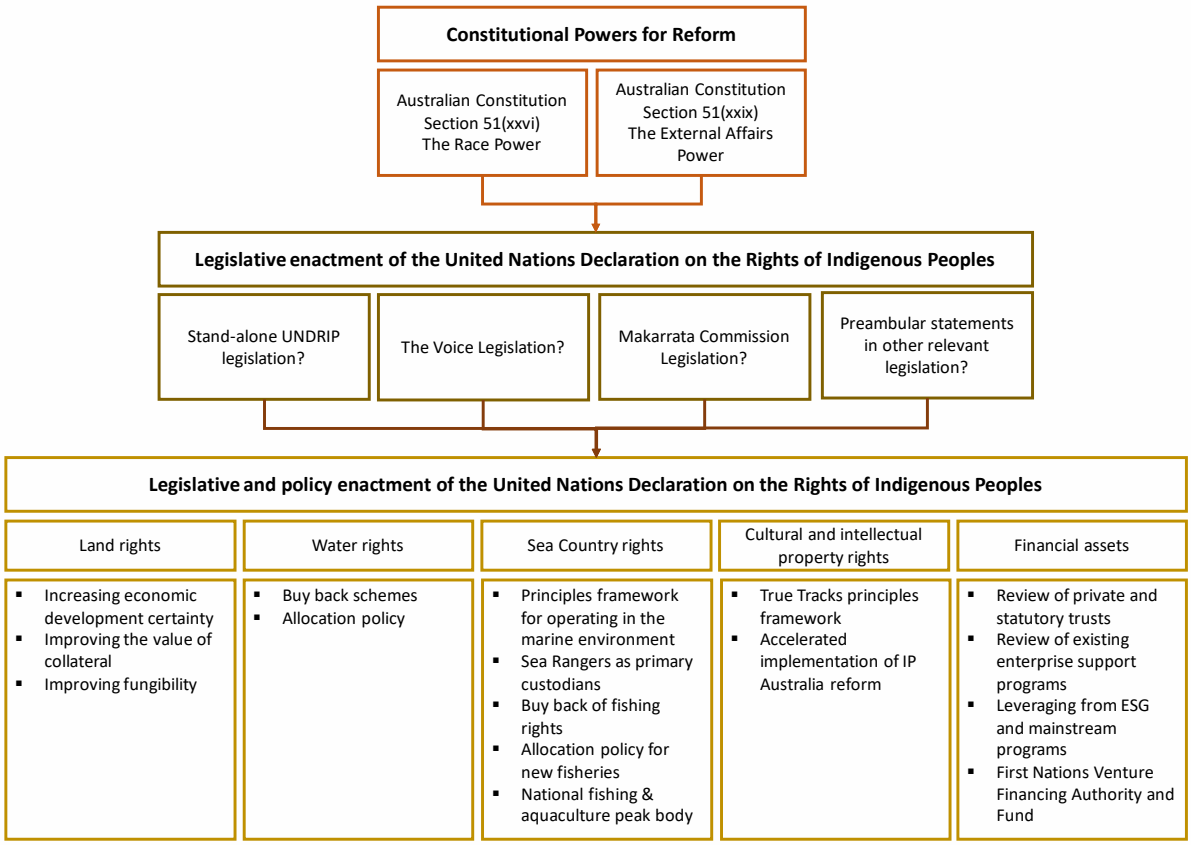

Figure 1 – First Nations economic self-determination reform pathway

Activating economic value from land rights

Given the depth of cultural, spiritual, social and economic connection that First Nations people, their customs, and traditions have to the Australian land and its resources, it is unsurprising that regaining rights to traditional lands that were never ceded has been a significant focus of First Nations advocacy. As a result, it is reclaiming rights that pertain to land tenure where the greatest gains have been made. However, despite the geographical extent of First Nations ownership or legal interests in the Australian terrestrial estate, these rights remain significantly constrained from the perspective of facilitating economic self-determination.

Australian First Nations land rights exist under numerous legislative regimes across the jurisdictions that comprise the Australian federation, the main ones of which are summarised in the following Table 3 and detailed in the Seminar 2 Background Paper.

Table 3 – Summary of main forms of First Nations land rights in Australia

First Nations Land Rights Regime	Jurisdictions	Description
State Aboriginal Land Trusts	Western Australia and South Australia	Usually former missions or reserves, a State Land Trust holds legal title on behalf of First Nations people as beneficial owners. Land title is typically in the form of inalienable freehold, but can include general purpose and pastoral leases.
Northern Territory Aboriginal Land Rights Act	Northern Territory	Over 50 percent of the Northern Territory and 85 percent of its coastline as inalienable freehold.
New South Wales Land Rights Act	New South Wales	Conditionally alienable
Divested ILSC	Nation-wide	Typically, freehold with alienability restrictions
Native Title Lands	Nation-wide	Nature of title is determined with respect to specific traditional laws, customs and practices that are the subject of the lands, can co-exist with other rights and tenure and typically subordinate to co-existing rights and tenure. In all cases it is extinguished by pre-existing freehold tenure.

The co-existence of rights to use a specific area of land is a significant feature of the Australian land tenure framework for both First Nations and non-Indigenous landholders alike. Even freehold title is not absolute possession – various government approvals such as planning approvals still control what actions can be undertaken and third-party caveats over freehold titles are commonplace. However, in the case of Australian First Nations land rights, the co-existence of multiple overlapping rights regimes, and various restrictions on dealings in land, are defining features of virtually all forms of land title created under regulatory regimes.

An analysis of themes in formal declarations from Australian First Nations from the 1937 Petition to King George V through to the more recent Yolngu Leaders Declaration of Sovereignty (2018) have been said to illuminate five key messages:

- Land is central to First Nations people's culture and way of life and these are inseparable;
- First Nations peoples' right to pursue, reject or negotiate development on their lands should be respected, especially with respect to local decision making;
- First Nations peoples want to be able to use their land as collateral for long-term social, economic and cultural development;

- There should be no extinguishment of their rights and interests or any diminution of the Indigenous estate; and
- International human rights standards are applicable, in particular the right to self-determination and to free, prior and informed consent on matters affecting their interests, including their ancestral lands and waters.[22]

First Nations tenure and its restrictions

First Nations people's legal right and interests in land are recognised over more than 50 percent of the Australian landmass. However, in the vast majority of cases, the ability for First Nations people to extract value from these interests is significantly curtailed.

As illustrated in the following Table 4,[23], across the 25 Commonwealth and state legislative instruments that assign rights in land to First Nations interests, none establish a tenure regime with the full extent of fungibility and alienability which attaches to freehold title or many forms of leasehold title over crown land under Australian law, and many carry very significant restrictions in this regard.

Table 4 – Summary of alienability of First Nations land rights regimes across Australia

Instrument	Prescribed Landholder	Title	Alienability		
			Private Sale	Leasing	Mortgage
Native Title Act 1993 (Cth)	Determined common law holders represented by PBC acting as trustee or agent	Specific communal or individual rights and interests in accordance with S.223 of the Act	✗	✗	✗
National Parks and Wildlife Act 1974 (NSW)	Local Aboriginal Land Councils or the New South Wales Aboriginal Land Council	Leasehold in the Western Division and freehold elsewhere	✗	✗	✗
Aboriginal Lands Act 1991 (Vic)	Specified Aboriginal Corporations	Conditional freehold	✗	✗	✗
Traditional Owner Settlement Act 2010 (Vic)	Traditional Owner Corporations	Inalienable freehold	✗	✗	✗
Aboriginal Land Act 1991 (QLD)	PBCs, trustees or First Nations (Aboriginal) people	Inalienable freehold or leasehold	✗	✓	✗
Torres Strait Islander Land Act 1991 (QLD)	PBCs, trustees or First Nations (Torres Strait Islander) people	Inalienable freehold or leasehold	✗	✓	✗
Aborigines and Torres Strait Islanders (Land Holding) Act 2013 (QLD)	Specified First Nations people	Leasehold	✗	✓	✗
Land Act 1994 (QLD)	Trustee	Reserve or freehold held in trust	✗	✓	✗

[22] Wensing, E. (2016) *The Commonwealth's Indigenous land tenure reform agenda: whose aspirations, and for what outcomes?,* Australian Institute of Aboriginal and Torres Strait Islander Studies.
[23] Adapted from: Wensing, E. (2019) *Land Justice for Indigenous Australians: How can the two systems of land ownership, use and tenure co-exist with mutual respect based on parity and justice?* PhD Thesis, Australian National University

Instrument	Prescribed Landholder	Title	Alienability		
			Private Sale	Leasing	Mortgage
Anangu Pitjantjatjara Land Rights Act 1981 (SA)	Anangu Pitjantjatjara Body Corporate representing all Traditional Owners	Inalienable freehold	✗	✓ Conditional	✗
Aboriginal and Torres Strait Islander Act 2005 (Cth)	Upon acquisition, ILSC with title granted to an Aboriginal and Torres Strait Islander Corporation.	Leasehold or freehold	✗	✓ Conditional	✓ Conditional
Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)	Community Council	Vested with the Community Council under a compulsory lease back to the Commonwealth	✗	✓	✓ Only of leasehold interest
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)	Aboriginal Land Trusts consisting of First Nations people resident in the regional Land Council Area	Inalienable freehold	✗	✓ Only of leasehold interest	✓ Only of leasehold interest
Pastoral Land Act 1992 (NT)	Aboriginal Association or Corporation	Restricted freehold	✗	✓ With restrictions	✓ With restrictions
Maralinga Tjarutja Land Rights Act 1984 (SA)	Anangu Pitjantjajara body corporate representing all Traditional Owners	Inalienable freehold	✗	✓ Conditional	✓
Aboriginal Land Rights Act 1995 (Tas)	State-wide Aboriginal Land Council	Inalienable freehold	✗	✓	✓ Only on lease or license
Aboriginal Lands Act 1970 (Vic)	Aboriginal Trust	Inalienable freehold	✗	✓ Conditional	✓
Aboriginal Lands (Aborigine's Advancement League) (Watt Street, Northcote) Act 1982 (Vic)	Aborigines Advancement League Inc.	Crown grant unspecified	✗	✓	✓
Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth)	Specified Aboriginal corporations	Freehold	✗	✓	✓
Aboriginal Land (Northcote Land) Act 1989 (Vic)	Aborigines Advancement League Inc.	Conditional freehold	✗	✓	✓
Aboriginal Affairs Planning Authority Act 1972 (WA)	Aboriginal Lands Trust	Crown reserve (for the use and benefit of First Nations inhabitants)	✗	✓ Conditional	✓ Conditional

Instrument	Prescribed Landholder	Title	Alienability		
			Private Sale	Leasing	Mortgage
Land Administration Act 1997 (WA)	First Nations person or approved First Nations corporation	Conditional freehold, lease or Crown reserve (for the use and benefit of First Nations inhabitants)	✗	✓ Conditional	✓ Conditional
Aboriginal and Torres Strait Islander Land (Providing Freehold) Act 2014 (Qld)	Specified Aboriginal and Torres Strait Islander people	Freehold	✓ Conditional	✓	✓
Aboriginal Land Rights Act 1983 (NSW)	Local Aboriginal Land Councils or New South Wales Aboriginal Land Council	Freehold throughout the State, except in Western Division where it is leasehold	✓ Subject to NSWALC approval	✓ Subject to NSWALC approval	✓ Subject to NSWALC approval
Land Administration (South West Native Title Settlement) Act 2016 (WA)	Noongar Boodja Trust	Freehold (not including Cultural Land or Managed Reserve Land)	✓ Conditional	✓ Conditional	✓ Conditional
Aboriginal Lands Trust Act 2013 (SA)	Aboriginal Lands Trust	Freehold, leasehold or any other titles purchased	✓ Subject to approval by Parliament	✓ Conditional	✓ Conditional

Given a primary intent of land rights policy is to effectively return some permanent legal interest in lands that were dispossessed, it is not surprising that only four of the 25 regimes summarised in Table 4 above permit the sale of the lands subject to those regimes and even then, only on a conditional basis. Further, acknowledging that it has taken between 180 and 225 years to reclaim the limited rights to lands once considered sovereign, it should also be unsurprising that many First Nations peoples find the prospect of having these interests extinguished, sold to third parties or otherwise appropriated through the processes of commerce, repugnant.

Notwithstanding these important facets of First Nations perspectives on land rights regimes in Australia, these restrictions create an underlying issue with respect to creating economic value from First Nations lands. Even in the four instances summarised in Table 4 where private sale, leasing, or mortgage is permitted, it is only so subject to conditions which serve to de-value the land. These restrictions combined with the fact that settler freehold title that largely precludes First Nations interests tends to be over the most natural resource rich lands and that First Nations collective decision-making processes and governance are different and complex, serve to fundamentally undermine the economic value of First Nations land interests.

The opportunities for creating value from land rights

While rights remain constrained, the legislative framework summarised in Table 4 above represents the only framework through which Australian First Nations are able to access and exercise some rights over a portion of the lands that were taken from them as a result of colonisation. It is, therefore, not surprising that the opportunities identified by the 'Activating Value from Land Rights Working Group' at the second *Murru waaruu* Seminar focused on

opportunities to repair and manage country and to create wealth in culturally, socially and environmentally sustainable ways from the Country's natural resource to which they have been denied access.

Detailed in the Background Paper pertaining to the *Murru waaruu* Seminar 2, these opportunities are summarised in the Figure 2.

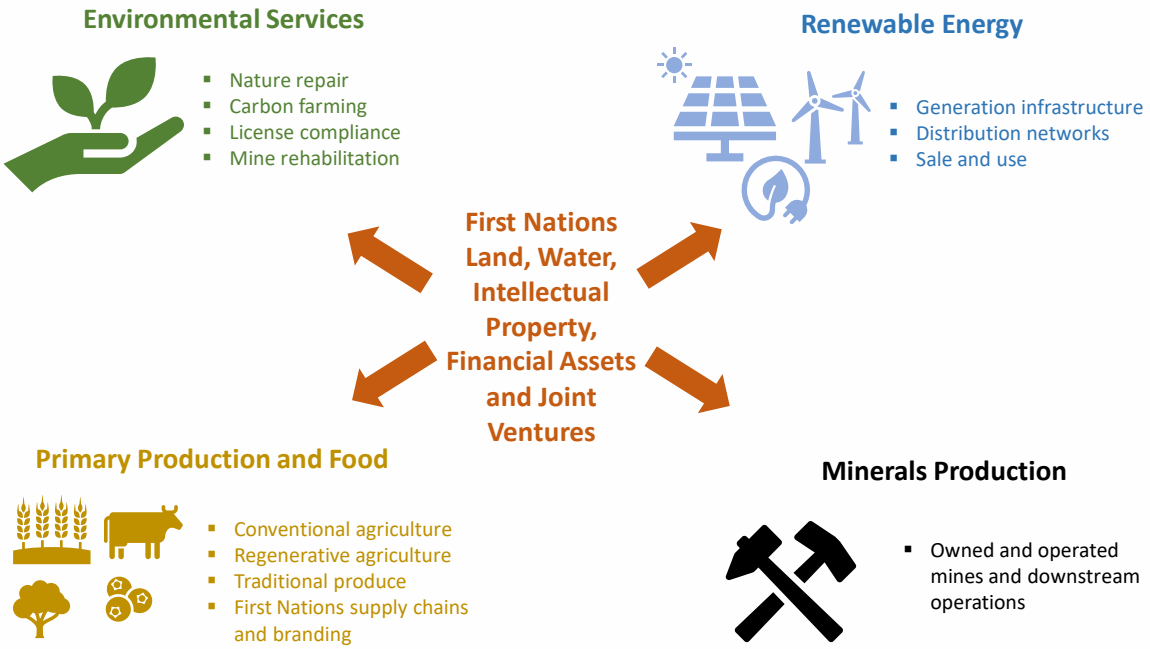

Figure 2 – High priority opportunities for First Nations-led development on First Nations land

Policy options

Increasing First Nations economic development certainty and capacity

A national First Nations estate MOLA project

At best, some Australian First Nations have only had some rights to their traditional lands returned to them for around 50 years. For a majority it has been for a much shorter period, measurable in years and months of single digits. In a few cases, from a purely geographic perspective, the natural resources associated with these lands have been fully or close to fully exploited by non-First Nations interests. In many instances the lands subject to the rights are the subject of co-existing tenure and rights, whereby First Nations rights are subordinated to the non-First Nations rights and the non-First Nations rights are appropriating and extracting economic value from those lands and the natural resources contained therein. In a lot of instances, the lands are not the subject to any economic development and their prospectivity for development is unknown.

In many ways, from a natural resource economic potential perspective, significant areas of the Australian continent remain underexplored. For example, as we move into further remote areas, particularly inland from the coastal areas, geology becomes increasingly covered,[24,25], and our understanding of surface and subterranean hydrology less well understood.[26] Further, non-First

[24] Schodde, R. (2010), *Depth of Cover Charts for the ACS Think Tank Report*, MinEx Consulting
[25] Theo Murphy High Flyers Think Tank (2010), Searching the Deep Earth: The Future of Australian Resource Discovery and Utilisation, Australian Academy of Science
[26] Ordens, C., McIntyre, N., Underschultz, J., Ransley, T., Moore, C. and Mallants, D. (2020), Preface: advances in hydrogeologic understanding of Australia's Great Artesian Basin, *Hydrogeology Journal*, 28, 1-11

Nations rights and tenure that co-exists is typically economic purpose specific – a right to mine a specific commodity, right to conduct a certain type of agricultural activity, right to install specific infrastructure, etc – which does not necessarily prevent co-existing rights and tenure undertaking different economic activities on the same lands.

However, for First Nations to be able to identify, assess and activate the opportunities they need to be able to understand the nature of the development environment, the natural resources available, the impact of accessing those natural resources on cultural and environmental values and the intersection of those activities with jurisdictional planning and other regulations. In most instances the data, knowledge and technical land tenure/use/planning skills to do this does not exist, or is at least not easy to access, synthesise and analyse.

Multi Objective Land Allocation (MOLA) uses geographical information systems (GIS) to source available datasets and algorithms that derive suitability for multiple land use individually and then combines them to provide optimal allocation for identified land uses. Whether tenure is exclusive or shared, First Nations can use MOLA to identify and assess potential economic uses of their land interests, prioritise them and understand their impacts. This process also aligns with existing cultural management planning that many Traditional Owner Groups have undertaken for partial, or the full extent, of their traditional homelands.

While some First Nations have undertaken MOLA GIS assessments for their specific land interests,[27], a national program would serve to not only provide individual First Nations with a better understanding of development opportunities on their lands and the cultural, environmental and social impacts of those activities, but also identify opportunities for First Nations to First Nations collaborations and serve as a prospectus for third party developers.

Use of the proposed Regional Voice structure to enhance First Nations economic collaboration

The number of registered First Nations interests in land in Australia is large. Under the framework established by the Native Title Act alone there are 584 registered determinations and an additional 194 applications with the National Native Title Tribunal.[28] Additionally, there are rights in land held under the various state regimes summarised in Table 3 and lands divested or to be divested by the ILSC.

Geographically speaking, some of these land interests are very large and some are relatively small. In some instances, a large number of land interests may adjoin within a relatively small geographical area, whereas in other instances some may be very isolated. Some, by virtue of their location and natural resources, either do or have opportunity to generate greater wealth than others. They are also unevenly distributed across the Australian state and territory jurisdictions, rendering them subject to different jurisdictional regulation.

There is no doubt that opportunities for First Nations wealth creation and prosperity will be optimised through high levels of collaboration between First Nations where it is economically rational and culturally appropriate to do so.

Implementation of The Voice will require the establishment of 'regional' voice structures, providing a forum for enhanced collaboration between groups. This should be used to activate economic collaboration between First Nations.

Improving the fungibility and value as collateral of First Nations tenure

A fundamental challenge associated with almost all forms of Australian First Nations tenure is that it is inalienable. The policy rationale for rendering most First Nations tenure inalienable is to ensure that First Nations retain their land rights, however limited they may be, in perpetuity. The fact that the vast majority of First Nations tenure cannot be legally transferred renders it largely

[27] https://www.yawuru.org.au/country/gis-mapping/?doing_wp_cron=1687936689.8039650917053222656250
[28] National Native Title Tribunal at at 30 June 2023 (http://www.nntt.gov.au/Pages/Statistics.aspx)

worthless as collateral for the purpose of debt financing, fundamentally limiting its use as a means of activating economic self-determination.

Government guarantee for financing to replace inalienability

Section 191(D) of the *Aboriginal and Torres Strait Islander Act 2005* (Cth) prescribes a specific function of the Indigenous Land and Sea Corporation (ILSC) as '*to guarantee loans made to Aboriginal or Torres Strait Islander Corporation for the purpose of the acquisition of interests in land and water-related rights*.'

This guarantor function that is currently specific to purchasing new lands or improving existing lands could be extended as a function to provide guarantee against existing First Nations land rights for loans to support any commercial endeavour that the First Nations land rights holder wishes to pursue, whether or not it involves the subject lands. This could be achieved either through additional resource provided to the ILSC or a separate Commonwealth Government agency.

Government guarantees are also used in a different context in Canada. In jurisdictions where First Nations have municipal powers, the Canadian Government guarantees bonds issued by those First Nations municipal authorities allowing them to leverage their ratings income.

While it is almost certain that government guarantees would see an increase in debt financing availability for First Nations with land interests, this model is not without its challenges. Firstly, government guarantees serve to substantially de-risk the transaction for both the lender and borrower, which can lead to sub-optimal commercial decision-making and enterprise failure. Secondly, in a sense this model serves to perpetuate government involvement in the affairs of First Nations and whilst arguably a significant improvement over the *status quo*, does not deliver optimal self-determination. Notwithstanding these challenges, it is an option worthy of further exploration.

A new class of tenure: unique First Nations commercial lease

Leasing terms can be structured such that the nature of the tenure approximates freehold. This can be achieved through mechanism such as long tenor with options for renewal that are automatic, subject to specific default events. Such longer-term and relatively caveat-free leases can be used as collateral for debt financing, albeit financiers will typically assign a lower value than freehold on the collateral.

A mechanism that provides First Nations an expedited pathway to transfer their land interests into a form of leasehold that approximates freehold would, subject to the market value of that leasehold, provide prospect for that leasehold to be used as collateral for financing. The leases could be for a specific or general purpose and could be sub-lettable to allow First Nations to engage third-party development on their lands as well as undertake their own development.

This is similar in concept to the soon to be established Western Australian Diversification Leases (see following text box).

Diversification Leases over Western Australian Crown Land

Within Western Australia, as with much of the rest of the nation, large areas of the State have not seen freehold land grants since European settlement, and hence remain Crown land. As such, these lands have progressively seen Native Title claims by First Nations seeking to have their never-ceded sovereignty restored (at least in part) over their ancestral lands. However, due to the specific mechanics of the Native Title Act, Native Title operates as a form of land interest/tenure which 'sits over the top' of the underlying Crown ownership, and (as noted above) so must work alongside other forms of interests granted by the Crown over that land, such as pastoral leases or mining leases.

Accordingly, over 90 percent of the State falls under the regulatory umbrella of the *Land Administration Act 1997* (WA) (LAA), and via related intersections with the *Public Works Act 1905* (WA) and the *Mining Act 1978* (WA) (Mining Act). An emerging issue with these laws has been the relatively limited scope for enabling usage of land that does not fall neatly within the established parameters of mining or pastoral operations. While an exhaustive analysis of current Western Australian law falls outside the scope of this paper, in general terms at present the large area of the State subject to pastoral leases may only be used for pastoral purposes, while mining tenements may only site infrastructure directly connected with a mining activity. 'general lease' options exist under the current LAA regime, however these leases are not preferred by the WA State Government to enable large-scale land usage as they confer exclusive usage and thus cannot easily co-exist with other forms of tenure.

Accordingly, the WA State Government in late 2021 announced that it was seeking to amend the LAA to better allow large-scale usage of Crown land for purposes other than cattle grazing and mining. A headline feature of these proposed changes is the introduction of a new type of interest, a 'diversification lease'. These are designed to facilitate large-scale usage of land, including potentially multiple concurrent types of usage, which do not require exclusive possession and hence may work hand-in-hand with other access types or interests.

Much community and industry attention, and State Government commentary, has focused on the intended suitability to enable large-scale renewable energy generation and/or hydrogen production, carbon farming or environmental offsetting. However, more relevantly for present purposes, a secondary but equally important focus of the new regime has been on the potential to enable First Nations economic development and land management. As a diversification lease would be capable of being issued to any person or party, including Traditional Owners and First Nations whether individually or collectively, the issue of such a lease to Native Title Holders over their Traditional Lands would thus enable a suite of on-country activities, *and* would be a recognised form of land tenure, with definable economic value, capable of being traded, sub-let or otherwise dealt with.

The *Land and Public Works Legislation Bill 2022* was introduced into State Parliament in November 2022, and passed the Legislative Assembly in February of 2023. While still subject to approval by the Legislative Council and hence potentially subject to change, the most salient features that the draft legislation provides include:

- Explicit recognition of the potential usage of diversification leases as enabling First Nations economic development and land management, usage and activation;
- A criterion for assessment including the degree to which the granting of a diversification lease by the Minister will "provide social and economic opportunities to Aboriginal people / communities";
- A continued recognition of the rights of First Nations people to access 'unenclosed and unimproved' parts of land under a diversification lease;
- A recognition that Diversification Leases will not impact existing Native Title Act requirements (i.e. will constitute a 'future act'). Thus, for non-First Nations parties (or more specifically non-Traditional Owner parties), an ILUA will be required, and hence where multiple applications exist or are likely to exist, *ceteris paribus,* First Nations peoples are in a stronger bargaining position.

However, against these positive factors, there are also some risk factors for First Nations people.

Firstly, in considering the grant of a diversification lease, the Minister is also bound to consider technical and financial capabilities of an applicant, together with track record. There is thus a risk that First Nations entrepreneurs in particular may be unable to meet this threshold.

Secondly, where pastoral leases already exist (which is the case for large swathes of Crown land in Western Australia), the area proposed to be utilised under a diversification lease must first be surrendered up out of the pastoral lease. Thus, pastoral operators (who benefit from 50-year terms) have effective right of veto over the grant of a diversification lease, even if that lease represents a higher and better use of land by its Traditional Owners. This is particularly galling in a context wherein pastoral leases are already privileged over Native Title tenure. However, there is at least no racial lens on this, as all applicants for a diversification lease will face the same barrier and need to negotiate with current pastoral lessees.

Finally, while there are advantages to a system of tenure in which First Nations people and entrepreneurs are afforded the same degree of access and rights as all other applicants (if not some slight privileged position due to the Ministerial decision-making criteria noted above), there are also disadvantages. Because a diversification lease is treated the same as any other land lease interest, the LAA would allow the Minister to grant an option to any party on any terms they see fit. Combined with the absence of any time limits on a diversification lease itself, this raises

Further, a specific agency function that works with First Nations interests to achieve this outcome could be stood-up either within an existing organisation such as the ILSC or as a new agency focused specifically on advancing First Nations economic development.

New class of tenure: freehold where native title and native title-like rights survive conveyance

The Commonwealth Government's response to the Mabo High Court decision, the *Native Title Act 1993* (Cth), established a new form of unique tenure that is not akin to any other in Australia, or indeed the world. Detailed in the Seminar 2 Background Paper, the rights provided by this Act are variable and depend on the specific First Nations customary association with lands, can co-exist with other tenure or be exclusive – the proverbial 'bundle of rights'.

While in most instances insufficient to enable economic activation of Country or Traditional Lands, Native Title rights are nonetheless critically important to First Nations communities and peoples as they represent and secure, as far as is possible to determine, the greatest degree of protection available under Commonwealth law for traditional and customary usage of Country. Among other matters, Native Title rights will typically include (at a minimum) rights to hunt, fish, gather, enter onto, pass over and remain on country, and conduct ceremony and traditional practices.. For some grants of Native Title, particularly where exclusive title is proven, rights may be much more substantial, including the ability to control access.

Given the communal and enduring nature of Australia's First Nations and First People's connection to Country, as noted above, there will be a difficult but necessary balance to strike between any activation of that land sufficient to support economic self-sufficiency, and ensuring that ongoing traditional, spiritual and cultural connection to land is not broken. It is clear that, at present, the pendulum has swung too far to one side of this equation. Decisions were made about First Nations and their connection to Country by non-First Nations peoples that, within the context of European systems of laws imposed upon those First Nations people without their consent, have resulted in a paternalistic, prescriptive and inflexible tenure model which in essence reduces recognised First Nations interests in their land to *only* those traditional, spiritual and cultural dimensions. This ignores the fact that, for many thousands of years, Country was also an important enabler of economic prosperity, self-sufficiency and communal wealth, and always has been. As the way in which the non-Indigenous population has evolved and developed its ability to generate value from land, from European settlers homesteading to market gardens to residential developments or office towers, so too should First Nations be empowered to explore what new models might look like for them.

One potential way forward could be to explore a model whereby these two streams of interests in Country – economic and productive capacity on the one hand, and spiritual, cultural and traditional linkages and obligations on the other – are not awkwardly forced to coexist under the one class of interest, but rather are treated as related but distinct.[29]

Working within the now-uniform Torrens system of land registry and title across Australia, this could see (for example) Native Title-like interests and rights to hunt for subsistence, cultural or traditional purposes, conduct ceremony, protect sacred sites and so on captured in the form of an overriding, binding easement which endures into perpetuity. Meanwhile, the ability to derive economic value from land could pass with an underlying freehold-like interest, which could be leased, traded, mortgaged, sold, sub-divided, re-purchased and so on as the Traditional Owners saw fit.

As much Native Title land is currently shared with other right holders (such as pastoral lessees), any conversion of existing tenure into such a model would require negotiations with and the consent of these existing interest-holders. An agreement would also need to be reached with

[29] Wensing, E. (2019) *Land Justice for Indigenous Australians: How can the two systems of land ownership, use and tenure co-exist with mutual respect based on parity and justice?* PhD Thesis, Australian National University

State governments, which typically hold the underlying Crown land title. However, these negotiations could take place on a normal commercial basis, potentially providing First Nations with an alternate income stream akin to rental payments and would allow Traditional Owners to explore multiple avenues of economic development, secure in the knowledge that their traditional, cultural and spiritual linkages and obligations to Country remain protected into the future.

This system could be applied to both Native Title rights, as well as other existing forms of First Nations tenure summarised in Table 3 above and in principle does not differ substantially in structure to private land conservation covenant frameworks that are commonplace in several of the States. Indeed, as illustrated in the following box, there is some evidence of a trend to incorporate First Nations access into these frameworks.

For purposes of clarity, it is proposed that this new form of freehold tenure would only be applicable to the current and future First Nations estate and not existing freehold tenure.

Victoria Trust for Nature

One example of an interest akin to this 'new tenure' model is emerging in Victoria, where the Trust for Nature, an independent statutory entity with primary responsibility for delivering that State's private land conservation programme, is working with First Nations to return land to its Traditional Owners.

The specifics of the Trust's conservation covenant programme and its operations fall outside the scope of this paper. However, in very broad terms, the primary mechanism the Trust uses to facilitate private land conservation is through a 'conservation covenant' – a voluntary but legally-binding and permanent encumbrance, noted on the certificate of title for a property, which passes with that land into perpetuity. The covenant will contain terms and conditions which restrict the uses to which that land might be put in future, and in some instances require landholders to avoid taking certain actions, such as land clearing, the planting of non-native plants, grazing stock, building improvements and so on.

In essence, while the land remains privately owned and is not managed by the State in the same way as parks, nature reserves and so on, the existence of the covenant means that land is required to be managed for conservation purposes. Because the covenant is implemented in the form of a binding encumbrance on the property title rather than a contract or similar agreement, the current owners and the Trust alike may be assured that future purchasers of the land will be equally bound by its terms. The exact form of the covenant, the area it covers, which activities are permitted and where, and so on, are able to be negotiated between the Trust and landholders to suit the particular circumstances and aspirations of both, as well as the nature of the property. In turn, landholders receive support from the Trust to achieve conservation outcomes, which may take a variety of support from grant payments to advice and planning.

As is apparent, this model of dual tenure – an underlying freehold title capable of being transferred, encumbered, sold etc, paired with a binding, permanent encumbrance which protects certain rights and interests into the future, no matter the owner of the underlying title – has obvious parallels to the First Nations dual tenure model proposed above.

It is thus unsurprising that the Trust for Nature has recently begun to explore using this system to facilitate restoring Country to its Traditional Owners. While still an evolving practice only recently implemented, and with limited information in the public domain, two examples of this system being used to hand back Country are already extant:

- Ned's Corner Station: A 30,000 hectare former pastoral station first purchased by the Trust for Nature in 2002, the Station has been managed by the Trust for conservation and revegetation ever since. It is currently the largest privately-owned conservation property in Victoria. Emerging from early work with the First People of the Millewa Mallee Aboriginal Corporation (FPMMAC; representing the Latji Latji, Ngintait and Nyeri Nyeri Traditional Owners) identifying cultural heritage sites, the Trust has worked closely with First Nations in managing the property, including planning conservation works and land management techniques. In 2022, the Trust announced that it would work with the FPMMAC towards a full transfer of legal ownership of the Station to the FPMMAC by early 2024.
  In preparation for this transfer, and to protect the interests of the Traditional Owners and ensure that the statutory objectives of the Trust remain fulfilled, the Trust and FPMMAC are understood to be currently designing the terms of an enduring covenant which will apply to the land. The terms of this are not presently public domain, however are understood to provide for the balancing of specific conservation and ecological outcomes with restoration of traditional, customary and cultural practices.

- Philip Island: Only recently acquired by the Trust in 2020, the 8ha Phillip Island site is hugely important for the overall health of the RAMSAR-listed Rhyll Inlet wetland. It is also a place of deep significance for the Bunurong First Nation. As of 2022, the Trust is understood to be in discussions with the Bunurong Land Council Aboriginal Corporation regarding a transfer of legal ownership back to the Bunurong Traditional Owners, with a coal (??) of this occurring by end of 2023. A land access and management agreement between the parties has already been signed, reflecting both conservation needs and cultural/traditional practices.

Improving certainty of land use outcomes

Special First Nations projects approval framework

Each of the reforms discussed in the previous subsection that are designed to improve the value of First Nations land rights as collateral for financing also, *prima facie*, make some contribution toward improving the land's fungibility. However, First Nations will still face approvals and

administrative processes that are both peculiar to First Nations tenure as well as mainstream approvals and administrative processes.

This could potentially be mitigated by a Commonwealth-State inter-agency function that is designed to expedite First Nations applications for approvals and other administrative requirements that are necessary for giving effect to their developments. Similar to the 'major projects' status that is used by development agencies in some Australian State Governments to accelerate the implementation of ventures that are considered important to the State, this would not only serve to allow First Nations to more productively develop their ventures, but also render partnering with First Nations more attractive to third parties.

Activating economic value from water rights

> *'The National Water Initiative (NWI) is a product of its time, with a focus on achieving cultural outcomes through engagement with Aboriginal and Torres Strait Islander people. Since 2004, Aboriginal and Torres Strait Islander people have articulated their aspirations for access to water for unconstrained use (that is, for both cultural and economic purposes).'*
>
> Productivity Commission
> Securing Aboriginal and Torres Strait Islander People's interests in water (2021)

Surface and subterranean water resources are of fundamental importance to Australian First Nations cultural, social and spiritual lives. As detailed in the Seminar 2 Background Paper, it is also of fundamental economic importance for activating the First Nations land estate, an aquatic resource to support fisheries and aquaculture, an opportunity for First Nations to manage the inland water estate and as a tradeable commodity (see Figure 3). This is a fact that has been advocated by First Nations for decades,[30], and which is recognised by the Closing the Gap target pertaining to water access, as well as it's emphasis in recent settlement packages.[31]

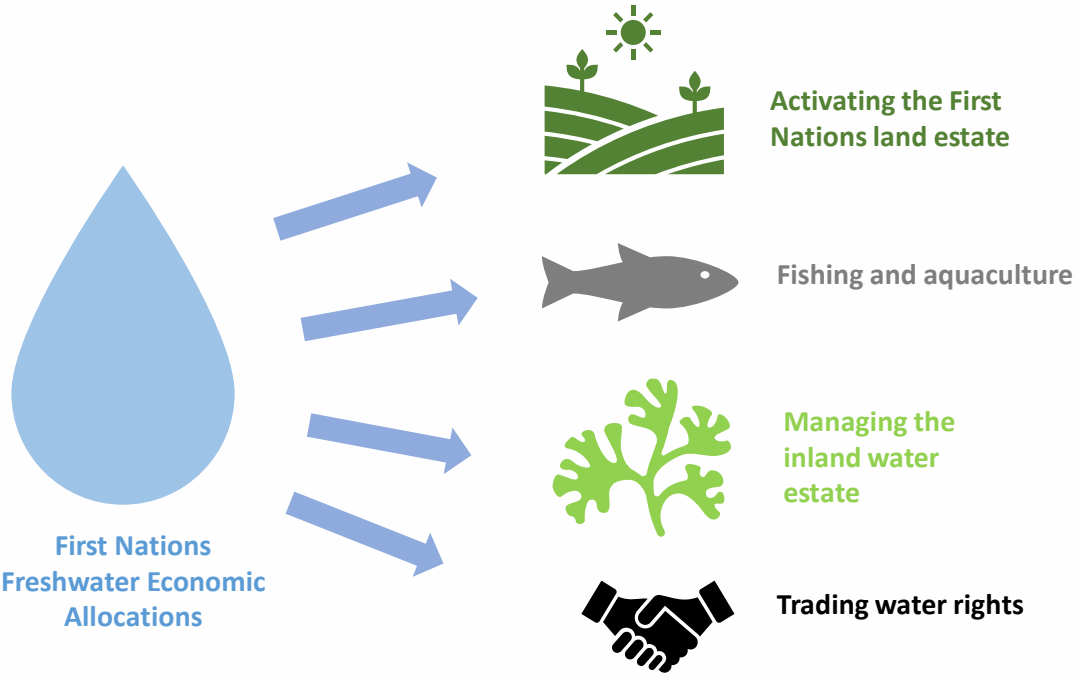

Figure 3 – Key economic utilisation of First Nations economic water rights

The regulatory and licensing framework as far as it pertains to water resources across Australia is complicated by:

- Having been founded in a colonised context, with many resources fully allocated;
- Where resources aren't fully allocated an absence of adequate hydrological and environmental knowledge to make allocation decisions; and
- Under the jurisdiction of the States rendering regulatory coordination of many water resources difficult.

[30] First Nations Portfolio (2023), Background Paper National First Nations Water Roundtable: Securing water rights for First Nations people's self-determination, Australian National University, National Native Title Council and indigenous Land and Sea Corporation
[31] Yamatji Nation Agreement WI2020/002

Within this complex framework until recently First Nations interests have not been a consideration and in more recent times only a subordinate consideration.

As discussed in the Seminar 2 Background Paper, First Nations interests in water are presently between 1 and 2 percent of the total volume of allocations and even where interests are held, they are principally in the form of 'cultural flows' which prevent those allocations being used for economic purposes. Further, and as also detailed in the Seminar 2 Background Paper, First Nations participation in water allocation and management decisions is limited and *ad hoc*.

In April 2023, and in response to these dire circumstances, the Commonwealth Ministers for Environment and Water and Indigenous Australians announced that the Commonwealth Government would embark on an ambitious initiative to deliver First Nations water across Australia[32].

There is no doubt that significant reform is required and it is unsurprising that the recent National First Nations Water Roundtable held in May 2023, which was facilitated by the Australian National University, National Native Title Council, and Indigenous Land and Sea Corporation, recommended the convening of a First Nations Water Working Group to facilitate the development of a First Nations-led, nationally consistent approach to First Nations' water rights. The Working Group would be a loose federation of experts with experience in advocating the rights and interests of First Nations over the past decades. Its role is to implement recommendations of the Roundtable, and include establishing a First Nations inland water alliance that can negotiate and seek to reach a national accord with all Australian Governments to implement a new approach.[33,34]

Fully allocated and unallocated resource: the need for a different approach

Very generally speaking the Australian water market can be broadly discussed according to two dimensions:

- Fully allocated water resources: are surface and subterranean water resources that have already been fully (or even over) allocated under licences issued by various State authorities. These resources are mainly located in the southern parts of the nation, including the Murray Darling Basin catchment.

- Unallocated water resources: are surface and subterranean water resources that have either not been fully allocated or are not likely to have been fully allocated (subject to better knowledge on specific hydrology and impacted ecosystems)

As identified by the Productivity Commission,[35], the solutions to securing First Nations economic and other water rights in these two environments differ. In the case of fully allocated resources, the only option is for the Government to purchase water entitlements from existing holders and allocate them to First Nations interests. Where water resources have not been fully allocated, mandatory economic water allocations should be given to First Nations interests, particularly as they intersect with interests in First Nations land.

Both vectors for securing First Nations water rights have their challenges. Purchasing entitlements in fully allocated water markets can be achieved either through the market or a

[32] Media release: Delivering-water-ownership-for-first-nations (PM&C) (https://ministers.pmc.gov.au/burney/2023/delivering-water-ownership-first-nations)
[33] The Mayiny-galang-ngadyang (People's Water) Communique: The National First Nations' Water Roundtable: Securing water rights for First Nations people's self-determination (2023), Australian National University, National Native Title Council and Indigenous Land and Sea Corporation.
[34] The Mayiny-galang-ngadyang (People's Water) Outcome's Report: The National First Nations' Water Roundtable: Securing water rights for First Nations people' self-determination (2023), Australian National University, National Native Title Council and Indigenous Land and Sea Corporation
[35] Productivity Commission (2021), 'Securing Aboriginal and Torres Strait Islander people's interests in water: supporting paper D', *National Water Reform 2020*, Australian Government, Canberra

voluntary or compulsory buy-back scheme, for example, as proposed by the Commonwealth Government in the Murray Darling Basin.[36] Both market acquisition and a voluntary buy-back scheme will result in the Government paying above (and potentially significantly above) normal market prices and will result in an uncertain quantum of entitlements for re-allocation to First Nations interests. On the other-hand, while a compulsory buy-back would provide certainty over the quantum and price (noting that in accordance with the Australian Constitution, compensation will be payable on 'just terms'), it will be politically problematic and potentially very disruptive to key sectors of Australia's agricultural industry.

While it is a comparatively simple task for water regulators to make entitlement allocations to First Nations in under-allocated water resources, an absence of knowledge is a challenge. Firstly, regulators need to understand the quantum and locations of allocations that will render the allocation having economic value. The aforementioned national MOLA-GIS analysis would assist in addressing this knowledge gap. Secondly, most of the unallocated water resource is located in relatively remote areas of northern and central Australia, where the understanding of the ecosystem services provided by those water resources their associated hydrology and cumulative impacts on those water resources is limited, rendering making any allocation decisions problematic. Resolving this lack of knowledge will require additional investment in research.

Policy initiative options

Given that activation of the First Nations land estate is so fundamentally dependent on First Nations economic water entitlements, existing entitlements are so small and the issues that need to be navigated to arrive at an equitable and meaningful solution are complex, efforts to resolve this must be focused, expedited and adequately resourced.

National First Nations Water Rights Working Group

As detailed in the Seminar 2 Background Paper, efforts by Australian governments to achieve First Nations economic water allocations have mostly failed. The proposal made by the recent ANU National First Nations' Water Roundtable to establish a First Nations Water Working Group,[37], should be endorsed and appropriately resourced, but with a clear mandate to resolve, among other matters, First Nations economic water allocations.

> *'...a First Nations Working Group be convened to facilitate the development of a First Nations led, nationally consistent approach to First Nations' water rights...the role should extend to...facilitating the establishment of a First Nations alliance that can negotiate and seek to reach a national accord with all Australian Governments to implement this new approach.'*
>
> Recommendation as per Communique
> ANU National First Nations Water Working Group

For the purpose of activating an environment that supports economic self-determination, time is of the essence with respect to developing a solution. As discussed, water performs a vital role in the cultural, spiritual and social lives of First Nations people and designing a solution to address all of these aspects of First Nations water rights is complex and will likely be a protracted process. Further, this urgency is exacerbated by the impacts of climate change on the nature of distribution of the Australian freshwater resource.

[36] Murray-Darling Basin Aboriginal Water Entitlements Program | National Indigenous Australians Agency (https://www.niaa.gov.au/indigenous-affairs/environment/murray-darling-basin-aboriginal-water-entitlements-program#:~:text=The%20Australian%20Government%20is%20providing%20%2440%20million%20to,activities%20through%20the%20Aboriginal%20Water%20Entitlements%20Program%20%28AWEP%29.)

[37] The Mayiny-galang-ngadyang (People's Water) Communique: The National First Nations' Water Roundtable: Securing water rights for First Nations people's self-determination (2023), Australian National University, National Native Title Council and Indigenous Land and Sea Corporation.

It is therefore recommended that an outcomes-oriented sub-group of the proposed National First Nations Water Rights Working Group be established with the appropriate expertise and resourcing to pursue a Terms of Reference not dissimilar to the following:

- With respect to fully allocated water resources:
  - Identify and quantify First Nations demand for economic allocations from fully allocated water resources;
  - Design an optimal market, voluntary or compulsory acquisition scheme for fully allocated resources in collaboration with existing holders of water entitlements and First Nations interests.
- With respect to unallocated water resources:
  - Identify and quantify First Nations demand for economic allocations from unallocated water resources;
  - Identify regulatory processes and approvals required to attain allocations from those water resources and its application across state and territory jurisdictions (including equity, noting different First Nations tenure systems);
  - Identify knowledge gaps in ecosystems impacts and hydrology that may be required to support regulatory processes and approvals;
  - Develop a roadmap for knowledge acquisition;
  - Develop a detailed strategy for sustainably activating unallocated resources.
- Develop a national First Nations economic water allocation policy that includes:
  - National standards for minimum First Nations economic water allocations;
  - Details of a National water allocations buy-back scheme;
  - Identification of structural and governance frameworks for holding First Nations economic water rights
  - A roadmap to unlock unallocated water resources for First Nations economic interests;
  - Establishing a benchmark for First Nations economic water allocations as a component of treaty and settlement.
  - Monitoring and evaluation frameworks regarding the progression of First Nations water ownership and the economic benefits to First Nations managing water access entitlements. This could also include indirect economic benefits such as protection of biodiversity/ health of country, water management jobs, health and wellbeing, how it is contributing to Federal commitments on Closing the Gap, report on how states and territory progress/alignment to National Water Initiative and identifying water uses/trends to inform market accessibility – gaps and opportunities.

Activating economic value from sea country rights

Like water resources, sea country is of enormous cultural, spiritual and social value to Australian First Nations and not only to coastal First Nations, but by virtue of ancient transnational trade routes and customary linkages, many inland First Nations as well.

Australian First Nations sea country rights

First Nations Australians have taken fish from the inland waterways and coastal environments of the Australian mainland and its islands for subsistence, cultural, social and trade purposes for over 60,000 years.[38],[39] The colonisation process has compromised this from two key perspectives. Firstly, the competition for fish resources from settlers and then subsequent quota and licensing regimes implemented by State Governments took precedence over First Nations rights to fish and in the vast majority of cases prohibited First Nations from fishing other than under recreational regimes (customary fishing rights are relatively recent development across Australia). Secondly, the cumulative impact of anthropogenic activity post colonisation has progressively caused significant damage to marine ecosystems, reducing stocks of aquatic species in many instances. As a result, First Nations access to culturally and economically important fishery resources has been substantially curtailed.

As discussed in the Background Paper to Seminar 2, within Australia (and indeed globally) there has been growing recognition that First Nations people have unique rights with respect to fishing, including in the context of Australia whereby in certain instances there is legal precedence that:

- First Nations people may not be bound by specific aspects of jurisdictional fishing regulations (*Karpany v Dietman*[40]);
- Customary fishing rights may extend to incorporate a degree of commerciality (*Akiba*[41]); and
- First Nations interests may provide a degree of control over access to certain fisheries, including to the level of invalidating the application of existing legislation to that First Nations-owned resource (*Blue Mud Bay*[42]).

The response to this jurisprudence from Australian jurisdictions has been variable. While many have done relatively little to move beyond the simple commercial, recreational, customary resource allocation framework, others have created new statutory or regulation-based rights and access regimes, including:

- The Northern Territory have introduced a Coastal Fishing Licence, whereby customary fishers may engage in limited commercial trade;
- The South Australian Government is introducing a mandatory First Nations quota for any new commercial fishery;
- The Tasmanian Government has allocated nine tonne of commercial Abalone quota to First Nations;
- The Torres Strait Regional Authority (TSRA)[43] manages the Torres Strait Protected Zone, the primary purpose of which is to preserve the unique natural environment and the way of life of the Torres Strait People, including traditional trading of seafood products; and

[38] Pascoe, B. (2018), *Dark Emu: Aboriginal Australia and the Birth of Agriculture*, Magabala Books Aboriginal Corporation, Broome, Western Australia
[39] Gammage, B. (2012), *The Biggest Estate on Earth: How Aborigines Made Australia*, Allen and Unwin, Australia
[40] (2013) 252 CLR 507
[41] *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth (2013)* 250 CLR 209
[42] Northern Territory v Arnhem Land Aboriginal Land Trust *(2008) 236 CLR 24*
[43] A unique Commonwealth Authority created under the *Aboriginal and Torres Strait Islander Act 2005* (Cth), operated in accordance with the Torres Strait Treaty between Australia and Papua New Guinea and under a jointly agreed natural resource management regime.

- The Commonwealth Government in 2018 extended the Indigenous Land Sea Corporation's (ILSC) remit to include sea country and freshwater estates, providing it with the ability to acquire commercial fishing licenses and divest them with First Nations interests.[44]

There is also increasing recognition of the importance of First Nations perspectives and input in resources management decisions. As original custodians of the lands and waters, regulators, decision-makers, private industry and the community at large have adopted varying measures and structures to seek input and advice on all aspects of policy and decision-making, particularly in the sphere of land management, primary industry and water rights. This also applies to the fishery resource where efforts are increasingly, albeit to varying extent, being made to integrate First Nations input and Traditional Ecological Knowledge into fisheries management.

As illustrated in the following Figure 4, the main vectors to economic self-determination supported by sea country are commercial fisheries and aquaculture and contract management of the marine estate.

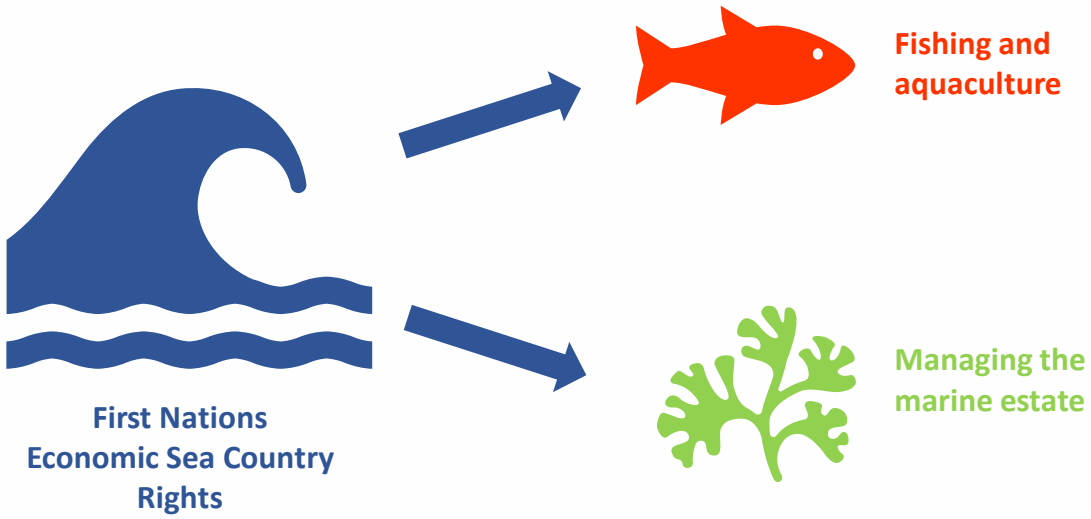

Figure 4 – Key opportunities from First Nations sea country rights

Policy initiative options

Recognition of Sea Country rights: principles framework for operating in the marine environment

As detailed in the Seminar 2 Background Paper, First Nations interests in sea country is an emerging area in Australia. With the exception of rights under the *Aboriginal Land Rights (Northern Territory Act) 1976* which vest approximately 85 percent of the Northern Territory coastline in Aboriginal (inalienable) freehold title and the unique circumstances of the Torres Strait Protected Zone, the only other instrument is sea country rights recognised under the Native Title Act, whereby limited sea country rights have only been recognised since 2001.

As an emerging area of reclamation and enforcement of First Nations rights, it has been proposed that national principles based approach should be adopted to guide the integration of First Nations fishing, aquaculture and management rights into the contemporary marine estate management regime and that this could be based on the principles established by the Indigenous

[44] *Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018, Aboriginal and Torres Strait Islander Land and Sea Fund (Consequential Amendments) Bill 2018 and Aboriginal and Torres Strait Islander Land and Sea Fund Bill 2018*

Advisory Group to the Fisheries Research and Development Corporation.[45] These principles are summarised in the following Table 5.

Table 5 – Fisheries Research and Development Corporation Indigenous Reference Group – Cairns Forum Principles

	Principle	Description
1.	Enhance First Nations recognition	For Aboriginal and Torres Strait Islander people's cultural fisheries to be implicitly recognised as a definitive sector within each level of the fishing and seafood industry.
2.	Resolve issues around access	Develop, maintain and improve access to aquatic resources and important areas for Aboriginal and Torres Strait Islanders.
3.	Improve governance and provide pathways to better representation and management models	To develop processes that best align with Aboriginal and Torres Strait Islander people's needs, including self-management or co-management which incorporates Traditional Fisheries Management (TFM) arrangements and techniques.
4.	Provide resourcing options in a user friendly and culturally appropriate manner to encourage greater First Nations involvement	To identify opportunities to reduce costs and the complexity of resourcing and funding for Aboriginal and Torres Strait Islanders.
5.	Improved capacity that empowers First Nations peoples	To lead to increased commercial opportunities and management roles for Aboriginal and Torres Strait Islander people arising from resource use and access.
6.	Develop agency capacity to recognise and utilise First Nation expertise, process and knowledge	To ensure Government, as part of its responsibility to consult and engage with Aboriginal and Torres Strait Islander people on resource use, undertakes such discussions in a supported and culturally appropriate way.
7.	Recognition of customary rights and knowledge, including processes to incorporate First Nations Traditional Fishing Knowledge and Traditional Fisheries Management	To acknowledge and value the benefits of Traditional Fishing Knowledge and Traditional Fisheries Management in the broader fisheries management processes.
8.	Improve knowledge and awareness of impacts on the environment and traditional harvest	To assess and mitigate the fishing and non-fishing impacts on Aboriginal and Torres Strait Islander cultural catch and practices.
9.	Management arrangements that lead to improved access, protection and incorporation of Traditional Fishing Knowledge and Traditional Fisheries Management input to processes	To allow Aboriginal and Torres Strait Islander people to have mandated access and management arrangements that aligns with, and incorporate, TFK and TFM.
10.	Increased value for First Nations (economic, social,	To improve the overall wellbeing of Aboriginal and Torres Strait Islanders through involvement in the fishing and seafood industry.

[45] Fisheries Research and Development Corporation Indigenous Advisory Group (https://www.frdc.com.au/indigenous-reference-group-irg)

	cultural, trade, health and environmental)	
11.	Benefits sharing	For Aboriginal and Torres Strait Islander people to derive benefits from the use of fish stocks and fishing rights

First Nations Sea Rangers as a primary custodians of the coastal marine estate

Indigenous land and sea ranger groups are supported by governments and undertake fee-for-service work for government agencies, as well as the private and not-for-profit sector. The success of this sector in terms of both management of the conservation estate and environment more broadly, as well as securing economic and other benefits for First Nations is detailed in the Seminar 2 Background Paper.

The prevalence of Sea Country Peoples along the Australian coastline, particularly in regional and remote areas, provides an efficient platform for managing the marine estate. Resources should be directed at growing the number and capacity of Sea Ranger programs to perform this custodial role. This should start in areas where there are existing ranger programs, expand into under-managed areas and ultimately transition to joint management where there are existing non-First Nations management functions.

First Nations commercial fishing and aquaculture rights

In both the context of wild-catch and forms of aquaculture,[46], the marine and freshwater fishery resource has performed a fundamental role in Australian First Nations subsistence, culture and trade for millennia. Similarly, fishery resources have performed a significant role in subsistence, culture and trade across common law jurisdictions for a very long time, evidenced by a significant body of jurisprudence and precedence pertaining to fishing rights that can be traced back to the Magna Carta.[47]

Despite a complex and sophisticated treatment of all natural resources under traditional and customary law of Australia's First Nations, the Australian continent was declared *terra nullius* by British settlers, who thereby imposed their own legal traditions upon Australia by the new Colonial governments. Under the inherited English common law system and Imperial legislation in effect at the time, fish found in territorial waters of the Colonies were considered not capable of being owned by any individual until lawfully caught. As such, First Nations peoples had no more right to any aquatic resources – even those which they had managed for thousands of years – than the newly arrived European colonists. As a result of industrial harvest methods and technological superiority of colonial fishers, paired with a lack of any significant catch, harvest, bag or other limitations, First Nations peoples were swiftly crowded out of emerging Australian fisheries.

Post-Federation, due to the nature of the Commonwealth-State division of legislative powers under the Australian Constitution, the control and management of aquatic resources and the fishing industry has largely been under the control of the States and the evolving common law. While thus varying between jurisdictions, in general terms this has involved increasing government control over which species of fish may be caught, by whom, where, when and in what quantities. Under most management systems, this is achieved by some allocation of the resource among and across recreational, customary and commercial fishers, and then a system of licenses, quotas and other control schemes (which in some instances are tradeable) to control rights within those broader categories.[48]

[46] For example, Baiame's Ngunnhu (or Brewarrina Fish Traps) in New South Wales
[47] Murphy B. (1968) 'The lawyer as historian: Magna Carta and public rights of fishery', Irish Jurist, 3(1)m 131-145
[48] Australian Venture Consultants (2020), Secure fishery resource access rights in Western Australia: Policy Position Paper, Western Rock Lobster Council

The nature of fishing rights and their management has been a contentious and fraught issue that has been argued many times before Australian courts and legislatures, a detailed analysis of which is well beyond the scope of this paper. However,, one particular legal wrinkle is worth exploring.

As noted above, the original common law position was that aquatic resources were incapable of ownership until legally caught. For some States – Victoria, South Australia and Tasmania,[49], - this 'default' position has since been modified by legislation such that the State has taken on legal ownership of aquatic resources, even when still alive and swimming in the jurisdictions waters. Meanwhile, the remaining states – Western Australia, Queensland and New South Wales (as well as the Commonwealth and Northern Territory),[50], – make no claim to ownership outright, but rather only claim the ability to legislate for management and regulation of the resource. Further, the extent to which the issuing of rights to fish by a jurisdiction, regardless of the jurisdiction's claim to ownership over the resource, creates a property or property-like right and the implications of that right, has been an ongoing industry and legal debate,[51],[52].

The net effect of this is that there may well be differential policy levers which States may have available to them in any negotiated activation of First Nations fishing and aquaculture interests, as well as differential policy drivers and stakeholder sensitivities regarding that action.

More broadly, and notwithstanding the contention that persist in Australia in relation to fishing rights, First Nations fishing rights face a similar dilemma to First Nations water rights – for the more valuable fisheries, the resource is fully allocated and resuming rights from people is challenged from both a legal and political perspective. Therefore, as is the case of water resource, the most likely solution would be for government to purchase back issued rights through either a market, voluntary or compulsory scheme in fully allocated fisheries, or in the case of new fisheries preserve a portion of the allocation for First Nations interests on a right of first refusal basis.

National First Nations fishing and aquaculture peak body

The First Nations commercial fishing and aquaculture sector in Australia is diverse and growing. While it is difficult to quantify the number of enterprises, the following Table 6,[53] is illustrative of the substance and diversify within the sector.

Table 6 – Examples of First Nations fishing and aquaculture businesses

Enterprise	Description
Maningrida Wild Foods	100 percent First Nations owned social enterprise, supplying barramundi and mud crab to the Maningrida and surrounding communities.
Yagbani Aboriginal Corporation	First commercial oyster operation in Northern Australia, with a current capacity of 80,000 black-lip oyster and planning to expand to 1 million.
Kuti Co.	100 percent First Nations owned commercial enterprise harvesting Pipis from the lakes and Coorong Fishery in South Australia.
Wanna Mar Southern Bluefin Tuna	100 percent First Nations owned Tuna purse sein and ranching operation supported by the Stehr Group in Port Lincoln and operating 25 tonne of quota.
Tasmanian Aboriginal Abalone Fishery	First Nations fishers in Tasmania operating 40 units (equivalent to 9 tonnes) of the commercial Abalone fishery.

[49] *Fisheries Act 1995* (Vic), *Fisheries Management Act 2007* (SA) and *Living Marine Resources Management Act* 1995 (Tas)
[50] Fish Resources Management Act 1994 (WA), Aquatic Resources Management Act 2016 (WA), Fisheries Act 1994 (QLD), Fisheries Management Act 1994 (NSW), Fisheries Management Act 1991 (Cth) and Fisheries Act 1988 (NT)
[51] Australian Venture Consultants (2021) An industry response to the academic assessment of the risks and benefits of a Deed of Agreement for the Tasmanian Rock Lobster Fishery, Western Rock Lobster Council
[52] Harper v Minister for Seas Fishery (1989) 168 CLR 314
[53] Australian Venture Consultants (2023), *Independent Review of the Indigenous Reference Group*, Fisheries Research and Development Corporation, Canberra

Zenadth Fisheries Company	Tropical Rock lobster, Coral Trout and Sea Cucumber operation in the Torres Strait

Given the unique nature of the sector, its emerging nature and its specific challenges and opportunities the establishment of a resourced peak body for the Australian First Nations fishing and aquaculture industry is recommended. This body could coordinate advocacy and undertake sectoral level promotion and joint market development activities for the sector, including a First Nations fishing and aquacultural provenance traceability and branding and certification program.

Activating economic value from cultural and intellectual property rights

'The current legal framework does not and is not designed to provide First Nations people with the ability to obtain holistic recognition and protection of their Indigenous culture and intellectual property rights. Any solution should be informed by and address the needs of First Nations people. It should recognise the cultural governance of First Nations peoples including their cultural authority to protect, use and share their Indigenous Knowledge as they see appropriate, which may include growing the demand for authentic Indigenous industries.'

Problem statement
Indigenous Expert Reference Group
IP Australia

NOTE: 'Indigenous Knowledge' refers to a range of knowledge held and continually developed by First nations and includes Cultural Expression, Traditional Knowledge and knowledge relating to Genetic Resources.

First Nations cultural and intellectual property is a vital asset for economic self-determination as it fundamentally underpins unique competitive advantage for First Nations enterprise. Traditional knowledge, cultural expressions and rights in genetic resources are sources of competitive advantage in markets for a range of products and services that are derived from First Nations intellectual property (see Table 5).

Furthermore, First Nations peoples have a right to own and control their intellectual property and not have it misused or misappropriate by other parties. This is a right recognised in UNDRIP.

However, the Australian intellectual property law framework is substantively deficient in providing First Nations people with legal means of protecting their intellectual property, fundamentally undermining this critical capacity. While some forms of cultural expression can be protected through mechanisms such as copyright and trademark, there is little capacity within the Australian framework to protect most aspects of traditional knowledge or genetic resources, a fact recognised by IP Australia and prominent First Nations legal practitioners.

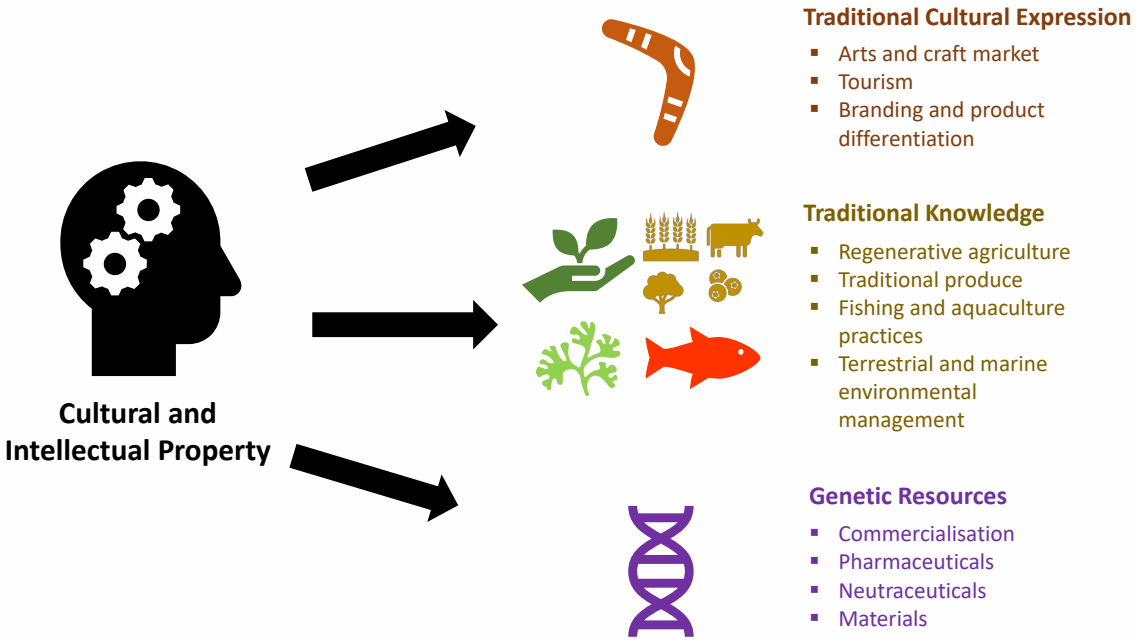

Figure 5 – First Nations Cultural and Intellectual Property as an enabler of competitive advantage

True Tracks Protocol Framework

First Nations heritage, culture and intellectual property is linked to First Nations people, land and identity and is constantly evolving. First Nations people have roles and responsibilities with respect to looking after Indigenous Knowledge and ensuring it is passed on to subsequent generations through customary channels and processes, with its use subject to consultation and consent processes that are in accordance with customary laws. Whilst modern global First Nations intellectual property frameworks are based on three main categories of First Nations intellectual property – Traditional Cultural Expression, Traditional Knowledge and Genetic Resources – there are numerous other categories that are both incorporated in and transcend these broader categories. This is illustrated in the following Figure 6.[54]

> *'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their science, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.'*
>
> Article 31(1)
> United Declaration on the Rights of Indigenous People

[54] Terri Janke and Company, *True Tracks: Indigenous Cultural an Intellectual Property Protocols*

Figure 6 – Key elements of First Nations heritage, indigenous cultural and intellectual property

Developed by eminent Australian First Nations Cultural and Intellectual Property lawyer, Terri Janke, the True Tracks Framework, [55], sets out a principles-based protocols framework for regulation and interaction with First Nations cultural and intellectual property. Summarised in the following Table 7, it has been identified that reform to the Australian intellectual property law framework that recognises First Nations cultural and intellectual property should be guided by these principles.

Table 7 – Janke True Tracks Framework

	Protocol	Summary
1.	Respect	Start from the principle in Article 31 of UNDRIP – Indigenous people have a right to maintain, control, protect and develop their ICIP.
2.	Self-determination	Empower Indigenous people in decision-making processes, establish Indigenous advisory groups and steering committees and provide regular updates.
3.	Consent and consultation	Commit to obtaining and maintaining free, prior and informed consent of Indigenous peoples for projects that affect their rights, in line with the spirit of UNDRIP.
4.	Interpretation	Indigenous people should be recognised as the primary guardians and interpreters of their cultures. Consideration needs to be given to appropriateness of terminology, impact of publication on culture and any confidential, sensitive or personal material.
5.	Cultural integrity	Maintaining the integrity of cultural heritage information or knowledge keeps culture strong. Ensure that the context is not harmful or inappropriate and always seek advice on any cultural restrictions that may apply to the use if ICIP.
6.	Secrecy and privacy	Indigenous people have the right to keep secret their sacred and ritual knowledge in accordance with their customary laws. Therefore, privacy and

[55] Janke, T. (2021), True Tracks: Respecting Indigenous Knowledge and Culture, Terri Janke & Associates

		confidentiality concerning aspects of Indigenous people's personal and cultural affairs should be respected.
7.	Attribution	Additional to copyright attribution, Indigenous peoples should be attributed as the owners of ICIP, and prominently so.
8.	Benefits sharing	Indigenous people have the right to share in the benefits from the use of their culture, particularly with respect to the commercial use of that culture. Further, benefits should flow back to the source communities.
9.	Maintaining Indigenous culture	Consideration should be given to how any proposed use might impact on the future use by others who are entitled to inherit the cultural heritage. Because Indigenous cultures and dynamic and evolving and protocols change, ongoing consultation in this regard is necessary.
10.	Recognition and protection	Use existing laws and develop policies to protect ICIP – IP laws, copyright notices, traditional custodian notices, ICIP clauses in contracts, trademarks and policies and protocols and official channels for First Nations to raise concerns.

IP Australia reform process

Through the agency primarily responsible for matters of intellectual property, IP Australia, the Commonwealth Government is in the process of examining the merits and possible structure of *sui generis* (stand-alone) legislation that would better protect First Nations cultural and intellectual property and allow First Nations interests to commercialise their cultural and intellectual property.

There are four key elements of the policy and legislative framework that is being considered by IP Australia that pertain to all types of Indigenous Knowledge with the exception of genetic resources (see further below). These are discussed in the following subsections.[56, 57]

A new Indigenous Knowledge right

The reform proposed by IP Australia revolves around the creation of a new right in the Australian intellectual property legal framework, an Indigenous Knowledge Right. This new right would recognise collective and communal ownership in Traditional Cultural Expression and Traditional Knowledge, but not knowledge pertaining to Genetic Resources, which would be implemented under a related framework in accordance with the Nagoya Protocol (see below).

It is proposed that the new Indigenous Knowledge Right demonstrate the following characteristics:

- Unlike other forms of intellectual property in Australia and recognising the ancient, continuing and evolving nature of cultural knowledge and heritage of Australian First Nations would not be dependent on a requirement of originality or novelty and would not have a set term for protection.
- Similar to copyright, protection will not be dependent on any form of registration of the Indigenous Knowledge Right.
- There would be no legal restrictions on commercial or non-commercial use of the Indigenous Knowledge by Traditional Owners or members of communities which own the rights and where use is consistent with their own cultural protocols.
- Third parties that want to use Indigenous Knowledge will have the obligation to obtain free, prior and informed consent of the Traditional Owners and enter into appropriate license agreements to share financial and non-financial benefits.

[56] IP Australia, *Stand-alone legislation for Indigenous Knowledge,* Australian Government, Canberra
[57] Nintionelimited, *Interim Report: Scoping Study on stand-alone legislation to protect and commercialise Indigenous Knowledge*, IP Australia, Australian Government, Canberra

- Licenses pertaining to Indigenous Knowledge rights could include requirements for third party users to acknowledge the owners of Indigenous Knowledge correctly when using it and to use licensed Indigenous Knowledge respectfully in a way that is not derogatory to communities.
- Breach exceptions for the purposes of education and news reporting that exist for many other forms of Intellectual Property may apply, but designed in consultation with First Nations.

Prevention of inauthentic product

The Indigenous Knowledge Rights discussed above could be complemented by legislated measures to prevent trade in inauthentic and promote trade in authentic products. While Australian law currently provides for action to be taken if a product is falsely labelled as being made by a First Nations business or artist, it does not prevent products being marketed 'in an Indigenous style' or 'inspired by' Indigenous culture provided there is no claim to authenticity.

Legislation could be introduced that makes it an offence to market products featuring and incorporating Traditional Cultural Expression unless they are made by Australian First Nations or under a license from owners of the Traditional Knowledge Rights and any inauthentic product must be clearly labelled as such. This could be coupled with a voluntary national First Nations provenance and authenticity traceability and labelling regime.

Border protections designed to prevent export or import of non-authentic First Nations products could also be introduced.

Finally, this could be supported by a national awareness campaign designed to education consumers, particularly tourist, on the importance of purchasing genuine First Nations products that are based on Indigenous Knowledge Rights.

National Indigenous Knowledge Authority

A new institution could also be stood up that has the responsibility for initiatives such as:

- Develop and implement an awareness campaign, including information and support for First Nations wishing to identify and protect their Indigenous Knowledge Rights and third parties that seek access to Indigenous Knowledge Rights.
- Assist First Nations in identifying, protecting and prosecuting their Indigenous Knowledge Rights.
- At the request of Indigenous Knowledge Rights holders, negotiate Indigenous Knowledge licenses and collect license fees on their behalf, streamlining the process for Third Parties.
- Establish a register of First Nation's Indigenous Knowledge Rights.
- Establish processes to assist third parties to identify and secure the consent of Indigenous Knowledge Right holders.
- Distributing any licensing fees collected from the third-party users to the holders of Indigenous Knowledge rights.
- Manage and enforce systems designed to identify genuine First Nations product.
- Coordinate an export and import authenticity program with Australian Customs and Border Protection.
- Powers to initiate enforcement action against unauthorised use and misappropriation of Indigenous Knowledge, breaches of licenses, unauthorised imports and breaches of labelling standards.

It is proposed that it would not be mandatory for First Nations or third parties to use the proposed National Indigenous Authority, allowing them to identify, protect, license and enforce their Indigenous Knowledge Rights on their own terms.

Growing competitive First Nations Indigenous Knowledge Rights-based businesses

Indigenous Knowledge Rights will be optimally protected in circumstances where there are competitive and financially sustainable businesses based on Indigenous Knowledge Rights, motivating and resourcing the owners of those rights to protect them and deterring any infringement. To this end, the Indigenous Knowledge Rights framework could include a range of government programs designed to build capacity that pertains to the commercialisation of First Nations Indigenous Knowledge amongst First Nations communities.

The Nagoya Protocol

As detailed in the Seminar 2 Background Paper, with its roots in the Convention of Biological Diversity (CBD) and Bonn Guidelines, the Nagoya Protocol,[58], goes significantly beyond the voluntary Bonn Guidelines and prescribes a number of 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.

- Prescriptive and Specific Obligations
  In order to meet the Access and Benefits Sharing requirements of the CBD, the Protocol requires States Party to 'via legislative, administrative or policy measures' provide for a number of specific actions and outcomes. 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 Clearinghouse.[59]
  - 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 embedded in 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; and
  - Competent National Authority responsible for granting access and issuing written evidence that access requirements have been met and register instruments with the ABSCH.

- Compliance and Monitoring

[58] *Nagoya 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
[59] 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

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 to ensure that Genetic Resources exploited within their territory has been appropriately permitted and the First Nation peoples or communities whose Traditional Knowledge it is associated with have given prior informed consent and the mutually agreed 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.[60] 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 – for example, *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), *Biodiscovery Act 2004* (QLD), *Biological Resources Act 2006* (NT),

Policy initiative options

Promotion of the True Tracks Framework as a basic standard for third parties dealing First Nations Cultural and Intellectual Property

As both a precursor and complementary tool to the current First Nations cultural and intellectual property reform that is underway (see next policy option), IP Australia should consider adopting and promoting the True Tracks Framework as a principles based protocol that third parties should adhere to when dealing with First Nations Cultural and Intellectual Property.

Acceleration of Australian First Nations Cultural and Intellectual Property law reform

Compared to the other areas of identified in need of significant reform, First Nations cultural and intellectual property reform appears more advanced to the extent that there is at least a Commonwealth Government process underway through IP Australia. However, this is proving to be a protracted process, with the current workplan indicating that by the end of 2022-23, the work will still be at a very early exploratory stage.[61]

The IP Australia reform process, including establishing a new Indigenous Knowledge rights at law, initiatives to prevent inauthentic product, National Indigenous Knowledge Authority and ratification and implementation of the Nagoya Protocol, should set a specific expedited timeframe for making recommendation on First Nations Cultural and Intellectual Property law reform and be resourced to achieve that goal within the shortest possible timeframe. As the IP Australia work progresses, reform should be developed in accordance with the principles set out in the True Tracks Framework.

Cultural knowledge transfer resourcing

One of the most devastating impacts of colonisation is its suppression of cultural knowledge transfer between generations. Dispossession, assimilation policies and the socio-economic impacts of colonisation, particularly premature death have resulted in widespread cultural

[60] Presently Ms. Jaime Grubb, Director, Biodiversity Policy Section, Commonwealth Department of the Environment and Energy, Canberra
[61] IP Australia (2021), *Indigenous Knowledge Work Plan 2022-23*, Australian Government, Canberra

disconnection, meaning that Elders holding cultural authority have been unable to pass important aspects of First Nations cultural and intellectual property onto the next generation of leaders.

Whilst some aspects of cultural and intellectual property have almost certainly been lost for ever, language centres and other such resources go someway to restoring and preserving First Nations cultural and intellectual property. Greater resourcing for First Nations organisations that are performing this important role will go someway to stemming the loss.

Utilising financial assets for facilitating economic self-determination

Investing our funds in our own backyard

As detailed in the Seminar 2 Background Paper, significant and in many cases growing financial assets, primarily in the form of cash and managed investments, are accumulating in trusts and statutory instruments to which specific First Nations interests are beneficiaries. In most if not all cases, the governance, distribution and investment charters that pertain to these assets are controlled by trust deeds or regulations that remove or substantially dilute First Nations control over these assets and in any event significantly constrain their utility.

In the case of statutory instruments, the control exists to give effect to specific government policy.. Whereas with private arrangements, the control typically exists with the intent of building a level of principal under management that generates adequate returns to make distributions to the benefit of the beneficiaries whilst maintaining the principal required to generate returns at least equivalent to those distributions, preserving wealth for future generations. Regardless of the intent of the control, it is contrary to the notion of economic self-determination.

In an environment where the efficacy of the First Nations policy of Australian governments is increasingly under question,[62], and self-determination is a key goal of Australian First Nations, it is not surprising that these assets are attracting increasing scrutiny. Firstly, many First Nations beneficiaries pose that these instruments, statutory or private, were established to benefit or compensate them and therefore they should determine when, where and how these funds are managed are invested. Secondly, it is argued that if First Nations are not able to make investments in soft and hard infrastructure, initiatives and ventures that are necessary to ensure that future generations have an adequate platform for economic equality and justice, future generations will be further compromised. Thirdly, in many instances where distributions from these assets are made to individuals, they have simply replaced government as a source of welfare, continuing a culture of dependency at the cost of self-determination.

Notwithstanding the contention between these perspectives, in the context of the persistently comparatively low socio-economic circumstances endured by Australian First Nations, the opportunity cost associated with having significant wealth to which First Nations are beneficiaries locked up in managed funds when those funds could be deployed in local initiatives that deliver greater socio-economic-cultural dividends becomes an increasingly pertinent issue, particularly in instances where the principal reaches a self-sustaining level or there is certainty as to a long-term income stream.

Across the world, including in comparable former British Colonies such as Aotearoa/New Zealand, Canada and the United States there are numerous examples of First Nations managing self-determined asset bases valued at billions of dollars, owned by their peoples and employing their peoples, facilitating re-connection to culture and country and delivering far superior socio-economic-cultural outcomes.

Developing clear, financially responsible pathways for Australian First Nations to be able to better utilise financial assets that are managed on their behalf for the purpose of activating self-determined local economies represents a significant resource for First Nations beneficiaries seeking this outcome.

[62] Productivity Commission (2023), Review of the National Agreement on Closing the Gap: Draft Report, Australian Government, Canberra

The early to expansion-stage equity gap

The fact that globally an overwhelming majority of enterprise concepts, particularly those based on innovation,[63], fail is well understood by researchers, entrepreneurs and early-stage investors alike. However, the survival rate of all new businesses across Australia is low, with around 48 percent of new Australian businesses failing within four years of their commencement.[64] It is, therefore, unsurprising that attracting external investment in ventures that are at an early stage of development is difficult, regardless of the merits of their business case.

Generally speaking, the ability of a venture to attract investment is a function of the investor's perception of risk and the rate of return they expect to compensate for that risk. Different investors have different risk appetites and associated return expectations. At the very early stages of a business – conceptual and pre-revenue - significant uncertainty associated with the untested nature of the venture means that arms-length external investment is typically not an option, with entrepreneurs having to fund enterprise through 'sweat equity,[65], own financial resources, contributions from friends and family or government grants. Once a clear business case has been established and ideally tested in the market in the form of early revenues, a wider range of equity and equity-like investment becomes more achievable. This may come from professional private equity or corporate venture capital, but because early-stage businesses still carry a significant and inherent degree of risk that is associated with high rates of business failure, high networth individuals (including angel investors) that have greater decision autonomy are a more common source of capital. Once the venture has demonstrated some market penetration, growth potential and relatively clear pathway to sustainable and adequate profitability, professional and corporate private equity become more realistic sources of capital. Finally, once the business has grown to a stage where it has assets that can be used as collateral and reliable cashflow forecasts to service principal and interest repayments, debt becomes a viable financing option.

The following Figure 7 illustrates typical capital requirements at different stages of venture development.

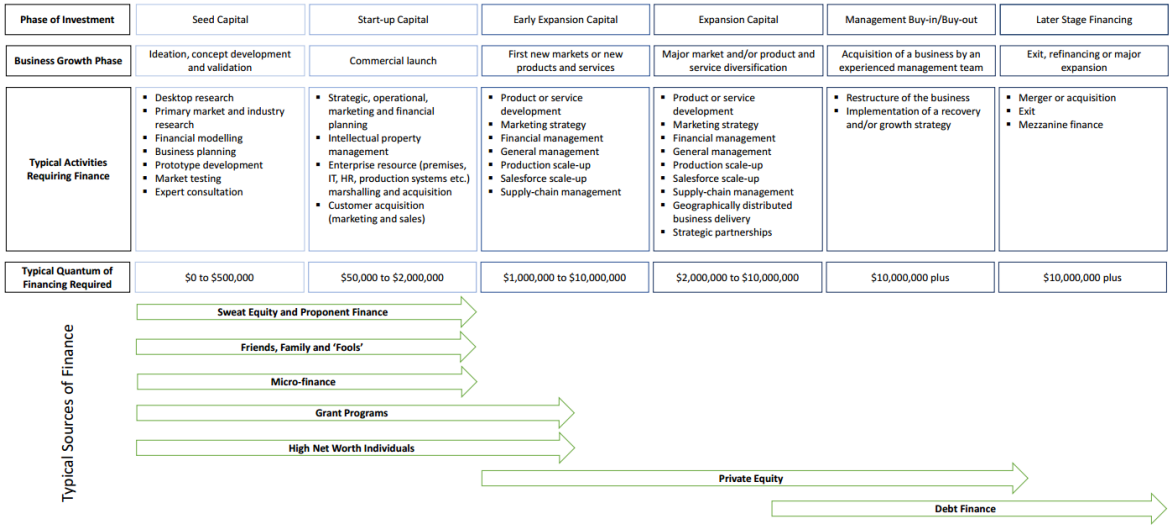

Figure 7 – Typical business development cycle, financing requirements and sources of finance

[63] Stevens, G. and Burley, J. (1997), '3,000 raw ideas = 1 commercial success', *Research Technology Management*, 40(3), 16-27

[64] Australian Bureau of Statistics (2022) Counts of Australian Businesses: Entries and Exits.

[65] The term 'sweat equity' refers to non-remunerated time spent by an entrepreneur and early stage venture team developing the venture.

As a result of average lower incomes and levels of intergenerational wealth transfer, First Nations Australians are substantially less likely to have adequate personal wealth, or access to friends and family with adequate personal wealth to invest in the very early stages of venture development. However, there are at least government grant programs and NGO micro-finance programs that go some way to addressing this gap.

Because in many instances (certainly not all), First Nations enterprises address smaller markets, are often in rural, regional and remote locations incurring higher capital and operating costs and deliberately incur higher costs associated with investing in their ability to deliver social and cultural benefits, they tend not to be able to demonstrate a returns profile that is commensurate with the expectations of mainstream private equity and venture capital for ventures at that stage of development. Further, it is rare that such an enterprise demonstrates adequate strategic alignment to justify corporate venture investment. Because ventures at this stage typically do not have an adequate asset base or reliable cashflow forecasts on which debt financing can be based, the early-to-mid stage equity financing gap that is faced by many ventures across the economy is a gaping chasm for most First Nations ventures.

The rapidly increasing propensity for a 'responsible investment' and particularly an environmental-social-governance (or, 'ESG') lens to be put over professional investment decisions presents a potential pathway to bridging this chasm for First Nations enterprise.

The rise of ESG: 'I'ESG?

'Responsible Investment' is an approach to professional investment management which factors in expectations with respect to social, environmental and ethical outcomes, together with financial outcomes. As illustrated in Figure 8 below, it incorporates a wide range of professional investment management practices.[66]

[66] Responsible Investment Association Australasia

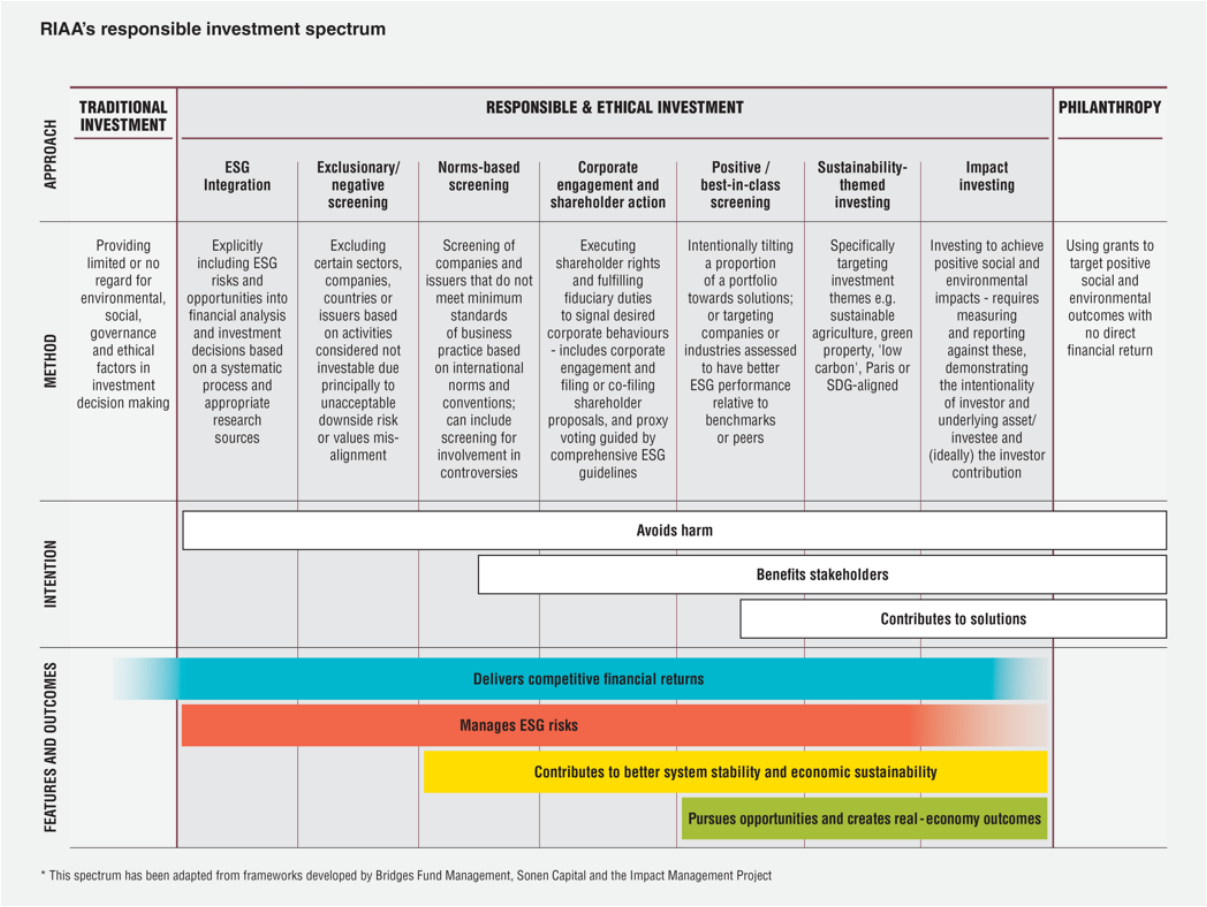

Figure 8 – Responsible Investment practices

As illustrated in the following Figure 9, effectively all growth in assets under management in Australia in recent years is characterised by responsible investment practices, which now account for over 40 percent of all assets under management in Australia.[67]

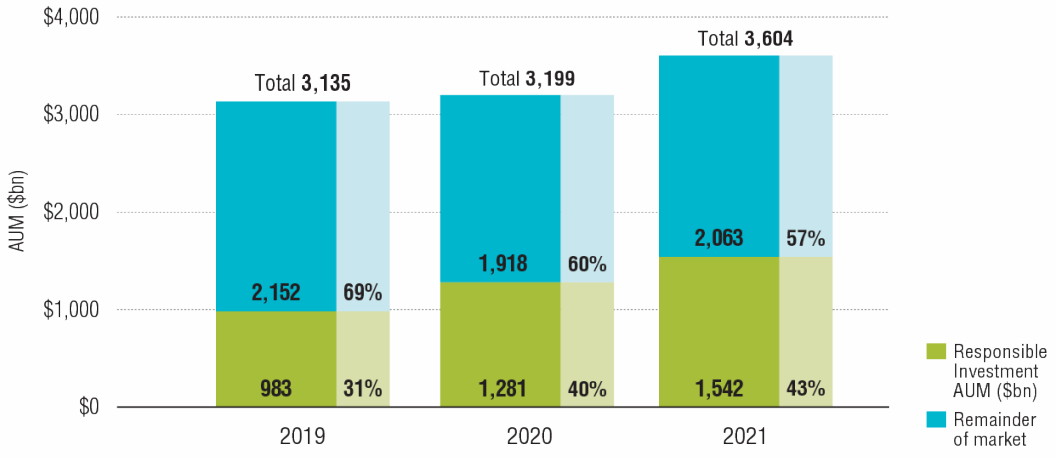

Figure 9 – Responsible Investment as a portion of total assets under management (Australia)

Whilst climate change, renewable energy, waste management and circular economy are the most common themes targeted by responsible investment strategies, indigenous business and cultural protection ranks approximately equally with important themes such as biodiversity, conservation,

[67] Responsible Investment Association Australasia

natural capital, sustainable transport, social impact and education.[68] Promoting the elevation of First Nations business and cultural protection as a priority for responsible investors, particularly in the ESG space (or 'iESG' as some have termed it) and particularly with respect to professional investors targeting early and mid-stage ventures will help bridge the early-mid-stage chasm faced by so many First Nations ventures.

Mandated access to mainstream programs

Like most governments around the world, the Australian Government implements a perpetual pipeline of programs that are designed to stimulate investment in specific industry that it wants to see established and grow in Australia. These programs typically revolve around the provisions of free equity in the form of grants or concessionary loans characterised by low or no interest, long tenor or debt subordination. Some contemporary examples include the Northern Australia Infrastructure Facility (NAIF), Modern Manufacturing Initiative (MMI), and Industry Growth Program.

It is not uncommon for these programs to include incentives for applicants to have a First Nations component to their proposal, or even special additional concessions for First Nations applicants. However, they all fall short of quarantining a portion of the program's budget allocation specifically to support First Nations businesses or industry.

Leveraging everything up: a First Nations financing ecosystem

While initiatives that address each of these opportunities to increase the financial resources available to First Nations economic self-determination will have impact, optimal outcomes will be achieved where the initiatives are able to leverage from one another to form a First Nations sector financing ecosystems. Where First Nations are able to access their own capital or equity in financial assets that are held and managed by third parties on their behalf they can invest directly or leverage from other sources of finance to take full ownership or meaningful equity stakes in enterprise and other assets to support a self-determination based economy. The following Figure 10, illustrates the importance of using these funds to leverage against other public and private investments to activate the other First Nations rights and assets discussed in this chapter, facilitating self-determined prosperity for First Nations People.

[68] Responsible Investment Association Australasia

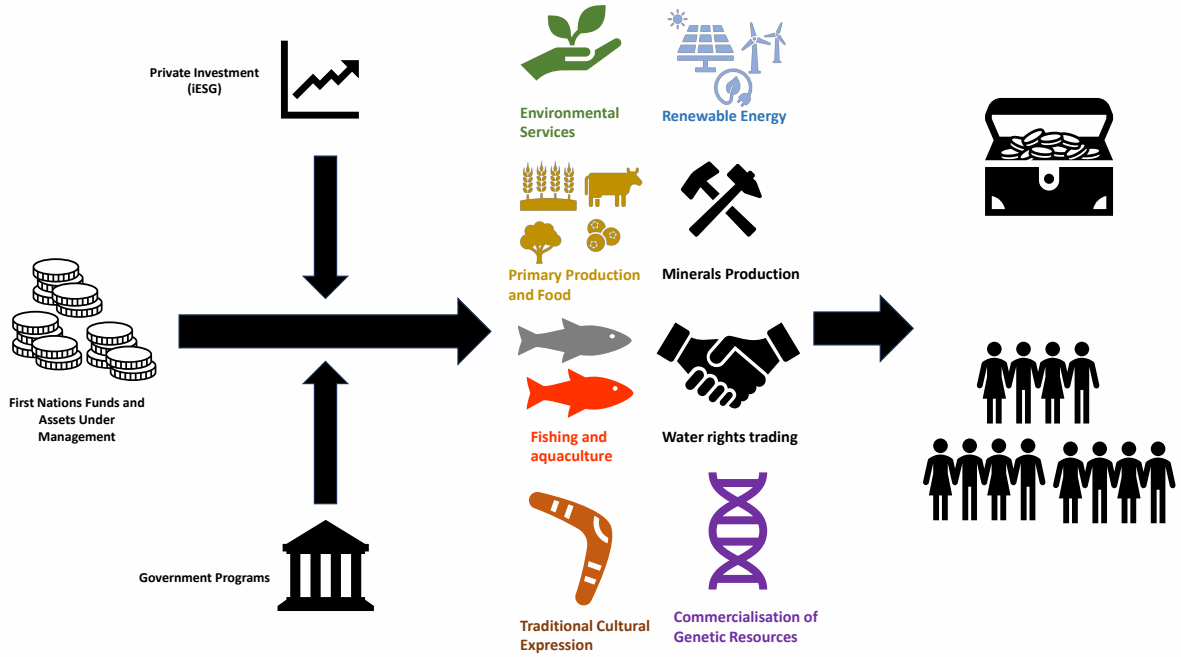

Figure 10 – Leveraging First Nations financial assets

Policy initiative options

Study into activating First Nations funds under management for self-determination

Significant learnings from overseas jurisdictions, particularly Canada and Aeteora/New Zealand , can be taken with respect to activating First Nations financial assets for the purposes of economic self-determination where First Nations groups have used funds accumulated from a range of sources including treaties and associated settlements, natural resources royalties, and in some cases taxation, to successfully invest in the local First Nations economy.

Obviously, for a range of reasons, many of these learnings may not be directly transferable to the Australian context, but they will certainly inform the development of mechanisms that can be used to use First Nations financial assets to build self-determined First Nations economies.

A national study should be commissioned that:

- Delivers a detailed understanding of the quantum and nature of financial resources that are under management in private trusts and statutory instruments across the Nation.
- Explores a range of international case studies where such financial resources have been deployed to develop self-determined First Nations economies, adapting any learnings to the Australian context
- Development of a quantitative modelling tool that allows First Nations beneficiaries to develop their own financial forecasts for funds being held on their behalf, including the impact of making investments in economic self determination.
- Develops best practice governance frameworks for this purpose, including working with benefactors and professional fund managers to give effect to greater First Nations control and investment flexibility
- Identifies best practice with respect to capacity building programs for First Nations wishing to manage their own financial resources

Growing the First Nations investment sector

Growing the investment market for First Nations ventures, particularly in the early-mid-stage capital gap will require initiatives designed to:

- Improve the deal flow (number of investment ready ventures)
- Identify and mobilie the capital that is aligned with the risk-reward profile presented by most First Nations ventures
- Facilitate investment from that capital

Improving the deal flow

At the end of the day, investment capital is globally mobile and will seek out deal-flow – an adequate pipeline of investable propositions that justifies deployment of investment capability and capacity. There are numerous programs designed to assist First Nations entrepreneurs and organisations develop enterprises that are delivered by government and NGOs or which provide grants for First Nations to access advice and support from the private sector.

Many of these programs could reasonably be described as rudimentary. It is important that programs designed to develop and grow First Nations enterprise teach principles of the 'entrepreneurial mindset' such as opportunity identification and validation, a 'kill-quick-kill-cheap' approach to assessment and resource marshalling as well as more basic business skills. It is also critical that the courses teach how to create - 'investment-ready' ventures, incorporating building-in investment attractive characteristics that align the business with the target category of investor and ensuring the business can successfully navigate investor due diligence.

Identifying and leveraging aligned capital

In addition to having an investment-ready venture, First Nations enterprise at the early-to-mid development stage will most likely achieve investment if it:

- Targets capital that is aligned with the risk-return profile that is typical of First Nations enterprise: in many cases this will be categories of responsible investment, particularly ESG investment; and
- Can lower the investors hurdle rate by providing it with avenues to leverage from various forms of cheap or free equity or debt finance.

Two initiatives that will assist in this regard are:

- Greater promotion of First Nations investment opportunities to the responsible investment market; and
- Mandating that mainstream industry development programs quarantine a portion of their budget for the exclusive use of First Nations enterprise.

First Nations Venture Financing Authority and Fund

In order to oversee and drive the development of a First Nations enterprise financing ecosystem, a First Nations Venture Financing Authority could be established whose functions include commissioning the aforementioned studies, promoting the sector to the responsible investment market, working with government and NGO enterprise development programs to enhance their services for First Nations enterprises and working with other Commonwealth agencies to negotiate specific budget allocations under mainstream industry development programs for First Nations enterprise and industry.

An established First Nations Financing Authority could also investigate the merits of using government resources to lower the hurdle rate for private investors in First Nations enterprise.

As has been the case with other higher risk industries that Australian Governments have sought to develop, direct government investment may be required as a catalyst for the development of a more effective First Nations investment sector. Various mechanisms have been used by governments globally to attract capital to specific sectors by deploying government capital in structures that lower the hurdle rate for private investment. By way of example, the following framework is based on aspects of models used internationally,[69], as well as the Commonwealth Government's former Innovation Investment Fund Program.

According to such a framework a fund, or fund-of-funds, is established for a specified amount (for argument's sake a pilot fund may require a total of $50 to $100 million of funds under management in order to demonstrate viability and efficacy) on a closed-end basis (for arguments 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 would contribute a portion of the fund's corpus representative of a risk profile that is required to attract private investment to the fund. For example, the risk profile may be 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, neither its capital or a return on its capital or other predetermined discounted return of and/or on its capital, depending on the risk appetite of the professional impact investment market.

The balance of the fund is then raised from the professional investment market from sources such, in this case, as the social impact investment fund sector, corporate social responsibility budgets, allocations from mainstream management investment funds to social investment.

A professional private equity investor with specific Indigenous enterprise investment experience is appointed through 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 should have a track record in supporting the development of First Nations businesses.

It is envisaged that the manager would be remunerated by way of a management fee and for the purposes of alignment, a carried interest in the fund. Because the fund, its private sector investors and the manager can incur loses as the result of poor investment decisions (the extent to 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 proportionately 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 the Commonwealth's return of capital is discounted, prioritised or subordinated. However, in the event of a total loss, the Commonwealth's capital would be 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. This framework is illustrated in the following Figure 11.

[69] 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

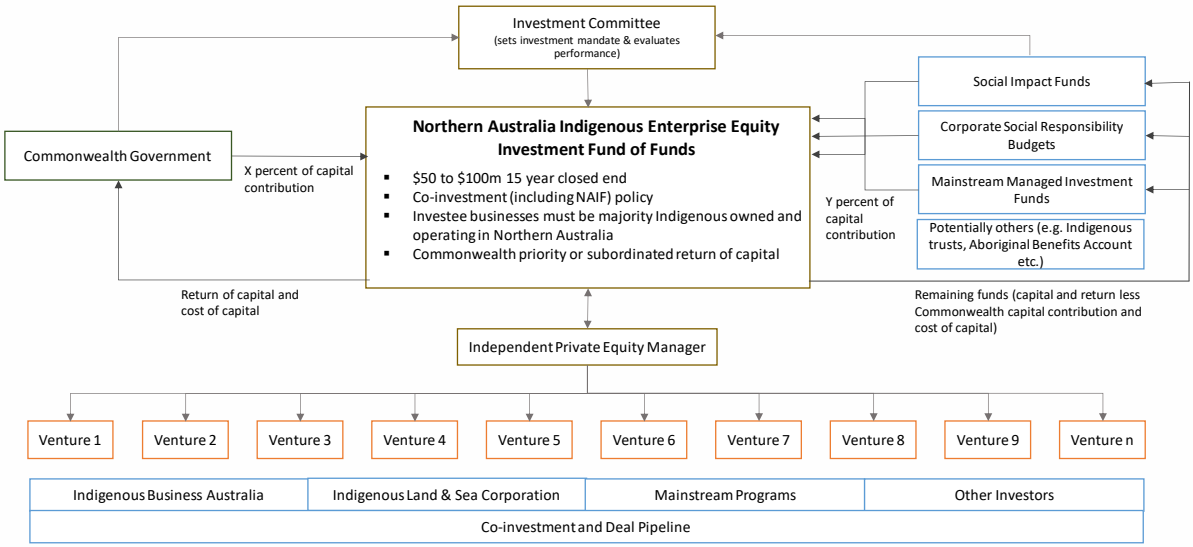

Figure 11 – Possible framework for Government investment in First Nations enterprise

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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