Australian National University | First Nations Portfolio

Murru waaruu

(On Track)

Economic Development Seminar Series

FNP
FIRST NATIONS PORTFOLIO

Policy Options Working Paper

Keeping on track to economic self-determination for Australia's First Nations
Draft for the consideration of Murru waaruu Seminar #5

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.

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Australian Government
National Indigenous Australians Agency

NIAA

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.

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

2 Ibid.

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1. Background

Economic self-determination refers to circumstance where a Peoples has the capacity and space to determine the conditions of labour, production, resource acquisition and distribution[1a], or in other words, the ability of a Peoples to use their rights and assets to conduct economic development in ways that they wish, to achieve the outcomes they wish. It is a human right that is embedded in two key United Nations human rights conventions to which Australia is party, as well as the United Nations Declaration on the Rights of Indigenous Peoples, which has been endorsed by Australia. Further, policy that is consistent with the right to self-determination has been the basis on which Indigenous peoples in jurisdictions such as Canada, Aotearoa/New Zealand and United States have built flourishing Indigenous economies that deliver substantial economic, social, environmental and cultural benefits not only to the Indigenous communities, but also to the wider nation-state.

Australia still has a significant road to travel in this regard.

In July 2022, the Australian National University's First Nations Portfolio (FNP) facilitated a two-day symposium – the *Marramarra murru*[1], Symposium - that was attended by approximately 170 First Nations business and community leaders and other experts in First Nations economic development from across Australia, Canada, the United States and Aotearoa/New Zealand to answer three simple questions:

1. Do we, as Australia's First Nations, want economic self-determination?
2. If so, what policy frameworks are required to facilitate economic self-determination?
3. What is the case that we need to make to government to implement that framework?

The resounding outcome from the *Marramarra murru* Symposium can be summarised as a strong desire to pivot First Nations economic development policy toward one that better supports economic self-determination for Australia's First Nations and progress on a structured, evidence-based pathway to better understand and articulate:

- How, in a post-determination environment characterised by an increasing incidence of treaty-like agreements and settlements, we structure agreements and settlement packages to provide an optimal platform for economic self-determination;
- The specific nature of rights over land, sea country, inland water resources, cultural and intellectual property and financial assets that have been and will continue to be reclaimed by First Nations, the self-determination opportunities they present, constraints with respect to realising those opportunities and required reform;
- A reform package that will deliver a policy environment more conducive to economic self-determination; and
- Details of the policy reform package, including institutional arrangements required to implement the reformed policy framework.

> *...agreed that the policy framework led by the Commonwealth for First Nations economic development was in urgent need for reform and that it is a critical component of implementing the Uluru Statement from the Heart in full...it needs to be replaced by a policy framework for the 21st century that has a razor like focus on self-determination.*
>
> **Communique, Marramarra murru First Nations Economic Development Symposium**
>
> **Australian National University, Canberra, July 2022**

1a Lienau, O. (2020), 'The multiple selves of economic self-determination', The Yale Law Journal, 129, February

1 A Ngambri, Ngunnawal and Wiradjuri term that describes the creation of pathways.

- To this end and addressing the specific recommendation of the *Marramarra murru* Symposium[2], the FNP embarked on an intensive 12-month program of research, consultation and policy formulation – this *Murru waaruu*[3] Seminar Series.

***Murru waaruu* Phase**	**Date**	**Seminar**	**Literature**	**Participation**
Reform to optimise the tools for economic self-determination	15 Feb 2023	**Seminar 1: Treaty & settlement** With some treaty-like arrangements in place with State Governments, and as we approach a period of post-determination and the prospect of a Makarrata Commission, what should a national treaty and settlement framework look like from the perspective of optimising conditions for economic self-determination?	· Background paper · Draft policy chapter	53
	18-19 Apr 2023	**Seminar 2: Activating the rights and assets** What reform is required across First Nations land, water, sea country and cultural and intellectual property rights and rights over financial assets to render them optimal tools for economic self-determination?	· Background paper · Draft policy chapter	78
The case for change in First Nations economic development policy	14 Jun 2023	**Seminar 3: What has been the cost of the past 235 years of policy?** What has been the price paid by First Nations for exclusion from the economic participation and inept First Nations economic development policy? What has been the price paid by Australian Governments in servicing the socio-economic disadvantage that is a result of that exclusion? What is the ongoing productivity penalty incurred by the Australian economy that is a result of the transactional relationship between First Nations and third party developers that is a result constrained First Nations rights?	· Background paper	67
	16 Aug 2023	**Seminar 4: Self-determination or the highway?** Empirical and observational evidence that economic self-determination models produce superior economic, social, cultural and environment outcomes for First Nations communities.	· Background paper	93
The policy position paper and implementation framework	03-04 Oct 2023	**Seminar 5: A policy framework for economic self-determination** Interrogating, stress testing and prioritising the policy options that have been developed in Seminars 1 and 2 and the case developed in Seminars 3 and 4.	· Policy options and preliminary draft framework	TBC
	22 Nov 2023	**Seminar 6: Institutional settings for economic self-determination** Exploring the suitability of the current institutional framework that supports First Nations economic development and recommendations for adjustments.	· Draft framework and institutional options	TBC
Policy position paper	28 Feb 2024	**Peer review (completed)** Expert political and technical review of the draft policy position paper.		
Policy position paper	15 Mar 2024	**FINAL POLICY POSITION PAPER**		

Figure 1 – *Murru waaruu* Seminar Series Program

2 First Nations Portfolio (2022), The Marramarra murru (Creating Pathways) First Nations Economic Development Symposium: Communique, Australian National University, Canberra

3 A Ngambri, Ngunnawal and Wiradjuri term that means staying on track.

Each of the *Murru waaruu* seminars has been supported by a detailed background paper that was provided to participants in advance of the seminar (see Appendix 1). Held bi-monthly over the course of the year, each Seminar to date has seen an average of around 70 First Nations community, business and peak body leaders, Commonwealth Government policymakers, researchers and other key stakeholders converge at ANU's Canberra campus to explore the issues, formulate policy and create the case for change.

The following Figure 2 illustrates representation of key stakeholder groups over the *Murru waaruu* seminar series.

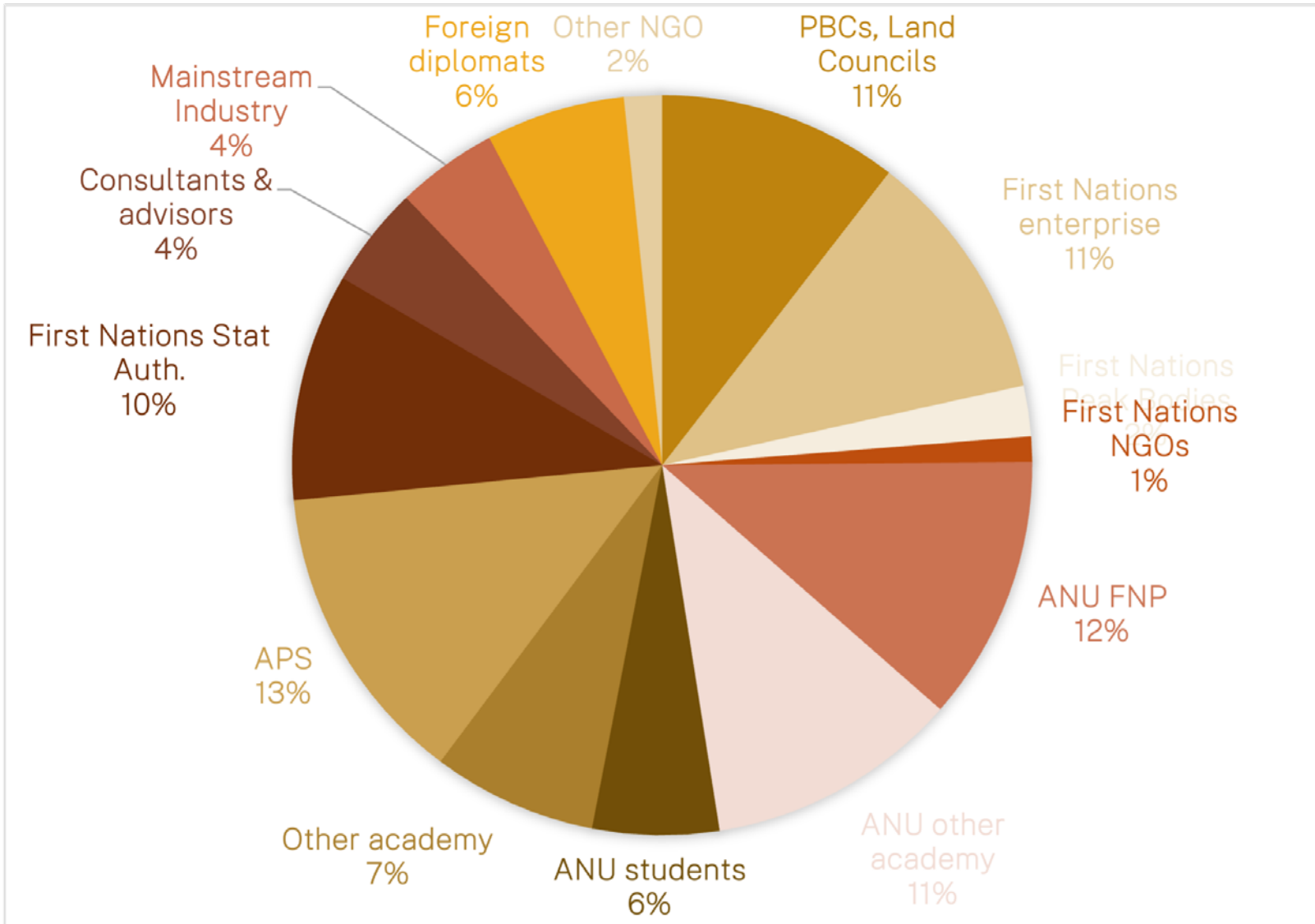


Figure 2 – Participation in the Murru waaruu Seminar Series

This Policy Options Paper sets out a series of policy options that have been identified by the *Murru waaruu* process that if implemented could activate and accelerate the growth of an Australian First Nations self-determined economy.

2. A legislative platform for significant reform

Evidenced by many of the initiatives proposed by this paper, much of the change required to activate Australian First Nations rights as the basis for economic self-determination requires significant reform. This point has been made variously by multiple stakeholders, including the Law Council of Australia (see below 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)**

2.1. Constitutional framework for reform

Given the nature and potential scope of legislative reform required at the jurisdictional level in relation to land, water and sea country rights, and that legal rights pertaining to intellectual property is the responsibility of the Commonwealth, Commonwealth engagement in law reform will be important. The 'race' power at Section 51(xxvi), and potentially the 'external affairs' power, at Section 51 (xxix) of the Australian Constitution, can provide a legal basis for supportive Commonwealth legislation.

Table 1 – Section 51(xxvi) and Section 51(xxix) as constitutional enablers of reform

Constitutional provision	Use
Section 51(xxvi) 'The Race Power'	Since its amendment in 1967, Section 51(xxvi) has provided a constitutional basis for the Commonwealth Parliament to make special laws for First Nations peoples. Section 51(xxvi) is not limited to beneficial laws and has been used as the constitutional basis to pass laws that adversely impact First Nations peoples (e.g. Kartinyeri v Commonwealth (1998) 195 CLR 337). It has, however, been used as the legal basis for beneficial commonwealth laws that advance the rights and interests of First Nations peoples, such as the *Native Title Act 1993* (Cth). The positive application of discriminatory powers is also consistent with Section 8 of the *Racial Discrimination Act 1975* (Cth) which allows for 'special measures' to be taken to advance the human rights of certain racial or ethnic groups and relevant international conventions to which Australia is party – Article 1(4) of the United Nations International Convention of the Elimination of All Forms of Racial Discrimination provides for similar 'special measures'. Section 51(xxvi) can be used as the legal basis for the Australian Government to pass legislation that supports First Nations' economic self-determination.
Section 51(xxix) 'The External Affairs Power'	The powers afforded to the Commonwealth Parliament to make laws with respect to matters physically external to Australia and laws affecting Australia's relations with other nations include making laws to implement Australia's obligations under international agreements irrespective of the subject matter of those agreements. However, the extent to which this applies to a non-binding international instrument, such as UNDRIP, is untested. It is therefore possible that Section 51(xxix) could be a constitutional basis for the passage of laws empowering First Nation self-determination where they are consistent with obligations set out in UNDRIP.

2.2. Legislating for UNDRIP

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has comprehensive application in advancing the social, cultural and political plight of Indigenous peoples. Relevant to the reform focus of this paper, 11 of its 46 articles refer to the right to economic self-determination and enablers of that right.

Increasingly, nation states with significant Indigenous populations are incorporating UNDRIP into their legal framework through jurisprudence, legislative and constitutional reform:

- Bolivia: legislation (2007) and constitutional reform (2009)
- Norway: jurisprudence (2020)
- Canada: legislation (2021)

Embedding UNDRIP into the Australian legal framework could provide an important foundation for the reforms that will advance economic self-determination of First Nations peoples. Suggested options to advance this include:

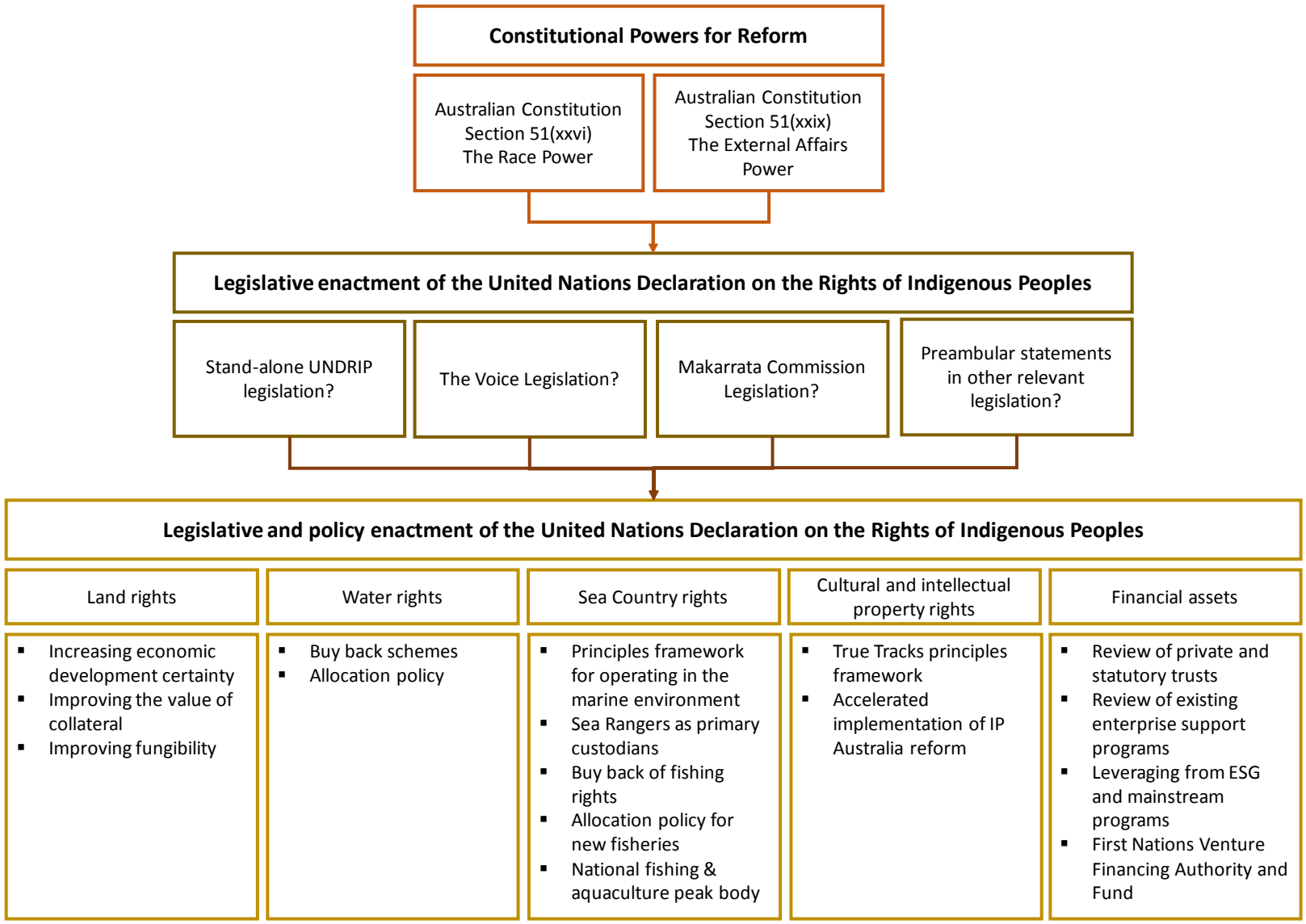
- Incorporation of the UNDRIP through stand-alone legislation requiring Commonwealth and other laws to be consistent with the Articles of UNDRIP.
- Incorporation of key articles in relevant legislation, for example, legislation designed to give effect to The Voice or the Makarrata Commission.
- Preambular statements in other legislation.

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.

While the reforms recommended in this paper can be achieved without a legally enforceable domestic UNDRIP or UNDRIP-like framework, constructive engagement and use of the Declaration would generally support and provide a useful framework for wholesale reform.

> *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**



2.3 Seminar working group questions

1. Are each of the legislative enablers of significant reform across land, water, sea country and cultural and intellectual property rights identified in this section viable?
2. Are there other legislative enablers that have not been identified in this section?
3. What are the benefits and drawbacks of the identified legislative enablers?
4. Based on this assessment what are the priority legislative pathways?
5. What are the key steps in an implementation plan for the identified priority pathway?

3. Land rights reform

3.1. The First Nations estate is extensive, but structurally constrained...

In terms of geography, there have been significant gains in the reclamation of ownership and legal interests in traditional lands that were never ceded by Australia's First Nations. In accordance with the provisions of no fewer than 25 separate pieces of State, Territory and Commonwealth First Nations legislation, Australian First Nations and First Nations people now have ownership of or legal interests in land equivalent to around 60 percent of the Australian landmass. However, this does not transfer the same, or in most instances any, level of economic empowerment to Australian First Nations.

In not a single instance does ownership or legal interests convey on the First Nations landholder the same fungibility or alienability enjoyed by holders of freehold tenure and in many cases leasehold tenure over Crown Land - both of which represent dispossessed First Nations lands that were never ceded. Even in the least constrained forms of Australian First Nations tenure – such as that provided under the *Aboriginal Land Rights Act 1983* (NSW), *Land Administration (South West Native Title Settlement) Act 2016* (WA) and *Aboriginal Lands Trust Act 2013* (SA) – private sale, leasing or mortgaging land is subject to conditions and approvals that don't burden other landholders, fundamentally devaluing the land and limiting its commercial use. This means that despite the geographic reach of First Nations tenure in Australia it is fundamentally constrained as an instrument for facilitating economic self-determination.

A policy framework that facilitates economic self-determination would instead provide far greater scope for First Nations lands to be used for commercial purposes.

3.2. Even though much of the most productive land is the subject of non-First Nations freehold tenure, the opportunity is abound...

It is unsurprising that as a nation state that was initially built on primary production that the most, conventionally speaking, natural resource rich areas of the country – typically the east coast and particularly south-eastern and the south-western areas – were the primary focus of early dispossession and released convicts and settler freehold land grants. Despite the First Nations estate in these areas being relatively sparse and more prevalent in the northern and interior areas of the continent, First Nations landholders have identified an abundance of potential opportunity, particularly in the context of emerging sectors (see Figure 3) and opportunities for delivering economic, social, cultural and environmental outcomes – the key drivers of the multipliers delivered by economic self-determination frameworks (see Section 9.1.3).

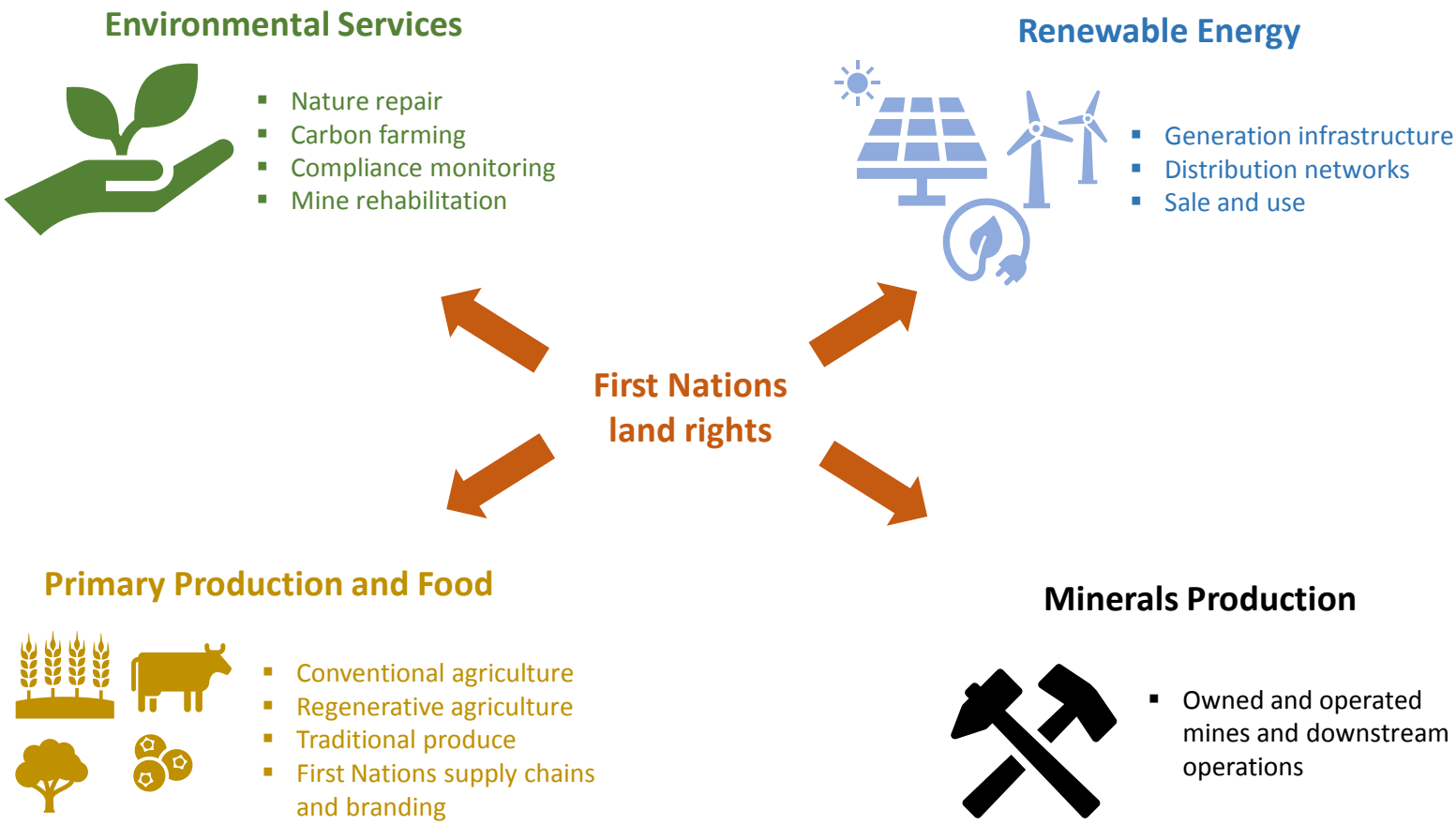


Figure 3 – Categories of potential opportunity for economic development on the Australian First Nations land estate

3.3. Identified policy options

The *Murru waaruu* Seminar Series has identified 3 categories of policy levers that could be pulled to improve the capacity of the First Nations land estate to support economic self-determination:

- Increasing First Nations economic development certainty and capacity.
- Improving the fungibility and value as collateral of First Nations tenure.
- Improving certainty of land use outcomes.

3.3.1. Increasing First Nations economic development certainty and capacity

The following Table 2 summarises the policy initiatives that have been identified by the *Murru waaruu* Seminar Series as initiatives that would support economic development certainty and capacity on the First Nations land estate.

Table 2 – Increasing First Nations economic development certainty and capacity: identified policy options

Initiative	Summary
National First Nations Estate MOLA Project	*Evidence-based identification of culturally aligned economic development opportunities on the First Nations estate.* For many First Nations, the reclamation of rights to their traditional lands is a relatively recent event. It will increasingly be the case that First Nations are re-connecting to these lands – re-establishing cultural knowledge and identifying development opportunities that can co-existing with cultural values. In some cases these lands will have been (or are) the subject of post-colonial development. But in many cases, they will not be. 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 the information to provide optimal allocation for identified land uses. Whether the tenure is exclusive or shared, MOLA can be used for cultural management planning, to identify and assess potential economic uses of lands and prioritise and understand their impact on cultural and other values within their estate.
Use of Regional Voice Structure to Enhance First Nations Economic Collaboration	*Optimise regional First Nations collaboration for wealth creation and prosperity* Under the Native Title regime alone there are currently around 600 determinations, estimated to expand to around 800 at full determination.[4] Geographically speaking, some land interests are very large and some are very small; some may be concentrated and closely connected, while others are vast and isolated; and some by virtue of their location are characterised by rich natural resources, while the natural resources of others are limited or complementary. Where it is economically rational and culturally appropriate to do so, wealth creation and prosperity will be optimised for First Nations where they are able to collaborate. The proposed regional framework that underpins The Voice *prima facie* presents a framework that could be used to explore, develop and formalise such collaborations.

3.3.2. Improving the fungibility and value as collateral of First Nations tenure

The following Table 3 summarises the policy initiatives that have been identified by the *Murru waaruu* Seminar Series as initiatives that would improve the fungibility and value as collateral of First Nations tenure.

Table 3 – Improving the fungibility and value as collateral of First Nations tenure: identified policy options

Initiative	Summary
Government financing guarantee	*Government carries the risk of loan default* The obstacle to debt financing that is created by the in-fungible and inalienable nature of the vast majority of First Nations tenure can be overcome by the Government offering the lender a full or partial loan guarantee as collateral in lieu of tenure. There are several mechanism through which this could be achieved, including potentially by modification to the current powers afforded to the Indigenous Land and Sea Corporation (ILSC) under Section 191(D) of the Aboriginal and Torres Strait Islander Act 2005 (Cth) '*to guarantee loans made to Aboriginal and Torres Strait Islander Corporations for the purposes of the acquisition of interests in land and water-related rights*' whereby those powers are broadened so that the ILSC can provide guarantees for sensible lending against First Nations land interests for sound commercial purposes and the ILSC is resourced to do so.

4 National Native Title Tribunal at 30 June 2023 (http://www.nntt.gov.au/Pages/Statistics.aspx)

New tenure class: First Nations Commercial Leasehold	*Using existing innovation in Crown land leasing frameworks* A very significant portion of the First Nations land estate is characterised by native title or other form of First Nations interests over Crown Land. As is the case with pastoral, exploration and mining leases over crown land, an expedited process whereby First Nations can be awarded a new type of lease over areas of Crown Land that are the subject of their interests that affords the leaseholder significant fungibility would potentially go some way to activating the economic potential of First Nations land estate, allowing First Nations people to allocate land usage and preserving their native title and native title like rights in perpetuity. Additionally, leasehold tenure over Crown Land can be structured such that it approximates freehold title through mechanisms such as very long tenor and automatic renewal that is subject to significant default events only, rendering the tenure more suitable for the purposes of debt financing collateral. This is similar in concept to pastoral diversification leases used in the Northern Territory and more recently, the general diversification leases used in Western Australia (see Appendix 1).
New tenure class: Freehold where native title – like rights survive conveyance	*Innovation in the Torrens system of land tenure to create a new class of First Nations freehold* The system of tenure created under the *Native Title Act 1993* (Cth) is globally unique with First Nations rights of access to and use of land based on the specific customary uses of the specific First Nation. At least historically typical rights in this regard have included rights to hunt, fish, gather, enter onto, pass over and remain on country and conduct ceremony and traditional practices (the so called 'bundle of rights'). In some instances they may be far more substantial, including exclusive possession. While there is clearly a need for First Nations to be able to be able to exercise these rights to perform millennia old cultural practices in perpetuity, there is also clearly a need for First Nations to be able to use the lands that are the subject of these rights for the purposes of economic self-determination. Further, there is clear trend in Australian jurisprudence that cultural rights include economic rights and rights to trade. Working within the now-uniform Torrens systems of land registry and title across Australia, the co-existence of native title and native title-like rights and the normal economic rights that are associated with freehold title in Australia could be achieved by a framework that allows Crown lands that are the subject of First Nations interests to be converted to a new form of freehold title, whereby the conventional native title and native title-like rights – rights to hunt and fish for cultural purposes, perform ceremonies, etc. - are the subject of an overriding, binding easement which endures into perpetuity, while the underlying freehold title can be used to derive economic value through leasing, trading, mortgaging, selling, sub-dividing, re-purchase or any other productive means that is normal to freehold title. It is likely that the easement, as in the case of all freehold will, *ceteris paribus*, reduce the value of this new class of freehold compared to existing freehold, but it will have greater fungibility and value as collateral than is the case of the existing First Nations tenure. It also has the advantage that it will not affect existing freehold title. In concept, this proposal does not differ substantially to the notion of private land conservation covenants, particularly those available under the Victoria Trust for Nature (see Appendix 1).

3.3.3. Improving certainty of land use outcomes

The following Table 4 summarises the policy initiatives that have been identified by the *Murru waaruu* Seminar Series as initiatives that would improve the fungibility and value as collateral of First Nations tenure.

Table 4 – Improving certainty of land use outcomes: identified policy options

Initiative	Summary
First Nations Projects Approval Framework	Regardless of jurisdiction, most moderately significant development projects in Australia face a complex and often protracted project approvals pathway, which presents both cost and risk to the developer. In circumstances where sectors are deemed to be a strategic priority, there is significant precedence for jurisdictional government and the Commonwealth collaboratively, to put in place mechanisms that ensure that projects in sectors of strategic priority area assisted with navigating the approvals process and machinery of government in the most efficient and certain way. A national agreement with respect to an expedited approvals framework for First Nations projects would serve to de-risk, improve capital access and accelerate the development of a self-determined First Nations economy.

3.4. Seminar working group questions

1. Are each of the policy options identified in this section viable?
2. Are there other policy options that have not been identified in this section?
3. What are the benefits and drawbacks of each of the identified policy options?
4. Based on this assessment, what are the priority policy options?
5. What are the key steps in an implementation plan for the identified priority policy options?

4. Water rights reform

4.1. What water rights?

First Nations rights with respect to licensed freshwater allocations are equivalent to between 1 and 2 percent of the total volume of all freshwater allocations across Australia. Not only are they a fraction of the 'volume' of the First Nations land estate, but are also far more constrained as an enabler of economic self-determination. The vast majority of First Nations water allocations convey rights to 'cultural flows' only, prohibiting their use for trade or any productive purpose in a commercial sense.

Whilst recognised by First Nations for decades, the utter inadequacy of Australia's water licensing regime in the context of First Nations rights is an issue that has recently been highlighted by the Productivity Commission (see below box). While it is encouraging that the Australian Government has demonstrated an interest in addressing this issue5, its challenges should not be underestimated.

In more populated, agricultural and industrial areas water resources are typically fully allocated (i.e. anthropogenic usage is at or over a level deemed to be environmentally sustainable), already putting at risk ecosystem services. The only option for activating First Nations economic water allocations in such circumstance is reallocation through a mandatory, voluntary or market buy-back program, such as that proposed by the Australian Government in the Murray Darling Basin.[6] In instances where there are *prima facie* unallocated resources (primarily surface and groundwater resources in central and northern Australia), scientific understanding of the hydrology and ecosystems services provided by these resources is typically deemed inadequate to form the basis of competent allocation decisions.

> *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)**

4.2. Once we have them, the opportunities are abound...

Accessing freshwater resources for economic purposes and at scale that can achieve economic, social, cultural and environmental outcomes has been identified as a significant vector for First Nations economic self-determination through activating the land estate for primary production, fishing and aquaculture enterprise, management of the inland water estate and conventional trading of entitlements that are in excess of productive needs (see Figure 4).

5 Media release: Delivering-water-ownership-for-first-nations (PM&C) (https://ministers.pmc.gov.au/burney/2023/delivering-water-ownership-first-nations)

6 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-

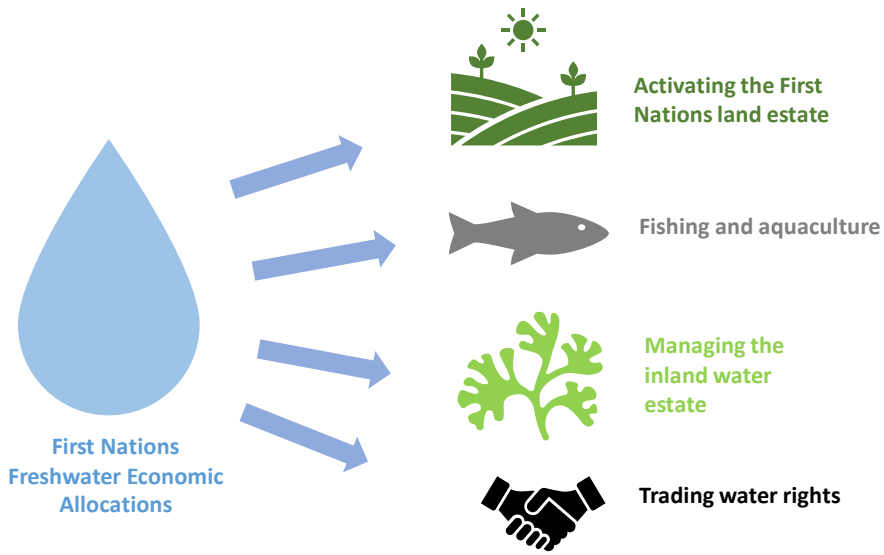


Figure 4 - Categories of potential opportunity for economic development on the Australian First Nations land estate

4.3. Identified policy options

The *Murru waaruu* Seminar Series concurs with the recommendation of a First Nations Water Roundtable hosted by the ANU in July 2023 that a National First Nations Water Working Group; should be established and adequately resourced to resolve, among other things, First Nations economic water allocations. However, it is also recommended that the Group should be supported by an outcomes-oriented subgroup with the appropriate expertise and resourcing to pursue the Terms of Reference summarised in the following Table 5.

Table 5 – Proposed Terms of Reference for National First Nations Water Working Group – economic water allocations

Area of water reform	Summary
Fully allocated resources	For resources that are fully allocated the only pathway for First Nations to attain economic water rights is via a market, voluntary or compulsory acquisition ('buy-back') scheme. Therefore, the key required initiatives are to assess First Nations demand for economic rights in fully allocated water resources and design the optimal acquisition scheme.
Unallocated water resources	While unallocated water resources present, *prima facie*, greater scope for First Nations people to acquire economic water rights at commercial volumes, allocation decisions pertaining to those resources are frequently plagued by gaps in knowledge pertaining to hydrology and ecosystems services associated with the resource, which serves as a barrier to making those decisions. In this case the key required initiatives are to prioritise unallocated water resources based on First Nations demand, develop a hydrology and ecosystems services knowledge acquisition roadmap for the priority resources and a detailed and implementable strategy for sustainably activating First Nations economic water rights in unallocated water resources.
First Nations economic water allocation policy	Once solutions to First Nations economic water rights in fully allocated and unallocated water resources have been identified a national agreement around a First Nations water allocation policy should be pursued. This policy would include: • National standards for minimum First Nations economic water allocations. • Details of a National economic water rights acquisition scheme. • A roadmap to unlock unallocated water resources for First Nations economic interests. • A benchmark for First Nations economic water allocations as a component of treaty and settlement.

4.4. Seminar working group questions

1. Are each of the policy options identified in this section viable?
2. Are there other policy options that have not been identified in this section?
3. What are the benefits and drawbacks of each of the identified policy options?
4. Based on this assessment, what are the priority policy options?
5. What are the key steps in an implementation plan for the identified priority policy options?

5. Sea Country reform

Sea Country has and continues to perform a fundamental role in the economies of Australian First Nations. However, as the result of colonisation this has been significantly compromised. Firstly, competition for fish resources from settlers and subsequent quota and licensing regimes implemented by State Governments that took precedence over First Nations rights to take fish other than for recreational or customary purposes have fundamentally limited the fishery resource as a platform for economic self-determination. Secondly, the cumulative impacts of anthropogenic activity post colonisation has progressively caused significant damage to marine ecosystems, reducing stocks of aquatic species in many instances.

The reclamation of rights to Sea Country is a relatively new endeavour. 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 1993* (Cth), whereby limited sea country rights have only been recognised since 2001.

However, 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*[7]);
- Customary fishing rights may extend to incorporate a degree of commerciality (*Akiba*[8]); 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*[9]).

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)[10] 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
- 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.[11]

There is also increasing recognition of the importance of First Nations perspectives and input in resource 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.

7 (2013) 252 CLR 507

8 Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth (2013) 250 CLR 209

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

10 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.

11 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

Regardless of individual jurisdictional responses, for First Nations, Sea Country is a vitally important resource for economic self-determination (see Figure 5).

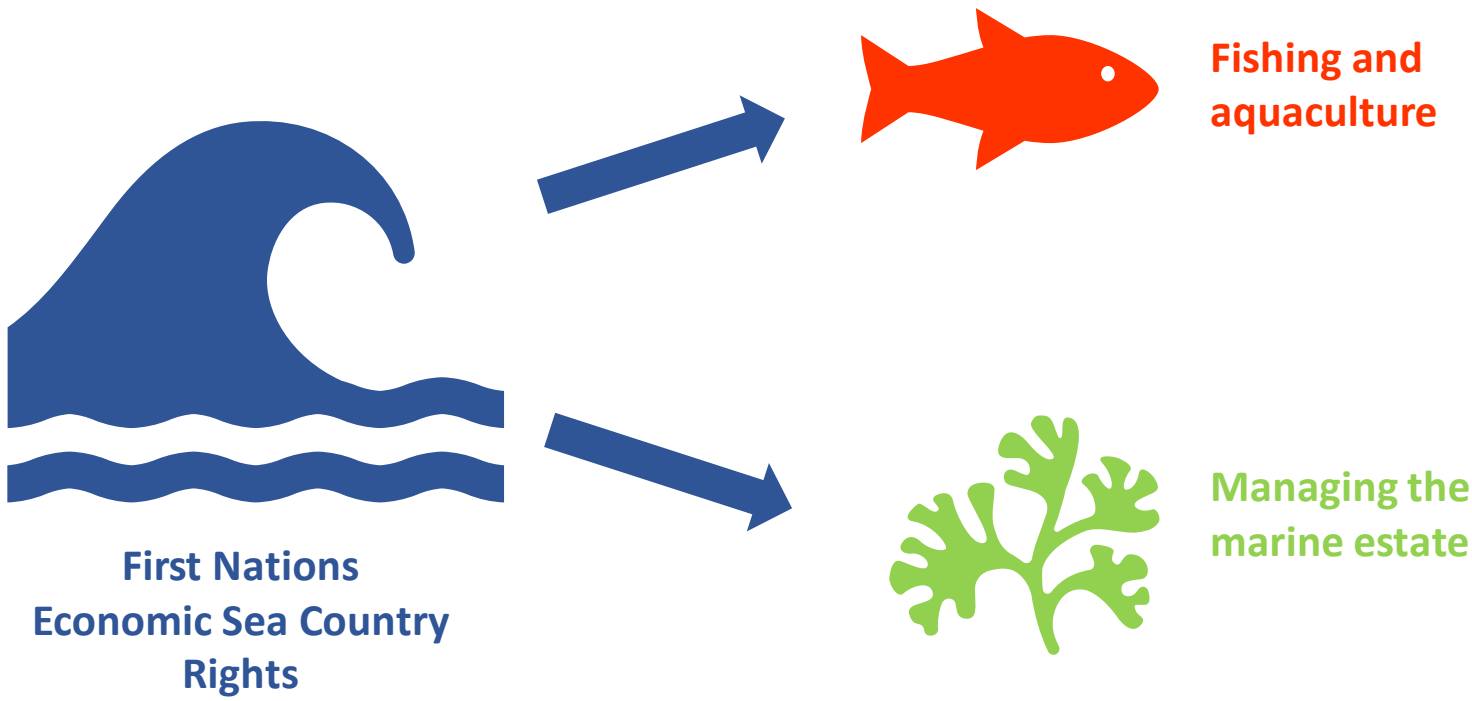


Figure 5 - Categories of potential opportunity for economic development on the Australian First Nations Sea Country

5.1. Identified policy options

The policy levers that could improve the capacity of the First Nations marine estate to support economic self-determination that have been identified by *Murru waaruu* Seminar Series are summarised in the following Table 6.

Table 6 – Growing the First Nations fishing and aquaculture sector: identified policy options

Area of Sea Country reform	Summary
Principles based framework for universal recognition of Sea Country rights	As an emerging area of reclamation and enforcement of First Nations rights, much of the Australian marine estate is not currently the subject of legally enforceable First Nations rights. However, there is every indication that greater areas of the marine estate will increasingly become so. In order to both preserve future First Nations rights and reduce unproductive future conflict between current users and prospective users of the marine estate and emerging First Nations interests, key sectors of the marine economy should adopt a principles-based framework to guide activities in the marine environment. Drawing from the principles-based framework developed by the Fisheries Research and Development Corporation Indigenous Reference Group, the framework should include principles designed to: • Enhance recognition of First Nations Sea Country interests • Resolving issues around access • Improving governance and providing pathways to better First Nations representation and management models • Providing resourcing options in a user friendly and culturally appropriate manner to encourage greater First Nations involvement • Improved capacity that empowers First Nations peoples • Development of agency capacity to recognise and utilise First Nations expertise, process and knowledge • Recognition of customary rights and knowledge, including processes to incorporate First Nations Traditional Fishing Knowledge and Traditional Fisheries Management • Improve knowledge and awareness of impacts on the environment and traditional harvest • Management arrangements that lead to improved access, protection and incorporation of Traditional Fishing Knowledge and Traditional Fisheries Management input to processes • Increased value for First Nations (economic, social, cultural, trade, health and environment) • Benefits sharing
First Nations Sea Rangers as primary custodians of the coastal marine estate	First Nations Sea Ranger Programs should be expanded and resourced to perform the role of a primary custodian (joint manager) of the marine estate that pertains to the First Nations traditional Sea Country. This is particularly so in areas where a First Nations Sea Ranger Group is the only physically present manager of the marine estate.
First Nations commercial fishing and aquaculture rights	Fishing rights has a very long history of common law jurisprudence that dates back to the Magna Carta, the net effect of which is that in Australia fishing rights have characteristics that make them more akin to a property right than a mere license. Therefore, like freshwater, the resumption of those rights in a fully-allocated commercial fishery (typically the more valuable fisheries) is both legally and politically challenging. In fully allocated fisheries, optimal market, voluntary or compulsory buy-back programs should be established. In the case of unallocated or new fisheries, standard First Nations allocation based on a right-of-first refusal should be established. These will likely need to be tailored for the peculiarities of each jurisdiction's fisheries law.
National First Nations fishing and aquaculture peak body	Differentiated across the dimensions of production systems, resource management, branding and socio-economic contribution, the national First Nations fishing and aquaculture sector is growing in terms of number of ventures, species diversity, geography and jurisdiction. This sector will have industry-level research and marketing needs and particularly in the context of the complex jurisdictional regulatory landscape that applies to commercial fishing, unique advocacy needs. This can be best supported by a National First Nations fishing and aquaculture industry peak body, which as the sector grows, may evolve into a federated structure.

5.2. Seminar working group questions

1. Are each of the policy options identified in this section viable?
2. Are there other policy options that have not been identified in this section?
3. What are the benefits and drawbacks of each of the identified policy options?
4. Based on this assessment, what are the priority policy options?
5. What are the key steps in an implementation plan for the identified priority policy options?

6. Cultural and intellectual property rights reform

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.

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.

Ensuring that First Nations can own and adequately protect their use of the cultural and intellectual property to the exclusion of all others will develop clear pathways for First Nations differentiated product in a range of industries and markets including the art, tourism, agricultural, fisheries and aquaculture, natural resource and environmental management and biotechnology industries (see Figure 6).

> *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.

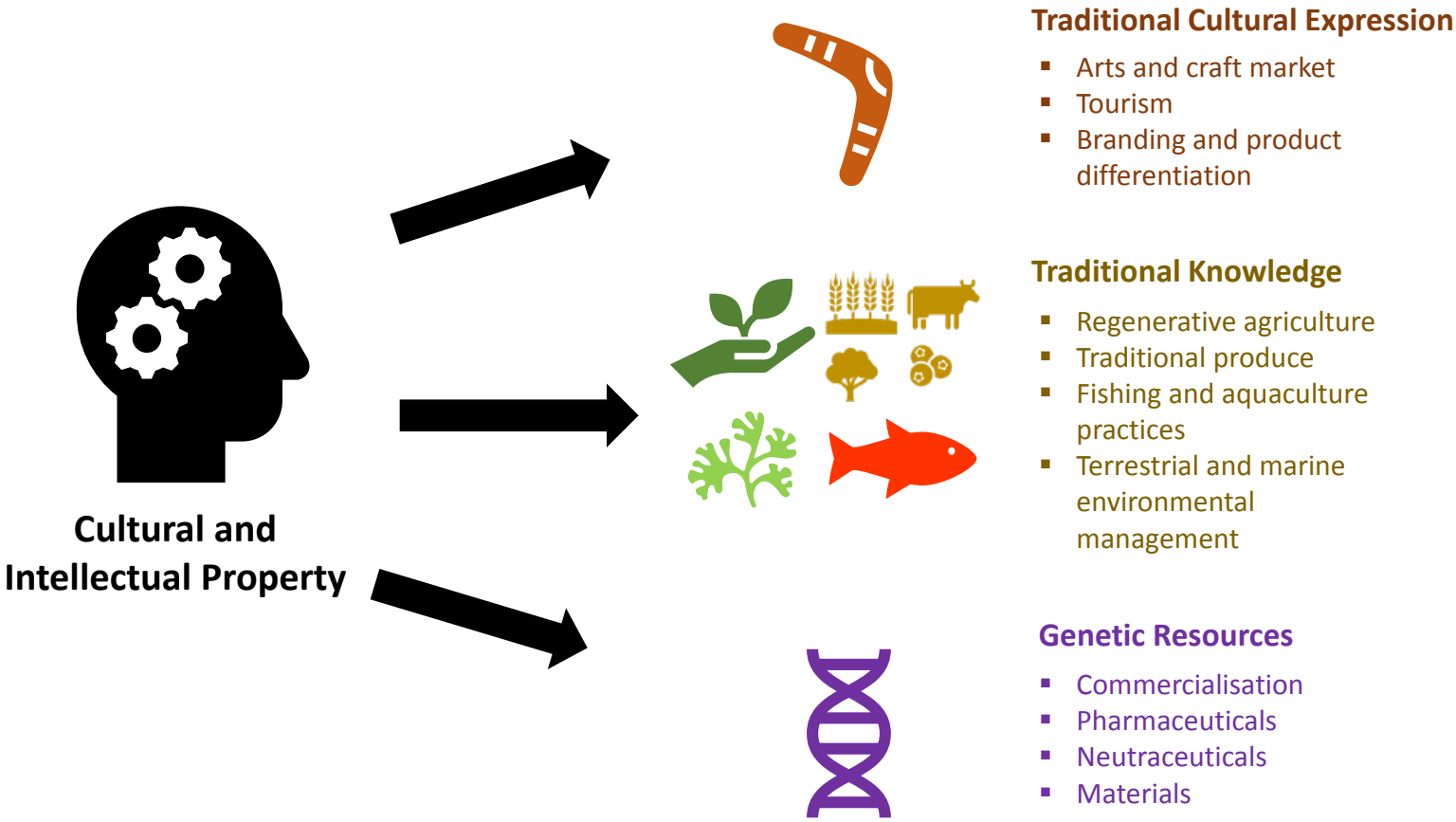


Figure 6 - Categories of potential opportunity for economic development on the Australian First Nations Sea Country

6.1. Identified policy options

The *Murru waaruu* Seminar Series has identified 4 categories of policy levers that could be pulled to improve the ability of First Nations to protect and 'commercialise' their cultural and intellectual property in ways consistent with economic self-determination. Fortunately, most of the initiatives identified are already at various stages of development, with the recommendations herein, mostly referring to acceleration of efforts to implementation.

6.1.1. Standards framework

Based on an existing framework developed by prominent First Nations cultural and intellectual property lawyer, Terri Janke, the *Murru waaruu* seminar series identified a need for a widely accepted ethical framework to guide dealings in First Nations cultural and intellectual property until the IP Australia reforms are developed and implemented (see Section 6.1.2). This framework is summarised in the following Table 7.

Table 7 – Key elements of the True Tracks Framework for dealing in First Nations cultural and intellectual property

Area of Cultural and Intellectual Property reform	Summary
True Tracks Framework as a standard for third parties dealing with First Nations Cultural and Intellectual Property	Until the reforms discussed in Section 6.1.2 are given effect, First Nations cultural and intellectual property is at risk of misappropriation and its economic use constrained. While the IP Australia process that is discussed in Section 6.1.2 is being further progressed, a principles-based framework for dealing with First Nations cultural and intellectual property should be promoted. This could be based on the True Tracks Framework developed by prominent First Nations intellectual property lawyer, Terri Janke, and should go to: · Respect for Article 31 of UNDRIP – First Nations people have the right to maintain, control, protect and develop their cultural and intellectual property · Self-determination – empower First Nations people in decisions pertaining to their cultural and intellectual property · Consent and consultation – obtaining Free, Prior and Informed consent · Interpretation – First Nations people should be the primary guardians and interpreters of their culture and intellectual property · Cultural integrity – cultural and intellectual property should only ever be used in non-harmful and culturally appropriate ways with the consent of the First Nations custodians · Secrecy and privacy – First Nations people have the right to keep secret their sacred and ritual knowledge in accordance with their customary law and this should be respected · Attribution – In addition to copyright, First Nations should be prominently attributed as the owners of First Nations cultural and intellectual property · Benefits sharing – First Nations have the right to share in benefits derived from the use of their cultural and intellectual property and those benefits should flow back to the source communities · Maintaining First Nations culture – when using First Nations cultural and intellectual property consideration should be given to how that use affects future generations who are entitled to inherit that cultural and intellectual property · Recognition and protection - use existing laws and develop policies to protect Indigenous Cultural and Intellectual Property

6.1.2. Acceleration of Australian Intellectual Property Law reform

The Commonwealth Government agency responsible for Intellectual Policy, IP Australia, is currently running a reform program that is giving considerations to each of the initiatives in the following Table 8. The *Murru waaruu* Seminar Series has endorsed these reforms and recommends their accelerated development and implementation.

Table 8 – Potential IP Australia Indigenous cultural and Intellectual Property Reforms

Area of Cultural and Intellectual Property reform	Summary
New Indigenous Knowledge Right	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 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. · 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	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 educate 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.
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.

6.1.3 Cultural knowledge preservation

The *Murru waaruu* Seminar Series recognises the extent to which First Nations cultural and intellectual property has been eroded by the processes of colonisation. It has also recognised the very significant effort contemporary First Nations organisations are going to in order to avert further loss, maintain knowledge and pass that knowledge onto the next generation. As summarised in Table 9, the *Murru waaruu* Seminar Series has identified a need to better resource these efforts.

Table 9 – Enhanced resourcing of cultural knowledge transfer and preservation efforts

Area of Cultural and Intellectual Property reform	Summary
Resourcing for cultural knowledge transfer and preservation	As a result of colonisation, much knowledge pertaining to cultural and intellectual property has been forever lost. Various First Nations led initiatives to avert the loss, rebuild, maintain and transmit knowledge pertaining to cultural and intellectual property to future generations are underway. From both the perspective of First Nations and the Australian national identify this vitally important effort needs to be better resourced.

6.1.4 Nagoya Protocol

The fact that despite Australia has been party to the Nagoya protocol for over a decade and its articles are still not reflected substantially in Australian law continues to be a point of frustration for First Nations that hold interests in knowledge pertaining to genetic resources. As summarised in the following Table 10.

Table 10 – Ratification of the Nagoya Protocol

Area of Cultural and Intellectual Property reform	Summary
Australian Parliament ratification of the Nagoya Protocol	While Australia has been a signatory to the Nagoya Protocol since 2012, the Australian Parliament is yet to ratify it. The Australian Parliament should ratify the Nagoya Protocol through legislation, such that the link between genetic resources and traditional knowledge is confirmed and that genetic resources may be held by First Nations people and communities through their unique knowledge and experience of biological organisms; mandate benefit sharing and free, prior and informed consent in relation to such genetic resources; and institutionalising the framework across the federation.

6.2. Seminar working group questions

1. Are each of the policy options identified in this section viable?
2. Are there other policy options that have not been identified in this section?
3. What are the benefits and drawbacks of each of the identified policy options?
4. Based on this assessment, what are the priority policy options?
5. What are the key steps in an implementation plan for the identified priority policy options?

7. Reform to rights in financial assets

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,[12] 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 consider 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 and 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.

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 people, facilitating re-connection to culture and country and delivering far superior socio-economic-cultural outcomes.

7.1. Identified policy options

The *Murru waaruu* Seminar Series has identified 2 categories of policy levers that could be pulled to improve the ability of First Nations to use the financial resources in which they have a beneficial interest to better activate economic self-determination.

7.1.1. Activating funds under management for economic self-determination

The *Murru waaruu* Seminar Series identified a strong desire among First Nations to have greater control over financial resources that are managed on their behalf, either in private trusts or under statutory instruments, so that those funds can be invested in 'their own backyard'. A practice that has delivered very significant economic self-determination outcomes in jurisdictions such as Canada and Aotearoa/New Zealand, it is a pathway that Australian First Nations are only just starting to explore. As summarised in Table 11, a study that informs the sector on issues associated with this pathway would prove a valuable resource.

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

Table 11 – A study into activating funds under management for self-determination

Area of financial assets reform	Summary
Study into activating funds under management for economic self-determination	Across Canada and Aotearoa/New Zealand, funds that have accumulated in trusts and other instruments to the benefit of First Nations have been used effectively to create local First Nations economies across a range of sectors by investing in infrastructure and ventures owned by the First Nations beneficiary. While this practice is starting to emerge in Australia, it is at a comparatively immature stage, with limited scope for local learnings. A national study that explores the following would be a significant resource to assist First Nations and relevant benefactors develop strategies in this regard: · 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.

7.1.2. Growing the First Nations investment sector

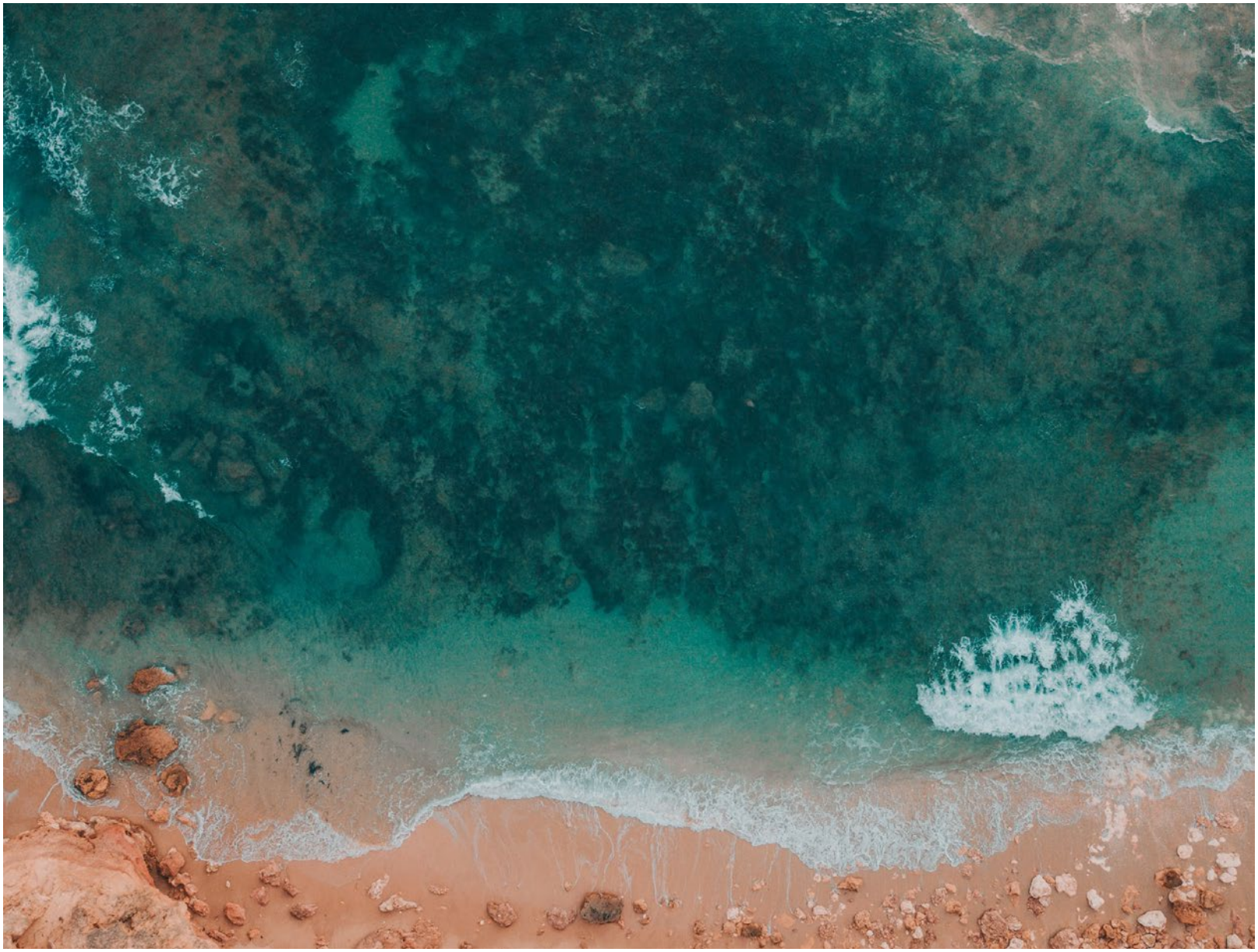
The *Murru waaruu* Seminar series clearly identifies where financing gaps reside in the First Nations economy and the need to identify sources of capital that demonstrate a return and risk profile that is aligned with ventures that are typical of a First Nations self-determined economy. Policy options in this regard are summarised in the following Table 12.

Table 12 – Growing the source of capital

Area of financial assets reform	Summary
Improving the deal-flow	While there is no shortage of business support programs delivered by governments and not-for-profit organisations and targeting First Nations enterprise, these are mainly very rudimentary in nature and designed to support mainly micro-enterprise and small business. Very few focus on growth strategies and investment attraction. Programs that can develop and grow First Nations enterprise by teaching 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 will go some way to improving their investability. 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 (the 'I' in ESG)	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.

7.2. Seminar working group questions

1. Are each of the policy options identified in this section viable?
2. Are there other policy options that have not been identified in this section?
3. What are the benefits and drawbacks of each of the identified policy options?
4. Based on this assessment, what are the priority policy options?
5. What are the key steps in an implementation plan for the identified priority policy options?



8. Towards treaty (treaty-like) and settlement

Whether historical or contemporary, formal agreements between organisations representing the interests of First Peoples and governments that are a product of historical colonisation, that establish the dimensions and details of the contemporary relationship between First Peoples and those governments under a unified nation state are of fundamental importance to modern nation states that have evolved from former British colonies.

These agreements, typically referred to as 'treaties', serve a number of functions, including:

- Validation of the fact that prior to colonisation, societies with their own culture, systems of governance and notions of sovereignty lived on the lands that were the subject of colonisation, and that this 'First Nations' sovereignty was either never ceded or if ceded, subject to terms;
- First Peoples have contemporary social, cultural, governance and economic rights enforceable under national and international laws;
- First Peoples are legally entitled to compensation and recompense from national and jurisdictional governments that were born out of colonisation; and
- First Peoples and the governments that are a legacy from colonisation wish to co-exist in a nation state that recognises both cultures, legitimises and recognises First Nations rights and interests and is harmonious and characterised by equality.

In the context of this paper, treaties and associated compensation settlements are a vital asset for economic self-determination – the associated compensation can provide land, sea country, water and financial assets that underpin economic development and treaties can be structured to provide greater autonomy in how First Nations use those assets to give effect to economic self-determination, including by recognising important jurisdictional rights.

The circumstance of British colonisation of Australia are quite different to each of the United States, Canada and Aotearoa/New Zealand. Because Britain's claim to sovereignty over Australia was founded in the international doctrine of *terra nullius* (land deemed to be unoccupied or uninhabited), Britain saw no legal reason to enter into treaties with Australia's First Nations. Therefore, historical treaties between Australian governments and its First Nations do not exist. Furthermore, Australian First Nations did not participate in the formation of the Commonwealth of Australia and until the 1967 referendum, First Nations Australians (Aboriginal and Torres Strait Islander peoples) were only mentioned in the Australian Constitution in a discriminatory sense. Since 1967, the Australian Constitution has been silent on Australia's First Nations. This is despite the fact, that in 1992, Australia's highest court rejected Britain's claim of *terra nullius.*[13]

Of course, Australia's First Nations aren't without some statutory pathways and pathways created by jurisprudence for redress for Colonisation. Legislation (such as the *Aboriginal Land Rights (Northern Territory) Act 1976*) and Federal legislation (*Native Title Act 1993* (Cth)) provide a statutory mechanism for First Nations to reclaim some interests in land, sea country and water. The Federal and jurisdictional legislative framework and High Court jurisprudence, also provides some framework for limited recompense. For example:

- **Division V of the Native Title Act** provides for native title holders to apply to be compensated for acts taken by the Crown in the right of the States, Territories or the Commonwealth that have impaired or extinguished,[14] native title rights. This compensation is payable on 'just terms'.[15] However, unless explicitly requested by the entitled party (a request which can be refused), may only be comprised of monetary payments. Further compensation is only payable on:
  - *Past acts* - which are those that occurred before 1 July 1993 (if legislation) or before 1 January 1994 (if any other act) that because of the *Racial Discrimination Act 1975* (Cth) may have been invalid by virtue of their discriminatory effect on native title rights;
  - *Intermediate period acts* – which are those that involve the granting of freehold or leasehold by the State between 1

13 Mabo v Queensland No. 2, [1992] HCA 23 – 175, CLR 1

14 s227, Native Title Act 1993 (Cth)

15 ss51, 53, Native Title Act 1993 (Cth)

January 1994 and 23 December 1996, per the date of the *Wik* decision, and which affect native title lands[16]; and
- *Future acts* – which are prospective acts of the State not yet done which will affect native title rights and interests, typically development or declaration of conservation estate.

- **Timber Creek** series of cases,[17] provides an indicative framework for calculating 'just terms' that includes components of economic loss (including time value of money) and cultural loss.

- **Settlements under State jurisdiction** such as those conducted under the *Traditional Owner Settlement Act 2010* (Vic) in Victoria and the Noongar South West and Yamatji Nations settlements in Western Australia.

While these agreements continue to evolve in their sophistication and represent a pathway to the more robust arrangements seen in the United States, Canada and Aotearoa/New Zealand, they fall well short of the treaty-settlement arrangements required to optimally activate an environment conducive to economic self-determination in Australia, as is seen in other comparable jurisdictions.

In Australia we cannot turn back the clock and implement historical treaties and have them recognised in the Australian Constitution. However, we can put it in place legal structures and institutions that bring Australia up to world best practice with respect to modern First Nations treaty and agreement making.

Given the fundamental chasm between Australia's treaty and agreement making environment and that of the comparable nations, it is not surprising that the key operational components of the Uluru Statement from the Heart – a constitutionally enshrined 'Voice' to Parliament and by virtue of this, constitutional recognition, and a Makarrata Commission – have similarities to mechanisms and institutions that form key components of the modern treaty and agreement making processes in comparable jurisdictions.[18]

8.1. Policy options

The *Murru waaruu* Seminar Series has identified 2 categories of policy levers that could be pulled to improve the ability of First Nations to use agreements and settlement packages to better activate economic self-determination.

8.1.1. Equitable negotiation and agreement making settings

The *Murru waaruu* Seminar Series identified inequitable power balance in negotiating platforms as being a significant barrier to reaching agreement over treaty and settlement. The following Table 13 identifies policy initiatives that would serve to ensure a more equitable negotiation setting.

16 Wik Peoples v Queensland (1996) 187 CLR 1

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

18 See Implementation of the Uluru Statement and treaty and settlement IN: Barnett, R. (2023), Murru waaruu Economic Development Seminar Series, Seminar 1 – Treaty and Settlement: Background Paper, First Nations Portfolio, Australian National University

Table 13 – Equitable treaty and settlement negotiating environment: identified policy options

Area of treaty and settlement reform	Summary
Empowered First Nations	In the vast majority of cases, negotiations between First Nations groups and the Federal or jurisdictional governments are characterised by a significant skew of negotiating power toward government that is underpinned by relative capability and capacity, legislation, counterparty dependency, dominant culture and politics. Initiative such as Constitutional recognition and The Voice, truth telling, strengthening of culture and capacity (negotiating, financial and political) building will go some way to creating a more equal negotiating platform.
Scale	Whilst there are some exceptions such as the Wiradjuri Nation of south-eastern Australia and the Noongar Nation of south-western Australia, most Aboriginal and Torres Strait Islander First Nations are characterised by relatively small populations, and there are many of them, resulting in diluted individual negotiating power. Where it is culturally appropriate and achievable, individual First Nations groups will achieve greater negotiating power where they are able to align their interests under a formal collaborative structure and negotiate with government as a single entity.
Certainty of terms and primacy of jurisdiction	Ambiguous terms in treaties and settlement and compensation agreements will invariably lead to protracted litigation. Further, where treaties and agreements are made under instruments that are the subject of subordinated judicial or parliamentary jurisdiction, they are vulnerable to protracted appeals processes associated with that litigation. A protracted agreement making and agreement implementation process will consume significant amounts of scarce resources and significantly delay the realisation of benefits.

8.1.2. Enduring treaty – responsive compensation

The *Murru waaruu* Seminar Series identified that the treaty framework that will have most relevance to Australia's circumstances is a framework akin to the Modern Treaties in Western Canada. Based on this framework, the *Murru waaruu* Seminar Series identifies an Australian treaty and settlement framework exhibiting characteristics set out in Table 14 below.

Table 14 – Australian Treaty and Settlement Framework: identified policy options

Area of treaty and settlement reform	Summary

Enduring principles and articles-based treaty agreement	Australian treaties should set out an agreed principles-based framework that sets the heads of power for the parties and establishes the dimensions and nature of the relation in perpetuity, leaving details of compensation to subsidiary agreements that are able to evolve as circumstances and knowledge changes over time.
	
	Treaties should be entered into under a jurisdiction of primacy.
	
	The treaties should incorporate:
	· **Preamble:** that explains the parties, the impact of colonisation on the specific First Nations party, the parties' desire to co-exist within the Australian nation and the requirement for the government party to compensate the First Nation party for the impacts of unjust colonisation.
	· **Articles** that set out the agreed principles that define the ongoing relationship between the First Nations Group and the government counterparty, including articles pertaining to:
	  · *Recognition of UNDRIP* – Australia has been a signatory to the United Nations Declaration on the Rights of Indigenous People (UNDRIP) since 2009. While UNDRIP is not legally binding on Australian Governments, in so far as Australia has capitulated to the convention, it has an international obligation to comply with its articles. To this end, treaties should reference the relevant articles of UNDRIP as principles that guide the relationship of the parties.
	  · *Power sharing* – treaties should establish clear areas of power-sharing where government and traditional decision-making processes and governance frameworks work collaboratively to give effect to the implementation of the treaty, including in the delivery of specific services to the relevant First Nations community.
	  · Service delivery arrangements – treaties should provide a mechanism that allows the government party to outsource the delivery of certain services to the First Nations party under terms and conditions prescribed by subsidiary compensation agreements.
	  · *Transfer of assets* – treaties should provide a mechanism for governments to transfer land, water, sea country and financial assets to the First Nations party under terms set out by subsidiary compensation agreements.
	  · *Time bound subordinate compensation agreements* – treaties should provide a mechanism for the parties to negotiate and agree subordinate compensation agreements that provide detailed terms with respect to delivering against the aforementioned articles over a prescribed period of time.

Time bound compensation agreements	A key aspect of the treaty and settlement and compensation process is the capacity for settlement terms to evolve such that they can respond to changing needs of First Nations and government parties, new information and knowledge, new opportunities for self-determination and mutual benefit and changing societal values, beliefs and expectations. Settlement and compensation agreements can be structured as follows: · **Time bound**: settlement and compensation agreements should be time bound so that they are, for reasons discussed above, not full-and-final settlement. However, they should be for a period of time that is adequate for meaningful resources and rights to be transferred and for the parties to achieve outcomes and learn from implementation, so that subsequent agreements can be continuously improved. · **Asset transfer:** settlement and compensation agreements should be specific about the land, sea country, water rights and financial assets that are to be transferred within the time period, state of asset readiness for intended purpose (e.g. status of compliance with various regulations and approvals) and the terms that apply to those transfers and the use of those assets (particularly with respect to local state or Federal Government encumbrances pertaining to their usage). · **Capacity building:** settlement and compensation agreements should be specific about capacity building resources that will be provided to the First Nations party and how those resources will be used over the time period. · **Institutional frameworks:** settlement and compensation agreements should identify any institutional arrangements or institutions that are to be stood up within the time period and specify the function, deliverables and resourcing of those institutions. · **Services and service delivery:** settlement and compensation agreements should identify services that are to be delivered by the First Nations party, the specifications of that service delivery and key performance criteria that are to be met, as well as resourcing for the service delivery. · **Co-management and power-sharing:** settlement and compensation agreements should identify specific areas in which co-management and power-sharing rights exist, the terms of and processes associated with co-management and power-sharing arrangements.

8.2. Seminar working group questions

1. Are each of the policy options identified in this section viable?
2. Are there other policy options that have not been identified in this section?
3. What are the benefits and drawbacks of each of the identified policy options?
4. Based on this assessment, what are the priority policy options?
5. What are the key steps in an implementation plan for the identified priority policy options?

9. Why this new policy framework is needed?

Key elements of the argument as to why a First Nations economic development policy framework that is more focused on economic self-determination is necessary was a major point of discussion throughout the *Murru waaruu* Seminar Series, with two specific seminars – Seminar 3 (What has the policy of the past 235 cost?) and Seminar 4 (Self-determination or the highway?) – focusing specifically on elements of the case for policy change.

Summarised in the following Figure 7, in the simplest of terms, the case for pivoting Australian First Nations economic development policy toward one that more directly encourages, facilitates and fosters economic self-determination - such as framework contemplated by this policy options paper - has three pillars.

Figure 7 – Pillars of the case for First Nations economic development policy change

These pillars for policy change are discussed in the following subsections.

9.1. The pillars that support the case for change...

9.1.1. Economic equity and justice

Economic equity: a human right at international and Australian law

Any discussion pertaining to economic self-determination for First Nations Australians is necessarily a discussion that revolves around the legal concept of rights, including:

- Rights in property (land, water, sea country, intellectual property and financial assets) as a fundamental enabler of economic development;
- Economic self-determination being embedded in the notion of First Nations people using their rights in property as the basis for economic development;
- All 'peoples' (including Indigenous peoples) having a human right under international conventions to exercise economic self-determination; and
- In the case of Australia, the policy and legislative environment that pertains to this rights framework for its First Nations people being grossly deficient.

Economic self-determination is not merely an alternative (and superior) framework for First Nations economic development. It is a fundamental human right recognised by international conventions to which Australia has been a signatory for decades.

In 1948 the General Assembly of the United Nations adopted the Universal Declaration of Human Rights (UDHR), to which Australia was an original signatory. With its 30 articles forming the foundation of all international human rights law, the UDHR incorporates two covenants, the International Covenant for Civil and Political Rights and the International Covenant for Economic, Social and Cultural Rights. Both Covenants contain the same Article 1.1:

> *All Peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their **economic**, social and cultural **development**.*

A more recent international instrument that Australia has endorsed, and which has been a significant focus of the *Murru waaruu* Seminar Series, is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Like some other former British Colonies, Australia was not among the first nations to support UNDRIP, eventually acceding in 2009, two years after it was adopted by the United Nations General Assembly. As discussed in previous *Murru waaruu* Seminars and summarised in the following Table 15, a full quarter of the Articles of UNDRIP pertain to aspects of the right to economic self-determination.

Table 15 – Articles of the United Nations Declaration on the Rights of Indigenous Peoples relevant to economic self-determination

UNDRIP Article	Relevant Text
Article 3	…the right to self-determination… [to] freely determine their political status and freely pursue their **economic**, social and cultural **development**.
Article 4	…in exercising their right to self-determination…the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for **financing** their autonomous functions.
Article 5	…right to maintain and strengthen their distinct political, legal, **economic**, social and cultural **institutions**, while retaining the right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
Article 8(2)	States shall provide effective mechanisms for prevention of, and redress for… any action which has the aim or effect of dispossessing them of their lands, territories or resources…
Article 10	…No relocation shall take place… [without] agreement on just and fair compensation…
Article 11(2)	States shall provide redress…with respect to cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent…
Article 17(3)	Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, and *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.

In order for international law obligations to be enlivened for Australian citizens, they must be enacted into domestic law. Unless, and until this occurs, these statements of principle and codified obligations have only ethical/normative or persuasive weight, able to be used to demonstrate to decision-makers how particular powers should be exercised or submitted to a Court to support an argument on a point of law but not creating a right of action in and of themselves.

Regardless, Section 3 of *the Australian Human Rights Commission Act 1986* (Cth) defines 'human rights' as the rights and freedoms recognised in the Covenant on Civil and Political Rights… and recognised or declared by any relevant international instrument.

The Act establishes an entity known as the Australian Human Rights Commission, whose prescribed functions include, *inter alia*, investigations of rights breaches, education, providing advice and submission to parliaments and courts, and undertaking research and advocacy on rights issues. Part IIA of the Act establishes a specific function being the Aboriginal and Torres Strait Islander Social Justice Commissioner. For the purpose of this Part of the Act, the definition of 'human rights' is extended to also include the rights and freedoms recognised by the International Convention on the Elimination of All Forms of Racial Discrimination. The functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner are to:

- Promote discussion and awareness of human rights in relation to Australian First Nations;
- Undertake research, educational and other programs for the purpose of promoting respect for the human rights of Australian First Nations people and promoting the exercise and enjoyment of human rights by Australian First Nations people;

- Examine enactments and proposed enactments for the purpose of ascertaining whether they recognise and protect the human rights of Australian First Nations people and report to the responsible minster hereon.

While UNDRIP is not legally binding on the Commonwealth Government or any State or Territory, in accordance with Sections 46(C)(3)(d) of the Act, the Aboriginal and Torres Strait Islander Social Justice Commissioner may have regard to any instruments relating to human rights when performing their functions.

While the status of domestic legislative enactment of the right to economic self-determination in Australia is in stark comparison to some other former British colonies such as Canada whereby the *United Nations Declaration on the Rights of Indigenous Peoples Act 2021* requires that all Canadian law is consistent with UNDRIP and establishes a process to achieve this, there is clearly some legal basis and a strong moral, ethical and practical imperative for the enforcement of this right.

Economic justice: monetary compensation is vital, but it isn't enough...

The impact of colonisation on First Nations peoples of the Australian continent and surrounding islands is immeasurable. It has caused immense and unquantifiable human suffering that continues today. We know this has included large scale loss of life caused by murder, state sanctioned and tolerated massacres, disease, and the manifestations of persistently dire socio-economic conditions; the destruction of culture, including language, knowledge, spiritual connection to country, as well as sites and artefacts; separation of families and communities; dispossession of lands and natural resources; and legislated and systemic institutionalised oppression and exclusion.

> *Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossessions underwrote the development of the nation.*
>
> **Justice Brennan**
>
> **Mabo v Queensland (1992) 175 CLR 1**

Other than as a source of slave or cheap labour, First Nations Australians were excluded from participating in the economy from the outset of colonisation, a theme that to varying degrees has been characteristic of the policies of Australian governments since 1788.

Furthermore, the wealth that has been created by the Australian economy has ostensibly been derived from the natural resources contained within the traditional lands and waters of First Nations Australians – lands and resources which Australian First Nations did no cede and were not compensated for.

The economic exclusion of First Nations Australians is not just a historic artefact of colonial Australia, nor is it merely the consequence of the intensely racist societal norms that were characteristic of Western society at the time, the historical eugenics-oriented policies of Australian Governments, or Australia's historically racist constitution that legally defined the societal position of First Nations Australians for much of the 20th Century.

During the period 1901 to 1967 there were no fewer than 15 pieces of Commonwealth legislation and policy alone that expressly prohibited First Nations Australian from participating in certain aspects of the economy. While the 1967 Referendum served as a catalyst for a new era of inclusion, epitomised by amendments to the Pastoral Award which granted First Nations pastoral workers equal pay and a series of machinery of government and legislative reforms implemented by the Whitlam Labor Government, constraint on economic participation continued to be a characteristic of Australian Government policy and legislation as far as it pertains to First Nations.

Even in the present day, where Britain's claim to the Australian continent under the legal doctrine *terra nullius* has been determined to have been a falsehood by Australia's highest court, legislated constraints to economic participation for First Nations persist. Almost all First Nations statutory land tenure, including that which under the *Native Title Act 1993* (Cth) - the Australian Government's primary response to the Mabo High Court decision - constrains its economic use; First Nations interests in licensed freshwater allocations are miniscule and where those allocations exist they are typically constrained to cultural usage only; Sea Country rights are limited and similarly constrained; First Nations interests in cultural and intellectual property cannot be adequately protected under Australian law; and where financial assets are held on trust for First Nations beneficiaries, paternalistic controls limit their use by First Nations for economic self-determination purposes.

> *...native title rights and interests held by the body corporate are not able to be: a) assigned, restrained, garnished, seized or sold; or b) made subject to any charge or interest; or c) otherwise affected...as a result of d) the incurring, creation or enforcement of any debt or other liability by the body corporate, or e) any act done by the body corporate.*
>
> **Section 56(5)**
>
> **Native Title Act 1993 (Cth)**

While there has been some progress in Australian jurisprudence recognising that First Nations rights should go to rights of an economic nature, Australian legislators have responded at glacial pace. As a result, this structurally embedded exclusion with respect to First Nations economic participation has persisted through a period of unprecedented wealth creation, both globally and within Australia. From a global perspective, the period from broadly the time at which Australia was colonised to the present has seen the largest economic expansion in the history of humankind. Within this, exploitation of Australia's relatively undeveloped natural resources has facilitated rapid domestic economic expansion to the point were on a per capita basis, Australia is one of the world's wealthiest nations.

Again, this is not just a historical artefact. Presently, primary and extractive industries (i.e. those industries that create wealth directly from the dispossessed traditional lands and waters of First Nations) account for 18 percent of Australian Gross Value Add. However, the most galling aspect of present-day exclusion is that around 85 percent of the total GDP generated by the Australian economy since 1820 has been generated post the 1967 Referendum and 65 percent since the Mabo High Court decision – in times of supposed enlightenment how much have the traditional owners of the resources that have enabled this growth benefited?

The simple answer to this question is basically not at all. The extent to which Australian First Nations have been excluded from participation in the economy has meant that from the onset of colonisation, they have not been able to create the same level of wealth as other Australians and have not enjoyed the benefits of inter-generational transfer of the wealth that has been created from the natural resources that they have never ceded.

9.1.2. The current policy framework is not delivering adequately...

It is clear that they are just not moving the dial...

The gap between First Nations Australians and the Australian average on most key measures of socio-economic status is large and stubbornly persistent – after well over a decade, only four of the Closing the Gap targets are on track to being achieved, 11 are not on track and four cannot be adequately assessed.

The profile and transparency that has been given to this dilemma by mechanisms such as the Closing the Gap framework

(measures, improvement targets and associated National Indigenous Reform Agreement and subsequent National Agreement on Closing the Gap) has raised awareness of this circumstance, particularly some of its manifestations such as absurdly high rates of adult and child incarceration and violence – sometimes referred to as Australia's 'National Shame'.

Further, as organisations such as the Productivity Commission apply an increasingly forensic approaches to understanding why Closing the Gap targets are not being met, the problem that has been readily apparent to First Nations communities for decades, should now be glaringly obvious to all – Australian citizens and governments, as well as global inter-governmental institutions, product and capital markets.

> *Progress in implementing the Agreement's Priority Reforms has, for the most part, been weak and reflects a business-as-usual approach to implementing policies and programs that affect the lives of Aboriginal and Torres Strait Islander people. Current implementation raises questions about whether governments have fully grasped the scale of change required to their systems, operations and ways of working to deliver the unprecedented shift they have committed to…It is too easy to find examples of government decisions that contradict commitments in the Agreement, that do not reflect Aboriginal and Torres Strait Islander people's priorities and perspectives and that exacerbate, rather than remedy, disadvantage and discrimination."*
>
> **Review of the National Agreement on Closing the Gap: Interim Report**
>
> **Productivity Commission (2023)**

They are associated with a significant fiscal burden…

The cost associated with the current policy framework, combined with the cost of servicing the persistent socio-economic disadvantage, is not insignificant.

While for a range of reasons it is not possible to calculate the fiscal cost incurred by Australian Governments in this regard with a high degree of accuracy, estimates pertaining to 2015-16 (seven years ago) indicate that the cost incurred by all Australian Governments is in the vicinity of $33.4 billion per annum, comprised of approximately $6.0 billion spent on services and programs that are provided to the First Nations community specifically and $27.4 billion representing an estimate of First Nations usage of mainstream government services such as social security, public order and safety, education, healthcare and other government services.

Notwithstanding issues as to the precision of this estimate, the amount is broadly equivalent to the Commonwealth spend on defence and education and more than the total budget of each of the Western Australian, South Australian, Tasmanian, Australian Capital Territory and Northern Territory Governments in 2015-16.

They are the source of a productivity penalty that impacts the entire Australian economy…

While it is extremely difficult to quantify the economic constraints associated with First Nations' rights and legal interests in land, water, sea country, intellectual property and financial assets has two significant outcomes that have a detrimental effect on productivity across the wider economy:

- **Transactional relationship –** whereby First Nations effectively trade their rights (e.g. extinguishment or suppression of native title rights or leasing on First Nation freehold) with a third-party developer such that a development may proceed in

exchange for some form of monetary and/or non-monetary compensation and other terms. This is opposed to a partnership relationship whereby the First Nations interests are able to participate as equity partners in the development or as vertical or horizontal joint venture partners by using the economic value contained in their rights and assets. While this is not a binary circumstance (i.e. commercial arrangements can exhibit elements of both transaction and partnership relationships), the limited extent of economic rights and absence of fungibility across the First Nations asset base means that most relationships between First Nations parties and third parties are transactional in nature.

- **Bureaucracy** – in order to firstly, prevent illegal or entirely inequitable appropriation of First Nations rights and secondly, to ensure that First Nations interests do not unduly constrain mainstream economic development, the aforementioned transactional relationship is heavily regulated by state, territory and Commonwealth legislation and arbitrated by Australian courts. It also requires not insignificant institutional and governance arrangements among First Nations interests to manage rights and any transaction that may impact rights. This regulatory, administrative, institutional and legal framework is characterised by significant and often protracted administrative and legal process, colloquially referred to as 'black-tape' – an adaption of the idiom 'red-tape' and typically used in a pejorative context - which refers to circumstances where regulations are excessive, rigid or redundant. In circumstances where First Nations interests held stronger, more fungible rights they would be able to engage in commerce under normal commercial terms and legal frameworks, protecting and creating value from their assets as they see fit, resulting in substantially less 'black-tape' and a more productive economy.

9.1.3. Economic self-determination frameworks deliver the results...

First Nations owned and operated enterprises, a central pillar of economic self-determination, not only deliver financial outcomes from a personal, family and community perspective, but deliver very significant and broader economic, social, cultural and environmental multipliers. This is particularly the case in rural, regional and remote areas where the opportunity to connect enterprise with First Nations land, water, sea country and cultural and intellectual property is more prominent and mainstream economic opportunity is more limited.

While First Nations enterprises operate in all sectors of the mainstream economy under mainstream business models, many also deploy unique business models that integrate First Nations rights to land, water and Sea Country, as well as cultural and intellectual property with mainstream business practices to service a range of markets under a for-profit or not-for-profit framework (see Figure 8).

Figure 8 – The landscape of First Nations enterprise

Across this landscape, the number of First Nations enterprises, be they sole trader, owner-manager businesses with employees or corporatised ventures is rapidly growing. According to the Australian Bureau of Statistics, the number of owner-manager First Nations businesses in Australia almost doubled over the decade up to 2021 to around 15,000 enterprises, 40 percent of which are employing businesses and two-thirds of which are located in rural, regional and remote areas of Australia. However, while this growth is encouraging, First Nations enterprise ownership remains well below the national average and proportionately well below that in Canada and New Zealand.

A separate analysis undertaken by Melbourne University Business School's Dilin Duwa Centre for Indigenous Business Leadership in collaboration with the Australian Bureau of Statistics that includes owner-manager enterprises, but with a significantly greater focus on for and not-for-profit First Nations corporations shows similar growth with the number of identified enterprises growing by a full third over the same time period. This analysis also demonstrates that on average, First Nations enterprises are well established, financially secure and resilient to major macroeconomic disruption.

This is important by virtue of the significant socio-economic multipliers that are generated by First Nations owned and operated enterprise – the main argument in support of economic self-determination policy. While attempts to quantify these multipliers demonstrate some degree of variation, they all have one thing in common – they are very significant. This is apparent when consideration is given to the attributes that are typical of First Nations enterprises that drive these multipliers (see Figure 9).

Figure 9 – The drivers of socio-economic multipliers associated with economic self-determination

9.2. It isn't one way or the other...

While a First Nations economic self-determination policy framework is very different to the more ubiquitous training/employment/procurement mainstream economy approach, the discussion herein is not intended to suggest that such an approach does not have a role to play.

Demonstrably, such approaches create and foster capacity, and for many First Nations people, particularly many urbanised First Nations people, it is a preferred pathway. Rather, the case being made for self-determination as an economic development model is that it is not only complementary to 'mainstream' models, it also represents a fundamental human right, delivers superior socio-economic-cultural multipliers, and in rural, regional and remote areas is often the only pathway to economic participation.

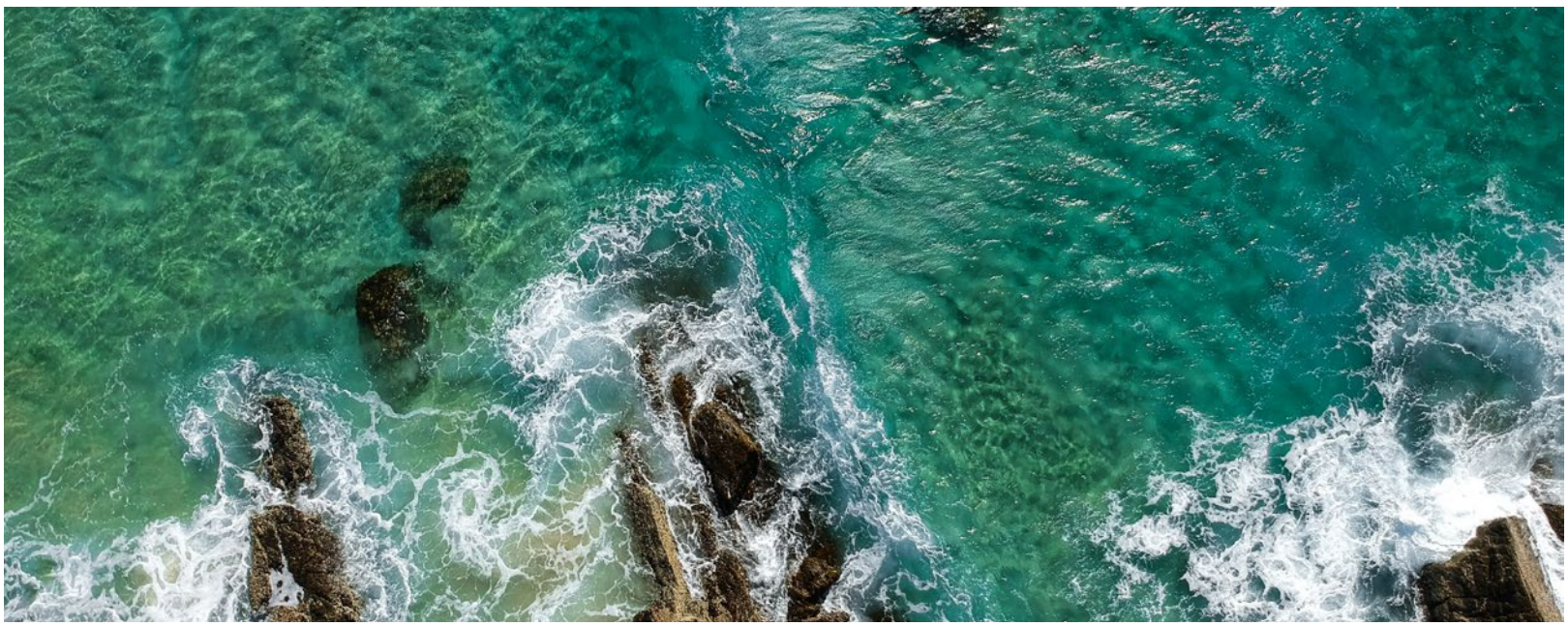
9.3. But we cannot maintain the *status quo*...

This case clearly highlights:

- The gross economic inequality and absence of economic justice that is endured by Australia's First Nations people;
- The persistent and unequivocal failure of current government policy in addressing significant and suborn socio-economic disadvantage suffered by Australia's First Nations people;
- The cost that is being incurred by Australian governments (and therefore Australian taxpayers) as a result of the limited efficacy of the current policy settings; and
- Policies that promote and support First Nations economic self-determination, as discussed throughout this policy options paper, go a long way toward addressing these issues in many circumstances.

These policy and fiscal dilemmas have been recognised by key stakeholders in other jurisdictions with substantial Indigenous populations decades ago, and as a result these jurisdictions are far more advanced in terms of outcomes for their First Nations than is Australia.

Australia needs to take urgent, decisive action in accordance with policy options set out in this paper now.



Appendix 1: Examples of tenure precedent

Unique First Nations Commercial Lease: Western Australian Diversification Leases

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 the spectre of possible 'land banking' by project proponents, particularly those with significant financial resources, potentially locking out Traditional Owners from activating their own Country.

Freehold where Native Title and Native Title – like Rights Survive Conveyance: The 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.

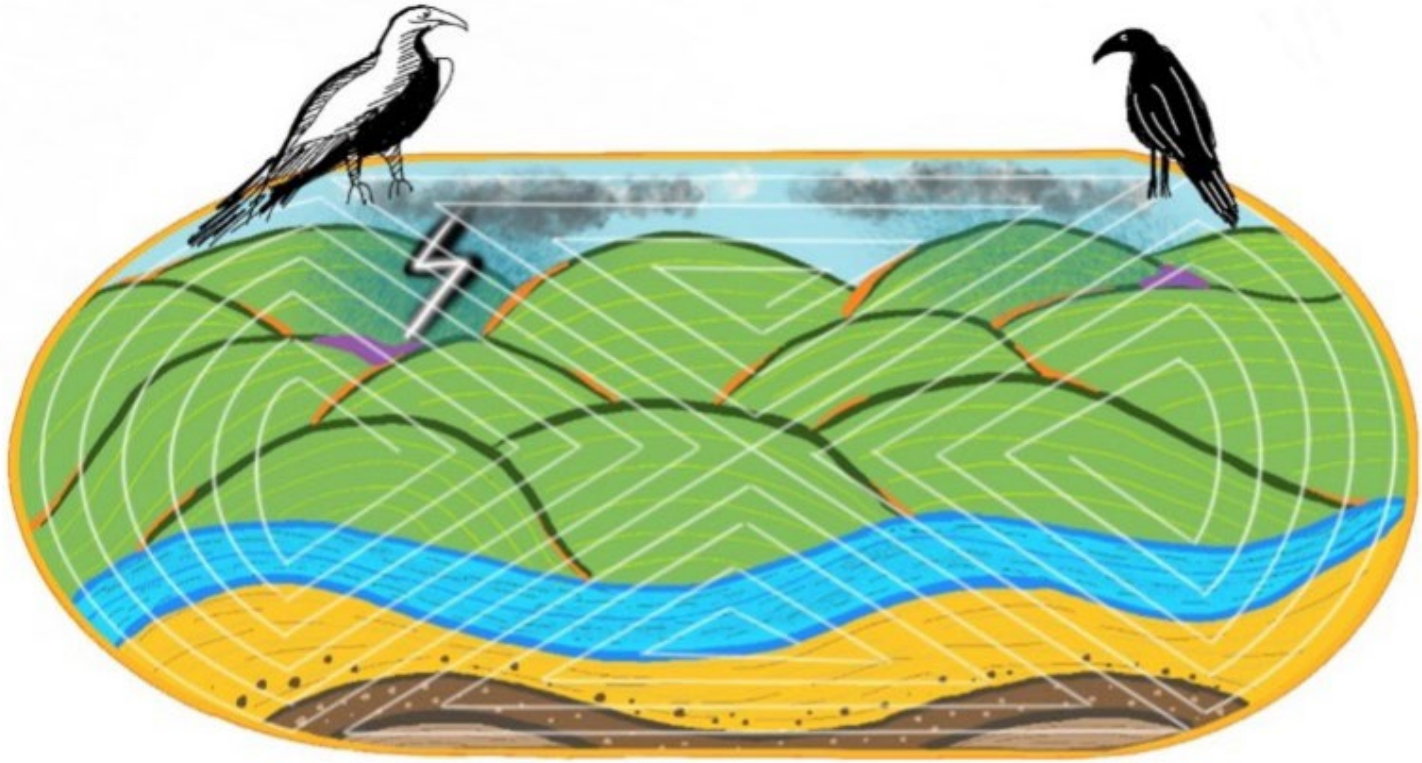
As is apparent, this model of dual tenure – an underlying freehold title capable of being transferred, encumbered, sold etc., paired with a binding, permanent encumbrance which protects certain rights and interests into the future, no matter the owner of the underlying title – has obvious parallels to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



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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