Australian National University | First Nations Portfolio

Murru waaruu

(On Track)

Economic Development Seminar Series

FNP
FIRST NATIONS PORTFOLIO

Policy Position Paper

Preliminary Draft for Institutional Settings for Self-Determination Seminar

Keeping on track to economic self-determination for Australia's First Nations

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.

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SPONSORSHIP

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

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.

Important note to the reader

With respect to the content, observations and recommendations contained in this preliminary Draft Policy Position Paper, the reader is cautioned as follows:

1. Whilst the content, observations and recommendations contained in this preliminary Draft Policy Position Paper are the result of significant research, dialogue and consultation they remain the subject of further interrogation and verification and therefore may be further refined or significantly changed as the *Murru waaruu* process continues toward its completion; and

2. The National Indigenous Australians Agency's sponsorship of the *Murru waaruu* Seminar Series and its products does not imply its endorsement of this preliminary Draft Policy Position Paper.

Foreword

PLACEHOLDER FOR PENULTIMATE DRAFT

Contents

1. Introduction

The impact of colonisation on the First Nations peoples,[1] of the Australian continent and its 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 appalling socio-economic conditions; the destruction of culture, including language, knowledge and practice, 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.

A fundamental premise of this Draft Policy Position Paper is that deliberate constraints pertaining to participation in the economy that have been placed on Australia's First Nations by the laws and actions of British colonial, and then subsequent Australian State and Commonwealth Governments since 1788, and which continue in various forms today, have been and remain a major cause of the stubbornly persistent socio-economic disadvantage Australia's First Nations people endure.

Economic self-determination refers to conditions where a People have the legal right, capacity and space to determine settings for labour, production, resource acquisition and distribution,[2] –conditions which enable a People to use their rights and interests in assets to create wealth for themselves, by lawful means of their choosing and timing. It is a critical dimension of the right to self-determination which, simply put, means that peoples are able to make decisions about matters that affect their lives.

Other former British colonies, such as Aotearoa/New Zealand, Canada and the United States have created more fertile conditions for Indigenous economic self-determination, in their case built off treaties. In these jurisdictions Indigenous peoples have generally been able to better use reclaimed rights in land, freshwater, Sea Country, and cultural and intellectual property, together with financial resources from compensation and restitution arrangements, to build self-determined local economies that fundamentally enhance their capacity to regenerate their cultures and communities.

Self-determination was established as an important principle in the framework of international law following the Second World War, given expression in the United Nations Charter.[3] It has binding effect at international law through various conventions, expressed at Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Australia has ratified both of these agreements.

With respect to Indigenous Peoples, the right to self-determination is the backbone of the preeminent instrument at international law dealing with the rights of Indigenous peoples; the United Nations Declaration on the Rights of Indigenous Peoples. Self-determination in the context of the Declaration has been described as the 'river in which all other rights swim'.[4] It is critical to survival, dignity and wellbeing of the Indigenous peoples of the world,[5] and has a critical economic dimension (see Appendix 1). The Declaration has been supported by 194 nation states, including Australia.

Australian public policy has generally not prioritised realising economic self-determination of Indigenous peoples as important. Advancing self-determination was an underpinning idea of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), and other related Commonwealth legislation pertaining to Indigenous peoples in the 1970s, including the *Aboriginal Councils and Associations Act 1976* (Cth). However, self-determination, and particularly economic self-determination, has in reality never found a firm footing in Australian public policy. Unlike its counterparts across the Pacific, Australia's First Nations economic development policy approach has instead focused on supporting training, education, jobs and procurement in the mainstream economy. We may

1 In this Policy Position Paper the term Australian 'First Nations' refers to the nations, tribes, moieties and other traditional political structures of Australia's Aboriginal and Torres Strait Islander Peoples, or Australia's 'First peoples'.
2 Lienau, O. (2020), 'The multiple selves of economic self-determination', The Yale Law Journal, 129, February
3 See articles 1 and 55.
4 Professor Michael Dodson statement of 24 November 1995 to the first session of the United Nations Commission on Human Rights Working Group, cited in Scott, C. (1996), 'Indigenous self-determination and decolonization of the International Imagination: a plea', Human Rights Quarterly, 18(814-820), John Hopkins University Press
5 See article 43 of the United Nations Declaration on the Rights of Indigenous Peoples.

wonder what the relative disadvantage of Indigenous peoples would look like today if government had focused, in the intervening years, on realising goals of economic self-determination for Indigenous peoples in Australia.[6]

Given the failure of Colonial, State, Territory and Commonwealth public policy to deliver economic equality and opportunity to Australia's First Nations peoples, and the demonstrated positive impact of economic self-determination policies that have created much greater opportunities for Indigenous peoples in other jurisdictions , developing a policy framework of economic self-determination for Australia's First Nations is a primary focus of the First Nations Portfolio at the Australian National University.[7]

In July 2022, the First Nations Portfolio convened the *Marramarra murru* (Creating Pathways) First Nations Wealth Forum and Economic Development Symposium. It brought Indigenous leaders from across Australia, Aotearoa/New Zealand, Canada and the United States together to explore and discuss opportunities to refocus First Nations economic development public policy to prioritise and give greater expression to economic self-determination for Australia's First Nations.[8] The outcome of this two-and-a-half-day dialogue was emphatic support from the 170 participants that the First Nations Portfolio should work, in collaboration with Indigenous people and other key stakeholders, to identify key options for policy reform and related initiatives and to create a strong case for that reform.

In response, the First Nations Portfolio has across 2023 facilitated the *Murru waaruu* (On Track) First Nations Economic Development Seminar Series. Summarised in the following Figure 1 and Appendix 2, this 12-month process has centred on critical exploration and problem-solving and has involved over 220,[9] individual participants. Participants represent a cross-section of Australian First Nations leadership, the Australian Public Service, leading policy researchers at the ANU and the broader Australian academy, and key actors in mainstream industry (see Figure 2). Informed by a series of comprehensive topical background papers, this national community of practice met on Ngambri and Ngunnawal Country at the University's Canberra campus on a bi-monthly basis over the course of 2023 to interrogate current and previous policy settings and their failings, explore options for reform, examine the merits of the case for policy change,[10] and, ultimately, to propose policy positions reflected in this preliminary Draft Policy Position Paper.

> *...agreed that the policy framework led by the Commonwealth for First Nations economic development was in urgent need for reform...it needs to be replaced by a policy framework for the 21st Century that has a razor-like focus on self-determination.*
>
> ***Marramarra murru* First Nations Economic Development Symposium Communique**
> **Australian National University First Nations Portfolio**
> **July 2022**

6 The Danish Institute for Human Rights (2023), Signatories for United Nations Declaration on the Rights of Indigenous Peoples (https://sdg.humanrights.dk/en/instrument/signees/28)
7 Established in 2020, the First Nations Portfolio is a branch of the Australian National University's executive that among other things, works to ensure that the University makes a leading contribution to national policy in relationship between Australia's Aboriginal and Torres Strait Islanders and the nation.
8 Barnett, R. (2022), *Marramarra murru First Nations Economic Development Symposium Background Paper*, First Nations Portfolio, Australian National University
9 This figure does not include unique participations in Seminar 6
10 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 5 - Policy Options Working Paper, First Nations Portfolio, Australian National University

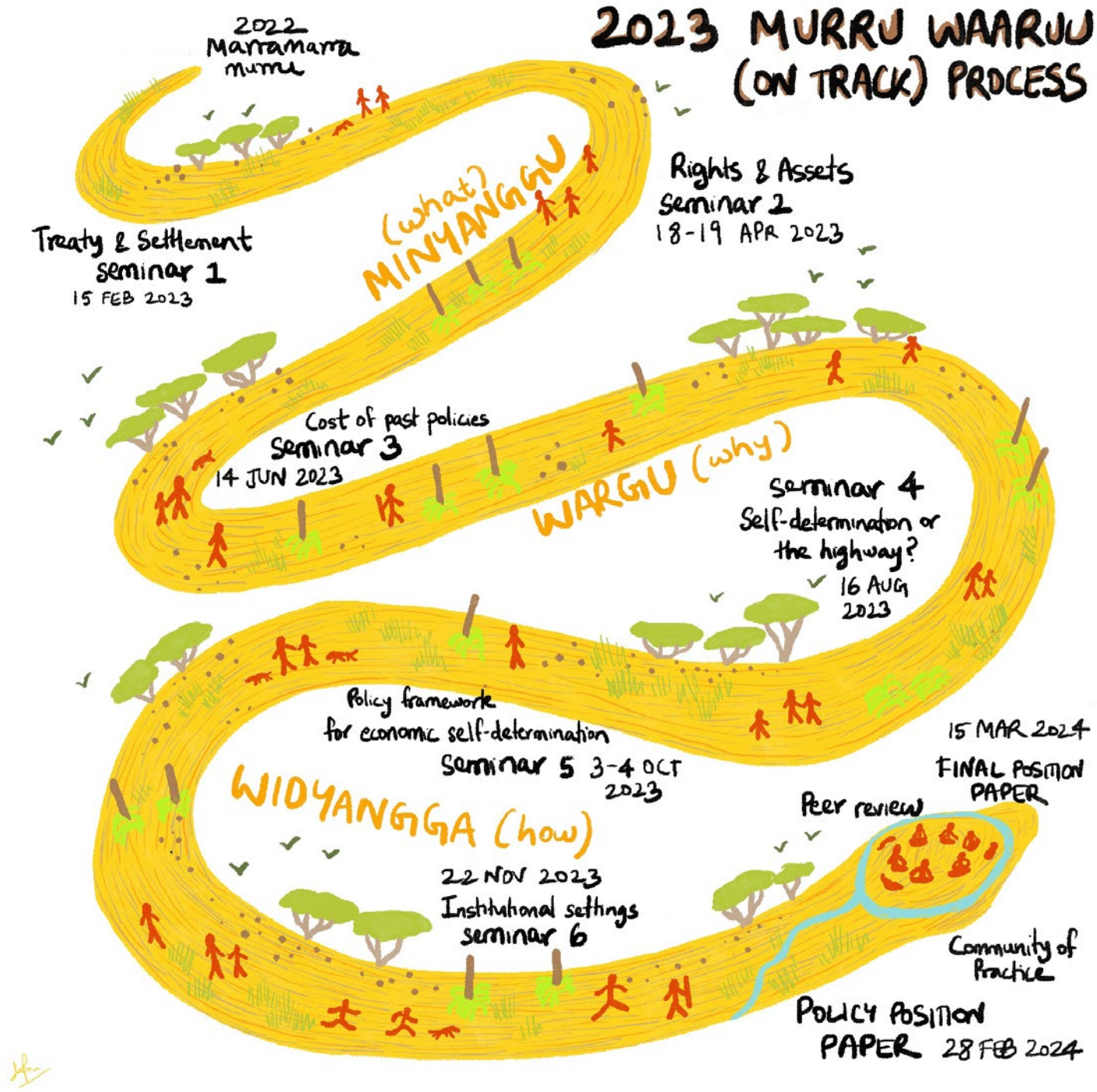
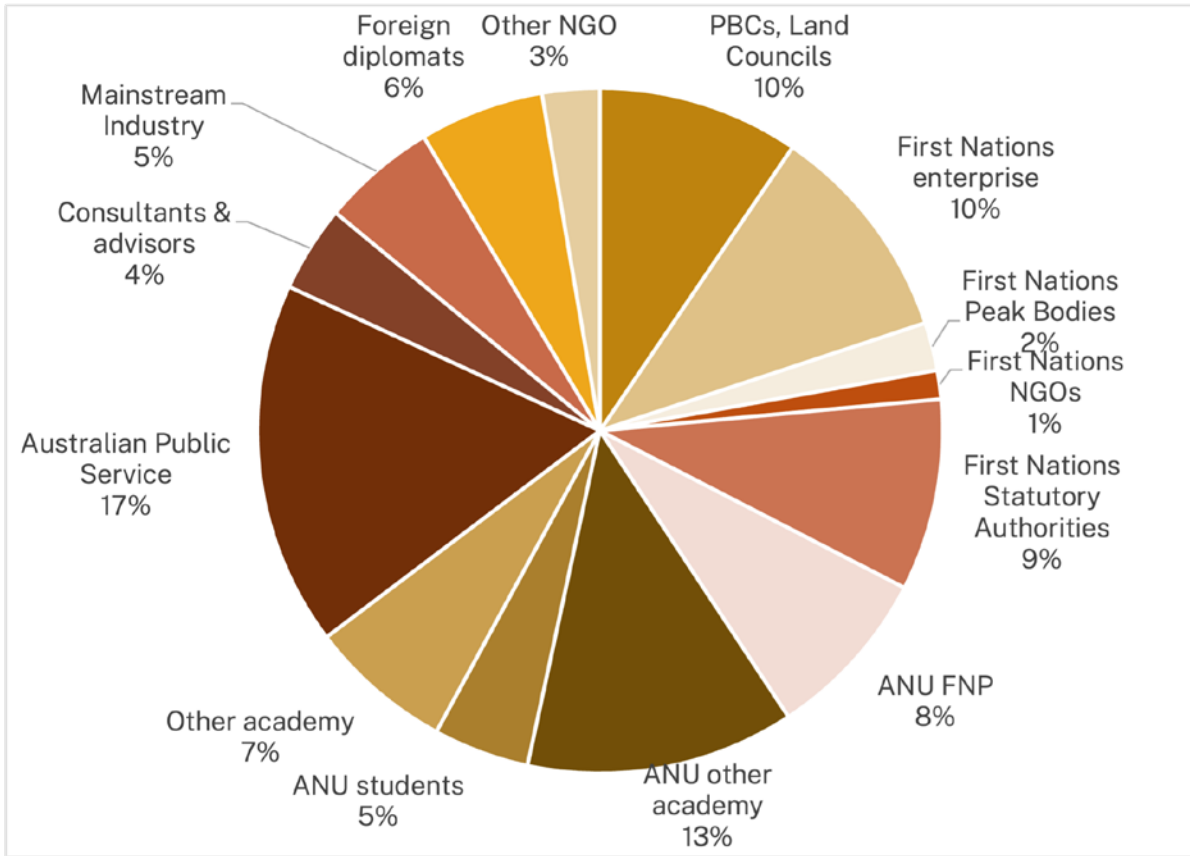


Figure 1 – The Murru waaruu journey

Figure 2 – Representation of unique participation in the Murru waaruu Seminar Series (n=221) (Note: to be updated at completion of Seminar 6)



This Draft Policy Position Paper proposes critical reform to legislative and policy frameworks that govern First Nations land, freshwater, Sea Country, cultural and intellectual property rights, rights to financial assets, and agreement and settlement frameworks. Reform options advanced in this Paper are designed to achieve better economic, social and cultural outcomes for Australian Indigenous peoples.

Many proposed reforms are long overdue, and many are significant. For Australia's First Nations to realise better economic opportunity, and to close the gap on key socio-economic measures between Indigenous and non-Indigenous people, urgent and strategic change to the underpinnings of the economic relationship Australia has with its Indigenous peoples is required. Benefits of proposed changes set out in this paper do not only belong to Indigenous peoples. For Australian governments which have for decades sought to address entrenched socio-economic disadvantage with blunt, often misdirected, and generally ineffective tools, there is much to be gained from a change to the policy landscape.

To assist the reader in navigating this Draft Policy Position Paper, the following Table 2 provides a summary of its contents.

Table 2 – Chapter and policy recommendation summary.

Chapter	Key policy recommendations	Page No.
2. A Legislative Framework for Optimal Reform This chapter discusses the Commonwealth's role in establishing a legislative environment of primacy that will assist in the implementation of some of the more disruptive reforms that are recommended in this Policy Position Paper.	▪ Targeted and strategic implementation of the principles underpinning the United Nations Declaration on the Rights of Indigenous Peoples into the Australian legislative framework.	14
3. Land Rights Reform This chapter discusses processes for validating opportunities for economic self-determination that can be derived from the First Nations terrestrial estate and reform that is required so that First Nations legal rights and interests in land can be used as an asset to underpin economic self-determination.	▪ National MOLA assessment of the First Nations estate. ▪ Native Title Act reform.	18
4. Freshwater Rights Reform This chapter discusses the significant challenges associated with securing First Nations licensed economic allocation in the Freshwater resource and sets out a pathway for resolving those challenges.	▪ Australian First Nations Freshwater National Working Group ▪ Reform to the National Water Initiative ▪ Assessment of First Nations demand for fully allocated freshwater resources ▪ Accessing economic volumes in fully allocated resources ▪ Assessment of First Nations demand for unallocated resources ▪ Creating the knowledge base for competent water allocation decisions ▪ Accessing economic volumes in unallocated resources	26
5. Sea Country Rights Reform This chapter describes the emerging nature of First Nations reclamation of legal rights and interests in Sea Country and establishes a pathway of reform that is required to reassert some control over Sea Country and to create value through fishing and future blue economy opportunities.	▪ A national framework for elevated Sea Ranger functions. ▪ Creating clear and consistent pathways for First Nations to acquire commercial licences and quota. ▪ Supporting the industry in standing up a National First Nations Fishing and aquaculture peak body. ▪ Preparing for the rapid growth of the Blue Economy.	35
6. Cultural and Intellectual Property Rights Reform This chapter discusses the status of the First Nations cultural and intellectual property reform process that is being undertaken by IP Australia and makes recommendations to their process to ensure an implementable, effective and expedited framework.	▪ Place-based processes for preservation and transfer of intellectual property. ▪ Place-based processes for identifying, describing and registering, with free, prior and informed consent, cultural and intellectual property. ▪ First Nations cultural and intellectual property legislation. ▪ Ratification of the Nagoya Protocol.	42
7. Reform to Rights in Financial Assets This chapter discusses a pathway to enable First Nations to use the equity that they hold as beneficiaries of various trusts and other instruments as a basis for mobilising other private and public capital into the First Nations enterprise sector.	▪ Improving enterprise development and growth management capacity. ▪ Improving investment management and governance capacity. ▪ Creating investment opportunity awareness. ▪ Reducing the hurdle rate for private investment.	50
8. A Framework for Treaty-like Agreements and Settlement This chapter presents a discussion on issues that need to be considered as the Nation moves into a treaty-like agreement and reparations environment in order to ensure that these frameworks deliver outcomes that can be used as assets for economic self-determination.	▪ Truth telling, reparations and sovereignty. ▪ Standing up the Makarrata Commission. ▪ Quarantining funds for reparations. ▪ Establishing national principles that underpin Treaty-like agreements.	57
9. Institutional Reform	TBC	61
10. The case for reform that enables Economic self-determination This final chapter sets out the arguments in support of the Government pivoting its current policy focus toward one that facilitates and supports economic self-determination for Australian First Nations.	▪ Current polices are not delivering adequate socio-economic outcomes. ▪ Current policies are not delivering economic equity or justice. ▪ Economic self-determination delivers the socio-economic outcomes and economic justice and equality.	63

2. A legislative framework for optimal reform

2.1. The case for integrating principles of the United Nations Declaration on the Rights of Indigenous Peoples into the Australian legislative framework to support economic self-determination

Creating conditions that encourage the effective activation of Indigenous economies in Australia, and that provide expression for economic self-determination, means significant reform is required. Comparative examples from Aotearoa/New Zealand, the United States and Canada, highlight examples of enabling public policy conditions that support and advance the economic interests and capacities of Indigenous groups. These examples are salient and highlight that although reform options must be tailored to suit Australian conditions, reform that supports Australian First Nations to make their own economic decisions and to own their economic risk is possible, can be effective, and should be a priority of government. .

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

The proclivity of government for continual re-labelling and predictable commitment to ineffectual changes to existing training, employment and procurement programs is a defining characteristic of the Australian economic policy landscape for First Nations. It is an ineffective response to complex and entrenched disadvantage. The approach has never and will plainly not facilitate the creation of significant economic value from Australian First Nations rights and interests that is so critical to driving progress to greater economic equality between Indigenous and non-Indigenous people. In this context it is worth contemplating that the most recent impactful reform to First Nations affairs in Australia was the enactment of the *Native Title Act 1993* (Cth) passed in response to the *Mabo* High Court decision,[11] some 30 years ago. This lack of critical legislative reform has been a failure to strategically and effectively address First Nations disadvantage in Australia.

While the full consequence of the Australian electorate's rejection at the recent referendum of the proposal for constitutional recognition by enshrining an Indigenous advisory body in the Constitution will take time to play out, it is fair to say that legislative reform enabling conditions for Indigenous economic self-determination will be necessary and important.

The *Murru waaruu* Seminar Series explored, developed and interrogated various options for a legislative framework capable of facilitating effective economic empowerment of Indigenous peoples. [12] These included using the 'race' power at Section 51(xxvi)

11 Mabo v Queensland (No.2) [1992] HCA 23; (1992) 175 CLR1
12 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 5 - Policy Options Working Paper, First Nations Portfolio, Australian National University

and potentially the 'external affairs' power at Section 51(xxix) of the Australian Constitution to enact legislation facilitating First Nations economic self-determination. Unsurprisingly, key reform ideas centre on a pathway to embedding the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), or key UNDRIP rights and principles in the Australian legislative framework. The interrogation of this issue as part of the Seminar Series highlighted that Australia needs to approach legislative endorsement of the UNDRIP principles in a strategic way that is designed for and well suited to the Australian legal and political context. Recent federal Canadian legislation committing to incorporation of the UNDRIP in Canada provides an important reference and should add weight to the need to take seriously the opportunity to use UNDRIP as an underpinning framework to realise goals towards Indigenous advancement and improved outcomes. The federal Parliament has recently engaged with this priority for the first time, having established the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the application of UNDRIP in Australia which is due to report in coming months.

> *'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**

2.2. Recommended reforms

2.2.1. Targeted and strategic integration of the principles of the United Nations Declaration on the Rights of Indigenous Peoples

The *Murru waaruu* Seminar Series considered the option of symbolic and preambular incorporation of the UNDRIP In legislation, which was dismissed as ineffective. It also considered the option of stand-alone UNDRIP legislation incorporating the instrument fully into Australian law, noting that exploration of this idea highlighted that the creation of enforceable rights could not occur all at once. It was suggested that this option could resemble the approach endorsed in Canada, although given the outcome of the referendum and the relatively conservative environment for law reform enabling Indigenous rights In Australia, which was a key point of discussion In the Seminar Series, that option was considered politically unviable in the short term. The preferred approach was a more targeted and strategic process of incorporation.

The Seminar Series concluded that the strategic and targeted incorporation of key articles and principles into relevant legislation, such as future legislation that may establish a Makarrata Commission, or current legislation subject to reform, should be pursued to give life to the UNDRIP and its important principles within Australia's federal legislative framework. The Seminar Series concluded that as part of this implementation process, a process of review and reporting would need to be undertaken to identify priority areas of reform and to socialise important rights and their substantive meaning, as well as key inconsistencies that may currently exist. The approach was preferred because it is more achievable in the short term and can be undertaken over time on a prioritised basis but ensuring key UNDRIP principles are ultimately given legislative support.

The following Table 2, summarises the proposed pathway to implementation.

Table 2 – Pathway to targeted and strategic integration of the principles of the United Nations Declaration on the Rights of Indigenous Peoples into the Australian legislative framework

Reform task	Summary
1. Stakeholder and public education and engagement program	The outcome of the October 2023 Referendum indicates that large sections of mainstream Australian society are unaware or at least inadequately informed on the plight of Australia's First Nations people, the fundamental and persistent drivers and enablers of poor socio-economic outcomes, Australia's legal and other international obligations, and the systemic failure of public policy to address these issues. The public discourse leading up to and after the Referendum also demonstrates a propensity for reform of First Nations affairs to be the subject of partisanship. It Is also important that key stakeholders that may be Involved in the operationalisation of key UNDRIP rights and principles, such as the public service, are supported so they understand the critical context and substantive meaning of the UNDRIP and its rights and principles. These matters are potential barriers to the effective domestication of key UNDRIP rights and principles. A strength-based and well organised stakeholder and public education and engagement program should be designed and carried out. This should begin as soon as practicable and be sustained in an ongoing way so it can inform and influence thought leaders and public awareness. Any such process would be informed by and critically depend on global expertise on UNDRIP and its rights and principles.
2. Formalised federal structure to examine and report on the alignment of key Australian legislations with the UNDRIP and make recommendations for priority reform	The Australian Parliament's Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs has, by means of referral from the Senate in August 2022, been exploring the application of the UNDRIP in Australia under Terms of Reference that include options for improving adherence to the principles of UNDRIP in Australia. Subject to the findings of the Committee's Report (which is scheduled for imminent release), to ensure a better understanding of priority areas and key inconsistencies, the federal government should commit to standing up a formal structure to undertake a process of review and reporting in relation to UNDRIP. Such a process would identify key inconsistencies in Australian legislation and highlight opportunities for strategic reform. The outcomes of such an audit would go to furthering the case for reform (see Task 2) and informing the prioritisation process suggested under reform Task 4 below.
3. Prioritisation of legislative reform	Drawing on the outcomes of Tasks 1 and 2 above, criteria should be co-designed with First Nations peoples who are Impacted by potential changes to legislation that prioritises the legislative reform that is required. Criteria might include likely impact on Closing-the-Gap targets, significant inconsistencies between Australian laws and the Nation's international obligations and those determined by First Nation input.
4. Reform to the Public Service Act to reduce risk of misalignment of future legislation	Because the provisions of existing legislation in many instances are the source of substantive constraints to Australian First Nations exercising their right to economic self-determination, legislative reform is the primary and immediate focus of this pathway. However, it is also important that future advice that Is provided by the public service to ministers pertaining to policy and legislation is not such that it perpetuates constraints on the ability of Australian First Nations to achieve economic self-determination. To mitigate this risk, new provisions could be incorporated into the *Public Service Act 1999* (Cth) that require the public service to take into consideration not only the need to effectively engage First Nations peoples but also the principles of UNDRIP when providing advice to Ministers and Parliament, including the drafting of legislation.

3. Land rights reform

Given the indefatigable efforts by Australian First Nations to reclaim legal rights in the unceded traditional lands they have been dispossessed of it is not surprising that it is the reclamation of legal rights and interests in land where Australian First Nations have made the greatest progress. Over 50 percent of the Australian landmass is the subject of a range of First Nations legal rights or interests,[13] and as we approach the resolution of all claims (full determination) under the Native Title regime, these interests are expected to increase to over 65 percent by the end of this decade.[14]

The full ambit of First Nations land interests is determined by no fewer than 25 separate pieces of Commonwealth and State legislation. While the largest geography of rights and interests is determined under the Native Title Act and Northern Territory Land Rights Act, every Australian State also administers its own legislative framework for awarding and managing First Nations rights and interests in land. The following Figure 3,[15] illustrates the extent of the First Nations land estate according to some of the main legislative sources of First Nations land tenure.

13 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 2 - Using the Acquired Assets Background Paper, First Nations Portfolio, Australian National University

14 National Native Title Tribunal (2022), *Native Title Determinations and Claimant Applications*

15 Jacobsen, R et al (2020), National Native Title Tribunal (2022) and Deloitte Access Economics (2021) in Barnett, R., Normyle, A., Doran, B. and Vardon, M. (2022), *Baseline Study – Agricultural Capacity of the Indigenous Estate,* Cooperative Research Centre for Developing Northern Australia, Australian National University and Indigenous Land and Sea Corporation

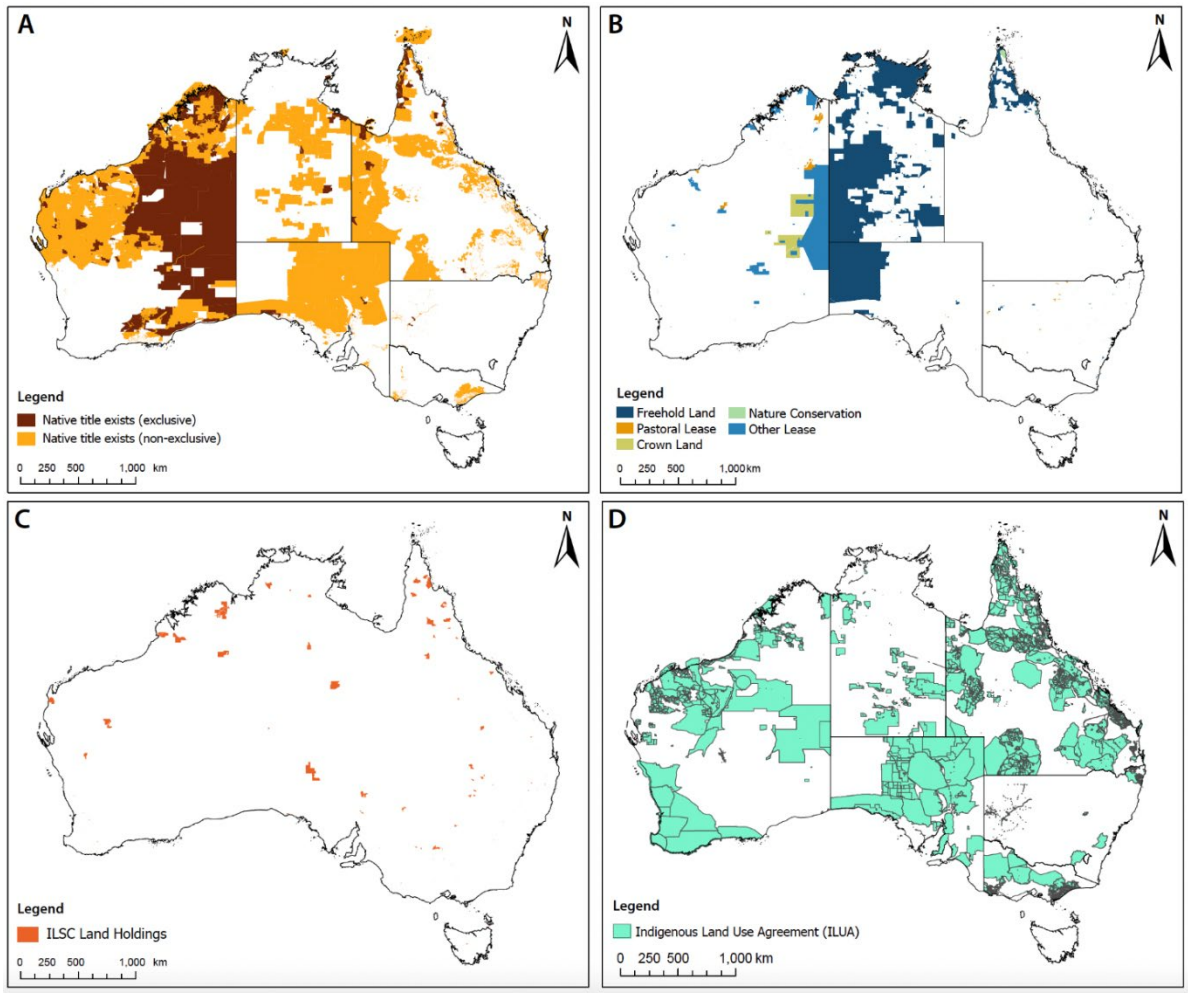


Figure 3 - (A), (B), (C) and (D) – The geographical extent of different forms of First Nations Tenure that define the Indigenous Estate

On the face of it, this landscape of legal rights and interests across the continent and its islands should present an abundance of opportunity, both in conventional land-oriented development as well as in enterprise associated emerging sectors of the economy, [16] (see Figure 4).

16 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series – Seminar 2 Using the acquired Assets: Preliminary Chapter Draft, First Nations Portfolio, Australian National University

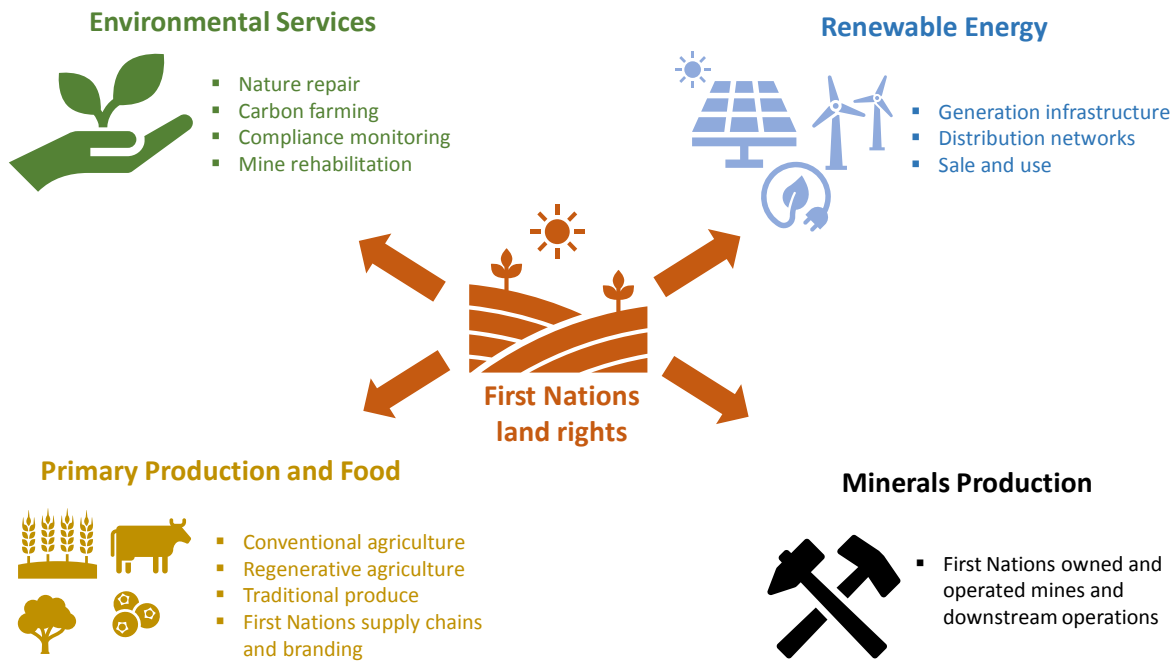


Figure 4 – Opportunities for First Nations to create value from land rights and interests

However, the capacity for First Nations to derive significant economic value from this geography of rights and interests is in all cases constrained, and in some cases is severely constrained. Across the portfolio of Commonwealth and State legislation there is no instance where the instrument conveys on the First Nations landholder the same fungibility or alienability that is enjoyed by most other landholders in Australia. Even in instances where there is some scope for the land interest to be used for commercial purposes – development, leasing, collateral for finance or sale – this is subject to legislated conditions and third-party approvals that do not encumber other Australian landholders.[17]

As a result, despite First Nations having interests that allows them to reside and practice culture on large areas of land across the nation, their ability to derive economic value from that land is curtailed. Of course, given how difficult it has been for First Nations to achieve rights and interests over their land, solutions to economic limitations of First Nation land rights and interest must take into account many factors, including the communal nature of title and the importance of providing titleholders with options that do not threaten or risk in adverse ways the critical gains they have made.

The *Murru waaruu* Seminar Series identified a range of ideas to unlock the economic potential of First Nation rights and interests in land, including better equipping First Nations to plan for economic development on their lands, collaborative structures for economic development, and importantly, improving the fungibility and value as collateral of First Nations land tenure.[18] From a broad range of identified policy options, the following reforms have been identified as priorities.

17 Wensing, E. (2019), *Land Justice for Indigenous Australians: How can the two systems of land ownership, use and tenure co-exist with mutual respect based on parity and justice?*, PhD Thesis, Australian National University
18 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 5 - Policy Options Working Paper, First Nations Portfolio, Australian National University

3.1. Recommendations: Enhancing First Nations economic development certainty and capacity

3.1.1. A national MOLA assessment of the First Nations estate

Only in the last 50 years have First Nations in Australia been recognised with and been able to assert limited legal rights and interests over their traditional lands. Many are still fighting for formal ownership and recognition. The capacity of titleholders to use their hard-won rights and interests over land for the purposes of self-determination is a significant issue. Creating economic opportunities for First Nations in relation to their lands that are consistent with critical social and cultural values and that build wealth and economic agency is an important priority for many First Nations.

For First Nations that want to pursue economic self-determination to improve socio-economic conditions for their people, a protracted process of identifying and validating culturally aligned economic development opportunities on their traditional lands is a significant obstacle.

Multi Objective Land Allocation (MOLA) can help to address this Issue. MOLA uses Geographical Information Systems (GIS) algorithms and a multitude of cross-sectional and longitudinal datasets pertaining to land characteristics, such as geology, hydrology, soil conditions, meteorology, vegetation and flora and fauna, tenure, planning regimes, infrastructure and cultural heritage to assess and project suitability for multiple land use individually and then combines the information to rapidly and accurately provide optimal allocations of land for identified purposes.

By integrating data about cultural land values and uses, First Nations could use MOLA to rapidly and accurately identify optimal development opportunities on their traditional lands that are congruent with important cultural values and uses. MOLA can help to efficiently de-risk decision-making about development, expediting both the identification and realisation of culturally aligned economic outcomes from their traditional lands.

The following Table 4, summarises the proposed pathway to implementation.

Table 4 - Pathway to implementation of a national MOLA assessment of the First Nations estate

Reform task	Summary
1. Establish data sovereignty framework	Undertaking MOLA assessments designed to identify development opportunities that can co-exist with the cultural values associated with First Nations land interests requires identification, recording and processing of data pertaining to a range of cultural values including ceremonial sites, historical artefacts and ancestral remains, song-lines, ecology of traditional produce and totemic species and so on. Naturally, First Nations are unlikely to disclose important aspects of this sacred knowledge without confidence that they can adequately control who has access to cultural data, in what form it can be accessed, and for what purposes it can be used. To this end, a condition precedent to a MOLA assessment for the purposes of identifying culturally aligned land development opportunities, is to ensure free, prior and informed consent, data management and legal frameworks are in place that guarantee First Nations have adequate levels of control over their cultural data and its use.
2. Promotion of integration of cultural mapping into mainstream planning processes	Presently, the only avenue for First Nations cultural values to be incorporated into public and private sector land use planning and allocation frameworks is via the heritage survey processes that are prescribed by legislation and public and private sector policies. The responsive, protracted and costly nature of these processes represent a productivity penalty and results in First Nations cultural authority being one degree removed from the process. Competent cultural spatial datasets would serve to improve the efficiency of assessing the cultural impact of developments, as well as to better integrate First Nations into land use and allocation decision making, further empowering them in economic decisions that impact their traditional lands.
3. Trials on an opt-in basis	As a basis for beta testing the MOLA assessment framework and informing the cost-benefit analysis discussed in Task 4 below, the framework should be trialled with a small number of willing First Nations groups to assess its usefulness as a decision support tool and effectiveness in identifying and planning development opportunities that can co-exist with cultural values on First Nations lands.
4. Cost-benefit analysis	Rolling out a MOLA assessment program across the entire national First Nations estate will be an expensive exercise. Therefore, there is a need to ensure that such an investment delivers two key outcomes. Firstly, that it can operate adequately within any constraints associated with the data sovereignty framework developed in accordance with Task 1. Secondly, that it is effective in identifying development opportunities that deliver cultural-social-economic benefits to the First Nation that justify the cost. To this end a quantitative and qualitative cost-benefit analysis should be undertaken with respect to the trials the subject of Task 3.
5. National roll-out on an opt-in basis	Subject to the outcome of Task 4 above, a framework and associated resourcing should be developed to support First Nations that wish to participate in a MOLA assessment of their traditional lands. This could be administered through a Commonwealth agency or instrumentality with geospatial data expertise, or such expertise could be established with a First Nations oriented instrumentality such as NIAA or the ILSC.

3.2. Recommendations: Improving fungibility and value as collateral of First Nations tenure

3.2.1. Native Title Act reform

For many First Nations communities and peoples, their beneficial interest in Traditional Lands may be their most significant asset. Conditions that restrict the use of and devalue First Nations land tenure as collateral for the purposes of finance are widely considered to be the most significant legislative constraint on Australian First Nations economic self-determination.[19]

Of the 25 State and Commonwealth statutes that provide for First Nations land rights and interests across Australia, 21 provide at least some pathway to sale, leasing or albeit, that pathway is typically complicated, uncertain, conditional or requiring Ministerial and third-party approvals.

Crucially, the largest geographic portfolio of First Nations rights and interests in land is derived from determinations made in accordance with the Native Title regime (as shown at the start of this chapter in Figure 2(A)). In addition to its large geographic footprint, for a significant number of typically regional and remote First Nations people, their beneficial interests in Native Title land, which is held by Registered Native Title Bodies Corporate (RNTBC), also referred to as Prescribed Body Corporate (PBC), as trustee or agent,[20] is their only asset. Enhancing the economic value of native title tenure can provide a meaningful pathway to economic self-determination for some of Australia's most marginalised and opportunity-constrained First Nations communities.

Native Title is one of only four statutory land title regimes which expressly prohibits rights and interests in land being sold, leased or mortgaged,[21] by the interest holders. Section 56(5) of the *Native Title Act 1993 (Cth)* (NTA) provides that:

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

As a result, Indigenous land under the Native Title regime cannot be used as security for borrowing. This does not entirely preclude it from being used for economic gain. Section 56(4) of the Native Title Act gives RNTBC's powers to deal with native title interests held in trust or as agent as authorised by the Regulations.[22] As such, RNTBC's may, with the consent of the trustees, hold money, invest and apply funds, enter into agreements and otherwise manage the land under their care. While this does not overcome the absolute bar on security interests, where particular rules are followed and the common law Native Title holders consent, Indigenous land may still be utilised for or to enable business or commercial activity through mechanisms such as leases or tied grants. Despite this, the fungibility and value as financial collateral associated with Native Title tenure is among the weakest of all tenures.

This situation Is largely a consequence of the historical processes which led to the Native Title Act. The Act was never drafted with the intent of creating tenure with any specific monetary value. It was primarily a response by the Keating Labor Government to the Mabo High Court decision, designed to provide for the recognition of native title, which was at the time a novel concept under Australian law, to establish how dealings in native title may proceed, to set standards for those dealings, and to establish mechanisms for determining claims to native title. The Native Title Act has been amended four times since it came into effect. Every amendment has been directed at improving the efficiency of the Act with respect to the above areas of focus, and to respond to further jurisprudence by the High Court (such as the *Wik* decision).

19 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 2 - Using the Acquired Assets Background Paper, First Nations Portfolio, Australian National University
20 There are around 260 RNTBCs in Australia.
21 The other statutory land regimes that preclude rights in land being sold, leased or mortgaged area *National Parks and Wildlife Act 1974* (NSW), *Aboriginal Land Act 1991* (Vic) and *Traditional Owner Settlement Act 2010* (Vic)
22 *Native Title (Prescribed Bodies Corporate) Regulations 1999*

As the Native Title system approaches a full-determination environment, it is appropriate and necessary to consider how the Act can be modernised so that it is can support First Nations aspirations for economic self-determination, and in so doing, meet Australian international obligations in relation to the right to self-determination.

Given the long and painful struggle of many First Nations to win limited legal rights and interests over their traditional lands, the prospect of being alienated from those lands through commercial processes may be terrifying and repugnant to First Nations titleholders. Rather than creating new forms of tenure derived from the Native Title regime that are more akin to fee-simple title,[23] a preferred pathway is to simply reform aspects of the Native Title Act to allow Native Title holders to continue to hold their native title rights in perpetuity, but to lease native title lands under terms of their choosing and in co-existence with other specific (exploration, mining, pastoral and diversification) and general purpose leases that may also apply to the subject lands.

The pathway to this reform is summarised in the following Table 5.

Table 5 - *Pathway to implementation of Native Title reform*

Reform task	Summary
1. Ground-truthing with land users and financiers	Any reform to the *Native Title Act* that is designed to enhance the value of native title rights as an economic asset must create an interest in land that is adequately fungible for commercial purposes and bankable in capital markets. To ensure that this the case, commercial uses and bankability of native title and native title under leasing terms that are likely to apply should be tested with a range of First Nations and non-First Nations developers and providers of debt and equity finance to identify and validate the optimal reform pathway.
2. Awareness and education campaign	As discussed in Chapter 2, it is apparent that any proposed significant reform to First Nations affairs will prove contentious across the Australian electorate and political apparatus. This is particularly so in the aftermath of the 'Voice' referendum. It thus is very likely that changes pertaining to land tenure will be no different, and possibly met by an escalated response. Similarly, to the campaign considered in the implementation pathway for integration of UNDRIP into the legislative framework contemplated in Chapter 2 (see Table 3), reform to *the Native Title Act* should be accompanied by a well-planned and sustained awareness and education program from the outset of the reform process that targets thought leaders and influencers and the wider electorate. Securing bipartisan political support will be crucial in this regard.
3. Reform of Section 56(5) of the *Native Title Act*	Section 56(5) of the *Native Title Act* prescribes a bar on Native Title interests and rights being used for commercial 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 of any charge or interest; or* (c) *Otherwise affected;* *As a result of:* (d) *the incurring, creation or enforcement of any debt or other liability of the body corporate (including a debt or liability owed to the Crown in any capacity or to any statutory authority); or* (e) *Any act done by the body corporate.'* While details of reform to the *Native Title Act* that are required to ensure that Native Title can be used optimally as an economic asset will be informed by Task 1, at a minimum and in any event, the amendment of Section 56(5) will be necessary.

23 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 5 - Policy Options Working Paper, First Nations Portfolio, Australian National University

4. Freshwater rights reform

The relationship between land and freshwater resources is, from cultural, environmental, social and economic perspectives, mutually-dependent. Despite this, the recognition of First Nations rights and interests in land has been, up to now, decoupled from rights in licensed freshwater allocations. It is only in the context of more recent settlement agreements with the States of Victoria and Western Australia, where freshwater and land allocations have formed key components of settlement and compensation for First Nations.

As a result, First Nations rights with respect to licensed freshwater allocations are presently equivalent to between 0.1 and 0.2 percent of the total volume of freshwater allocation across Australia.[24] Further, while in terms of quantum they are almost antithetical to First Nations rights and interests in land (see Chapter 3), they are comparable in terms of their limitations as an economic asset. The vast majority of the already miniscule quantum of the national freshwater resource that has been allocated to Australian First Nations is in the form of 'cultural flows', where use for economic purposes is legally prohibited.

For First Nations landholders, access to adequate quantities of freshwater that can be used for economic purposes is important for activating most of the areas of land-oriented opportunity identified in Figure 2 above. In the case of primary production it is crucial. As illustrated in the following Figure 5, economic allocations of freshwater resources have been identified as underpinning other economic opportunities for First Nations.[25]

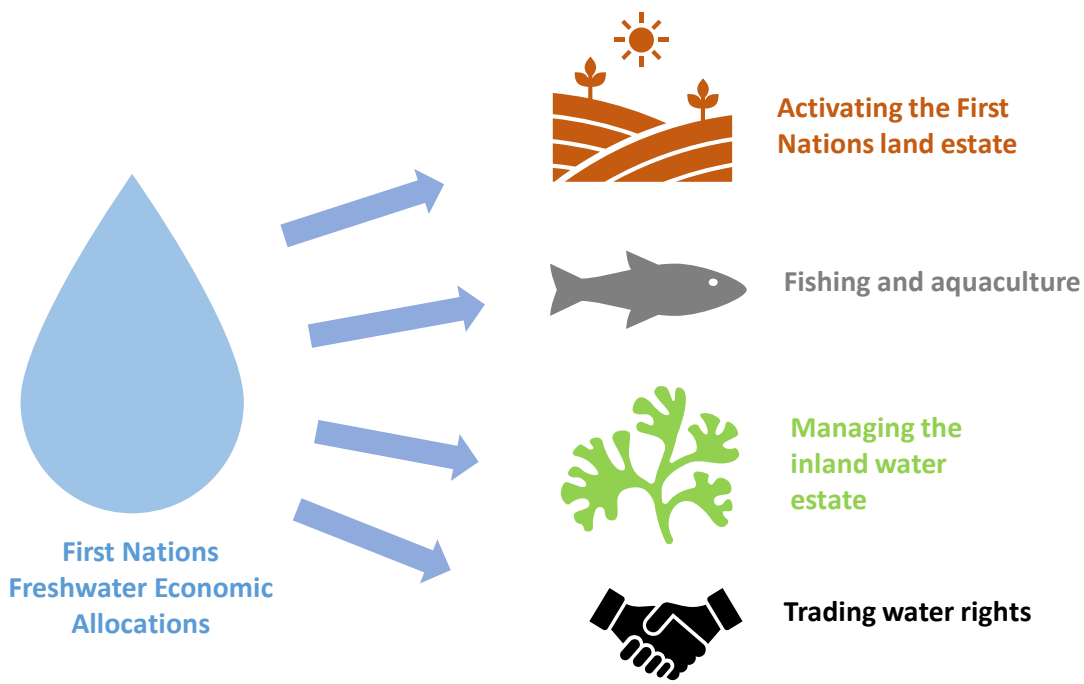


Figure 5 - Opportunities for First Nations to create value from land rights and interests

24 Jackson, S. et al (2011) and Hartwig, L. (2020) in Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 2 - Using the Acquired Assets Background Paper, First Nations Portfolio, Australian National University
25 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series – Seminar 2 Using the acquired Assets: Preliminary Chapter Draft, First Nations Portfolio, Australian National University

4.1. Recommendations: embedding First Nations in the governance of freshwater resources

Limited inclusion of First Nations in freshwater use planning and decision-making has been a major factor in the very little recognition that is given to First Nations freshwater rights, particularly with respect to rights to licensed allocations for economic purposes.

4.1.1. Australian First Nations Freshwater National Working Group

In recognition of the inadequacy of First Nations access to freshwater resources for cultural, social or economic purposes, and significant concerns of First Nations over the impact of excessive consumption of freshwater resources on their cultural and social values, the First Nations Portfolio hosted a First Nations Water Roundtable in May 2023. The Roundtable sought to identify issues and a pathway to universal reform in this area. A key outcome of the Roundtable was a recommendation to establish a National First Nations Water Working Group.

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

The *Murru waaruu* process endorses the recommendation to establish a National First Nations Water Working Group. The Group would have a primary purpose of embedding First Nations interests in the development of all aspects of national freshwater policy and allocation decision making (see Section 4.1.2). However, in light of the importance of First Nations economic freshwater allocations in activating the economic value of land interests, as well as the economic opportunities associated directly with the freshwater resource itself, this Draft Policy Position Paper goes further in its recommendations. It also recommends that a sub-committee to the proposed National First Nations Water Working Group is established as a priority and with Terms of Reference specific to licensed First Nations economic water allocations.[26]

26 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 5 - Policy Options Working Paper, First Nations Portfolio, Australian National University

The following Table 6 summarises the proposed pathway to implementation.

Table 6 - Pathway to implementation of a National First Nations Water Working Group Economic Allocations Subcommittee

Reform task	Summary
1. Stand-up the proposed National First Nations Water Working Group	A proposed National First Nations Water Working Group should be stood-up as a matter of priority. It is vitally important that this Group is endorsed and recognised by the Commonwealth and jurisdictional governments, has a Terms of Reference that authorises it to engage at the highest level of national dialogue (including the National Water Initiative – see Section 4.1.2) across all aspects of managing the freshwater estate and allocating water resources and is comprised of members who collectively are highly regarded from a freshwater cultural, technical and economic perspective and who have adequate political agency to influence change.
2. Establish a First Nations licensed economic water allocations sub committee	Given the vital importance of increasing access to economic water allocation licenses and inherent complexity of that task, a priority action for the National First Nations Water Working Group established in accordance with Task 1 should be to establish a subcommittee that focuses exclusively on developing solutions that result in First Nations being able to access economic water allocation licenses in both fully allocated and unallocated freshwater catchments. In particular, this group should have a key focus on accessing water allocations for economic use in the context of activating the First Nations land estate (see Section 3). The sub-committee should have the ability to co-op experts at its discretion for the purposes of supporting its deliberations and critically, should be supported by a suitable community engagement framework that ensures that diverse economic water needs of different communities are taken into account in the development of solutions.

4.1.2. Reform to the National Water Initiative

Established in 2004 and the subject of an intergovernmental agreement between all the Australian States and the Commonwealth, the National Water Initiative (NWI) is a framework for water reform. It requires all States and Territories to prepare water plans with provisions for the environment, achieve sustainable water use in over-allocated or stressed water systems, introduce registers of water rights and standards for water accounting, expand trade in water rights, improve pricing for water storage, and deliver and better manage urban water demands.

While the NWI has achieved some coordination of jurisdictional water policy, it has been criticised for its Murray-Darling Basin focus, inability to adequately address environmental concerns and suboptimal engagement of First Nations interests, particularly with respect to First Nations access to water for economic use. A recommendation from the *Murru waaruu* Seminar Series is that the NWI be the subject of an urgent reset that, among other things, is designed to substantially increase the extent to which First Nations are meaningfully involved in the governance of freshwater resources across the nation.

> *'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 Peoples' interests in Water (2021)**

The following Table 7, summarises the proposed pathway to implementation.

Table 7 - Pathway to implementation of the proposed reset of the National Water Initiative

Reform task	Summary
1. Reset process for the National Water Initiative	The Commonwealth should lead a significant reset of the NWI that results in an improved coordination of water policy across all jurisdictions and with a specific and express focus on the meaningful incorporation of First Nations interests in the governance of the freshwater resource across the Nation.
2. Integration of First Nations interests into National Water Initiative reform	The National First Nations Water Working Group (see Section 4.1.2) should be a key component of the process to reform the NWI, particularly with respect to improving First Nations economic water allocations. However, the outcome should go beyond simple First Nations advisory structures, to First Nations performing an integral function in water policy, usage and allocation decisions throughout the machinery of Commonwealth and jurisdictional governments that regulate freshwater resources in Australia. It should also address frameworks for water allocations as part of Government-First Nations agreement making and reparations and the prospect of First Nations being primary custodians of particularly unallocated water resources.

4.2. Recommendations: fully allocated resources

In fully allocated water catchments where First Nations have economic allocations, such as the Murray-Darling Basin , allocations are typically small and not physically linked to a First Nations land resource. With most First Nations being highly financially constrained and therefore limited in their capacity to acquire further water entitlements in the market, First Nations that hold licensed economic water rights are left with trading as a singular means of realising economic value from those rights. This limits opportunities for economic self-determination compared to those that can be derived from legal rights and interests in land assets.

These circumstances are arguably most prevalent in the Murray-Darling Basin, but also exist elsewhere across particularly southern areas of the nation.

4.2.1. Assessment of First Nations demand for fully allocated resources

Freshwater is of immense, multidimensional value to First Nations. Some First Nations will prioritise cultural and social values associated with freshwater resources above any economic interests, particularly in circumstances where they have been deprived of access for social and cultural purposes and the water source has been degraded. For various reasons, others will have an immediate or future need for access to water for economic purposes, particularly with respect to activating the First Nations land estate. The MOLA program recommended in Section 3.1.1 will assist First Nations in determining how cultural and social values associated with water resources can co-exist with economic objectives.

It is recommended that the first step in attaining licensed allocations of economic water resources is to develop a detailed understanding of current and future First Nations demand for those allocations.

The following Table 8, summarises the proposed pathway to implementation.

Table 8 - Pathway to understanding First Nations demand for economic allocations from fully allocated freshwater resources

Reform task	Summary
1. Identification of land activation requirements and opportunities	It is likely that the most immediate source of demand for economic allocations of freshwater will be in circumstances where First Nations are seeking to activate legal interests and rights in land through means such as irrigated conventional agriculture and horticulture, traditional produce, emerging nature repair and biodiversity markets, etc. As a priority, engagement should take place with First Nations holders of such assets to determine the nature and quantum of demand for First Nations licensed economic water allocations from fully allocated resources that is required to activate economic opportunities associated with those lands and for sustained operations and growth.
2. Identification of other demand for economic water allocations	While the economic activation of the First Nations land estate is a priority for access to freshwater for economic use, as depicted in Figure 4, First Nations have identified other opportunities for creating economic value from Freshwater entitlements. A study into identifying these opportunities, the specific location, quantum and nature of economic water rights required to activate them will go further to developing an actionable understanding of First Nations demand for economic water allocations.
3. First Nations economic water allocations demand study	Drawing on the outcomes of Tasks 1 and 2 above, a study should be developed that identifies and quantifies the specific nature, quantum, location and application of demand from First Nations for economic allocations from the fully allocated Australian freshwater resource. This study will form the basis of designing mechanisms for providing this access.

4.2.2. Accessing economic volumes in fully allocated resources

Providing First Nations with economic entitlements in markets where the freshwater resource has been fully or over-allocated presents a fundamental challenge. For this to occur, someone else has to forgo rights that they have previously acquired and which have underpinned investment. Compulsory acquisition of freshwater entitlements from others will meet strong resistance and is therefore most likely politically unviable, if not inequitable. This leaves two viable pathways – resourcing the acquisition of economic water entitlements for First Nations through the market or creating new sources of freshwater that can be allocated to First Nations interests for commercial purposes.[27]

27 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 5 - Policy Options Working Paper, First Nations Portfolio, Australian National University

The following Table 9, summarises the proposed pathway to implementation.

Table 9 - Pathway to creating First Nations economic water allocations in fully allocated freshwater resources

Reform task	Summary
1. First Nations economic water entitlements acquisition fund	Building on an existing Commonwealth initiative (Murray-Darling Basin Aboriginal Water Entitlements Program), the Commonwealth Government should establish a fund that is of a size informed by the analysis discussed in Table 8 above that can be sourced by First Nations requiring access to economic entitlements of freshwater to activate First Nations land estate or other legitimate economic purposes. Within the current machinery of government, given its statutory responsibilities, the ILSC would seem the appropriate vehicle to manage this proposed resource.
2. Study into accessing other sources of freshwater for First Nations economic use	Further complicating the challenge is that in addition to competing commercial demand, as a result of overallocations and the impacts of climate change, there are many locations across Australia where the level of sustainable freshwater resource is decreasing. In this context, new sources of freshwater that could be utilised by First Nations for economic purposes should be identified. This might include changes to allocation process such as automatically allocating a portion of bulk entitlements to First Nations interests rather than trading them on the market, or providing an automatic First Nations right in new recycled water or water from future brackish or seawater desalination that can be used for economic purposes or traded by First Nations. To understand these possible opportunities better, a study should be undertaken to identify alternative pathways for access to economic allocations of freshwater and understand their viability.
3. Australian First Nations economic freshwater entitlement acquisition scheme	Drawing on the outcomes of Tasks 1 and 2 above, a resourced plan to provide First Nations with adequate allocations of freshwater in fully allocated resources should be prepared and implemented. This plan should prioritise the intersection of where adequate water can be attained through a viable mechanism and that water can be used to activate the economic value of First Nations land estate, with more challenging circumstances the subject of solution identification in the first instance.

4.3. Recommendations: unallocated resources

In the case of unallocated water resources (which are mainly located in northern Australia such as the Fitzroy Basin in the Kimberley) the challenge is different to fully allocated resources. First and foremost, in many instances there is inadequate understanding of the hydrology and environmental services associated with freshwater resources that have potential to be the source of freshwater for economic purposes, rendering water allocation decisions by government agencies problematic, if not impossible. The second and more insidious challenge is that when mainstream demand for a freshwater resource is identified and investment is made in providing the knowledge base upon which competent allocation decisions can be made, existing allocation mechanisms that are enlivened in most cases marginalise First Nations interests and in some, exclude them, perpetuating limited access to freshwater resource for First Nations economic use.

It is intended that the governance implications of this issue are addressed through the recommendations discussed in Section 4.1. The recommendations discussed in this section go to activating unallocated resources as a source of economic water entitlements for First Nations.

4.3.1. Assessment of First Nations demand for unallocated resources

While there is most certainly post-colonial use and disturbance of freshwater resources in more regional and remote areas of Australia, these areas are not as impacted as the southwest and the southeast of Australia. In some instances, save for the impacts of climate change, freshwater systems and the ecosystem services they provide remain relatively intact in undeveloped areas of Australia.

In addition to constraints that the environmental regulations of Australian governments will present with accessing these water resources for economic purposes, many First Nations will want to preserve cultural and social values associated with these water resources. However, in other instances, First Nations will want to activate water resources for economic purposes in culturally and environmentally sustainable ways, particularly with respect to activating their interests in their land estate, a decision that will be aided by the MOLA program that is the subject of the recommendation discussed in Section 3.1.1.

Because this will require investment in the development of scientific knowledge to inform competent allocation of these relatively untapped freshwater resources, understanding the location, level and nature of demand for this purpose is required to prioritise such investments.

The following Table 10, summarises the proposed pathway to implementation.

Table 10 - *Pathway to understanding First Nations demand for economic allocations from unallocated freshwater resources*

Reform task	Summary
1. Identification of land activation requirements and opportunities	As with fully allocated resources, it is likely that the most immediate source of demand for economic allocations of freshwater will be in circumstances where First Nations are seeking to activate legal interests and rights in land through means such as irrigated conventional agriculture and horticulture, traditional produce and land restoration as well as potentially in the future, production of hydrogen from electrolysis. As the priority, engagement should take place with First Nations holders of such assets to determine the nature and quantum of demand for First Nations licensed economic water allocations from unallocated resources that is required to activate economic opportunities associated with those lands and for sustained operations and growth.
2. Identification of other demand for economic water allocations	While the economic activation of the First Nations land estate is a priority for access to freshwater for economic use, as depicted in Figure 4, First Nations have identified other opportunities for creating economic value from Freshwater entitlements. A study into identifying these opportunities, the specific location, quantum and nature of economic water rights required to activate them will go further to developing an actionable understanding of First Nations demand for economic water allocations.
3. First Nations economic water allocations demand study	Drawing on the outcomes of Tasks 1 and 2 above, a study should be developed that identifies and quantifies the specific nature, quantum, location and application of demand from First Nations for economic allocations from the unallocated Australian freshwater resource. This study will inform prioritisation and nature of investment in knowledge and information requirements to underpin competent water allocation decisions.

4.3.2. Creating the knowledge base for competent water allocation decisions

Creating a conventional scientific and traditional knowledge-base that can inform appropriate water allocation decisions across all unallocated freshwater resources around Australia is an enormous exercise. It may be insurmountable in the short to medium term. Therefore, in order for there to be timely activation of resources, investments in creating this knowledgebase should be prioritised

against the demand study discussed in Section 4.3.1 and implemented in such a way that it draws on the national conventional scientific capability as well as the traditional ecological and cultural knowledge of the specific First Nations that have interests in the subject freshwater resource.[28]

The following Table 11, summarises the proposed pathway to implementation.

Table 11 - Pathway to acquiring the knowledge needed to underpin competent allocation of economic water entitlement to First Nations in unallocated freshwater resources

Reform task	Summary
1. Knowledge investment acquisition prioritisation	Drawing on the demand study that is the subject of Section 4.3.1 above and in consideration of other criteria such as the scale and nature of interest in the unallocated water resource, other non-economic uses of the resource, the extent to which conventional scientific knowledge pertaining to the resource exists, interest on the part of the First Nations proponent in contributing traditional ecological knowledge to investigations and the availability of conventional scientific capacity, specific unallocated water resources should be prioritised for investment in the acquisition of knowledge required to underpin a competent allocation decision.
2. Protocols and framework for knowledge acquisition	Once knowledge acquisition priorities have been identified, clear protocols and frameworks must be established to ensure that the knowledge base that is generated and which will ultimately underpin the allocation decisions is informed by both conventional science and traditional ecological knowledge and that the traditional knowledge that is contributed by the First Nations proponent is used properly and adequately protected.
3. Resourcing and implementation plan	Once the priorities are identified and the protocols and framework for knowledge acquisition is in place, a plan for the acquisition of requisite knowledge in accordance with the priorities identified should be established. While it is probable that the Commonwealth will be required to direct significant resources to the plans for implementation, its scientific nature means that much of the investigation may also be eligible for various academic and scientific grants, particularly where conventional science is undertaken in collaboration with traditional knowledge.
4. Economic water allocation framework	As adequate knowledge is attained for freshwater resources that have been identified as with a framework for allocating economic interests in freshwater resources should be established. This should include processes to predict and monitor future usage and impacts of climate change and significant involvement of First Nations in the governance of those frameworks and processes.

4.3.3. Accessing economic volumes in unallocated resources

Based on the knowledge developed under the recommendation discussed in Section 4.3.2, any issue of licensed entitlements for freshwater for economic use to First Nations from a specific unallocated water resource will be the subject of the relevant water regulations of the particular jurisdiction as they stand at the time. However, in the case of unallocated freshwater resources in regional and remote areas, and particularly where a First Nations proponent is the only user of the water resources, there is an easier pathway to establishing the First Nations interest as the primary custodian of that resource.

28 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 5 - Policy Options Working Paper, First Nations Portfolio, Australian National University

5. Sea Country rights reform

Incorporating its Exclusive Economic Zone, Australia's marine jurisdiction is the third largest in the world. The biodiversity of Australia's marine environment, incorporating temperate and tropical marine ecosystems, underpin significant and unique fisheries; its subsea geology hosts significant hydrocarbon deposits; and its climate is conducive to supporting renewable energy generation at scale.

With the exception of rights of inalienable freehold over 85 percent of the intertidal zone of the Northern Territory afforded to First Nations under the *Aboriginal Land Rights (Northern Territory) Act 1976,* and certain associated rights of control recognised by the Australian High Court in the Blue Mud Bay Case in 2008,[29] and the special rights afforded to First Nations in the Torres Strait,[30] and certain associated trading rights recognised in the Akiba High Court determination,[31] First Nations rights over Sea Country are a relatively new development.

Rights over Sea Country under the native title regime have only been recognised since 2001,[32] and by virtue of international law principles pertaining to (particularly innocent) right-of-passage and inherited common law principles with respect to rights to fish and navigate waters, unlike the rights afforded under the Northern Territory land rights regime, native title over Sea Country can only ever be non-exclusive. To date, there have only been 37 native title determinations that include Sea Country, concentrated primarily in Western Australia and Queensland.[33]

Further complicating First Nations rights to Sea Country is the disparate approach to fisheries management across the State jurisdictions in terms of the role First Nations perform in resource management, total resource allocation policy and approaches to First Nations participation in the commercial sector. As illustrated in the following Figure 6 and similar to circumstance in Canada and Aotearoa/New Zealand, commercial fishing is a significant economic self-determination pathway for First Nations Sea Country peoples. Similarly, the provision of marine estate management services through marine Indigenous Protected Areas and Sea Rangers is also an important area of opportunity.[34]

29 Northern Territory v Arnhem Land Aboriginal Land Trust (2008) 236 CLR 24
30 *Aboriginal and Torres Strait Islander Act 2005* (Cth)
31 Akiba on behalf of the Torres Strait Regional Sea Claims Group v Commonwealth (2013) 250 CLR 209
32 *Commonwealth v Yarmirr* (2001) 208 CLR 1
33 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 2 - Using the Acquired Assets Background Paper, First Nations Portfolio, Australian National University
34 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series – Seminar 2 Using the acquired Assets: Preliminary Chapter Draft, First Nations Portfolio, Australian National University

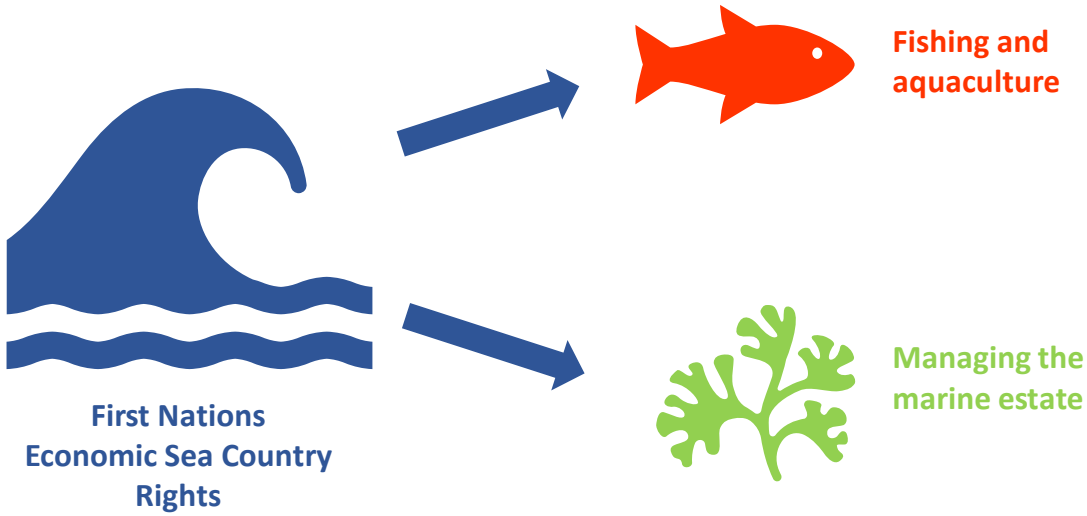


Figure 6 - *Opportunities for First Nations to create value from Sea Country rights and interests*

5.1. Recommendations: elevation of the function of Sea Rangers

While coming from a lower base by virtue of the relative immaturity of reclamation of Sea Country rights, the growth of the Sea Ranger sector is demonstrating a similar trajectory to that of terrestrial First Nations Ranger Groups – as First Nations exercise their rights of control over the intertidal zone of the majority of the Northern Territory coastline, native title determinations over Sea Country increase and marine Indigenous Protected Areas become more prevalent, it is very likely that the Sea Ranger footprint along particularly coastal areas of Australia will increase.[35]

5.1.1. A national framework for elevated Sea Ranger functions

Sea Rangers have the potential to perform a range of conservation estate management, license compliance and research functions that are currently undertaken by government agencies. Transitioning these functions to established Sea Ranger groups on a fee-for-service basis achieves two outcomes. Firstly, it provides income that can contribute toward the financial sustainability of Sea Ranger activities, and secondly, it returns some custodianship to First Nations with respect to the management of their traditional sea countries. These are both important self-determination outcomes.

35 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 5 - Policy Options Working Paper, First Nations Portfolio, Australian National University

The following Table 12, summarises the proposed pathway to implementation.

Table 12 - Pathway to implementation of a National First Nations Water Working Group Economic Allocations Subcommittee

Reform task	Summary
1. Mapping of regulatory and research functions that could be undertaken by Sea Ranger Groups	The Australian marine estate is jurisdictionally complex, characterised by each state and territory having unique regulatory frameworks across fisheries and aquaculture, conservation and environmental management and marine infrastructure that applies to state or territory waters, the Commonwealth having frameworks for national waters and the EEZ and some delegation and power-sharing arrangements between each State/Territory and the Commonwealth across each domain of regulation. Furthermore, because the reclamation of Sea Country is not as progressed as the reclamation of land rights, compared to terrestrial First Nations Ranger Groups, the Sea Ranger sector is not as large or advanced in most cases. A study should be undertaken to identify the specific legislative marine fisheries and aquaculture compliance, conservation and environmental management and compliance and research activities under each jurisdictional regime that could be outsourced to Sea Ranger Groups.
2. National study into the enhancement of Sea Ranger functions	A study into the Sea Ranger sector should be undertaken that identifies area of operations, capacity and capability of existing and likely future Sea Ranger Groups and maps that capacity and capability against the opportunities identified in Task 1 above. This study should also identify capacity and capability gaps that informs a Sea Ranger Development Program discussed in the following Task 3.
3. National framework for elevation of Sea Ranger roles and responsibilities	Drawing on Tasks 1 and 2 above, a national framework for the elevation of Sea Ranger roles and responsibilities should be developed. For each jurisdiction this should include clear targets for devolution of roles and responsibilities to Sea Rangers, processes for that devolution (including capability building and accreditation programs) and resources to be provided primarily by the Commonwealth.

5.2. Recommendations: commercial fishing rights

Accessing commercial fishing rights presents First Nations with a similar dilemma as that presented by freshwater resources – in the case of attaining rights in fully allocated fisheries, rights can only be forcibly attained at the detriment of existing rights holders, either through cancelling and reassigning existing licenses or diluting existing quota. This is politically untenable and, in any event, inequitable as existing rights – rights akin to a property right - were acquired under lawful circumstance.

Albeit a relatively new development, some jurisdictions are establishing policies that allow some commerciality to be included in traditional fishing rights, as well as making allocation of quota in commercial fisheries that are not fully allocated to First Nations and mandating that First Nations are allocated a minimum allocation in any new commercial fisheries. This trend, combined with aspects of commercial rights determined by jurisprudence such as the Akiba,[36] and Blue Mud Bay,[37] suggests a pathway toward greater ownership of commercial fishing rights by First Nations is emerging.[38]

However, this does not address the issue of ensuring First Nations access to fully allocated commercial fisheries, fisheries which

36 Akiba v Commonwealth (2013) 250 CLR 209
37 Northern Territory v Arnhem Land Aboriginal Trust (2008) 236 CLR 24
38 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 2 - Using the Acquired Assets Background Paper, First Nations Portfolio, Australian National University

are inevitably the more economically valuable fisheries.

5.2.1. Creating clear and consistent pathways for First Nations to acquire commercial licenses and quota

The following Table 13, summarises the proposed pathway to implementation.

Table 13 - *Pathway to creating access for First Nations to commercial quota and licenses*

Reform task	Summary
1. Identification of pathways for activation of First Nations commercial quota	The ILSC recently commissioned a study that explores opportunities and needs for First Nations to participate in commercial fisheries. This preliminary study will explore the current extent of First Nations participation and aspirations in the sector and the status and trajectory of jurisdictional First Nations commercial fishing legislative pathways and participation initiatives. Drawing on the findings of this preliminary study, pathways for securing commercial fishing quota in both fully allocated and unallocated commercial fisheries should be identified.
2. Standardisation for allocation of new and not fully allocated fisheries	Drawing from the observations in Task 1 above, a consistent national framework for allocating commercial fishing rights to First Nations from fisheries that are not fully allocated, or new fisheries should be explored.
3. Funding for the acquisition of licenses and quota in fully allocated commercial fisheries	For reasons discussed above, it is likely that the only viable pathway for acquiring licenses and quota for First Nations interests in fully allocated fisheries is to purchase license and quota in the market. Similar to the case for fully allocated water resources, a fund should be established for this specific purpose. Given its statutory remit, the ILSC would seem a suitable vehicle for managing such a resource.

5.3. Recommendations: First Nations fishing and aquaculture peak body

In 2010, the Fisheries Research and Development Corporation,[39] established an Indigenous Reference Group (FRDC IRG) to provide expertise-based advice on a range of matters dealing with aspects of Australia's First Nations fishing and seafood industry focused on research, development and extension, with a view to providing the FRDC with advice that will improve the FRDC's investment in fishing and aquaculture priorities for Australia's Indigenous people. As the First Nations fishing sector has grown, the sector has sought services from this body that are more akin to those that would normally be provided by an industry peak body. The unique nature of the First Nations fisheries and aquaculture sector, apparent success of the FRDC IRG in raising awareness of First Nations fisheries and aquaculture needs and enhancing research, development and extension outcomes,[40] combined with a growing sector that will increasingly face issues where collective industry representation is required to address its unique needs, presents a strong case for the establishment of an Australian First Nations fishing and aquaculture peak body for the purposes of supporting the advancement of the sector.

39 The Fisheries Research and Development Corporation is one of 15 Rural Research and Development Corporations enacted under various legislation, which are the principal mechanism through which the Australian Government and different sectors of primary production (and in some cases components of their value chains) in Australia co-invest in research and development for industry and community benefits.
40 Australian Venture Consultants (2023), *Independent Review of the Indigenous Reference Group*, Fisheries Research and Development Corporation, Canberra

5.3.1. Supporting the First Nations fishing and aquaculture industry in standing up a National First Nations Fishing and Aquaculture Peak Body

The case for a peak body has been long recognised by the FRDC-IRG and other key First Nations fishing and aquaculture industry leaders.

The following Table 14, summarises the proposed pathway to implementation.

Table 14 - *Pathway to supporting a First Nations led National First Nations Fishing and Aquaculture Industry Peak Body*

Reform task	Summary
1. Support the outcome of the Darwin Forum	The Australian First Nations fishing industry will be holding a conference in Darwin in 2024. An intended key outcome of this conference is agreement on a structure for a National First Nations Fishing and Aquaculture Peak Body. This will be designed by the First Nations fishing and aquaculture industry and, therefore, it is important that it is supported by the Commonwealth and jurisdictional governments.
2. Work with First Nations leaders to ensure representation and expertise is optimal	Given the aforementioned jurisdictional complexities with respect to fishing and aquaculture and marine environment and infrastructure regulation, as well as initiatives and mechanisms to support First Nations participation in the commercial sector, it will be critically important that the peak body established in Task 1 has access to the necessary jurisdictional representation and expertise.
3. Ensure adequate resourcing for the peak body	Across Australia, most fishing and aquaculture industry peak bodies are subsidised by governments, albeit in the case of the larger fisheries at least, those subsidies are derived from resource access fees paid by industry to governments. As a small and emerging sector, the proposed First Nations fishing peak body, by virtue of the limited resources of its members and small license fee contributions, will require significant subsidisation through its formative years and until its members can become adequately profitable to directly support the organisation. Given the challenges faced by the sector, governments should ensure that the peak body is adequately resourced.

5.4. Recommendations: Assessment of emerging offshore industry opportunities

The so called 'Blue Economy' encompasses more than just fishing and aquaculture and environmental management services. Emerging and future sectors include offshore renewable energy generation, carbon sequestration and subsea mining. These new sectors present new challenges and opportunities for First Nations economic self-determination. For example, in many cases the main operational footprint may be outside of traditional Country, but through environmental connectivity, directly impact First Nations Sea Country and lands. If they are outside recognised Country, First Nations business models may need to revolve around coastal and terrestrial linkages and support for the offshore asset.[41]

Understanding the nature of these emerging and future Blue Economy industries and how they may impact First Nations interests and opportunities for economic self-determination important for future planning.

41 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 2 - Using the Acquired Assets Background Paper, First Nations Portfolio, Australian National University

5.4.1. Preparing for the rapid growth of the Blue Economy

The key emerging and future sectors of the Blue Economy may be significant future drivers of First Nations economic self-determination. In order to assist First Nations in better understanding the nature of those potential opportunities, their challenges and pathways to participation, a series of white papers should be commissioned that explore these new sectors and their likely intersection and trajectory with respect to First Nations interests.

The following Table 15, summarises the proposed pathway to implementation.

Table 15 – *First Nations participation in emerging and future Blue Economy sectors white paper series*

Reform task	Summary
1. First Nations Future Blue Economy Opportunities White Paper 1: Offshore Renewable Energy	This white paper should be a detailed and evidence-based assessment of opportunities and constraints pertaining to the establishment of offshore renewable energy infrastructure across Australia, and the trajectory of the sector on a regional scale but with a specific focus on the opportunities and challenges such a sector presents to First Nations and options for First Nations participation.
2. First Nations Future Blue Economy Opportunities White Paper 2: The Marine Carbon Economy	This white paper should be a detailed and evidence-based assessment of opportunities and constraints pertaining to the establishment marine carbon abatement and offsets industry across Australia, and the trajectory of the sector on a regional scale but with a specific focus on the opportunities and challenges such a sector presents to First Nations and options for First Nations participation.
3. First Nations Future Blue Economy Opportunities White Paper 3: Subsea Mining	This white paper should be a detailed and evidence-based assessment of opportunities and constraints pertaining to the establishment of subsea mining across Australian territorial waters, and the trajectory of the sector on a regional scale but with a specific focus on the opportunities and challenges such a sector presents to First Nations and options for First Nations participation.

6. Cultural and Intellectual Property Rights Reform

The economic value that can be created and the level of market differentiation that can be achieved through the application of Australian First Nations unique cultural and artistic expression, traditional knowledge and knowledge in genetic resources that has been created over the course of some 60,000 years – Australian First Nations Cultural and Intellectual Property – is significant. It Is significant not only in its own right (e.g. the $250 million Australian First Nations art and craft market), but as an enabler of opportunities associated with land, freshwater and Sea Country rights (e.g. application of traditional ecological knowledge in primary production and land management or commercialisation of knowledge in genetic resources). This is illustrated in the following Figure 6.[42]

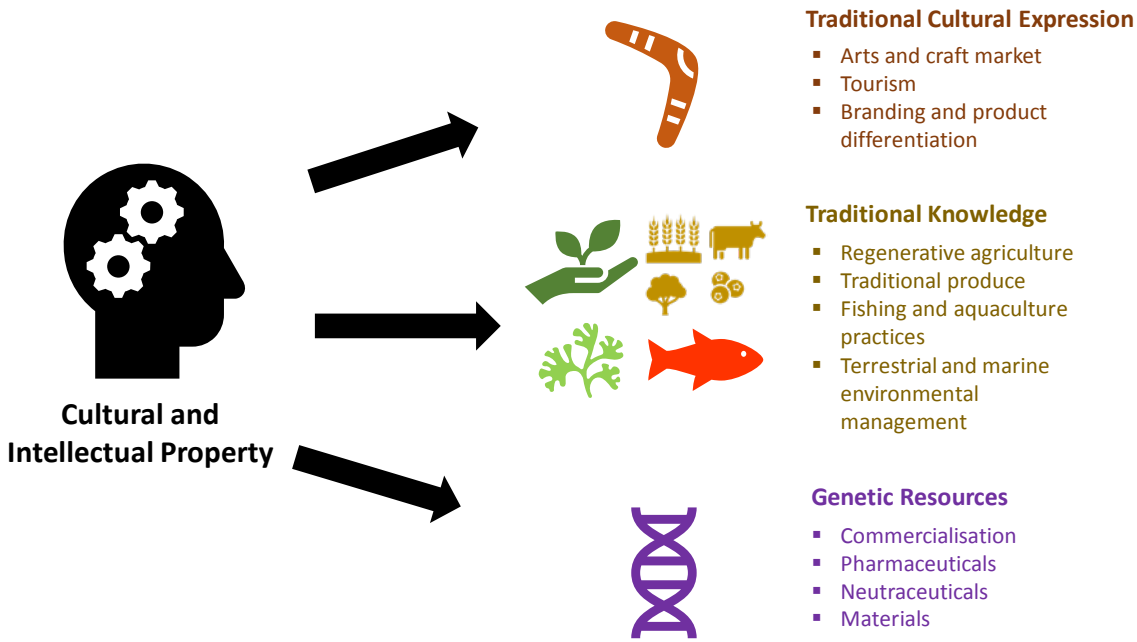


Figure 7 - Opportunities for First Nations to create value from rights and interests in cultural and intellectual property

However, with the exception of very limited protections over cultural expression that can be attained through copyright laws, the Australian intellectual property regulatory framework does not afford adequate protection for First Nations over their cultural and intellectual property, rendering it vulnerable to misappropriation which limits the ability of First Nations to use this extensive asset as a basis for economic self-determination. Further, the lack of an effective property rights structure inhibits the economic potential that should be able to be derived by First Nations from the wealth of their cultural and intellectual property.

It is important to note that whilst it is important that legislative protection of these rights is created, the very nature of cultural and intellectual property rights means that its effective protection and appropriation of any economic value requires an interplay between the legislative process and the cultural processes of Australian First Nations.

Building off the True Tracks Framework created by eminent First Nations intellectual property expert, Terri Janke, as a voluntary framework of guiding principles for those dealing in First Nations cultural and intellectual property, a process for enhancing the ability of First Nations to economically gain is currently underway.

42 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series – Seminar 2 Using the acquired Assets: Preliminary Chapter Draft, First Nations Portfolio, Australian National University

6.1. Recommendations: cultural governance framework for Indigenous Cultural and Intellectual Property

While the principle of free, prior and informed consent pertains absolutely to all dealing in First Nations rights, dealing in Indigenous Cultural and Intellectual Property provides perhaps the most salient example of the need for primacy of this principle. It is imperative that as frameworks are developed to restore, maintain, transfer and protect Indigenous Cultural and Intellectual Property that First Nations are at the centre of design and implementation.

6.1.1. Place-based processes for preservation and transfer of cultural and intellectual property

Colonisation has had a significantly detrimental impact on the culture and intellectual property of Australian First Nations. Massacres, murders, incarceration and assimilation has resulted in the loss of cultural knowledge, practices and languages; relocation has resulted in disruption of connection to cultural lands and waters; private property rights and the creation of enclosed land have limited access to cultural lands and waters; and development has seen the destruction of and damage to sacred artefacts and places, extinction or redistribution of totemic and other culturally important flora and fauna species, and disruption of song lines. Further, the loss of cultural and intellectual property across First Nations is not just the consequence of historical colonisation. Disproportionate premature mortality of Elders who hold cultural knowledge is a direct result of persistent poor socio-economic conditions. Combined with high levels of incarceration and mental health issues among many younger First Nations people, these and many other factors disrupt traditional processes of transferring cultural and intellectual property across generations.

Therefore, many First Nations are in urgent need of resources to fund processes for capturing, storing, enhancing and transmitting critical cultural and intellectual property.[43]

43 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 5 - Policy Options Working Paper, First Nations Portfolio, Australian National University

The following Table 16, summarises the proposed pathway to implementation.

Table 16 – Pathway to a place-based preservation and transfer of cultural and intellectual property program

Reform task	Summary
1. Framework for place-based approach	Various mechanisms have been used by First Nations to avert loss, preserve and grow their cultural and intellectual property such as reinvigoration of ceremonies and their various cultural components within communities, undertaking cultural heritage service activities, elevation of cultural authority in community organisations, art and language centres, co-designed school curricula, 'men's sheds', cultural tourism services, revegetation and land-care programs. Key to the success of a cultural and intellectual property preservation and transfer program is that it is tailored for the cultural and community needs of a specific First Nation. To ensure this is the case, a place-based approach to the program should be co-designed with First Nations and cultural and intellectual property experts.
2. Cross program approach	It is commonplace for governments, corporations and other sources of philanthropic investment to fund many of the sorts of initiatives mentioned in Task 1 above, often under circumstances where preservation and transfer of cultural and intellectual property is not an express and formalised priority of the investment, albeit it is usually at the very least a consequence. Frameworks that render, with the consent of the relevant First Nation, preservation and transfer as an express criteria that must be met should be promoted. This might include cultural and intellectual property that is sensitive and must remain confidential and removed from the public domain.

6.1.2. Place-based processes for identifying, describing and registering cultural and intellectual property

A framework enabling registration of cultural and intellectual property can help to ensure that any economic benefit is preserved for the First Nations owners of that property, and that benefit cannot be misappropriated by third parties leaving the First Nations owners without recourse. The same priority arises if a First Nations cultural and intellectual property framework is perceived not merely in a defensive framework, but also from the perspective of it creating a positive asset. The communal nature of ownership and the sensitivity of some cultural and intellectual property has always presented a challenge to the definition and subsequent registration frameworks.

Concerns such as these can be partially mitigated by the adoption of a place-based approach to identifying, describing and registering cultural and intellectual property.

The following Table 17, summarises the proposed pathway to implementation.

Table 17 – Pathway to establishing a national framework for describing and registering First Nations cultural and intellectual property

Reform task	Summary
1. Linkage to the preservation and transfer of cultural and intellectual property program	It is likely that the place-based approach to developing and implementing the cultural and intellectual property preservation and transfer program that is the subject of the recommendation discussed in Section 6.1.1 above will provide a strong foundation for furthering that framework for the purposes of developing structures for description and registration of a First Nations intellectual and cultural property.
2. Co-design of a description and registration framework	Working in collaboration with First Nations, co-design a series of options for formats in which individual First Nations can choose to describe and register their cultural and intellectual property. These options should cater for a range of cultural sensitivities and non-disclosure requirements, as well as being adequately robust for the purposes of legal protection and enforcement of rights.
3. Design of a national registration framework architecture	For registration to be effective, it must be able to be accessed by third parties undertaking due diligence to ensure that they do not infringe, as well as legal counsel for the purpose of protecting a First Nations cultural and intellectual property and prosecuting their rights therein. However, this system must also adequately protect cultural sensitivities. Drawing on the same co-design principles that underpin Tasks 1 and 2 above, an architecture for a national First Nations Registered Cultural and Intellectual Property database and information service should be designed and with the free, prior and informed consent of First Nations, made accessible to at least First Nations organisations, intellectual property advisers and the legal profession.

6.2. Recommendations: regulatory reform

First Nations cultural and intellectual property is an asset that can underpin economic self-determination for First Nations. The most critical reform to realise this is the creation of First Nations intellectual property rights that are enforceable at law and establishing appropriate institutions that support the maintenance and protection of those legal rights. However, creating enforceable rights of this nature under the contemporary Australian and international legal frameworks is complicated by the nature of much First Nations cultural and intellectual property. This includes the relationships between the cultural and natural (biocultural) environment and First Nations peoples, their custodianship and guardianship activities, and expression of spiritual and cultural identity. These are often qualitatively different from the commercial/industrial or individualistic artistic endeavours more commonly protected by intellectual property law.

6.2.1. First Nations cultural and intellectual property legislation

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

In recognition of this issue, the World Intellectual Property Organisation (WIPO) has through its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) (inaugurated in 2000) attempted to form a consensus view on the best way to ensure First Nations interests are protected by and brought within the existing international

order. The focus of this work has been on challenges presented by the current intellectual property framework with respect to the nature of intellectual property that is in the form of traditional knowledge, traditional cultural expression and genetic resources, with draft articles going to issues such defining misappropriation, identifying ownership and beneficiaries and scope of protection.[44] The status of the WIPO IGC's work is a draft International Legal Instrument that is currently being considered by member nations and other stakeholders,[45] which in 2022 was referred by the WIPO General Assembly to a diplomatic conference for the purposes of its conclusion.

The merits of dedicated legislation that provide stronger, more fit-for-purpose protection for First Nations cultural and intellectual property to safeguard against misappropriation and recognise the value of First Nations cultural and intellectual property as part of a mix of regulatory responses has been recognised by the Productivity Commission.[46]

IP Australia, the Commonwealth agency with primary responsibility for matters of Intellectual Property, has made some progress towards the objective of creating a unique and enforceable First Nations cultural and intellectual property right.

With considerable alignment to the principles of the True Tracks Framework developed by Terri Janke and Company, the initiatives that are being explored by IP Australia include initiatives to prevent inauthentic product, growing the sector based on First Nations cultural and intellectual property, establishing a First Nations Indigenous Knowledge Authority, and creating a new 'Indigenous Knowledge Right' within the Australian intellectual property legal framework.[47]

It has been proposed that the new Indigenous Knowledge Right demonstrates 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, the Right would not be dependent on a requirement of originality or novelty and would not have a set term for protection;
- Similar to copyright, protection would 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 be obliged 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; and
- 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.

IP Australia is also exploring the prospect of a new institution – a 'National Indigenous Knowledge Authority' - that among other things would:

- 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;

44 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 2 - Using the Acquired Assets Background Paper, First Nations Portfolio, Australian National University
45 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2019), *Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources*, World Intellectual Property Organisation
46 Productivity Commission (2022), Aboriginal and Torres Strait Islander visual arts and crafts, Australian Government, Canberra
47 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 5 - Policy Options Working Paper, First Nations Portfolio, Australian National University

- Establish processes to assist third parties to identify and secure the consent of Indigenous Knowledge Rights 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; and
- Powers to initiate enforcement action against unauthorised use and misappropriation of Indigenous Knowledge, breaches of licenses, unauthorised imports and breaches of labelling standards.

The following Table 18, summarises the proposed pathway to implementation of the proposed Indigenous Knowledge Right and its supporting institutional infrastructure.

Table 18 – *Pathway to implementation of a legally enforceable Indigenous Knowledge Right and institutional framework*

Reform task	Summary
1. Ground truthing of the proposed Indigenous Knowledge Right and National Indigenous Knowledge Authority	To date, the development of the prospective Indigenous Knowledge Right has been mainly confined to IP Australia and its Indigenous Advisory Panel. While acknowledging the progress that has been made to date in outlining the nature of the proposed Indigenous Knowledge Right, it is imperative that much wider consultation with First Nations cultural authority, leadership, communities and businesses is undertaken to ensure there is comfort that the proposed legally enforceable right will be effective and not have unintended commercial or cultural consequences. To this end, a formal structure for co-design of national legislation for an Indigenous Knowledge Rights should be established as a priority. Similarly, there is likely to be different perspectives from stakeholders as to the optimal nature and design of the proposed National Indigenous Knowledge Authority in terms of its scope (particularly with respect to the registry function discussed in Section 6.1), powers and structure within or external to government. To ensure that the institution that administers the proposed Indigenous Knowledge Right has the support of stakeholders, extensive consultation will be required. This ground-truthing process should also consider outcomes of the WIP IGC process pertaining to the proposed International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources.
2. Accelerated implementation	Subject to the aforementioned consultation, the IP Australia reform process should be accelerated to implementation, particularly with respect to the proposed Indigenous Knowledge Right and institutional framework that supports its establishment and implementation.

6.2.2. Ratification of the Nagoya Protocol

The Nagoya Protocol explicitly recognises that Genetic Resources are linked with Traditional Knowledge, and that Genetic Resources may be 'held by' First Nation peoples and communities through their unique knowledge and experience of biological organisms. It requires State Parties to take 'via legislative, administrative or policy measures' various specific actions and provide for outcomes beneficial to First Nations, including benefits for First Nations whose traditional knowledge led to discovery, access on mutually agreed terms, and institutional frameworks to administer free prior and informed consent and benefits sharing, as well as compliance and monitoring frameworks.

Australia signed the Nagoya Protocol in 2012 but is yet to ratify the Nagoya Protocol and therefore is not party to it.

The following Table 19, summarises the proposed pathway to implementation.

Table 19 – *Pathway to implementation of the Nagoya Protocol*

Reform task	Summary
1. Engagement and communications	Given a decade has passed since Australia signed the Nagoya Protocol, creating understanding of its operative components and the implications of ratification among key stakeholders will be important to ensure its support. An engagement and communications plan should be developed and implemented to this effect.
2. Ratification of the Nagoya Protocol	Draft and introduce legislation to the Australian Parliament to ratify the Nagoya Protocol.

7. Reform to rights in financial assets

A manifestation of the economic exclusion and the resultant two centuries of very low socio-economic status discussed in this paper is a demonstrable paucity of accumulated financial wealth across the Australian First Nations population. Hundreds of years of no rights over land, freshwater, Sea Country, and cultural and intellectual property, decades of largely non-economic rights over these assets, unemployment and lower income status and negligible inter-generational wealth transfer have resulted in First Nations having limited capital and constrained access to equity or debt finance. This fundamentally limits the ability of First Nations people to capitalise on the opportunities identified in the previous chapters.

Despite this, many First Nations are not without interests in financial assets. As a result of policy, settlements and compensation, and land access agreements, many First Nations across Australia have beneficial interests in trusts and other structures that hold significant financial resources for their benefit. However, these funds are typically managed by third parties, with their use highly prescribed and for the most, they are invested in managed funds rather than specific First Nations assets that can drive economic self-determination.

If First Nations were better able to access the equity in financial assets under management to which they are beneficiaries, it would provide a significant resource for activating the economic value in the land, freshwater, Sea Country, and cultural and intellectual property rights in which they have interests. This is particularly so where that equity can be leveraged against private investment from the responsible investment market, or funding from government First Nations or mainstream economic development programs. This is depicted conceptually in the following Figure 7.[48]

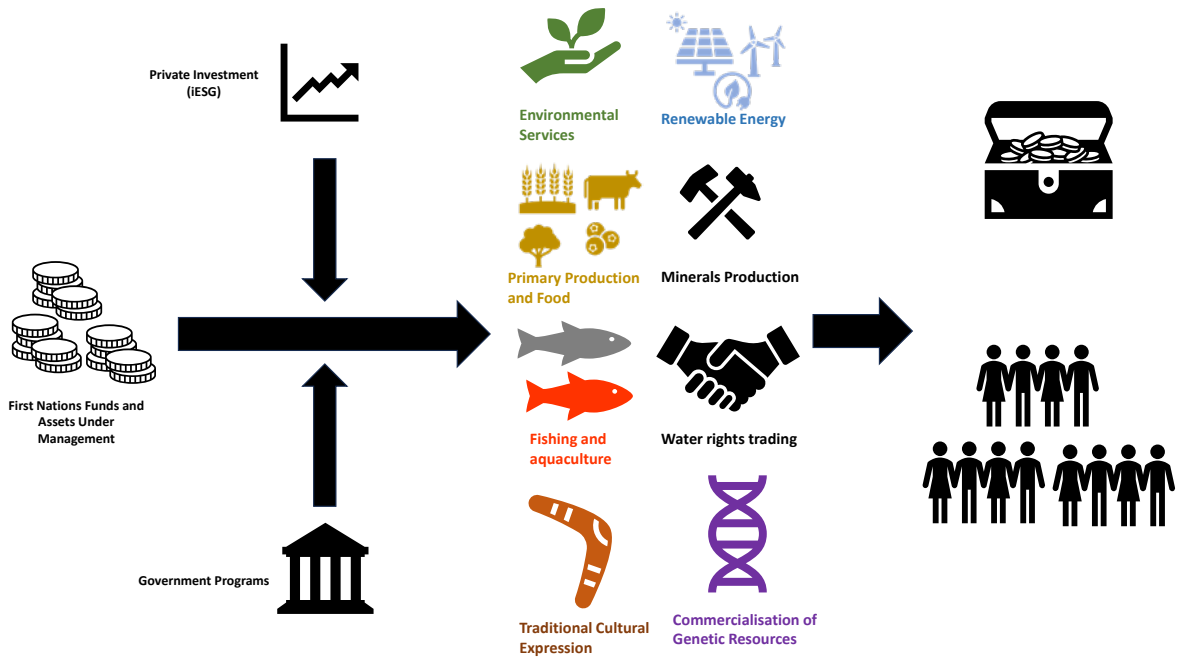


Figure 8 – Deploying First Nations capital for economic self-determination

48 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series – Seminar 2 Using the acquired Assets: Preliminary Chapter Draft, First Nations Portfolio, Australian National University

7.1. Recommendations: capacity building

Whilst there are many commercially capable First Nations organisations, as a result of the impacts of colonisation and sustained poor socio-economic conditions that are derived from colonisation and its processes, many First Nations organisations lack capacity in areas such as enterprise development; market analysis, strategy and sales; commercial law; and financing and related matters.. Certainly, significant progress has been made in better equipping First Nations organisations through the education and career pathways of First Nations leaders, as well as better matching appropriately skilled non-First Nations executives and board members who have a value-system that is more aligned with specific First Nations organisations. Nevertheless, capacity building remains a critical need.[49]

Any commitment to addressing capability gaps cannot be used as a reason to not advance more substantive economic self-determination measures. Programs designed to build capacity must be implemented contemporaneously with the other initiatives discussed in this Draft Policy Position Paper.

7.1.1. Improving enterprise development and growth management capacity

Private capital in the form of equity and debt is mobile – it will seek out investments that meet its financial return aspirations, risk tolerance and other strategic outcomes that might be sought (e.g. implementation of corporate strategy or operations, environmental or social outcomes, etc.). Other things being equal, First Nations enterprise will be more successful accessing finance where it is able to achieve alignment with the mandate of specific investors. By their nature, most First Nations business will achieve strong alignment with investors with a social mandate and some will address needs of investors with an environmental mandate, or strategic and operational alignment with a corporate investor. Where this alignment can be matched with financial returns to the investor, capital will become more accessible.

There is no shortage of business and management training, including education and mentoring programs for First Nations people delivered by governments, not-for-profit organisations, and increasingly the higher education sector. However, these tend to be fairly rudimentary and do not address all the critical skill requirements. Programs that are able to embed enterprise development and growth skills and other higher end business skills will perform an increasingly important role in building the capability that is required to drive optimal economic self-determination.

49 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 5 - Policy Options Working Paper, First Nations Portfolio, Australian National University

The following Table 20, summarises the proposed pathway to implementation.

Table 20 – Pathway to integrating business growth skills in First Nations business and entrepreneurship programs

Reform task	Summary
1. National review of First Nations business and entrepreneur support programs	A detailed analysis of the landscape of government and not-for-profit First Nations business and entrepreneurial support and development programs on offer should be undertaken. This should incorporate all forms of program including short courses, accredited courses and mentoring programs; map the location and clients of each program; assess each program's curricula; and where available, performance assessments.
2. Co-design of a First Nations business growth program	A panel comprised of First Nations community, business and finance leaders, as well as mainstream entrepreneurs, investors and business school academics should be established to develop a range of teaching, mentoring and other skills development initiatives designed to transfer business growth and financing skills to existing and aspiring First Nations entrepreneurs and managers. These initiatives should be designed so that they can be adopted and implemented by the existing First Nations business and entrepreneurial support programs.
3. First Nations business growth program implementation	Drawing on Tasks 1 and 2 above, the Commonwealth should work with existing programs and First Nations communities to tailor the specific tools for existing programs and their clients and support their implementation.

7.1.2. Improving investment management and governance capacity

A key tool in improving the ability of First Nations to utilise equity held in trusts and other instruments to which they are beneficiaries is transitioning the management of those assets to First Nations. While this process has certainly begun in Australia, in most cases there remains a long road to travel until First Nations have control over the financial assets for which they are beneficiaries.

For this to occur, First Nations need to have adequate legal compliance and investment management skills to ensure they can manage the financial asset to achieve the financial return and other outcomes they are pursuing both legally and under a strong governance regime. From an investment management perspective, as First Nations begin to explore deploying capital in ventures and infrastructure that underpins local First Nations economies, these skills will need to go beyond managed investment expertise to private equity and debt financing capabilities, as well as regional economy development skills.

The following Table 21, summarises the proposed pathway to implementation.

Table 21 – Pathway to development investment management and governance capability

Reform task	Summary
1. Co-design of a First Nations Trustee and Funds Management Program	A panel comprised of First Nations community, business and finance leaders, as well as mainstream fund managers, private equity investors, debt financiers and business school academics should be established to develop a program that transfers both legal compliance and investment skills to existing and aspiring First Nations trustees and fund managers. Subject to understanding the market for such a program, its design should give consideration to multiple program entry points ranging from individuals with limited business or financial literacy through to First Nations professionals working in the funds management, investment or legal sectors.

7.2. Recommendations: Growing the First Nations capital market

On the face of it, capital with mandates that are aligned with First Nations ventures is growing. Effectively all growth in assets under management in Australia in recent years is characterised by responsible investment practices, which now account for over 40 percent of all assets under management in Australia. Whilst climate change, renewable energy, waste management and circular economy are the most common themes targeted by responsible investment strategies, Indigenous business and cultural protection ranks approximately equally with important themes such as biodiversity, conservation, natural capital, sustainable transport, social impact and education.[50]

7.2.1. Creating investment opportunity awareness

Promoting awareness of First Nations business and cultural protection as a priority for responsible investors, particularly in the ESG space (or 'iESG' as some have termed it) will very likely increase the amount of capital that is readily visible for the First Nations economy.

50 Responsible Investment Association Australasia (2022) in Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series – Seminar 2 Using the acquired Assets: Preliminary Chapter Draft, First Nations Portfolio, Australian National University

The following Table 22, summarises the proposed pathway to implementation.

Table 22 – Pathway to increasing awareness of investment opportunities in the Australian First Nations self-determined economy.

Reform task	Summary
1. Prospectus and case studies	Utilising the outcomes of the MOLA assessment that is the subject of the recommendation discussed in Section 3.1, a series of case studies across the various dimensions of the Australian First Nations self-determined economy as well as by way of demonstrating potential, the Canadian and Aotearoa/New Zealand self-determined economy, a prospectus targeting the professional investment industry should be prepared. This should be a detailed document that includes, for purposes of illustration, investment returns modelling, risk assessment and socio-economic impact modelling.
2. Investment road-show	The prospectus development in Task 1 above, should be promoted to the national and international professional investment sector, with a particular focus on the ESG and social impact investment segment.

7.2.2. Reducing the hurdle rate for private and public investment

A unique and arguably the most important contribution that the Commonwealth Government can make with respect to mobilising capital for investment in First Nations ventures is to use its balance sheet to lower the hurdle rate for private investors and financiers, as well as other mainstream government economic development programs. While this can be achieved through a range of measures, such as directly investing public funds in the form of free equity (e.g. grants), or as equity on concessional terms, providing debt financing on concessional terms, providing loan guarantees or taxation concessions, it is vitally important that the mechanism for doing this is structured in such a way that it achieves the intended outcome and limits any negative externalities.

The intended outcome is addressing one of market failure. Viable First Nations enterprises deliver substantiative and much need socio-economic outcomes across First Nations communities.[51] However, for a range of reasons private investor hurdle rates are too high for these investments for adequate capital to flow. Therefore, the notion of using public resources to lower those hurdle rates is a clear way of addressing that market failure.[52] Similarly, First Nations ventures are often uncompetitive in addressing the performance measures of various public sector economic development programs.

Understanding and addressing potential negative externalities is a more complex task. These externalities include potential to crowd out existing investors in the market and most importantly, unviable enterprises receiving capital. Both of these risks can be substantially mitigated by public-private co-investment models that vest investment decision-making with professional investors, but within a clear mandate set by policy.[53]

51 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 4 - Self-determination or the highway? Background Paper, First Nations Portfolio, Australian National University

52 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series – Seminar 2 Using the acquired Assets: Preliminary Chapter Draft, First Nations Portfolio, Australian National University

53 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 5 - Policy Options Working Paper, First Nations Portfolio, Australian National University

The following Table 23, summarises the proposed pathway to implementation.

Table 23 – Pathway to deploying public investment to lower the hurdle rate for other investors

Reform task	Summary
1. Establish a clear principles framework	For reasons of efficacy, it is vital that the design of any program that will deploy public capital for the purposes of activating private and other public investment into First Nations enterprise is done so in accordance with a set of principles that will ensure that the deployed capital achieves its intended outcomes and that any potential negative externalities are mitigated. A panel of First Nations business and community leaders, mainstream investment professionals and public policy experts should be established to determine a principles framework for this purpose.
2. Study into mobilising private and public capital into First Nations enterprise	Generally speaking, there is significant private capital and capital associated with various First Nations and mainstream programs that could be bought to bear with respect to activating First Nations self-determined economies. However, the risk-return profile that is characteristic of many First Nations enterprises typically renders First Nations ventures uncompetitive in private impact investment markets and public funding programs. A study should be undertaken to determine the most suitable mechanism for the Commonwealth to use its balance sheet to mobilise capital from the private market and public programs into First Nations enterprises.
3. Program design summit	Drawing from the principles framework established in Task 1 above and the outcomes of the study in Task 2 above, a range of alternative mechanisms for using Commonwealth resources to mobilise private capital and capital from various public programs into First Nations venture should be established. These options should be socialised at a national summit attended by a range of equity investors and debt financiers (with a particular focus on key areas of responsible investing), managers of significant Commonwealth and State industry development programs (such as NAIF), IBA and ILSC to deliberate over the benefits and drawbacks of the alternative models.
4. Program implementation	Drawing on Task 3 above, a preferred program should be designed and rolled-out.

8. A framework for treaty-like agreements and settlement

As the nation approaches a status of full determination under the native title regime and as pressure and engagement on the question of agreement making and reparations for past harms continues, there are important opportunities for First Nations. The specific structure and terms of settlements between government and First Nations, as well as the financial assets that are transferred to First Nations interests under any such agreements will become critical as an enabler of economic self-determination.[54]

Because Britain's claim to sovereignty over Australia was based on the Doctrine of Discovery and *Terra Nullius,* and because there were no historical treaties or enforceable promises made by the Crown to First Nations in Australia, First Nations Australians are generally in a legally and politically weaker position in relation to agreement making compared to Indigenous peoples in Aotearoa/New Zealand, Canada and the United States. State and Territory governments in Australia are slowly advancing commitments to treaty-making with varying success and based on different approaches. Against that backdrop, the preference of governments to negotiate native title settlement agreements rather than go through lengthy and expensive litigation, has opened the door to realising constructive agreement making between the Crown and First Nations Peoples.

8.1. Recommendations: establish the enabling conditions

The rejection of the Voice referendum in October 2023 and the general political discourse surrounding it suggests that there may be, at least in the short to medium term, strong resistance within the Australian electorate, media, and certainly in major political factions, to substantively advancing First Nations rights and interests. Some agreements, which have been described as treaty-like, for example native title settlement agreements in Western Australia, have delivered important gains to First Nations groups and do not appear to have been particularly contentious. Advancing a national treaty-making framework, given the referendum outcome, may be more challenging.

Any commitment to developing a national treaty or agreement-making framework must also engage in educating key stakeholders and the wider public about the benefits of such agreements as well as key, fundamental principles, clearly articulated. Strong and clear information is important and can mitigate against misinformation or disinformation that would invariably be levelled at any commitment for national treaty or agreement making framework.[55]

8.1.1. Truth telling, reparations and 'sovereignty'

Key to any education program designed to build broad public support for national treaty or agreement making will be a process of truth telling, involving among other things, the communication and ownership of key historical facts that invite constructive dialogue about how to settle unfinished business of Australian history, and to fairly address the claims of First Nations peoples. Conversations about loss, damage, and reparations, as well as realising First Nation aspirations for self-determination could be a key focus of that process. It could occur as part of a Makarrata Commission process and be advanced alongside a substantive process to facilitate treaty or agreement making.

8.1.2. Stand-up the Makarrata Commission

To ensure that the education program that is the subject of the Recommendation discussed in Section 8.1.1 is sustained and

54 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 1 - Treaty and Settlement Background Paper, First Nations Portfolio, Australian National University
55 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 5 - Policy Options Working Paper, First Nations Portfolio, Australian National University

effective, it should be facilitated by a permanent institution with a dedicated responsibility. A key recommendation of the Uluru Statement of the Heart, the establishment of the proposed Makarrata Commission would oversee a robust national truth-telling process, the development of frameworks for agreement making and would likely play a key role in assisting in the negotiation of agreements.

8.1.3. Quarantine funds for reparations

While there is no way of accurately quantifying the total reparation account for Australian First Nations, there is broad consensus that the amount is large. It is likely that meeting these obligations will require the establishment of a future fund structure. An investigation into options for establishing such a fund should be undertaken well ahead of the rollout of agreement making at a national scale.

8.2. Recommendations: establish national principles that underpin treaty-like agreements

Concurrent to establishing the enabling conditions the subject of Recommendation 8.1, a comprehensive investigation into aspects that should define a national agreement-making framework should be undertaken. This could be an important early role for a Makarrata Commission.

The *Murru waaruu* process identified several considerations in this regard.

The detail of what treaties or agreements should look like should be subject to a process of critical research, negotiation and collaboration with First Nations peoples and key institutions. It should therefore be a key responsibility of a Makarrata Commission. Nonetheless, the *Murru waaruu* process advanced some proposals that could underpin the development of any such process. This includes that Australian treaties or agreements should be underpinned by a framework agreement of standards and principles that guide negotiations, must be legally enforceable, and address a broad range of matters ultimately fairly negotiated as part of a treaty process. A treaty or agreement making process should also enable subsidiary agreements to be made between groups that deal with a range of matters considered relevant and that can ensure agreements can evolve and change over time.[56]

Some key aspects treaties or agreements could include are:

- **Preambles:** that explain 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 formally legally binding on Australian Governments, rights contained in it are considered by many to be binding at international law. In so far as Australia has capitulated to the convention, it definitely has a a moral if not 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.

56 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series – Seminar 1 Treaty and Settlement: Preliminary Chapter Draft, First Nations Portfolio, Australian National University

- *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 agreements.

- *Compensation and reparations* - treaties or agreements would provide compensation and reparations to First Nations parties which would be negotiated according to agreed principles.

- *Review clauses* - treaties or agreements should not be 'full and final' and should be subject to review and capable of evolving over time. It is important that treaties or agreements are not full and final. They must be able to evolve so they can respond to changing needs of First Nations and government parties as new information and knowledge, new opportunities, and changing societal values, beliefs and expectations. Lessons from overseas highlight that parties will be more inclined to agree to settlement terms if they don't represent full-and-final settlement. There will be a view held by some that non-finalisation of settlements will create uncertainty for third parties, such as developers. However, processes can be built into the settlement framework to reduce this uncertainty and, in any event, final settlements that do not satisfy either party create greater uncertainty.

- *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 agreements.

For treaties or agreements to be enduring they must be legally enforceable. The nature of paramountcy of Australian settler law means that enforceability is a critical concern for treaty-making In Australia. Some key considerations related to how the Crown is held to its promises are:

- **International law**: (public) international law comprises the rules, principles and institutions that facilitate the conduct of states and international organisations in their relations with each other and in some instances with individuals, groups and transnational companies. The intricacies of achieving this jurisdiction for Australian First Nations treaties are beyond the scope of this paper and may prove challenging. However, the formation of treaties under the jurisdiction of international law would place jurisprudence in the hands of a court that is independent from both parties, such as the International Court of Justice, as well as bringing international eyes to the treaty and the conduct of the parties to the treaty. At a minimum, some International oversight may be considered.

- **Australian constitutional law**: the Australian constitution is the highest law in Australia. Recognition of the general structure of treaty frameworks and rights in the Australian constitution would render treaties the jurisdiction of the Australian High Court, as is the case in Canada pursuant to Section 35(1) of the Canadian Constitution Act 1982.

- **Federal legislation**: the Federal Parliament can give effect to treaties or agreements in legislation. Federal legislation could be binding on States and Territories In various ways so far as the Constitution would permit.

- **State legislation**: legislation passed by State or Territory parliaments to give effect to treaties or agreements will only be effective so far as they are not superseded by conflicting Federal legislation or contravene state law making powers allowed under the Australian Constitution. Further, they will only apply to treaties made in their jurisdictions.

9. Institutional Reform

PLACEHOLDER FOR DRAFT FOLLOWING COMPLETION OF SEMINAR 6

10. The case for reform that enables economic self-determination

The proposition of this preliminary Draft Policy Position Paper is not to replace the mainstream economy training-employment-procurement focus that is typical of First Nations economic development policy of Australian Governments, or to in any way dilute the policy initiatives that are proving effective at addressing the more universal targets under the National Agreement on Closing the Gap. Rather this Draft Policy Position Paper is seeking a pivot from this platform either by way of new investment or reallocation from ineffective programs to a framework that directly enables, promotes and fosters First Nations economic self-determination – a framework that complements existing policy and will ensure that First Nations economic equality and justice is achieved.

As summarised in Figure 9 and discussed in the following subsections, the case for the reform is underpinned by three fundamental truisms.

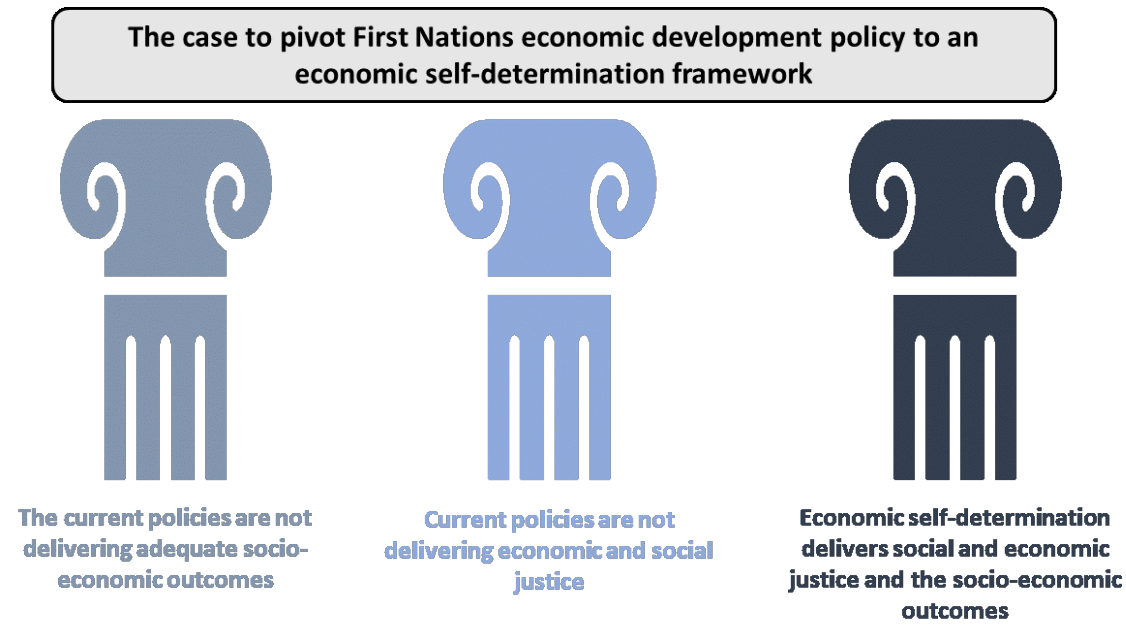


Figure 9 – The case for pivoting First Nations economic development policy to an economic self-determination framework

10.1. Current policies are not delivering adequate socio-economic outcomes

10.1.1. Socio-economic outcomes from the current policy framework are incremental at best

By virtue of the consistent benchmarking and more forensic review of the efficacy of First Nations policy across Australian Governments, there now can be no debate as to the failure of historical and contemporary policy with respect to addressing the socio-economic disadvantage that is endured by First Nations Australians. Recognised by First Nations people for decades, this should no longer be a surprise to the rest of the nation.

Of the 17 targets that comprise the National Agreement on Closing-the-Gap, the nation's primary policy framework for improving the plight of Australia's First Nations peoples, only four are on track to being met by 2031 – participation in early childhood education, adult employment, incarceration of children and legal interests and rights in land and Sea Country outcomes. While the

Closing-the-Gap Targets on track	4
Closing-the-Gap-Targets not on track	10
Closing-the-Gap-Targets that currently can't be measured	3
Total Closing the Gap Targets	**17**

'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.'

Productivity Commission
Review of the National Agreement on Closing the Gap: Interim Report (2023)

Productivity Commission's Annual Data Compilation Report for July 2023 also says that outcomes are improving for most targets, outcomes are getting worse in four target areas; rates of adult imprisonment, children in out-of-home care, and suicide have all increased, and children's early development outcomes at the start of school have declined.

These circumstances present a general argument that the First Nations policy of Australian governments is failing to address quickly enough the socio-economic disadvantage endured by Australia's most marginalised population.

10.1.2. The existing policy framework is a significant fiscal expense

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, [57] the amount is broadly equivalent to the Commonwealth spend on defence or 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.

10.1.3. The current policy framework underpins a productivity penalty

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, there are two significant outcomes that have a detrimental effect on productivity across the wider economy:[58]

- **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.

57 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 3 - What has the past 235 years of policy cost Australia's First Peoples, the Nation and Its Economy Background Paper, First Nations Portfolio, Australian National University
58 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 3 - What has the past 235 years of policy cost Australia's First Peoples, the Nation and Its Economy Background Paper, First Nations Portfolio, Australian National University

10.2. Current policies are not delivering economic equality or justice

10.2.1. Economic self-determination is a human right at international and Australian law

> *'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.'*
>
> **Article 1.1**
> **United Nations Declaration of Human Rights**
> **International Covenant for Civil and Political Rights**
> **International Covenant for Economic, Social and Cultural Rights**

While knowledge of the persistently high levels of socio-economic disadvantage endured by Australia's First Nations people and the failure of the policy of Australian governments to adequately address this situation quickly enough is now more widely broadcast, the breaches of international law that perpetuate this situation are arguably less well understood. 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.[59]

Australia has been a signatory to the United Nations Universal Declaration of Human Rights – the foundational document for all international human rights law – since 1948. Its two covenants, the International Covenant for Civil and Political Rights and the International Covenant for Economic, Social and Cultural Rights contain the same Article 1.1, which infers Peoples the human right of economic self-determination.

In 2009, Australia also endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). As illustrated in Appendix 1, 11 of the 46 Articles of UNDRIP go directly to a Peoples' right to economic self-determination or rights to enablers thereof.

> *'Human rights means the rights and freedoms recognised in the International Covenant on Civil and Political Rights... or recognised or declared by any relevant instrument.'*
>
> **Section 3**
> **Australian Human Rights Commission Act 1986 (Cth)**

59 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 4 - Self-determination or the highway? Background Paper, First Nations Portfolio, Australian National University

Collectively, these insert both a legal and ethical or normative framework of compliance within Australia. Section 3 of the *Australian Human Rights Commission Act 1986 (Cth)* creates a definitional link to human rights as interpreted by these United Nations instruments to which Australia is either a signatory or endorsee. This same Act establishes and provides for the functions of an Aboriginal and Torres Strait Islander Social Justice Commissioner, for whom in performing its functions the definition of human rights is extended to also include the rights and freedoms recognised in the International Convention on the Elimination of All Forms of Racial Discrimination and to give regard to any instruments relating to human rights.

As discussed in Chapter 2, legislative enactment of the right to economic self-determination in Australia is in stark comparison to some other former British colonies such as Canada. Its *United Nations Declaration on the Rights of Indigenous Peoples Act 2021* requires the Canadian Government to take all measures necessary to ensure the laws of Canada are consistent with the UNDRIP and to implement an action plan for that purpose. Accordingly, there is clearly some legal basis and a strong moral, ethical and practical imperative for the enforcement of this right.

10.2.2. The breach is not just historical

> *'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 exploited 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 not 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 Australians 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.[60]

60 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 4 - Self-determination or the highway? Background Paper, First Nations Portfolio, Australian National University

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. As discussed in the preceding chapters of this Draft Policy Position Paper, almost all First Nations statutory land tenure, including that which under the Native Title Act - 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.

10.2.3. The price paid

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 1992 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.[61]

10.3. Economic self-determination delivers the socio-economic outcomes and economic justice and equality

The efficacy of economic self-determination models is derived from the significant socio-economic-cultural multipliers they have demonstrated to deliver to local First Nations economies (see Figure 10).[62] In many cases these multipliers have been demonstrated to be several orders of magnitude greater that is the case for normal mainstream economic activity.

61 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 3 - What has the past 235 years of policy cost Australia's First Peoples, the Nation and Its Economy Background Paper, First Nations Portfolio, Australian National University
62 Barnett, R. (2023), *Murru waaruu* Economic Development Seminar Series Background Paper: Seminar 4 - Self-determination or the highway? Background Paper, First Nations Portfolio, Australian National University

Figure 10 – *Socio-economic-cultural multipliers of self-determined First Nations economies*

Achieving and ideally exceeding the targets of the Closing-the-Gap framework is of vital importance, not only on the basis of the most simplistic notions of humanity and equity, but also in the context of the proposition of this Draft Policy Position Paper, people cannot engage in the economy if they are not safe, healthy, at liberty and adequately educated. It should, therefore, be no surprise that the position of this Draft Policy Position Paper is not to undermine policy initiatives under the Closing-the-Gap framework that are proving effective at addressing the targets, but rather to establish a complementary self-determination framework as outlined in the previous sections that will make a substantial contribution to achieving the targets and in some instances, exceeding them.

Appendix 1: The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP): Article directly relevant to economic self-determination

As listed in the following Table 23, 11 of the 46 Articles that comprise the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) pertain to the right to economic self-determination, or enablers thereof.

Table 23 - 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.

Appendix 2: The *Murru waaruu* process

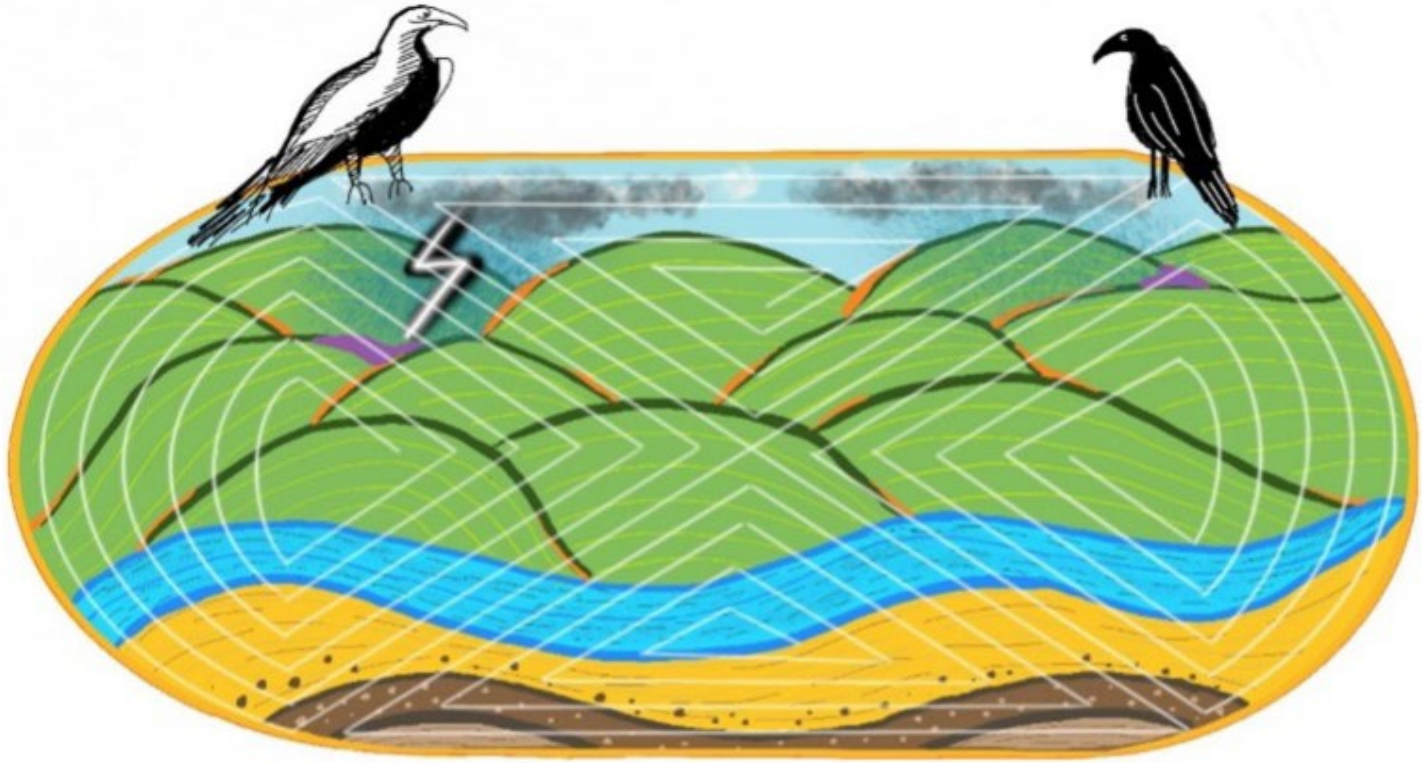
The following Table 24 summarises the *Murru waaruu* process.

Table 24 – Murru waaruu Seminar Series Process

***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 (FNP-Background-Paper-Seminar-One-2023.pdf (anufirstnations.com.au)) ▪ Draft policy chapter (1 Treaty and Settlement Draft Policy Paper Chapter FINAL (anufirstnations.com.au))	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 (Seminar2_UsingTheAquiredAssets.pdf (anufirstnations.com.au)) ▪ Draft policy chapter (2 Using the aquired rights Draft Policy Paper Chapter Draft FINAL (anufirstnations.com.au))	78
The case for change in First Nations economic development policy	14 June 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 (2306_Seminar3_WhatHasBeenTheCost_06.pdf (anufirstnations.com.au))	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 (2308_Seminar4_SelfDeterminationOrTheHighway_07.pdf (anufirstnations.com.au))	93

Murru waaruu Phase	Date	Seminar	Literature	Participation
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 (2309_Seminar5_Policy-Options_03.pdf (anufirstnations.com.au)	102
	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 (Link to be added following seminar)	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**		

All background issues papers and other documents supporting the *Marramarra murru* Symposium and *Murru waaruu* Seminar Series can be accessed at: First Nations Portfolio - ANU - Events (anufirstnations.com.au)



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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