



Law Council
OF AUSTRALIA

Inquiry into economic self-determination and opportunities for First Nations Australians

**Joint Standing Committee on Aboriginal and Torres Strait Islander
Affairs**

12 July 2024

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council is grateful for the contributions received from its Indigenous Legal Issues Committee, and the Australian Environmental and Planning Law Group of its Legal Practice Section. The Law Council is also grateful for the contributions to this submission made by the following of its constituent bodies:

- The Victorian Bar (**Vic Bar**)
- The Law Society of New South Wales (**LSNSW**), and
- The Law Society of South Australia (**LSSA**).

Introduction

1. The Law Council appreciates the opportunity to provide this submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs (the **Committee**) in relation to its inquiry into economic self-determination and opportunities for First Nations Australians. The terms of reference for this inquiry are drawn broadly, which is indicative of the breadth and scale of areas for growth and opportunity for First Nations economic self-determination.
2. Given the breadth of the inquiry and the Law Council's remit, this submission is targeted towards how legal mechanisms and initiatives can make a positive impact along the path towards economic self-determination for First Nations people.
3. For the purposes of this submission, we have used the terms 'Indigenous', 'Aboriginal and Torres Strait Islander' and 'First Nations' interchangeably to reference the Aboriginal and Torres Strait Islander people belonging to this country.

Implementing in Australia the United Nations Declaration on the Rights of Indigenous Peoples

4. The United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**)¹ provides a principled framework for respecting, protecting and fulfilling the individual and collective rights of Aboriginal and Torres Strait Islander peoples, and pursuing their full participation and empowerment across the political, economic, social and cultural apparatus of the State. UNDRIP is the most comprehensive international instrument on the rights of Indigenous peoples and was also drafted with the involvement of Indigenous peoples (including Aboriginal and Torres Strait Islander peoples).²
5. The drafters of UNDRIP recognised that control by First peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.³ As article 3 of UNDRIP states:

Indigenous 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.

6. Economic self-determination is a subset of the broader self-determination right. As the Victorian Bar notes, the right to economic self-determination is not just a collective right of First Nations peoples to pursue the economic development of their lands, water and culture, but encompasses the right of all First Nations people to pursue their own economic development. This includes the ability, both legally and practically, to access education, training, employment and business opportunities. Land rights, broader native title rights and Indigenous cultural and intellectual property (**ICIP**) rights are some of the key tools in the broader economic self-determination landscape for First Nations people.

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex ('**UNDRIP**').

² Australian Human Rights Commission, *UN Declaration on the Rights of Indigenous Peoples* (web page), <https://humanrights.gov.au/our-work/un-declaration-rights-indigenous-people>.

³ UNDRIP (n 1) preamble.

7. While Australia endorsed UNDRIP in 2009,⁴ pledged to uphold it in 2017 as part of its bid for a seat on the Human Rights Council,⁵ and conducted a parliamentary inquiry into its application in Australia in 2023 (which included recommendations for implementation),⁶ no concrete steps have been taken since at the federal level to implement UNDRIP in Australia in a comprehensive manner. We are also concerned that the Government is not undertaking sufficient work to understand how UNDRIP interacts with the Closing the Gap framework.⁷
8. The Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs (**JSCATSIA**) has already made a suite of recommendations on Australia's implementation of UNDRIP, which the Law Council supports and which ought to be pursued. The Law Council recommends that the Government implement the following recommendations of the inquiry as a matter of priority:
 - (a) The Government ensure its approach to developing legislation and policy on matters relating to Aboriginal and Torres Strait Islander people (including, but not limited to, Closing the Gap initiatives) be consistent with the Articles outlined in UNDRIP (Recommendation 1): as a first step, the Government could implement an audit of legislation and policies for consistency with the standards of UNDRIP, and also consider whether amendments are required to the Closing the Gap Agreement to better align the Agreement with UNDRIP (see also paragraph 11 below).
 - (b) The Government develop a National Action Plan, in consultation with Aboriginal and Torres Strait Islander peoples, that outlines the approach to implementing UNDRIP in Australia (Recommendation 2): as the Law Council noted in its 2022 submission to JSCATSIA,⁸ this is a government strategy or policy, not legislation. As such, to be effective, accountability will be important to track progress on outcomes agreed to. Defining metrics of success during the planning stage, collecting and analysing data against those metrics through implementation, and a public reporting mechanism are all important to ensuring the National Action Plan is effective in practice.
 - (c) The Government establish an independent process of truth-telling and agreement-making, as requested by Aboriginal and Torres Strait Islander peoples, as a mechanism to support healing and assist implementation of UNDRIP (Recommendation 4): the Law Council has consistently welcomed the Uluru Statement from the Heart, which calls on the Government to establish a truth-telling and agreement-making body. The Law Council

⁴ Australian Human Rights Commission, *Implementing UNDRIP* (Factsheet, 2021) <https://humanrights.gov.au/sites/default/files/2020-10/implementing_undrip_-_australias_third_upr_2021.pdf>.

⁵ Australian Human Rights Commission, *Incorporating UNDRIP into Australian law would kickstart important progress* (web page, 13 September 2021) <<https://humanrights.gov.au/about/news/opinions/incorporating-undrip-australian-law-would-kickstart-important-progress>>.

⁶ Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (Report, November 2023)

⁷ See for example evidence provided by the Department of Foreign Affairs and Trade (**DFAT**) and the National Indigenous Australians Agency (**NIAA**) to the JSCATSIA, which acknowledged that UNDRIP does not underpin performance frameworks within the department, and provided limited discussion on how the National Agreement on Closing the Gap interacts with and implements UNDRIP: [Evidence to the JSCATSIA, House of Representatives, Canberra ACT, 22 October 2022](#), 1-2, 7-9.

⁸ Law Council of Australia, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022), [2022 06 24 - S - Inquiry into the Application of the UNDRIP in Australia.pdf \(lawcouncil.au\)](#).

welcomes action from the Government to deliver on this request from First Nations Australians, consistent with upholding the right to self-determination.

Recommendation

- **The Government should implement the recommendations made by JSCATSIA in its inquiry into the application of UNDRIP in Australia, and take action on recommendations 1, 2 and 4 as a matter of priority.**

Driving progress on the National Agreement on Closing the Gap

9. In February 2024, the Productivity Commission released its first three-yearly review of government action on the National Agreement on Closing the Gap (the **Agreement** or **Closing the Gap**). The report concluded that governments are not adequately delivering on the Agreement and have failed to “fully grasp the nature and scale of change required to meet the obligations”;⁹ and that changes following the Agreement have merely reflected tweaks to, or actions overlaid onto, business-as-usual approaches by government.¹⁰ The results of the review are extremely disappointing and have been raised as a significant concern by members of the Law Council’s Indigenous Legal Issues Committee.
10. The Law Council strongly supports all the Productivity Commission’s recommendations for change,¹¹ and places emphasis on the aspects of the recommendations set out below as areas for priority action by the Government.

Closing the Gap needs to be reviewed for consistency with UNDRIP

11. The Government’s First Nations policy and legislative development to date has largely been undertaken through the lens of Closing the Gap. Without a review of the Agreement against UNDRIP, shortcomings will likely arise in the Government’s approach. Examples of opportunities for better alignment with UNDRIP include:
 - (a) Priority Reform 1 (Formal Partnerships and Shared Decision Making) can be better aligned to article 3 of UNDRIP through clarifying that shared decision making is a step towards, but does not itself fulfil the right to self-determination, and that self-determination requires efforts beyond shared decision making;
 - (b) Priority Reform 4 (Shared Access to Data and Information at a Regional Level) can be amended to include a commitment to Indigenous data sovereignty. This would align with the right under article 31 of UNDRIP to maintain, control, protect and develop cultural heritage, traditional knowledge, and traditional cultural expressions; the right to maintain, control, protect and develop

⁹ Productivity Commission, *Review on the National Agreement on Closing the Gap* ([Study report, volume 1, 7 February 2024](#)) 3.

¹⁰ Ibid.

¹¹ Productivity Commission, *Review on the National Agreement on Closing the Gap* ([Study report, volume 1, 7 February 2024](#)) 11-24. Note that the report recommends that power needs to be shared (recommendation 1), Indigenous data sovereignty needs to be recognised and supported (recommendation 2), mainstream government systems and culture need to be fundamentally rethought (recommendation 3), and stronger accountability is needed to drive behaviour change (recommendation 4).

intellectual property over these; and the underlying principle of free, prior and informed consent.¹²

12. The Law Council would be pleased to consult with Government on a detailed analysis of the Agreement against UNDRIP.

Aboriginal Community Controlled Organisations (ACCOs) are valuable partners in policy design and delivery

13. Feedback from the Law Council's Constituent Bodies reinforces the observations of the Productivity Commission: i.e. that ACCOs hold valuable knowledge and expertise in delivering culturally safe and effective services in First Nations communities.¹³ Government should therefore be working in partnership with ACCOs in policy delivery, rather than treating them as passive receivers of funding.¹⁴ In the context of economic self-determination, there is a need to work with ACCOs to identify gaps in access to professional services for Indigenous businesses (see paragraphs 45 to 52 below).

First Nations cultural competency and knowledge must be embedded within the Australian Public Service

14. There are several current opportunities that the Government should take up to embed First Nations cultural competency and knowledge within the Australian Public Service (**APS**):
 - (a) Earlier this year, the *Public Service Act 2013* (Cth) was amended¹⁵ to include a new APS value of 'stewardship', which has been described by the Minister for the Public Service as "leaving the APS in a better shape than we found it".¹⁶ Embedding First Nations cultural competency is a significant way in which the public service can deliver on this new APS value, since it builds a better way of engaging with an important segment of the Australian public. In issuing guidance to the APS on this new APS value, we recommend that the Government include the attainment of First Nations cultural competency.
 - (b) In May 2024, the Parliamentary Joint Committee on Human Rights (**PJCHR**) handed down its final report on its inquiry into Australia's human rights framework.¹⁷ This report recommended that the Government make human rights training mandatory for all APS employees, including the Senior Executive Service; and that this include human rights training on delivering services to the community, and developing policy and legislation.¹⁸ Taking up this recommendation can bolster the APS's capability to engage in culturally appropriate ways with First Nations stakeholders and in developing First Nations policy, including through an understanding of human rights concepts such as self-determination, non-discrimination, and free, prior and informed consent.

¹² For an explanation of free, prior and informed consent (FPIC) in the First Nations context, see the resources developed by ANTA [here](#). We note also the significant work that needs to be undertaken in the management of native title interests to embed FPIC principles into business practice – see for example the [overview provided by Corrs Chambers Westgarth](#) on FPIC in the Australian context.

¹³ Productivity Commission, *Review on the National Agreement on Closing the Gap (Study report, volume 1, 7 February 2024)* 19.

¹⁴ *Ibid.*

¹⁵ See the *Public Service Amendment Act 2023* (Cth).

¹⁶ The Mandarin, [Minister sends up signal for APS stewards \(themandarin.com.au\)](#).

¹⁷ PJCHR, [Inquiry into Australia's Human Rights Framework](#) (Report, May 2024).

¹⁸ PJCHR, [Inquiry into Australia's Human Rights Framework](#) (Report, May 2024), xxiv [9.59].

- (c) The Australian Human Rights Commission is currently consulting publicly to develop a National Anti-Racism Framework. This framework can help educate the APS on important matters to bear in mind when developing First Nations policy or legislation, or when engaging with First Nations stakeholders—including avoiding “deficit discourse”,¹⁹ and bringing a trauma-informed perspective (e.g., adhering to the principle of “do no further harm”).²⁰

A federal independent legislative oversight mechanism is urgently needed to achieve the Closing the Gap targets

15. Given the significant lag in achieving progress, the need for an independent oversight mechanism to monitor and assess the progress of Commonwealth bodies against Closing the Gap targets has become urgent. The Law Council recommends that the Government urgently establish an independent oversight mechanism (which we note all Australian jurisdictions have already committed to undertaking in the context of Priority Reform 3).²¹ We recommend that the Commonwealth mechanism be established by legislation, and note the following advantages of a legislative based mechanism:
 - (a) the legislation can clearly define the objective and scope of powers and functions of the mechanism;
 - (b) a legislated mechanism makes it less vulnerable to changes in the political environment, which aids in preserving the mechanism’s independence;
 - (c) individuals who comprise the governing body of the mechanism can be appointed under the legislation, and be subject to the usual limited grounds for termination, which promotes the governing body’s independence in its decision making;
 - (d) the mechanism can be given statutory information-gathering powers to strengthen its ability to effectively review the performance of government organisations against the Closing the Gap framework; and
 - (e) the mechanism can operate transparently and independently of Government, reporting for example to Parliament and tabling its independent reports in Parliament.
16. As set out in the Productivity Commission’s recommendations, this mechanism should be developed in partnership with First Nations people and should operate in a First Nations led manner.

¹⁹ The AHRC has defined “deficit discourse” as framing identity in narratives of negativity, deficiency and failure; and forming a critical part of the racialisation process and protecting white interests by justifying interventions in First Nations and other negatively racialized peoples’ lives:

https://humanrights.gov.au/sites/default/files/document/publication/national_anti-racism_framework_scoping_report_2022_0.pdf

²⁰ Ibid, 17.

²¹ Productivity Commission, *Review on the National Agreement on Closing the Gap (Study report, volume 1, 7 February 2024)* 22.

Recommendations

- **The Government should undertake a review of the National Agreement on Closing the Gap for consistency with UNDRIP, and propose amendments that are required to achieve alignment with UNDRIP.**
- **The Government should work in partnership with ACCOs in the design and delivery of policies and programs for First Nations communities.**
- **The Government should embed First Nations cultural competency as a core skill for the Australian Public Service.**
- **The Government should legislate an independent oversight mechanism to monitor and assess the progress of Commonwealth bodies against Closing the Gap targets.**

Addressing legislative barriers to, and creating opportunities for, economic self-determination

Reviewing the investment settings of Indigenous land funds

17. Recent media reports²² have raised concerns about the historical management of financial investments by the Government in respect of the Aboriginal and Torres Strait Islander Land and Sea Future Fund (**ATSILSF Fund**), and the Aboriginal Benefit Account (**ABA**). These reports suggest that the Government has lost the opportunity for significant returns over the years due to conservative investment strategies required by legislation.

Aboriginal and Torres Strait Islander Land and Sea Future Fund

18. The ATSILSF Fund was established to complement the native title regime in circumstances where native title had been extinguished. The purpose of the ATSILSF Fund was to form a capital base from which the Indigenous Land and Sea Corporation (**ILSC**) could draw income from to acquire land and water-related rights for the benefit of First Nations Australians. From the mid-1990s to 2019, until its management was transferred to the Future Fund, the majority of capital from the ATSILSF Fund was invested in low yield term deposits in order to comply with statutory obligations.²³

19. The purpose of the *Financial Management and Accountability Act 1997* (Cth) (**FMAA**), which applies to the management of the ATSILSF Fund, 'is to provide a framework for the proper management of public money and public property'.²⁴ Under section 39 of the FMAA, public money such as that in the ATSILSF Fund must only be invested in an authorised investment, which includes Commonwealth or State or Territory securities, a deposit with a bank or any of form of investment prescribed by the regulations.

20. Because the ATSILSF Fund does not receive any additional money each year, the balance of the fund is now significantly lower than what it could have been if

²² Ronald Mizen and Peter Ker, "'Disgraceful' government neglect costs Indigenous funds \$1b', *Australian Financial Review* (online, 3 June 2024) <<https://www.afr.com/politics/federal/disgraceful-government-neglect-costs-indigenous-funds-1b-20240229-p5f8wy>>.

²³ Ibid.

²⁴ *Financial Management and Accountability Act 1997* (Cth).

investments for the fund had been allowed to pursue a more balanced investment strategy rather than being placed in a bank account term deposit.²⁵ Between 2007 and 2019, the ATSILSF Fund investments provided an average return of 4.2 percent; in comparison, the Future Fund returned on average about 8.5 percent over the same period.²⁶

21. We understand that the ILSC, which receives annual payments from the ATSILSF Fund, could have been provided which tens of millions of dollars in annual payments, or hundreds of millions of dollars if those funds had been reinvested instead.²⁷ This type of investment return would have had a significant impact on the economic power of the ILSC.

Aboriginal Benefit Account

22. Similarly, the ABA, established in 1978 to manage royalties from mining on Indigenous land in the Northern Territory, has been subject to the same restrictions as the ATSILSF Fund—and since 2012, 100 percent of its funds under management have been put into bank account term deposits to comply with statutory obligations.²⁸ It is estimated that, if the ABA had been permitted to pursue a more balanced investment strategy over 2013–14 to 2018–19, it could have made \$173 million more by 30 June 2023.
23. The Government should review the legislative settings for the ABA to assess whether they are fit-for-purpose. We also recommend that the Government consider how it may address the historically lost opportunity for income due to these conservative investment strategies, by for example providing a financial injection to these funds.

Recommendations

- **The Government should review the legislative settings for investments made under the ABA to assess whether they are fit-for-purpose.**
- **The Government should consider options to address the lost opportunity for higher investment returns through the ATSILSF Fund and ABA.**

Reducing the complexity of native title

24. Constituent bodies of the Law Council have continued to express the position that Commonwealth Government should focus on streamlining the interaction between the *Native Title Act 1993* (Cth) and state and territory native title legislation. The regulatory framework for native title holders is complicated and difficult to navigate.
25. Accordingly, native title applicants often rely on legal practitioners for advice in progressing their claim from the outset and through the determination process. That advice is critical to establishing and maintaining Prescribed Bodies Corporate (**PBCs**) and Registered Native Title Bodies Corporate (**RNTBCs**). The Law Council highlights the importance of legal representation for native title applicants that is conducted by a

²⁵ Ronald Mizen and Peter Ker, “Disgraceful” government neglect costs Indigenous funds \$1b’, *Australian Financial Review* (online, 3 June 2024) <<https://www.afr.com/politics/federal/disgraceful-government-neglect-costs-indigenous-funds-1b-20240229-p5f8wy>>.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Mizen and Ker (n 27).

practitioner who has comprehensive understanding of the regime and can translate that complexity into plain English to those they represent.

The financial burden of compliance for Registered Native Title Bodies Corporate

26. Unlike owners of freehold land, native title holders face significant barriers to activation of their assets. A significant gap exists between the resources available to PBCs and RNTBCs and the perpetual mandatory regulatory costs they face.
27. In 2021, the Centre for Aboriginal Economic Policy Research at the Australian National University College of Arts & Social Sciences published the report *Toward a Perpetual Funding Model for Native Title Prescribed Bodies Corporate* (the **CAEPR Report**).²⁹ At the time of publication in May 2021, there were 232 PBCs with almost 40 percent of Australia's lands and waters under native title.³⁰
28. The CAEPR Report notes:

It has been widely acknowledged by a series of government-initiated reviews and inquiries that the expanding range of functions required by PBCs has led to a growing mandatory administrative burden. It is also acknowledged that the funding made available to perform these functions has been, and continues to be, grossly inadequate, certainly for the vast majority of PBCs who have little or no income. This mismatch between mandatory duties and available funding has long been undermining both PBC capacity and socioeconomic development outcomes for common law holders (Bauman et al., 2013; Burbidge et al., 2020, p. 43; Deloitte Access Economics, 2014; Dillon, 2017, 2021; Langton & Frith, 2010; Productivity Commission, 2020, pp. 333–334).

Native title rights themselves are inalienable, meaning that they cannot be sold, and are perpetual. Put simply, native title is forever. Accordingly, PBCs are established in perpetuity having no legal or regulatory end date. This has important implications for PBC funding. For example, if a PBC becomes insolvent, the native title rights remain inalienable and cannot be sold by an administrator. Fundamentally, PBCs will require a stream of operation revenue in perpetuity, given the permanence of their legal rights to native title and obligations under the [Native Title Act 1993 (Cth)] and [Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)].

...

... on the basis of data provided by the [National Native Title Council], there is a significant shortfall in annual funding for core compliance by PBCs, with government funding, currently available through the PBC Basic Support Funding and the PBC Capacity Building Funding, only meeting around 10% of PBCs' core compliance costs.³¹

²⁹ Woods et al (n 26).

³⁰ Ibid, 1.

³¹ Ibid.

29. The CAEPR Report estimates that any PBC would need approximately \$500,000 in funding each year to cover its costs of compliance with statutory obligations³² to simply enable it to engage in discussions regarding economic activation of the land using the framework of free, prior, informed consent. Furthermore, additional funding would be needed to engage in meaningful business development.³³
30. The CAEPR Report analysis of available data also found that more than half of the PBCs in the study not only start small but have remained small over the course of their existence, and some PBCs may decline in their financial fortunes, rather than grow. A ‘small’ corporation is defined by the Office of the Registrar for Indigenous Corporations (**ORIC**) as a corporation that will have at least two of the following in a financial year:
- consolidated gross operation income of less than \$100,000;
 - consolidated gross assets valued at less than \$100,000; and
 - fewer than five employees.³⁴
31. This analysis raises the need to either change how PBCs are funded, or to reform the regulatory burden on PBCs to enable greater financial sustainability. The Law Council welcomes the Government’s \$20.8 million 2024–25 Budget measures to improve the native title system, which we hope will address some of these issues.
32. As a threshold issue, PBCs must be enabled to develop the capabilities and capacity to effectively and efficiently deal with their native title, heritage and cultural obligations, and be in a position to then pursue expanded aspirational goals. This will include resourcing the skills and capacity training (such as project management and business development skills) necessary for activating native title assets. Smaller PBCs and those in more remote locations may require greater support to meet the challenges posed by factors such as size and geographical isolation.

Recommendation

- **The Government should reduce the complexity of regulatory compliance for PBCs and RNTBCs.**

Simplifying compliance obligations for Indigenous businesses

Success of the Indigenous business sector

33. The Indigenous business sector is a success story for First Nations economic self-determination. Research published by the University of Melbourne this year has found that the Indigenous business sector contributes more than \$16 billion to the Australian economy, employs 116,795 people and pays \$4.2 billion in wages.³⁵ The Government’s Indigenous Business Sector Strategy has well supported the growth of the sector through facilitating access to capital, access to markets (particularly the government sector through the Indigenous Procurement Policy), market information

³² *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth); *Native Title Act 1993* (Cth); *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

³³ Woods et al (n 26) 15-16.

³⁴ Office of the Registrar of Indigenous Corporations, *Corporation size and reporting* (Factsheet) <<https://www.oric.gov.au/publications/catsi-fact-sheet/corporation-size-and-reporting>>.

³⁵ University of Melbourne, *Indigenous Business Snapshot reveals significant value to Australian economy* (17 April 2024), < <https://www.unimelb.edu.au/newsroom/news/2024/april/indigenous-business-snapshot-reveals-significant-value-to-australian-economy>>.

about Indigenous business via Supply Nation and developing know-how through business hubs.³⁶

34. Indigenous entrepreneurship reveals that First Nations people and their advisors are at the cutting edge of modern commerce, rather than mere recipients of needs-based economic support. Indigenous businesses are active in every sector of the Australian economy, ranging from agribusiness, food and beverages to construction, engineering, tourism, energy as well as creative industries.³⁷
35. While the sector is experiencing substantial growth, there is room to significantly develop First Nations entrepreneurship well beyond its current extent. Indigenous businesses are not confined to 'cultural' operations such as tourism or art; they include many commercial and industrial endeavours (examples include road contracting, finance, mining, commercial fishing).³⁸ Policy settings that encourage the growth of commercial and industrial based Indigenous businesses can lift the sector into the next frontier.

Opportunities to simplify compliance obligations for Indigenous businesses

36. Notwithstanding these successes, the regulatory environment for Indigenous businesses is complicated. As an example, the LSSA has noted that any or all of the following entities may be engaged for Indigenous businesses operating in South Australia:
 - (a) Office of the Registrar of Indigenous Corporations;
 - (b) Office of Consumer Business and Services;
 - (c) Australian Charities and Not-for-profits Commission;
 - (d) Australian Business Register;
 - (e) Indigenous Business Australia; and
 - (f) First Nations Chamber of Commerce.
37. We therefore recommend that, as part of an Indigenous Business Sector Strategy refresh, the Government consider what regulatory barriers faced by Indigenous business can be simplified or removed.

Recommendation

- **The Government should undertake a refresh of its Indigenous Business Sector Strategy and examine opportunities to simplify or remove regulatory barriers faced by Indigenous businesses.**

³⁶ National Indigenous Australians Agency, *The Indigenous Business Sector Strategy: Supercharging Indigenous Business Start-Up and Growth 2018-2028* (Report, 2018) 7 <https://www.niaa.gov.au/sites/default/files/documents/publications/ibss_strategy.pdf>.

³⁷ Supply Nation, *Supply Nation notches 5,000 Indigenous businesses* (28 June 2024), <<https://nit.com.au/28-06-2024/12232/supply-nation-notches-5000-indigenous-businesses>>.

³⁸ For an overview of alternative approaches to Indigenous entrepreneurship and its context within both traditional First Nations and post-settlement, see Kelleher, L. M., 2012, *Schumpeter's Bahnbrechen Considered in the Light of Native Title Legislation and Indigenous Entrepreneurship*, PhD thesis, 4.2, 147-163. See also Hindle, K & M Lansdowne, 2005, Brave Spirits on New Paths: Toward a Globally Relevant Paradigm of Indigenous Entrepreneurship Research, *Journal of Small Business and Entrepreneurship*, Vol 18, No 2, Spring, 132 for a discussion of what constitutes an Indigenous business.

Standalone legislation for Indigenous Cultural and Intellectual Property Rights

38. Recognition and protection of Indigenous cultural and intellectual property (ICIP) rights for First Nations people is an essential part of their cultural heritage.³⁹ These rights are unique in that they are passed on from generation to generation,⁴⁰ and are rights that belong to a group of people, as opposed to one person.⁴¹ First Nations communities possess distinct aspects of their knowledge, creative expressions, and innovations,⁴² which are often very deep-rooted and at times difficult to define. Additionally, First Nations communities also have cultural products, expressions, and manifestations⁴³ that are intricately woven into all other facets of society.⁴⁴
39. However, First Nations knowledge, culture, creative expressions, and innovations have been in ways at 'odds with conventional western notions of intellectual property'.⁴⁵ For example:
- (a) **Communal ownership:** Under Indigenous customary law, traditional knowledge or cultural works are more likely to have been created over many generations and are deemed to be owned collectively by the tribal or family group (i.e., communally owned), whereas in non-Indigenous law, for copyright to exist in a work, it must be original and attributed to a specific individual or individuals.⁴⁶
 - (b) **Oral traditions and transient artwork:** Section 35 of the *Copyright Act 1968* (Cth) requires that any copyrighted work must be in material form (i.e., a physical or tangible embodiment of the work). However, ICIP is 'traditionally orally based and transferred through practice'⁴⁷ such as songs, dances and stories (told through a painting) and can also be transient in nature such as body and sand paintings.⁴⁸

³⁹ Rupert Myer, [Report of the Contemporary Visual Arts and Craft Inquiry](#) (June 2002) 150.

⁴⁰ Terri Janke and Robynne Quiggin, [Indigenous cultural and intellectual property: the main issues of the Indigenous arts industry in 2006](#), (10 May 2006) 11.

⁴¹ Ibid.

⁴² Rupert Myer, [Report of the Contemporary Visual Arts and Craft Inquiry](#) (June 2002) 150.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid. See also Dr Terri Janke, [Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights](#) (1998) 50 – 96. Terri Janke provides a guided discussion on the existing domestic laws that address ICIP, and to what extent they protect ICIP rights. See also the Arts Law submission on this consultation where it was noted that the *Copyright Act* was introduced to incentivise creative output, but it does not sufficiently grapple with the differences in creative output for First Nations Australians. Stand-alone legislation that effectively protects these types of rights, will work to incentivize creative output containing ICIP.

⁴⁶ Standing Committee on Environment, Communications, Information Technology and the Arts, [Indigenous Art – Securing the Future: Australia's Indigenous visual arts and craft sector](#) (20 June 2007) 11.8. See also section 32 of the *Copyright Act 1968* (Cth) (**Copyright Act**) states that for copyright to exist in a work, it must be original. Artwork that is based on or derived from a tradition pre-existing theme may not be considered original, meaning no copyright over that particular piece of art subsists. Further, subsection 35(4) of the *Copyright Act* attributes ownership to an identified individual or individuals. This makes it particularly challenging for First Nations artists to claim rights over literary, dramatic, or artistic works to one person or specific persons as it would be claiming rights over certain materials that belong to the community. A similar issue exists in the *Designs Act 2003* (Cth) where protections are afforded to designs in relation to products and items (see section 8). However, this poses issues with certain designs such as 'Indigenous clan insignias' which may not be commercially applied to a product, therefore they won't be registerable under the Act and thus not afforded protection.

⁴⁷ Terri Janke et al., [Rights to Culture: Indigenous Cultural and Intellectual Property \(ICIP\), Copyright and Protocols](#) (29 January 2018).

⁴⁸ Standing Committee on Environment, Communications, Information Technology and the Arts, [Indigenous Art – Securing the Future: Australia's Indigenous visual arts and craft sector](#) (20 June 2007) 11.14.

- (c) **Expiration of intellectual property rights:** While ICIP is recognised to an extent in existing legal frameworks, the expiration of general copyright and design protection poses a significant risk to the cultural works and designs by First Nations communities. The lapse of these protections can lead to unauthorised use and misappropriation of these works, undermining the integrity and cultural significance those works holds for First Nations communities.⁴⁹
- (d) **Sale of inauthentic products and the Australian Consumer Law:** Sections 18 and 29 of the Australian Consumer Law (ACL)⁵⁰ prohibit misleading or deceptive conduct and false or misleading representations in the marketing and sale of products and services, including First Nations art and craft products and merchandise. However, the ACL does not preclude the sale of 'inauthentic art and craft products, unless they are falsely labelled'.⁵¹
40. The Law Council has for a long time supported *sui-generis* legislation as the likely best long-term option to resolve the complex challenges of properly recognising and protecting ICIP within current legislative frameworks.⁵² Stand-alone legislation honours and respects the culture and traditions of First Nations communities,⁵³ acknowledges First Nations contributions by ensuring that their legacies are preserved, and fosters cultural continuity and respect for First Nations identities. We therefore welcome and support the Department of Infrastructure, Transport, Regional Development, Communication, and the Arts current consultation on the development of stand-alone legislation to protect ICIP rights.⁵⁴ The Law Council recently made a submission as part of this consultation.⁵⁵

⁴⁹ See section 33 of the Copyright Act which provides that the duration of copyright protection is generally the life of the artist plus 70 years and section 46 which provides that a duration of a design registration is maximum 10 years.

⁵⁰ *Competition and Consumer Act 2010* (Cth) schedule 2 (Australian Consumer Law), sections 18 and 29.

⁵¹ House of Representatives Standing Committee on Indigenous Affairs, [Report on the impact of inauthentic art and craft in the style of First Nations peoples](#) (December 2018) [4.84]. The Committee indicated that the Australian Consumer Law cannot deal with issues of inauthentic Indigenous products... making it inadequate to deal with the misappropriation of culture. Stand-alone legislation may be the best long term option to resolve this complex issue.

⁵² House of Representatives Standing Committee on Indigenous Affairs, [Report on the impact of inauthentic art and craft in the style of First Nations peoples](#) (December 2018) xxi (Recommendation 8). See also Law Council of Australia, [Interim Report on stand-alone legislation to protect and commercialise Indigenous Knowledge](#) (10 November 2022); Law Council of Australia, [Aboriginal & Torres Strait Islander Visual Arts & Crafts Inquiry](#) (14 September 2022) [24] – [30] and Law Council of Australia, [Enhance and Enable – Indigenous Knowledge Consultations 2021](#) (3 June 2021) [102].

⁵³ A similar approach provides support for the stand-alone protection offered to Indigenous cultural heritage in various State and Commonwealth legislation including: *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); *Aboriginal Heritage Act 1972* (WA); *Aboriginal Heritage Act 1988* (SA) and *Aboriginal Heritage Act 2006* (VIC).

⁵⁴ Department of Infrastructure, Transport, Regional Development, Communication and the Arts, [Indigenous cultural and intellectual property rights](#).

⁵⁵ Law Council of Australia, A new legislative framework to address and protect Indigenous Cultural and Intellectual Property Rights (5 July 2024), <[4553 - S - Standalone legislation regarding Indigenous Cultural and Intellectual Property Rights.pdf \(lawcouncil.au\)](#)>.

Improving access to professional services for regional, rural and remote communities

Assistance to access legal, financial and strategic services

41. Indigenous businesses require access to appropriate legal, financial and strategic services to be able to thrive as an enterprise. While some businesses will have the means to access those services from inception, many will require assistance to access and pay for these services in their establishment phase.

Provision of pro bono services by the legal profession

42. The legal profession already makes substantial pro bono contributions to enable Indigenous entrepreneurship. For example, Lawyers for the Arabunna Maree People (**LAMP**) provided in excess of \$20 million of pro bono assistance at the request of a small remote Aboriginal community relating to serious and important legal matters concerning the management and protection of their Country. Other individual law firms are routinely approached by First Nations peoples all over Australia to provide legal assistance in matters relating to economic management and protection of Country. This is often separate from native title work, and can involve a range of issues to protect economic assets, including rights to hunting and fishing entitlements, rights to water or entitlements to Country-related intellectual property including intangible cultural heritage such as stories.
43. The legal profession is experiencing a high demand for this type of legal assistance which stretches beyond the capacity of existing resources within legal practices. Government support to supplement these types of services (for example, matching dollar for dollar the law firm contributions in pro bono services) can go a long way in meeting this unmet demand from First Nations people.
44. Conflict of interest is a further issue in the provision of legal services relating to protection and management of Country. Particularly in native title claims which generally involve many parties, concerned First Nations people frequently find that knowledgeable lawyers already act for another party and cannot provide legal services due to an existing conflict of interest.

Jurisdictional specific examples of professional service delivery

45. The LSNSW and LSSA have emphasised the need to ensure the availability of professional services, and the benefits of working with ACCOs to identify gaps in service availability and access and accompanying solutions.
46. Some examples of effective access to professional services assistance, supplied by our Constituent Bodies, is set out below.

New South Wales

47. The Law Society of New South Wales notes the example the Yarpa Hub in NSW: a “one stop shop for First Nations businesses, industry and community”.⁵⁶ It is a partnership between the NSW Aboriginal Land Council and the Australian Government, established in 2018 under the Indigenous Business Sector Strategy,⁵⁷ and provides custom business solutions, skills training and support in the key areas of

⁵⁶ Yarpa Hub, *Strengthening the First Nations Business Sector in NSW* (online) <<https://yarpa.com.au/>>.

⁵⁷ Yarpa Hub, *About Yarpa* (online) <<https://yarpa.com.au/about/>>.

employment, business support and industry support to members. Membership is open to:

- *First Nations businesses (at least 50% owned and controlled by First Nations people);*
- *First Nations people in the very early stages of business or who aspire to start a business;*
- *Corporate, industry, government and NGP entities that have a genuine commitment to supporting the socio-economic prosperity of First Nations people and communities;*
- *First Nations individuals seeking connections and advice to support their own employment success;*
- *Employment Service Providers committed to providing culturally appropriate support to First Nations job seekers.*⁵⁸

48. By way of example, services provided to First Nations business members include:

- Access to one-one-one business coaching and mentoring
- Priority invitation to training and development workshops and networking events
- Participation in Yarpa Grow—a business accelerator program delivered in partnership with Western Sydney University
- Promotional spotlight of their business via social media and newsletter
- Business directory listing
- Facilitated connections to industry, corporate and government members who have a commitment to increasing First Nations engagement within their supply chain.⁵⁹

South Australia

49. The LSSA has highlighted that provision of free legal services in regional and remote South Australia is largely offered by the Aboriginal Legal Rights Movement (**ALRN**)⁶⁰ and Legal Services Commission of South Australia,⁶¹ as well as pro bono work through JusticeNet. Notably, the latter has developed its ACCO Connect program which is currently assisting Aboriginal Lands Trust groups only.

50. These organisations are well-positioned with the necessary expertise to carry out initiatives to improve access to justice and bolster economic self-determination for Aboriginal people in South Australia. However, the extent to which such organisations are able to do this across Australia is largely dependent on the funding that is made available to them, and contingent on the particular jurisdiction within which they operate.

51. Despite the positioning of these types of organisations and bodies to provide valuable assistance, the LSSA notes current funding levels for access to a range of legal services by First Nations peoples in South Australia continues to fall well below the level of demand. Without service provision extending to the legal assistance that is

⁵⁸ Yarpa Hub, *Membership* (online) <<https://yarpa.com.au/membership/>>.

⁵⁹ Ibid.

⁶⁰ See Aboriginal Legal Rights Movement, *Homepage* (online) <https://www.alrm.org.au/>.

⁶¹ See Legal Services Commission of South Australia, *Homepage* (online) <https://lsc.sa.gov.au/>.

readily accessible and relevant to Aboriginal needs, it is apparent that the ability of Aboriginal people to build economic capacity and strength will be limited in South Australia, and beyond.

52. Provision of accessible informed services that are sensitive to the operational needs and relational preferences of First Nations peoples, as needs arise, is crucial to meaningful support of the development of economic independence at grassroots levels and above.

Accessible information to make informed choices

53. Some First Nations people may speak English as a second or third language, or otherwise experience English literacy or communication barriers. Or they may have experienced prior disempowerment within Australia's administrative or legal systems leading to confusion or undermining trust in the legal system.⁶²
54. Some of the Law Council's Constituent Bodies have raised that best practice accessible language, information and distribution are not systematically deployed in communities to provide preventative or educational resources to empower First Nations people to make their own informed choices, particularly when it comes to economic empowerment.
55. The Law Council recommends that the Committee encourage relevant stakeholders to foster a combination of hyper-local solutions led by community and democratised accessible information that is designed for the needs of those in the community. This may mean, instead of providing a legal practitioner for a town or community, providing training for a community member to become a paralegal who can then help drive referrals and pathways as needed but also be a source of location-based evidence as to what is needed in the community.
56. The Law Council understands from the LSSA that this model of consultation with remote communities as to their legal needs has been applied to some extent in South Australia for many years, in order to navigate the legal complexities arising from the interaction between federal and state/territory agencies and legislation.

⁶² Law Council of Australia, *The Justice Report* (Report, August 2018), 31
<<https://www.lawcouncil.asn.au/justice-project/final-report>>.