AIATSIS Submission - Inquiry into the Opportunities and Challenges of Engagement with Traditional Owners in the Economic Development of Northern Australia

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About AIATSIS

AIATSIS is Australia’s national Institute dedicated to Aboriginal and Torres Strait Islander peoples’ knowledge, societies and cultures. We are both the custodian of Australia’s national collection of Aboriginal and Torres Strait Islander heritage materials and one of Australia’s publicly funded research agencies. AIATSIS has legislative responsibility, *inter alia*, to provide leadership in Aboriginal and Torres Strait Islander research, providing advice to government on Aboriginal and Torres Strait Islander culture and heritage including native title. AIATSIS is committed to ensuring Indigenous knowledge, culture and governance are respected, valued and empowered by laws and policies that concern them. AIATSIS also has legislative responsibility to provide leadership in best practice ethical research with Indigenous peoples and in relation to Aboriginal and Torres Strait Islander collections’ practices.¹

AIATSIS actively undertakes research on issues that impact on the lives of Aboriginal and Torres Strait Islander peoples. The AIATSIS Native Title Research Unit (NTRU) was established 26 years ago following the High Court’s *Mabo*² decision as a partnership between the Commonwealth Indigenous affairs portfolio


² *Mabo and ors v State of Queensland (No 2)* 175 CLR 1
agency and AIATSIS. AIATSIS supports the native title sector and conducts research and analysis of the law, policy and practice of native title. Our research is informed by community governance and is underpinned by the principles of our Guidelines for Ethical research with Indigenous Peoples (GERAIS)\(^3\). The new AIATSIS Indigenous Research Exchange established in 2018 will provide additional capacity to coordinate and connect Indigenous communities, research and policy making.

It is on this basis that AIATSIS makes the following submissions to the Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia:

- The involvement of Aboriginal and Torres Strait Islander peoples is necessary for the successful design of policy and programs and in order to define the indicators of success and in setting targets for measuring achievement. Retaining connection to country is critical to the identity and cultural continuity of Aboriginal and Torres Strait Islander societies and as a consequence, for the wellbeing and self-determination of Aboriginal and Torres Strait Islander peoples and should not be compromised at the will of the State in pursuit of economic development.

- Native title should be reformed to ease the time and resource burden on claimants, address the inequality of bargaining power, and strengthen rights and interests to ensure secure and certain property rights which allow native title holders to act with confidence.

- Native title organisations should be resourced in a way that allows groups to take a holistic approach to addressing their needs and priorities and ensures individuals are appropriately compensated for the time and resources they expend allowing organisations to be empowered to take their role as managers of their estate and conduits of cultural authority in their region.

- Governments should offer localised assistance to businesses in the form of expert advice, concessional loans and training options to support broader economic engagement and development.

- Indigenous knowledge is inherently valuable and forms the basis upon which many development opportunities can be formed. The value must be recognised and all strategies for economic development opportunities and capacity building must engage with the aspirations of traditional owners.

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Rights and interests allowing for commercial uses as well as rights and interests in relation to water resources must be recognised to allow native title holders to effectively leverage and manage their property rights in line with their economic development aspirations.

**Sustainable development and Indigenous values**

Aboriginal and Torres Strait Islander peoples are the first peoples of this continent and as such have a unique and essential relationship to the lands and waters we now share as a nation. Retaining connection to country is critical to the identity and cultural continuity of Aboriginal and Torres Strait Islander societies and as a consequence, for the wellbeing and self-determination of Aboriginal and Torres Strait Islander peoples. Indigenous peoples’ laws and philosophical traditions, kinship, language and art are all connected through their relationship with lands and waters. As such, the rights of Aboriginal and Torres Strait Islander peoples are recognised under international law and reflected in Australia’s obligations under the United Nations Human Rights framework, in particular, the United Nations Declaration on the Rights of Indigenous Peoples 2007.4

Indigenous knowledges inherently include environmental, water- and land-based knowledge because they stress the importance of the holistic connection between all living beings and the Earth.5 An examination of land and sea management programs administered by traditional owners reveals success in threatened species conservation; the eradication of feral animals, pests and weeds; along with improved ecological health of the environment and the Aboriginal political communities who administer these programs.

It is imperative that legislation conferring land rights and native title be reformed to enable Indigenous people to take full advantage of the emerging environmental land management opportunities as a springboard for economic development.6 It is also important for economic development to be firmly grounded on principles of self-determination and sustainable development, including varying degrees of self-government. A development agenda for Northern Australia must meet the goal of

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delivering a future that ensures environmental, economic, social and cultural sustainability.\(^7\)

Native title is now formally recognised over 37 per cent of Australia’s land and sea: with 12 per cent recognised as exclusive possession native title. As at 24 October 2019 there were 396 registered determinations that native title exists in entire or part of the determination area covering a total of approximately 2,983,063 sq km or 37.2 per cent of the land and sea of Australia. There are 1304 ILUAs on the Register of Indigenous Land Use Agreements.\(^8\) These significant land holdings are managed by over 204 registered native title bodies’ corporate (RNTBCs) also known as native title corporations. The broader Indigenous Estate comprises lands granted under Commonwealth and state and territory legislation.\(^9\)

Since 2006 AIATSIS has been carrying out research on the structure and operation of native title corporations also known as Prescribed Bodies Corporate (PBCs) or Registered Native Title Corporations (RNTBCs).\(^10\) While many of these corporations are not appropriately equipped or resourced to meet the ongoing demands of managing their native title land and waters, a number of native title groups have been very successful in asserting and implementing their land management aspirations via programs such as Indigenous Protected Areas and ranger employment programs.\(^11\)

Indigenous knowledge, particularly ecological knowledge\(^12\) has gained currency as an essential key to the management of Australian landscapes and the Indigenous Estate. Programs that combine responsibilities for country and cultural priorities with employment and development aspirations have also made a positive contribution to the major aims of the Federal Government’s *Closing the Gap* Initiative.\(^13\)


\(^12\) Jones, R.; Thurber, K.A.; Wright, A.; Chapman, J.; Donohoe, P.; Davis, V.; Lovett, R. Associations between Participation in a Ranger Program and Health and Wellbeing Outcomes among Aboriginal and Torres Strait Islander People in Central Australia: A Proof of Concept Study. Int. J. Environ. Res. Public Health 2018, 15, 1478.
Tenure and title reform

One of the challenges that impedes Aboriginal and Torres Strait Islander peoples’ sustainable economic development is that Indigenous access to Crown land is often misunderstood as absolute beneficial ownership over areas commonly referred to as ‘unallocated Crown land’. The Mabo decision clarified that radical crown title can only carry absolute beneficial ownership where there is no pre-existing interest. Native title is a recognition of pre-existing interests and therefore is a burden on the Crown’s title. The Crown cannot acquire a beneficial title where there is a pre-existing owner; that is, native title holders.

However, government practices have been slow to adapt and follow the current legal position and agencies continue to act as if Crown land that is subject to native title is also subject to Crown beneficial ownership over native lands.

Brennan J in Mabo articulated:

…if the land were occupied by the Indigenous inhabitants and their rights and interests in the land are recognised by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land.

In the context of Wik Peoples and Thayorre People v Queensland where the High Court considered the meaning of radical title, Toohey J confirmed that ‘radical title does not of itself carry beneficial ownership.’ The major implications of this reasoning for the power of the Crown to regulate are significant: the crown cannot transfer a ‘better’ title than the one it acquired at sovereignty.

In order for Aboriginal and Torres Strait Islander peoples’ land to be utilised as a registrable interest, it is often presumed that native title must be extinguished or suppressed by the creation of an alternative interest. While this may have been the case at common law, the Native Title Act 1993 (Cth) (NTA) has ensured that

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14 This was a presumption in Attorney-General (NSW) v Brown (1847) 1 Legge 312 and confirmed in Commonwealth v New South Wales [1932] HCA 43; (1923) 33 CLR 1.
15 Strelein, Tran, Barcham, forthcoming, Native Title and Property.
extinguishment is not necessary in most circumstances. AIATSIS submits that this is a fundamental flaw in the design of that system and has led to the inability of Aboriginal and Torres Strait Islander peoples to maximise the use of their land.

**Just resolution of native title**

The costs of prosecuting a native title claim are high. As at 6 March 2019 there were 286 outstanding native title applications yet to be finalised\(^{21}\) with significant transactional costs involved.\(^{22}\) Given that substantial amounts of time and money are spent on proving or challenging the continuity of cultural practices: is there a convincing policy rationale for this, and are the current legal requirements for establishing connection well-suited to that policy rationale?

The adversarial process of litigation is time consuming, unpredictable and involves significant costs.\(^{23}\) The Federal Court of Australia is increasingly cognisant of its legislative responsibility to dispose of native title matters as a positive legal obligation.

Even in negotiated determinations, the process has proven particularly inhibiting for development of native title lands where State and Territory respondents have strongly argued in consent determination for a proviso that native title rights and interests be exercised for ‘non-commercial’ purposes only.

In order to achieve the resolution of native title claims there must be an inference that native title exists and persists.\(^{24}\) The inequality of the bargaining position of native title claimants requires substantive legal procedural reform. and will require addressing broader structural issues present within the native title system\(^{25}\) including: the variable and ‘restrictive’ standard and burden of proof,\(^{26}\) the unregulated transaction costs of native title dealings imposed by the former, and the governance challenges created by the mandatory corporatisation of Indigenous decision making processes and native title rights.\(^{27}\)

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\(^{22}\) ALRC Connection to Country (2013) at paragraph [3.61]

\(^{23}\) McCann, Laura Induced Institutional Innovation in Response to Transaction Costs: The Case of the National Native Title Tribunal (Agricultural and Resource Economics, paper presented at the 43rd Annual Conference of the Australian Agricultural and Resource Economics Society, Christchurch, New Zealand, 20-22 January, 1999) page 5


\(^{25}\) Senator Patrick Dodson, No one can ever take your land away; key note address to the AIATSIS National Native Title Conference, 5 June 2018 available at: https://aiatsis.gov.au/publications/presentations/no-one-can-ever-take-your-land-away


\(^{27}\) Kathleen Clothier ‘Corporations (Aboriginal and Torres Strait Islander) Bill 2005: Positive or Negative Discrimination?’ (2006) 10 Australian Indigenous Law Reporter 1, p11. See also
More importantly, AIATSIS reiterates that the property law system is more than capable of creating mechanisms for dealing with unique interests such as recognised native title laws and customs including the recognition of the right to use lands and waters and their resources for any purpose – including commercial rights and interests as per the decisions in *Brown* and *Akiba*.28

Substantive legal reform requires recognition that native title is a communal title and that the NTA empowers native title holders to make decisions as a group with cultural legitimacy rather than acting to constrain or encumber decision-making and dispute management.

Strengthening native title rights and interests provides a sound basis for economic development and this assurance allows holders of title to plan and act with confidence. This is as true for native title holders as it is for any other property owner. Changes to the native title framework that strengthen the negotiating power and economic security of native title are possible, for example through legislative confirmation that native title can be exercised for commercial purposes.

Our response to the terms of reference of the *Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia* are made on the above mentioned principles and as set out below.

### 1. The current engagement, structure and funding of representative bodies, including land councils and native title bodies such as prescribed body corporates

Aboriginal and Torres Strait Islander groups want to have control over funding, and to be funded in a way that is appropriate and flexible. Funding that is constrained to specific targeted uses is inadequate; it needs to be allocated in a way that allows groups to take their own approach to addressing their needs and priorities.

Improving the quality, coordination and transparency of service provision means that long-term approaches are required to properly address many of the complex issues facing Aboriginal and Torres Strait Islander communities. Short-term funding and the discontinuation of successful Aboriginal and Torres Strait Islander programs results in the loss of local capacity, knowledge and experience. Program design should be evidence based and informed by comprehensive data to enable effective planning and evaluation. This means that there must be greater collaboration and coordination of services across the whole of government ensuring the various levels

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28 Macabe, Patrick 'Pilki and Birriliburu: Commercial native title rights after Akiba' (2015) 19 AILR 64 pp71-73
of government work together to avoid duplication. This requires transparent and open dialogue with Aboriginal and Torres Strait Islander communities.

Strategies to improve the quality, coordination and transparency of service provision include:

- Funding agreements that include a requirement for service bodies to engage with community, report on how many Aboriginal and Torres Strait Islander people access their services and develop access improvement targets;
- Local service delivery plans developed by local Aboriginal and Torres Strait Islander community governance bodies in partnership with government that include measurable targets, expenditure and outcomes; public reporting on all programs, including information about who is responsible for the service delivery and the ratio of funding for Aboriginal and mainstream organisations;
- Regular evaluation of funding programs and the provision of services;
- Publicly available and transparent audits of service delivery outcomes; and
- Co-locating services where possible or holding multi-agency days to inform the community about key services available in a transparent and easily accessible way.

Effective governance is one of the keys to overcoming colonial legacies of socioeconomic disadvantage and social dysfunction, and for building a sound base for local community and economic development.29

The NTA and the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) (PBC Regulations) work together to require Indigenous peoples who secure a determination of native title to establish incorporate a body under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act) to hold and/or manage their native title rights and interests on their behalf.30

Adopting a corporate model for Indigenous governance belies the role of native title holders as law makers and decision-makers that undertake essentially governmental functions in relation to their native title lands, particularly as to the intermural allocation of rights and interests and benefits and the intergenerational impacts of development decisions.

Nevertheless, the mandatory nature of incorporation of native title creates a resulting obligation on the part of government to properly fund these positive statutory

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30 The NTA ss56-57 require the Court to determine a Prescribed Body Corporate’ to for the native title determination; Reg 4 of PBC Regulations require the PBC to be an Aboriginal or Torres Strait Islander Corporation, which is defined reg3) in accordance with the CATSI Act; the CATSI Act s16-5 defines such corporations as those incorporated under the CATSI Act.
obligations so as to enable native title holders and native title corporations to efficiently administer the native title estate and the broader Indigenous estate.\textsuperscript{31}

Prescribed Bodies Corporate (PBCs) and Registered Native Title Bodies Corporate (RNTBCs) as native title corporations provide a space for the creation of new resources and meanings that may help Aboriginal groups more effectively undertake their roles in maintaining their own laws.\textsuperscript{32}

Native title corporations play an important role in managing and protecting the native title rights and interests of Aboriginal and Torres Strait Islander people. AIATSIS research examining the political economy of native title labour has found that the vast majority of the native title work that common law native title holders and PBCs do is reactionary and outwardly-focused; addressing the interests of state and territory government agencies or the demands of private proponents in future acts proceedings. Unlike the mostly non-Indigenous government and private sector workers they are engaging with, native title holders and native title corporation directors are not meaningfully compensated.\textsuperscript{33} In order to address the external demands thrust upon them and at the same time proactively identify and implement plans to pursue their members’ aspirations, native title corporations need significant resourcing and capacity building support. Any PBC work related activity undertaken to meet expectations of external actors significantly impacts their ability to meet their own needs and aspirations.

The true cost of this work is widely underestimated. Research AIATSIS conducted with Eastern Maar Aboriginal Corporation found that the PBC required $150,000 per annum simply to meet governance obligations and to ensure its basic operations before they even considered identifying and pursuing members’ aspirations. This figure did not include the cost of the necessary support and services provided to the PBC by its Native Title Service Provider.\textsuperscript{34}

Changes to the PBC regulations to allow PBCs to charge proponents for prescribed services were meant to help address this by indirectly resourcing PBCs to take on these functions. Anecdotal evidence however suggests that many PBCs are not charging for these services, either because they are unaware they can, do not have

\textsuperscript{31} The Indigenous estate has been formed through five key mechanisms: (1) Creation of Aboriginal reserves in the protectionist era (2) Land rights legislation passed since the 1960s (3) Other land legislation which allows for transfers or leasing to Indigenous groups (4) Land acquisition programs since the late 1960s and (5) Native title processes’. See ‘The Environmental Significance of the Indigenous Estate: Natural Resource Management as Economic Development in Remote Australia’. (CAEPR Discussion Paper No.286/2007) p5


\textsuperscript{34} B Burbidge & J Clark, Tracking native title work: Community report to Eastern Maar Aboriginal Corporation and Native Title Services Victoria, AIATSIS, Canberra, 2017.
that basic capacity to do so, or because proponents do not pay.\textsuperscript{35} Facilitating greater awareness in native title corporations and with proponents and developers of an effective fee for service model would promote better economic engagement with traditional owners and their positive obligations to manage the native title estate in the best interests of the native title holders.

Many native title corporations run the risk of being trapped in an ‘incapacity spiral’ where their lack of basic organisational and administrative resourcing prevents attempts to build capacity.\textsuperscript{36} Previous AIATSIS research conducted with a small PBC in the Pilbara indicated that the vast majority of native title work performed by native title holders is unpaid and devoted not to the pursuit of their own priorities, but to accommodating the demands and interests of other actors, such as state governments and mining companies.\textsuperscript{37}

In addition to prosecuting claims and managing future acts and agreement negotiations for native title holders, Native Title Representative Bodies/Service Providers (NTRB/SPs) are looking to (1) file compensation applications for native title parties and (2) support the establishment and ongoing functions of native title corporations. There may also be a new and important role for NTRB/SPs to play with respect to the revision of native title determinations.\textsuperscript{38} With this increasing litigation workload, NTRB/SPs will be less able to support PBCs in their commercial and development roles and aspirations. It is a pressing imperative to ensure resources and attention moves directly to PBCs to ensure they are ready and able to engage directly with the opportunities that arise as well as create opportunities of their own.

The National Native Title Council (NNTC) has recommended that each PBC be allocated three-year recurrent funding at a level of $300,000 per annum and that this funding be made available six months prior to the expected date of a determination of the existence of native title by the Federal Court.\textsuperscript{39} AIATSIS supports the NNTC’s recommendation as a transitional measure in the absence of more comprehensive settlements, reparations and nation-building agreements. Providing establishment funding and ongoing negotiated operational budgets is an urgent matter if the opportunities for development are to be harnessed by native title holders. In any

\textsuperscript{35} Sweeney, A Fees for Services and PBCs, AIATSIS PBC website available at: https://www.native title.org.au/learn/pbcs-making-it-work/fees-services-and-pbcs

\textsuperscript{36} L Strelein, ‘Native Title Bodies Corporate in the Torres Strait: finding a place in the governance of a region’ in T Bauman, LM Strelein & JK Weir (eds), Living with native title: the experiences of registered native title corporations, AIATSIS Research Publications, Canberra, 2013, p. 80.


development plan for the north, native title corporations will be required to fulfil positive obligations under the NTA, support needs to be provided to native title corporations to enable them to negotiate and set their own priorities, which in turn will address the current inequality of the bargaining position and strengthen the long term sustainability of both industry and the local communities.

AIATSIS supports the National Native Title Council’s position that both the NNTC and NTRB/SPs must be funded adequately to ensure the efficient administration of native title determinations and support PBCs in the management of their post determination native title estate. But this will only work if PBCs are empowered to take their rightful role as managers of their estate and as conduits of cultural authority in their region.

The current deficit paradigm in Australian policy making has resulted in ‘unilateral interventions into the political, social and economic lives of Indigenous communities’ that not only ignore cultural context but may undermine the cultural capability that could lead to change. AIATSIS submits that any effective policy program needs to work beyond these conceptual limitations.

2. The role, structure, performance and resourcing of Government entities (such as Supply Nation and Indigenous Business Australia)

AIATSIS makes no submission on this term of reference

3. Legislative, administrative and funding constraints, and capacity for improving economic development engagement

In the 2014 Inquiry into the development of Northern Australia, AIATSIS submitted that there is a particular need to ensure that social impacts on the rights and interests of Indigenous people are properly assessed and that processes are culturally appropriate. Professor Ciaran O’Faircheallaigh analysed various
approaches to Social Impact Assessments (SIAs) and concluded that an ‘effective SIA’ in the context of large-scale resource development of Aboriginal land involves, firstly, the level of control of Aboriginal people in the process, and, secondly, an analysis of the practical activities that must be undertaken and issues that must be addressed to realise an effective process.\(^{43}\)

A hyper-focus on Aboriginal land tenure as an ‘impediment’ to economic growth has in the past resulted in distorted policies that exclude Indigenous priorities and aspirations. The 2014 ‘Pivot North’ Inquiry into the development of Northern Australia identified Aboriginal land tenure as a ‘brake on development’; a hindrance to prospective businesses, as well as an impediment to the release of land for residential and commercial development.\(^{44}\) It was also critical of the complexity, uncertainty and untimeliness of these processes. Such views were fiercely rejected by various submissions from the major Indigenous Land Councils as representative bodies. The Central Land Council noted that the ALRA process is ‘efficient, clear and accessible to third parties’ wanting to formalise an interest in land, citing that as of 2013, in some communities, up to ninety-percent of available land is now under lease.\(^{45}\) Similarly, the Northern Land Council (NLC) contended that the ALRA is the ‘optimum system for merging Traditional Aboriginal Ownership of country with western legal and property rights’.\(^{46}\) The NLC provided further criticism in maintaining that ‘far larger impediments to development than land tenure are to be found in Government’s historical unwillingness to fairly recognise the property rights of traditional owners under the ALRA’.\(^{47}\)

The *Aboriginal Land Rights (Northern Territory) Bill 2006* introduced some technical amendments and whole of township leasing; concerns were raised by the Land Councils that there was little to no opportunity for the Aboriginal communities affected to give free informed and prior consent: ‘Indigenous Australians have a right to self-determination and that this includes the rights to forms of tenure that reflect cultural difference’.\(^{48}\) These reforms lacked any substantive consultation process, indicative of a larger ignorance of many fundamental human rights as enshrined in international instruments. Improving engagement must have such concerns at its
core, as the Central Land Council (CLC) submits: ‘a very real risk of development that does not include Aboriginal people is that the socioeconomic gap between Aboriginal and non-Aboriginal people will widen.’49

The transfer of the head lease in the community of Gunyangara via a Memorandum of Understanding from the Commonwealth’s Executive Director of Township leasing to Gumatj AC (as representative of the traditional owners) is an important and positive development which demonstrates that there is no reason why desires for greater flexibility and ‘security’ of tenure arrangements in communities on Aboriginal land must come at the expense of the self-determination and property rights of traditional owners.

The NTA contains significant issues in terms of agreement making, which stem from the inequality of bargaining position between Indigenous and non-Indigenous parties to the agreement due to the right to negotiate, but without a right to veto. In an ordinary property scenario, only zoning regulations would determine appropriate uses for property. This should also apply in the Indigenous context; where groups are tenure holders, they themselves can determine restrictions on use based on the value they deem the property to have. Having this flexibility provides opportunities for organisations to develop assets to make improvements or sell assets to generate capital for further purchases or development.

Thus, any ‘restraints’ on engaging traditional owners in economic development can be seen as turning on perception; whereby the Australian government has historically and continuously viewed land rights and native title legislative frameworks as onerous, costly and unproductive, whilst other entities such as Land Councils have contended the opposite. Ideological (and ontological) tensions are inevitably a major constraint in and of themselves, often resulting in a complete misalignment between objectives and aspirations of the Indigenous population and government policy.

Examining the broader aims of sustainable economic development on Indigenous terms is required as a part of improving engagement between government and Indigenous peoples and economic development. AIATSIS submits that it would be an improvement if the various layers of government could offer localised forms of assistance to small business entrepreneurs as well as more established business operators in the form of expert advice, concessional loans and training options so as to support broader economic engagement and development in addition to the support that is required for native title corporations.

4. **Strategies for the enhancement of economic development opportunities and capacity building for traditional owners of land and sea owner entities**

It is important to recognise Indigenous knowledges and to engage traditional owners to inform economic development of northern Australia. Indigenous intangible cultural heritage – or knowledge – is the starting point for engagement with country. However, when attempting to understand what constitutes Indigenous knowledge, the application of non-indigenous frameworks to this process confuses and distorts its definition and protection. Indigenous knowledge comes in multiple forms, and is linked to philosophical and legal traditions, language and education, stories, song and ceremonies. How these definitions apply within a national context has not been broadly understood or interrogated, nor has there been a model for the practical assertion of Aboriginal and Torres Strait Islander knowledges, let alone systematic mechanisms to restore lost connections to country. Indigenous conceptions of knowledge tend to overlap with intangible cultural heritage (ICH) or Indigenous Cultural and Intellectual Property (ICIP), native title, heritage and environmental legislation – all of which enable some form of recognition and protection. However, the ways in which Indigenous knowledge has been asserted within law and policy has not always been consistent, timely or culturally appropriate. This struggle to reach an agreed definition is characteristic of the challenges of translating Indigenous relationships to land (and evidence of this relationship) into ‘something’ that is recognisable and capable of protection.\(^50\)

There is currently limited protection under Australian intellectual property law for protection of Indigenous knowledges; and there is great value in including such protections through product differentiation and marketing of authentic products. Product differentiation created by specific localised knowledge associated with methods of collection and uniqueness of location (fish catch) is an untapped source of economic value for Indigenous peoples. Currently the lack of protection and ease with which Indigenous knowledges can be exploited or appropriated is detrimental to their own economic opportunity and development.

In light of the size of the Indigenous estate in northern Australia and the rapidly growing Indigenous population, traditional owners need to play a fundamental role in the development of the north. Strategies for the enhancement of economic development opportunities and capacity building must as a starting point engaging with the aspirations of traditional owners and understanding the Indigenous estate. Failure to co-ordinate native title goals and aspirations with State strategy negotiations relating to economic and social development of Indigenous people not

only isolates the native title process from these broader policy objectives, it limits the capacity of the broader policy to achieve its objectives. It also fails to understand the importance of filtering development through the cultural values and structures of the community and fails to recognise native title as an asset in the development process.51

AIATSIS research on commercial fishing and aquaculture aspirations has indicated that in many coastal Aboriginal and Torres Strait Islander communities there is an appetite for economic development which is not unconditional; a desire to have greater ability to pursue economic development opportunities as part of broader community wellbeing agenda. Use of customary aquatic resources generates a broad range of important knowledges, (cultural, spiritual, social, and economic, health and environment) values of great importance to Aboriginal and Torres Strait Islander peoples. Many involved in the research wanted the ability and support to operate commercial enterprises in ways which were not economically the most ‘efficient’ in terms of profit accumulation, but that specifically accommodated and enhanced non-economic values, thereby optimising the total package of benefits generated for their communities.52

Interest in the use of land and sea country for economic development is just one part of many Aboriginal and Torres Strait Islander communities’ desire for greater control over and responsibility for the management of their natural resources on their traditional lands. Caring for country has always included making a living from country and maximising the resources that can be sustainably exploited by traditional owners. Enhanced opportunities for and engagement in economic development needs to be accompanied by greater involvement of traditional owners in resource use and allocation decisions.

5. The principle of free, prior, and informed consent

A change in the relationship between governments and Indigenous peoples is required to identify practical ways that facilitates the utilisation and assertion of Aboriginal and Torres Strait Islander peoples’ strengths and capabilities.

The right to self-determination is recognised under international law. Although the right is clearly recognised in Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural

Rights, there is much debate about the application of the content of self-
determination as it applies to Indigenous people.\textsuperscript{53}

AIATSIS submits that the involvement of Aboriginal and Torres Strait Islander peoples in decisions that affect them warrants a significant investment in engagement and leadership. This engagement is necessary for the successful design of policy and programs. It is also important when defining the indicators of success or targets that measure achievement that these goals and measures be co-designed with the very Aboriginal communities and individuals who are themselves affected.\textsuperscript{54}

If Indigenous communities are to effectively manage the Indigenous estate, they must have control over their lands and waters in accordance with the principle of Aboriginal self-determination. This form of self-determination means resourcing communities efficiently to implement structures that support local level governance and self-management particularly in regional and remote communities.\textsuperscript{55}

6. Opportunities that are being accessed and that can be derived from Native Title and statutory titles such as the Aboriginal Land Rights (Northern Territory) Act 1976

The Blue Mud Bay decision\textsuperscript{56} should represent a major opening for coastal traditional owners in the Northern Territory who want to pursue economic development opportunities involving their sea country. The High Court decision in 2008 affirmed that land and waters to the low tide mark adjacent to coastal Aboriginal land handed back via ALRA were still Aboriginal land, and so permits were required for entry by non-traditional owners. The NLC has issued rolling waivers allowing permit-free access to the intertidal zone as negotiations have continued these past ten years.\textsuperscript{57}

Approximately 85\% of the NT’s coastline is adjacent Aboriginal land. The prominence of both recreational and commercial fishing in the Northern Territory, and the importance of intertidal zones as habitats for some of the most lucrative species (including barramundi and mud crab), has raised hopes that the decision will afford traditional owners enhanced access to economic opportunities on their own country. Additional intertidal zone permits by themselves could present a significant boon for coastal traditional owners which could be reinvested into local enterprises.

\textsuperscript{56} Northern Territory of Australia v Arnhem Land Aboriginal Land Trust [2008] HCA 29
Many traditional owners and the NLC, however, want to ensure any decision will not just create a passive income stream, but will also support the development of local on-water businesses, particularly commercial fishing and aquaculture. In a policy environment where the Commonwealth and NT Governments are making firm commitments to ‘close the gap’ in socioeconomic status between Indigenous and other Territorians, this is a positive attempt to bridge this gap.

Traditional owner fishing ventures conducted using the NT’s Aboriginal Coastal Licences, are limited and still in their infancy due to myriad interlinked administrative, logistic and economic hurdles. A key concern in a number of coastal NT communities, however, is the impact of commercial fishing that is already taking place on their country.

AIATSIS research on the cultural and livelihood values of fishing has found that:

- The community of Milingimbi hosts a small traditional owner fishing enterprise, whose catch is sold locally. AIATSIS recent research project found high levels of support for the fishing enterprise from the community, but significant animosity towards non-local, non-Indigenous commercial barramundi fishers.
- Many residents of Milingimbi and surrounding outstations were frustrated that the non-Indigenous commercial fishers were making money by exploiting and allegedly severely depleting local resources, while the traditional owners and community received no benefit and had no say in how, when or where such fishing activities were conducted. This was exacerbated by the fact that the area is subject to sea closures under ALRA; some commercial fishers were regularly entering coastal waters to fish without applying for the requisite permits.
- In the nearby community of Maningrida the local commercial fishing business recently became the first in decades to sell their catch in the Darwin fish market. The ABC covered the anger of traditional owners towards commercial barramundi fishing by non-locals, who share similar concerns to those identified in Milingimbi. The group have also pushed for a local sea closure under ALRA so as to have a modicum of control over and protection of the management of local fish stocks.  

The conclusion to be drawn is that Aboriginal and Torres Strait Islander communities are disengaged from fisheries management and any associated policy and decision making processes. Further, Aboriginal and Torres Strait Islander communities have limited access to programs that may support their participation in commercial fishing activities.

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Aboriginal and Torres Strait Islander communities are not properly considered in terms of benefits and equitable distribution of resources both for cultural purposes and economic aspirations. AIATSIS submits that existing arrangements through the Blue Mud Bay negotiations offer no opportunities for traditional owners to use their intertidal property right to control access, have a greater say in management decisions, or pursue economic development aspirations and this reflects the ongoing inequality of bargaining position that Indigenous communities face in light of an urgent need for additional resources to negotiate on an equal basis with other parties.

Allowing the use for commercial purposes from the rights afforded by s 211 of the Native Title Act should allow native title holders to effectively leverage their property rights for economic development aspirations. This is consistent with the emerging judicial interpretation of the native title rights and interests following Akiba. Neither the NTA nor the Aboriginal Land Rights Act contain provisions which prioritise traditional owners, in terms of the commercial exploitation of resources found on their land and sea country. As a result traditional owners are seriously undermined. The interests of traditional owners inevitably end up secondary to those of proponents who, via access to greater resources or superior socio-political positioning, are able to more effectively navigate bureaucracies and secure support from key actors. Conversely, it is significantly difficult for traditional owners to proactively leverage their property rights to establish the same commercial resource exploitation.

More importantly, AIATSIS reiterates that the property law system is more than capable of creating mechanisms for dealing with unique interests such as recognised native title laws and customs and recognition of native title for any purpose – including commercial rights and interests as per the decisions in Brown and Akiba, and reforms to the NTA and Corporations (Aboriginal and Torres Strait Islander) Act as proposed in previous AIATSIS submissions.

Further, any agreements made regarding water catchment management must involve traditional owners and include considerations of their cultural values and practices. There should also be opportunities for Indigenous economic development through commercial allocation of water to Indigenous land holders such as through a Strategic Indigenous Reserve (NAILSMA Indigenous Water Policy Group). Native title initiatives with state and territory governments have provided the impetus for traditional owner involvement in catchment management and water sharing plans.

To provide equitable rights to traditional owners it is argued that the following issues need to be addressed in any agreement made in relation to water rights:

- The recognition of cultural flows by all governments in their legislation and policy
- The right to exploit water resources for cultural and commercial purposes
- The right to full and meaningful participation in water management processes.

Government agencies involved in northern Australia should consider supporting Indigenous organisations and communities in their bid to carry out non-extractive water activities that do not require a specific allocation of water, protecting local ecosystems. The outcome may result in greater participation of Indigenous people, their aspirations and their role in water management itself to ensure positive impacts on the rights and interests of traditional owners.

Research has demonstrated that having Indigenous lands and waters returned as part of the Indigenous estate improves the wellbeing of Aboriginal and Torres Strait Islander political communities undertaking caring for Country and Land and Sea management programs. The Ewamiam people originate from the Agwamin society with traditional lands in the Einasleigh lands region inland from Europeans describe as Cairns in Northern Queensland. James Cook University has undertaken a quantitative and qualitative assessment of the improvements in the well-being in the of the Ewamiam community as a result of traditional land and sea management programs. A specific finding of the case study was that knowing country is being cared for the right way and having control over country resulted in significant improvements in wellbeing for the community.

Agreement-making, native title and Indigenous environmental governance are firmly enmeshed in structural changes promoted for Indigenous communities, and hinge on economic development. These perspectives emphasise local Indigenous community capacity and the need to provide sustainable economic opportunities. Integral to the multiple intersecting dimensions of native title, ecology and agreement-making are the economic opportunities provided by agreements in emerging areas of environmental ‘service’ provision. In the North West Kimberley, and throughout Australia, many traditional owner groups undertake the environmental and ecological

63 ibid. p115
64 ibid. p116
management of their estate and manage a fee for service environmental management program in addition to their conservation responsibilities.

Most regional and remote communities in northern Australia have Aboriginal communities often sit on or are surrounded by native title land. The development of Northern Australia should utilise this presence and provide meaningful employment opportunities for traditional owners in accordance with the principles of Aboriginal self-determination.**65**

Ensuring Indigenous engagement and agency in designing policy and programs requires strengthening support for self-determination, respect for Indigenous governance and decision making structures and a genuine commitment to Indigenous priority setting and outcomes evaluation.**66**

The involvement of Indigenous peoples is necessary for the successful design of policy and programs and also in order to define the indicators of success and in setting targets for measuring achievement. It is imperative that Indigenous groups are at the forefront of engagement to appropriately navigate the stated objectives of Indigenous self-determination including addressing inconsistencies and conflicts that have been generated in the past by poor historical design of policy and constantly changing policy frameworks. The design of the engagement process requires detail on how to obtain the views of Indigenous people to ensure that policy writers make culturally informed decisions.**67**

At the time of writing, reforms are taking place that may have the capacity to reframe, if not transform, relationships between Indigenous peoples and mainstream Australia. The States of Victoria and South Australia have begun to establish the infrastructure to fulfil their commitment to negotiate self-determination mechanisms (including treaties) and other states and territories indicate that they may follow. The potential for change is glimpsed in the language of treaty that puts concepts of sovereignty and the autonomy of collectives that have never surrendered their status as independent political entities at the centre of the conversation.**68**

AIATSIS submits that land justice is part of a multi-faceted approach to ending Indigenous disadvantage and promoting communities’ wellbeing and healing. It

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needs to be a form of land justice that seeks to benefit Indigenous people rather than secure non-Indigenous interests. And it needs to be accompanied by a commitment to end the under-funding of Indigenous health, education, and housing and community infrastructure. It is this holistic approach that offers the most promise for an improved future for Indigenous people on their own terms.\(^69\)