

Indigenous Reference Group to the Ministerial Forum on Northern Development

28 February 2019

Hon. Warren Entsch, MP
Chair
Joint Standing Committee on Northern Australia
PO Box 6021
Parliament House
CANBERRA ACT 2600

Via Email: jscna@aph.gov.au

Dear Mr Entsch

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

I refer to the abovementioned matter.

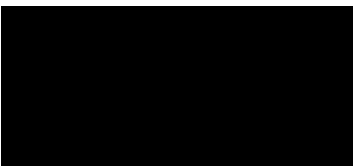
The Indigenous Reference Group to the Ministerial Forum on Northern Development (the 'IRG') is one of two formal advisory groups to the Ministerial Forum on Northern Development (the 'Ministerial Forum'). Established in August 2017, the IRG has, at the direction of the Ministerial Forum, been working closely and intensively with relevant Commonwealth, Western Australian, Northern Territory and Queensland Government agencies, the not-for-profit sector and private sector to develop a suite of policy initiatives that are designed to substantially enhance the engagement of Northern Australian Indigenous interests in the development of the Northern Australian economy, thus creating a pathway for Northern Australia to reach its full economic potential.

Of the 36 specific policy recommendations presented to the Ministerial Forum by the IRG, 16 have been endorsed for implementation, with several of those policy initiatives currently the subject of cross-jurisdictional implementation planning. The IRG would like to take this opportunity to thank the Ministerial Forum for its genuine and expedient engagement with the IRG and ongoing support for its initiatives.

The Northern Australian Indigenous economy faces unique opportunities and challenges and is rapidly evolving. The institutional framework that pertains to Indigenous economic development in Northern Australia must recognise the unique nature of the Northern Australian Indigenous economy and similarly, must adapt to its evolving needs. On this basis, the IRG welcomes the Joint Standing Committee on Northern Australia's inquiry and is very pleased to present this submission.

The IRG looks forward to engaging further with the Joint Standing Committee on this critically important issue.

Yours faithfully,



Peter Yu
Chair
Indigenous Reference Group to the Ministerial Forum on Northern Development



INDIGENOUS REFERENCE GROUP TO THE MINISTERIAL FORUM ON NORTHERN DEVELOPMENT

SUBMISSION TO THE JOINT STANDING COMMITTEE ON NORTHERN AUSTRALIA INQUIRY INTO THE OPPORTUNITIES AND CHALLENGES OF THE ENGAGEMENT OF TRADITIONAL OWNERS IN THE ECONOMIC DEVELOPMENT OF NORTHERN AUSTRALIA

28 FEBRUARY 2019

The Indigenous Reference Group to the Ministerial Forum on Northern Development

The Indigenous Reference Group to the Ministerial Forum on Northern Development (the 'IRG') was appointed by the Ministerial Forum on Northern Development (the 'Ministerial Forum') in August 2017, as one of two formal standing advisory groups. The IRG's directed purpose is to engage directly with, and provide policy advice to the Ministerial Forum, ensuring Indigenous perspectives are included in its deliberations, contributing to the achievement of tangible and sustainable benefits. In the first instance, the IRG has been tasked with advising on aspirations and barriers relating to developing the Indigenous business sector, growing the capability of Indigenous land owners to engage in development, and supporting Indigenous innovation.

Members of the Northern Australia Indigenous Reference Group

- **Mr Peter Yu (IRG Chair)**, Chief Executive Officer, Nyamba Buru Yawuru Ltd
- **Mr Lawford Benning**, Chair, MG Corporation
- **Dr Donna Odegaard, AM**, Chairperson, Aboriginal Broadcasting Australia
- **Mr Joe Morrison**, Director, Six Seasons Pty Ltd
- **Mr Nigel Browne**, Chief Executive Officer, Larrakia Development Corporation
- **Cr. Vonda Malone**, Mayor, Torres Shire Council
- **Ms Fiona Jose**, Chief Executive Officer, Cape York Partnership
- **A.Prof. Colin Saltmere**, Managing Director, Indjalandji-Dhidhanu Aboriginal Corporation

The IRG is an expertise-based committee comprised of Indigenous leaders across Northern Australia that have broad expertise and significant experience in Indigenous business, community and government leadership in Northern Australia. Brief biographies for IRG members are contained in Attachment 1 to this submission.

The IRG has maintained a disciplined focus with respect to its advice to the Ministerial Forum. The IRG has focused very specifically on addressing an evident market failure in the development of Northern Australia, being inadequate activation of the Northern Australian Indigenous economy. Indigenous Northern Australians comprise an average of 15 percent of the population of Northern Australia (compared to 2.5 percent in Southern Australia), with much larger Indigenous representation in the populations of northern Western Australia and Northern Territory (approximately 25 percent), and in populations outside of the main urban centres across Northern Australia (well in excess of 50 percent in many instances). As a result, Indigenous organisations are a key component of the government, industry and non-government-organisation institutional framework in Northern Australia. Northern Australian Indigenous interests in the land and sea estate are much greater than they are in Southern Australia, with Indigenous interests owning or exercising some degree of legal control over close to 80 percent of the Northern Australian landmass, and considerable areas of sea country. Trade with and investment from Asian interests are important drivers of the development of Northern Australia and Northern

Australian Indigenous interests have a significant heritage with respect to particularly South East Asian trade, having conducted trade for centuries prior to European colonisation of the Region. And, very importantly, international conventions and increasingly the Australian judiciary are recognising that Indigenous interests extend beyond cultural rights and rights of occupancy, to rights over natural resources, intellectual property and a right to development. In this environment, Indigenous businesses' products and services are becoming increasingly important components of the trade profiles of many nations.

In other words, the size of the Indigenous population, importance of Indigenous organisations and extent of Indigenous interests in land, water, sea, natural resources and other intangible assets in Northern Australia, means that Indigenous Northern Australians are paramount stakeholders in the Northern Australian economy. **Unless Indigenous interests in the Northern Australian economy are optimally activated, Northern Australia will at best never reach its social and economic potential and at worst, fail to develop socially and economically.**

Indigenous enterprises in Northern Australia face both the same generic structural challenges as all business in Northern Australia, as well as unique challenges relating to the particular circumstances and history of Indigenous people. The generic structural challenges faced by all Northern Australian business include small and sparse local markets, remoteness, poor infrastructure, harsh climate and a degree of political irrelevance that is derived from the electoral imbalance between Northern and Southern Australia. In addition to these structural challenges, Indigenous business in Northern Australia also faces challenges that are the result of two centuries of discriminatory dispossession, oppressive and punitive policy that has resulted in widespread background of intergenerational socio-economic disadvantage among Indigenous Northern Australians. This manifests itself in many ways, including relatively limited capacity to engage in the workforce and to own, successfully operate and grow commercial enterprise. Further, while well-resourced social programs are obviously critical to improving the dire health and education status of many Northern Australian Indigenous communities, reliance on government funding itself can often create perverse incentives, which in turn discourage enterprise and perpetuate ongoing dependence on services delivered and funded by governments. Without concurrent economic development, a significant number of Indigenous Northern Australians will remain welfare dependent and continue to live with the negative impacts of dependency and passivity.

This means that the market failure in the development of Northern Australia that is the result of the generic challenges targeted by the Commonwealth's Northern Australia Agenda are greatly exacerbated in the case of the Northern Australian Indigenous economy. Developing policy initiatives that target the source of this unique market failure in the Northern Australian Indigenous economy with a high degree of specificity is the primary focus of the IRG.

Since early 2018, the IRG has been working closely and intensively with senior officials in Commonwealth, Western Australian, Northern Territory and Queensland Government agencies whose statutory and policy functions intersect with the Northern Australia Agenda and/or Indigenous economic development. This work has focused on establishing a policy framework designed to substantially enhance the engagement of Northern Australian Indigenous interests in the development of the Northern Australian economy. The work commenced with a cross-jurisdictional policy assessment and development workshop in March 2018 which delivered 36 specific policy recommendations. The April 2018 Ministerial Forum endorsed 16 of those specific recommendations for implementation planning and referred the remaining 20 recommendations for further consideration.

Northern Australia Indigenous Reference Group Policy Development Consultation

Commonwealth Agencies – Prime Minister & Cabinet; Austrade; Agriculture and Water; Indigenous Business Australia; Indigenous Land Corporation; Office of Northern Australia; CRC for Development of Northern Australia; Northern Australia Infrastructure Facility; CSRIO; and Geoscience Australia.

Western Australian Government Agencies – Premier & Cabinet; Primary Industries and Regional Development; Jobs, Tourism, Science and Innovation; Water and Environmental Regulation; Training and Workforce Development; Communities WA; Planning, Land and Heritage; and Kimberly Development Commission.

Northern Territory Government Agencies – Chief Minister’s Office; Trade, Business & Innovation; Health; Northern Territory Solicitor; Tourism NT; Local Government & Communities; Environment & Natural Resources; and Land Resource Management.

Queensland Government Agencies – Premier & Cabinet; State Development; Treasury; Employment & Training; Aboriginal and Torres Strait Islander Partnerships; Transport & Main Roads; Environment & Science; and Fire & Emergency.

The 16 recommendations can be broadly categorised as initiatives designed to:

- 1. Create jobs and foster labour participation, entrepreneurship and business acumen among the Northern Australian Indigenous population;**
- 2. Develop knowledge management systems and commission research and development that is designed to improve the decision-making environment for Indigenous managers and business owners in Northern Australia;**
- 3. Develop infrastructure that supports Indigenous economic development in Northern Australia;**
- 4. Provide improved access to capital and international markets for Indigenous businesses in Northern Australia;**
- 5. Initiatives to activate the economic value of land, water, sea and cultural resource rights and interests of Northern Australian Indigenous people; and**
- 6. Give effect to institutional arrangements that work to activate, accelerate and optimise Indigenous economic development across Northern Australia**

Focusing on the implementation instructions, the IRG held workshops in each jurisdiction to test existing policy initiatives against the 16 recommendations. This exercise culminated in a joint planning workshop in September 2018 that delivered an implementation plan to the Ministerial Forum’s November 2018 meeting. This consultative work has been supported by commissioned independent research and expert policy analysis associated with each of the six themes identified above.

The implementation plan was endorsed by the November 2018 Ministerial Forum, with six specific implementation actions currently underway, all of which are directly relevant to the Terms of Reference for this inquiry. In particular, agreement by the Ministerial Forum to capture the work of the IRG through a proposed Northern Australian Indigenous Development Accord among the jurisdictions, together with the potential implementation of pan-Northern Australian institutional arrangements to support the specific needs of Northern Australian Indigenous economy, represent a much needed resetting of the institutional framework that applies to Indigenous economic development in Northern Australia.

Observations, opinions and recommendations presented in this Submission are informed by both the policy work undertaken by the IRG over the past 12 months, as well as the collective wisdom of the IRG members.

Summary of the Recommendations to the Inquiry

The IRG makes the following recommendations to this inquiry:

- 1. Inquiry Terms of Reference** – With respect to creating a business environment that optimally activates the Northern Australian Indigenous economy, the current focus of the inquiry’s Terms of Reference on Traditional Owners and opportunities and challenges directly linked to the Northern Australian Indigenous land, water and sea estate is too limiting. This limited focus will substantially constrain the Northern Australian economy from reaching its potential and disenfranchise a significant portion of the Northern Australian Indigenous economy. ***The IRG strongly recommends that the Standing Committee on Northern Australia give consideration to all Indigenous owned and operated enterprise in***

Northern Australia and view the activation of the significant broader Indigenous economy as not separate to, but critical to the future success of the Northern Australian economy.

2. **The current engagement, structure and funding of representative bodies, including land councils and native title bodies such as prescribed body corporates** – Native Title Representative Body Corporates have performed a critical role in giving effect to native title and other land rights to Indigenous interests across Northern Australia. While institutional capability that prosecutes and defends Indigenous land and sea interests and rights will always be necessary, a new institutional response is required that is designed to specifically address the unique market failure in the establishment and development of all Indigenous business in Northern Australia, including those that are operated by Traditional Owners through Prescribed Body Corporates and other constructs. ***The IRG strongly recommends a realignment of the institutional framework that applies to Indigenous economic development in Northern Australia that recognises the broader business support, capability building and resourcing needs of Traditional Owners operating through PBCs or other constructs, as well as Indigenous businesses that are not directly linked to land, water or sea assets.***

3. **The role, structure, performance and resourcing of government entities (such as Supply Nation and Indigenous Business Australia)** – Indigenous Land and Sea Corporation has and continues to perform an important role in supporting land, water and sea acquisition by Indigenous interests and the development of specific types of business that improve land, water or sea assets. However, this focus is too restrictive for the purposes of growing the Northern Australian Indigenous economy. Similarly, Indigenous Business Australia has and continues to support, through financing and business support services, many Indigenous owned and operated businesses, including in Northern Australia. However, its nation-wide remit and current support services do not provide the focus, intense case management and concessions that are required to grow the Northern Australian Indigenous economy. The current policy and legislative framework that applies to these organisations limits the extent to which this can be achieved. ***The IRG strongly recommends either a stand-alone Northern Australian Indigenous economic development body that can deliver the well-resourced, acutely focused, concessional, ‘best-in-class’, broad-spectrum Indigenous business support and financing that is required to optimally activate the Northern Australian Indigenous economy, or a statutory re-tasking of the existing Indigenous economic development organisations to achieve this result.***

4. **Legislative, administrative and funding constraints and capacity for improving economic development engagement** – A largely reactive response of the Developing Northern Australia Agenda to addressing the critical importance of the Northern Australian Indigenous economy has resulted in an existing related institutional framework that while clearly endeavouring to support Indigenous enterprise to the extent it can, is equally reactive and lacking the required intensity of focus. ***The IRG strongly recommends that the legislative, administrative and funding framework that applies to the implementation of the Northern Agenda be supplemented with a specific institutional capability dedicated to supporting the delivery of outcomes against the Indigenous Enterprise and Business pillar of the Northern Australia Agenda and providing the well-resourced, acutely focused, concessional, ‘best-in-class’, broad-spectrum Indigenous business support and financing that are required to optimally activate the Northern Australian Indigenous economy.***

5. **Strategies for the enhancement of economic development opportunities and capacity building for Traditional Owners and land and sea owner entities** - The delivery of the IRG’s policy recommendations are underpinned by a proposed Northern Australia Indigenous Economic Development Body (or equivalent function) as a key component of the institutional framework that is delivering on the Northern Australia Agenda. This institution will, through a network of business and employment hubs, provide Indigenous business in Northern Australia tailored business support programs based on ‘best-in-class’ support services, enhanced market access for the products and services developed by those businesses, support those businesses in navigating the regulatory

environment, commission research that provides those businesses with the knowledge they need to manage risk and make sound commercial decisions, develop and advocate for policy designed to support Indigenous business in Northern Australia and provide Indigenous businesses in Northern Australia with access to capital that is optimally aligned with the risk-profile of those businesses. ***Consistent with the IRG's responses to the Terms of Reference to this inquiry, a key recommendation of the IRG that is currently the subject of scoping is a proposed Northern Australia Indigenous Economic Development Body (or equivalent function) as a key component of the institutional framework that is delivering on the Northern Australia Agenda.***

- 6. The principle of free, prior and informed consent** - Further Indigenous land, water and sea tenure, access and control reform is required to give meaningful effect to the United Nations Declaration on the Rights of Indigenous People's principle of free, prior and informed consent in Australian law. Given the extent of Indigenous land, water and sea estate interests in Northern Australia, this is of significant importance to the development of the Northern Australian economy. Furthermore, while some aspects of Indigenous Intellectual Property could arguably be protected under the current regime, the existing intellectual property protection framework within Australia is often not best suited to protection of Indigenous interests, falls short of world-best-practice and is inconsistent across jurisdictions. An inability to protect Indigenous intellectual property rights across Northern Australia serves as a barrier to developing the Northern Australian Indigenous economy. ***The IRG strongly recommends that Australian Governments prioritise the reform required to give meaningful effect to the United Nations Declaration on the Rights of Indigenous People's principle of free, prior and informed consent in Australian law as it pertains to rights and interests in the land, water and sea estate. However, all reform in this area must not overcomplicate the agreement process, ensuring key principles of flexibility, transparency, predictability and efficiency are upheld.***

The IRG strongly recommends that the Council of Australian Governments seek to harmonise Australian legislation pertaining to Indigenous Intellectual Property based on current best practice as per its obligations under the Declaration on the Rights of Indigenous Peoples, Convention on Biological Diversity and Bonn Convention, as well as world-best-practice recommendations of the World Intellectual Property Organisation and the Nagoya Protocol.

- 7. 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** – There are numerous examples of economic activation of the Indigenous estate, particularly in the land-care, pastoral and tourism sectors. These instances of value creation from particularly land assets are well known. However, what is less widely acknowledged is the fact that activation of these assets has taken over a quarter of a century, cost Australian Governments billions of dollars and accrued an enormous opportunity cost for Indigenous people and the wider Northern Australian economy. With the right institutional framework and support programs, there remains substantial scope to grow the Indigenous economy in Northern Australia far beyond that which is defined by Indigenous land, water and sea title that has conventional economic value. ***Noting this, the IRG has provided examples specific to this Term of Reference.***

These recommendations are discussed in detail in the following subsections

Comment on the Inquiry's Terms of Reference

Prior to responding to the specific Terms of Reference for this inquiry, the IRG would like to provide comment on the nature of its Terms of Reference.

Restoring, to an extent, the sovereignty of Aboriginal and Torres Strait Islander people by conferring interests and rights in land to Traditional Owners through legislation such as *Aboriginal Land Rights Act (Northern Territory) 1976* and *Native Title Act 1993* (Cth) has been the main response of Australian governments to

recognition, firstly by some Australian parliaments and subsequently by the Australian judiciary, that the British occupation of Australia under the British common law doctrine of *terra nullius*, was illegal.

Grants of land and determinations of native title are only meaningful in a practical sense if the holders of those interests and rights are able to use them to care for country, restore and maintain culture, create wealth and deliver well-being and prosperity to Indigenous people associated with those lands.

For this reason, it is not surprising that the Terms of Reference for a parliamentary inquiry focus on Traditional Owners and the Indigenous land, water and sea estate. Indeed, this should be a key component of any such inquiry. However, for the following reasons any policy that is derived from this limited scope will be substantially constrained in its ability to activate the Northern Australia Indigenous economy:

- Firstly, in Northern Australia there are many Indigenous rights and interest in land, water and sea that for various reasons such as an absence of *in situ* resources or remoteness, have limited, if any, conventional economic value;
- Secondly, there are many Indigenous people in Northern Australia who are not Traditional Owners and are therefore unable to directly benefit from enterprise that is derived from land, water and sea interests and rights; and
- Thirdly, there are many actual and aspiring Indigenous owned and operated businesses in Northern Australia that do not have any link to land, water or sea interests and rights, but still face the same generic structural challenges associated with Northern Australia, as well as the unique challenges faced by Northern Australian Indigenous owned and operated business.

A fundamental principle underpinning the IRG's deliberations is that while enterprise based on the Indigenous land, water and sea estate is obviously a very important component of the Northern Australian Indigenous economy, policy must address the challenges faced by all Indigenous owned and operated businesses and aspiring businesses and Indigenous persons seeking employment and career pathways. A policy framework that only addresses challenges and opportunities faced by enterprise tied to the Indigenous land, water and sea estate will not allow Northern Australia to reach its full potential and by its nature, will disenfranchise a significant portion of the Northern Australian Indigenous economy. As such, ***the IRG strongly recommends that the Standing Committee on Northern Australia give consideration to all Indigenous owned and operated enterprise in Northern Australia and view the activation of the significant broader Indigenous economy as not separate to, but critical to the future success of the Northern Australian economy.***

Having expressed this concern, the remainder of this submission will address each Term of Reference specifically.

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

'Land Councils' (in their various forms) have been instrumental in establishing land, water and sea rights for Indigenous people in Northern Australia. The land rights advocacy activity of some of these organisations in the early 1970s was critical in driving change and creating awareness among Australian political institutions and the wider electorate, of what is becoming an increasingly better and more widely understood injustice. The four Land Councils in the Northern Territory established under the *Aboriginal Land Rights (Northern Territory) Act 1976* have overseen the implementation of Indigenous land, water and sea tenure that covers approximately 45 percent of the Northern Territory landmass and 85 percent of its coastline and have become key institutions in the governance of the Northern Territory more generally. The Native Title Representative Body Corporate (NTRBC) functions under Part 11 of the *Native Title Act 1993* (Cth) that are performed by 10 separate NTRBCs with jurisdiction over parts of Northern Australia have, over the past quarter of a century, successfully

prosecuted native title claims for literally hundreds of Traditional Owner groups across Northern Australia. This has created, and continues to grow, the Northern Australian Indigenous land, water and sea estate.

As a result, the vast majority of the Northern Australia landmass is the subject of Indigenous ownership or some degree of Indigenous control. This has also resulted in the establishment of almost 150 Prescribed Body Corporates (PBCs) across Northern Australia (representing approximately 75 percent of all PBCs in Australia) that hold determined native title interests and rights as trustee or agent for the common law holders of those interests and rights in accordance with Division 6 of the *Native Title Act 1993* (Cth). Based on current claims, it is possible that up to an additional 45 PBCs will come into existence across Northern Australia over the coming decade.

However, few of these PBCs hold land interests and rights that are of conventional economic value. Around 75 percent of the PBCs across Northern Australia are classified by the Office of the Registrar of Indigenous Corporations as 'small' Aboriginal and Torres Strait Islander Corporations, meaning they have less than five employees and/or annual income of less than A\$100,000 and/or non-native title assets of less than A\$100,000. Only approximately 4 percent of PBCs across Northern Australia are classified as 'large' Aboriginal and Torres Strait Islander Corporations with 25 or more employees and/or annual income greater than A\$5.0 million and/or non-native title assets in excess of A\$2.5 million.

While in some cases, PBCs are under-resourced because they have chosen not to engage in economic activity, they have mismanaged economic development initiatives, or continue to face tenure related constraints to development, most PBCs are under-resourced because the land, water or sea that is the subject of their interests and rights is such that it possesses limited opportunity for land, water or sea based economic development of any kind. While the financial capacity of a PBC is by no means a measure of its importance, it is a matter of fact that as a result of this dilemma around three quarters of Northern Australian PBCs will struggle to resource basic functions under the *Native Title Act 1993* (Cth), let alone engage in economic development associated with their native title.

Most small and many medium-sized PBCs are operating today by virtue of administrative, financial, legal and other support services being provided by a NTRBC, which is an increasingly important 'post determination' function for the NTRBCs. In other cases, PBCs that are in close geographical proximity are forming alliance-type relationships that allow them to share resources and collectively capitalise on opportunities. Irrespective of these structural responses, the 'post-determination' environment is emerging as one that is characterised by a very small number of relatively well-resourced PBCs and a large number of PBCs with very limited capacity, primarily by virtue of the conventional economic value of the land, water or sea estate in which they hold rights or interests. The ongoing resourcing of particularly smaller PBCs will be important in ensuring the integrity of the current native title system.

While institutional capability that prosecutes and defends Indigenous land and sea interests and rights will always be necessary, a new institutional response is required that is designed to specifically address the unique market failure in the establishment and development of all Indigenous business in Northern Australia land based or otherwise, including those that are operated by Traditional Owners through PBCs or other constructs. NTRBCs will remain an important resource for PBCs in the short-term, but in a post-determination environment where a very different institutional framework is required, it is not clear what their role will be in 10 to 20 years' time.

As such, the IRG strongly recommends a realignment of the institutional framework that applies to Indigenous economic development in Northern Australia that recognises the broader business support, capability building and resourcing needs of Traditional Owners operating through PBCs or other constructs, as well as Indigenous businesses that are not directly linked to land, water or sea assets.

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

There are many Commonwealth (as well as Western Australian, Northern Territory and Queensland) Government programs that can be accessed to support, with varying degrees of specificity, Indigenous economic engagement across Northern Australia. Indeed, the Northern Australia Senior Official Network Group recently identified 74 separate Commonwealth, state and territory programs that are designed at least in part to assist with Indigenous economic development that can be accessed by entities or individuals in Northern Australia. However, the main national Indigenous specific economic development agencies are the two organisations enacted under the *Aboriginal and Torres Strait Islander Act 2005* (Cth), namely Indigenous Business Australia (IBA) and Indigenous Land and Sea Corporation (ILSC), as well as Supply Nation which is a non-government organisation.

Each of these organisations is resourced variably by appropriations from government and self-generated income through investments and/or fee for service. Each organisation has and continues to make a significant contribution to facilitating Indigenous economic self-determination across Australia. However, there are a number of structural constraints that limit the ability of these entities to adequately support Northern Australian Indigenous economic development.

The ILSC has a statutory remit to acquire land, water and sea, and through grants, loans or loan guarantees, transition the ownership of acquired land, water or seas to Indigenous interests. The ILSC has a statutory remit to support land, water or sea management functions on ILSC acquired or transferred lands, waters or seas. This includes land and water-care and conservation, social, cultural or economic activities. The ILSC has made significant divestments of the Indigenous estate to Indigenous groups and supported the development of a number of Indigenous businesses in Northern Australia, particularly in the pastoral, traditional produce and Indigenous tourism sectors. Recent amendments to the *Aboriginal and Torres Strait Islander Act 2005* (Cth) that, among other things, extend the ILSC's remit to water and sea interests is a welcome development that presents significant opportunity for Northern Australian Indigenous businesses. Nevertheless, economic development activities that can be supported by the ILSC are restricted to land, water and sea based businesses and only businesses that 'improve' those land, water and sea estates.

From a business support and financing perspective, IBA has a broader statutory remit and is able to provide business support services and financing to a wider range of Indigenous businesses and does so in Northern Australia. However, it currently faces a number of challenges with respect to delivering the well-resourced, acutely tailored and more concessionary support that Northern Australian Indigenous business requires. Firstly, IBA's main function in terms of capital and internal resources is its home lending function. Secondly, IBA is a national program, with the majority of its business support and investment activity concentrated on the east coast and southern Australia, where the majority of the Australian Indigenous population reside. Thirdly, its national remit and requirement to adhere to sound commercial principles, means it is limited with respect to providing a discriminatory program in Northern Australia that is acutely focused, or which provides the additional concessionary support that is required to overcome the unique market failure.

Supply Nation performs a critical function in certifying Indigenous ownership and operation of businesses and marketing those businesses to potential customers in private and public supply chains across the Nation. Continued support for these functions is very important in assisting relatively remote Northern Australian Indigenous enterprise in being competitive in both local and wider domestic markets.

Given the limitations of the existing institutional framework with respect to adequately addressing the unique market failure in the development of the Northern Australian economy, **the IRG strongly recommends either a stand-alone Northern Australian Indigenous economic development organisation that can deliver the well-resourced, acutely focused, concessional, 'best-in-class', broad-spectrum Indigenous business support and financing that is required to optimally activate the Northern Australian Indigenous economy, or a statutory re-tasking of the existing Indigenous economic development organisations to achieve this result.** A study exploring these alternatives commissioned by the IRG is close to completion.

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

There is consensus across the Northern Australian Indigenous leadership that Indigenous economic interests in Northern Australia had not been given adequate consideration in the design of the legislative, administrative and funding arrangements that apply to the Northern Australia Agenda. This commenced with inadequate focus on the Northern Australia Indigenous economy and its potential in the *Our North, Our Future Whitepaper*, and as a result is reflected in the institutional framework that was derived from that Whitepaper. This is despite 'Indigenous Entrepreneurship and Business' being one of six pillars under the Northern Australia Agenda.

The Northern Australia Indigenous leadership voice has been loud and united in this regard, and to the credit of Commonwealth, state and territory governments, as well as organisations that comprise the existing institutional framework, the existing institutional apparatus has, to some extent, responded to these concerns. This is evident through the establishment of the IRG itself, specific research activities of the CRC for Developing Northern Australia, and the current loan portfolio of the Northern Australia Infrastructure Facility. Nevertheless, this reactive approach to policy development has left a legacy of Indigenous economic interests typically being a secondary consideration in the Northern Australia Agenda, and without dedicated institutional capacity.

Similar to the 'whole of nation' constraints that apply to the organisations established under the *Aboriginal and Torres Strait Islander Act 2005* (Cth), the existing Northern Australia institutional framework fails to deliver the discriminatory resources, concession and focus that is required to support optimal growth of the Northern Australia Indigenous economy. For example, while the CRC for Developing Northern Australia has a specific research program focusing on Traditional Owner led business with a number of projects currently underway, it does not have the governance arrangements that are required to ensure these projects deliver on the specific needs of Indigenous managers and business owners and is focused primarily on land-based Indigenous businesses. Similarly, the Northern Australia Infrastructure Facility has provided loans to businesses that have Indigenous interests. However, the current remit for debt to be the default instrument and what appears to be a preference for not providing finance on terms and conditions that are much below the Commonwealth's cost of capital, renders the Northern Australia Infrastructure Facility an irrelevant source of concessionary finance for the vast majority of Indigenous businesses in Northern Australia.

To have a substantial impact on the Northern Australian Indigenous economy, the legislative, administrative and funding arrangements must achieve the following:

- Recognise the unique challenges that all Indigenous owned and operated businesses in Northern Australia face and be designed specifically to address those unique challenges;
- Acutely understand the specific challenges and opportunities facing specific Indigenous owned and operated businesses of different types, in different parts of Northern Australia and bring to bear on those businesses support packages that cover the full suite of commercial needs, are acutely tailored to the specific needs of each business and which are based on 'best-in-class' service products;
- Develop knowledge and knowledge products that can be used by Indigenous managers to inform decisions that decrease risk and optimise productivity through better strategic, operational and financial decisions;
- Provide access to capital classes with a risk appetite that is aligned with the risk profile of most Indigenous owned and operated businesses in Northern Australia;
- Ensure that local workforces have every opportunity to develop the skills for the current and future job opportunities that exist in a specific region, and that Indigenous and non-Indigenous enterprise has access to that workforce;

- Provide a platform for the development of evidence-based policy advocacy targeting both issues immediately affecting Indigenous enterprise in Northern Australia, as well as longer terms structural issues; and
- Provide an advocacy mechanism that gives Indigenous enterprise in Northern Australia a loud and equal voice in the Northern Australia agenda.

To this end, **the IRG strongly recommends that the legislative, administrative and funding framework that applies to the implementation of the Northern Agenda be supplemented with a specific institutional capability dedicated to supporting the delivery of outcomes against the Indigenous Enterprise and Business pillar of the Northern Australia Agenda and providing the well-resourced, acutely focused, concessional, 'best-in-class', broad-spectrum Indigenous business support and financing that are required to optimally activate the Northern Australian Indigenous economy.**

Strategies for the enhancement of economic development opportunities and capacity building for Traditional Owners and land and sea owner entities

Consistent with the IRG's responses to the Terms of Reference to this Inquiry, a key recommendation of the IRG that is currently the subject of scoping is a proposed Northern Australia Indigenous Economic Development Body (or equivalent function) as a key component of the institutional framework that is delivering on the Northern Australia Agenda. This body will service the capacity building needs of Traditional Owners and land and sea owner entities, as well as the many other existing and aspiring Indigenous businesses that comprise the Northern Australia Indigenous economy.

The following Table 1 summarises the strategic intent of the proposed Northern Australia Indigenous Economic Development Body (NAIEDB).

Element of Strategic Intent	Preliminary Draft
Vision	By 2035, a sustainably developed Northern Australia, where Indigenous owned and operated business accounts for a portion of Northern Australia non-resources industry Gross Regional Product (GRP) that is at least at parity with the portion of the Northern Australian population that is Indigenous.
Mission	To maximise the sustainable development potential of Northern Australia by ensuring that Indigenous business in Northern Australia is able to meet its full potential, thereby delivering wealth and prosperity to Indigenous Northern Australians that is commensurate with that of non-Indigenous Northern Australians.
Key objectives – First Two Years	<ol style="list-style-type: none"> 1. Establish Business and Enterprise Employment Hubs. 2. Develop and prosecute a Northern Australia Indigenous Commercial Research Priorities Plan. 3. Convene a ‘think-tank’ on Northern Australia Indigenous economic development policy comprised of pre-eminent thought leaders in the space. 4. Develop and advocate for key initiatives under that policy platform.
Key Objectives – First Five Years	Validation of the NAIEDB model through evidence-based data demonstrating impact on Northern Australian Indigenous enterprise and progress in significant relevant policy reform.
Operating Principles	<ol style="list-style-type: none"> 1. The NAIEDB will add value to the existing Northern Australia and Indigenous economic development institutional framework 2. The NAIEDB will be administratively efficient 3. The NAIEDB will be apolitical and independent
Key Stakeholders	<ul style="list-style-type: none"> ▪ All Indigenous owned and operated enterprise across Northern Australia ▪ Indigenous communities across Northern Australia ▪ Local governments across Northern Australia ▪ State and territory governments across Northern Australia and their agencies relevant to Northern Australia economic development and Indigenous economic development ▪ Commonwealth government and its agencies relevant to Northern Australian and Indigenous economic development ▪ Not-for-profit and private sector business service providers ▪ Industry with interests in Northern Australia ▪ Australian public and private research providers

Table 1 – Strategic Intent of the Proposed Northern Australia Indigenous Economic Development Body

The proposed NAIEDB would not replicate existing Indigenous business support and financing capacity. Rather it will seek to partner with existing Commonwealth, state and territory government programs, programs offered by non-government organisations and the private sector to deliver acutely tailored, well-resourced and appropriately concessional business support and financing packages for Indigenous businesses in Northern Australia.

The specific functions that are proposed to be performed by the NAIEDB, as well its relationships with the existing developing Northern Australia and Indigenous enterprise development institutional framework is illustrated in Figure 1 below and summarised in the following subsections.

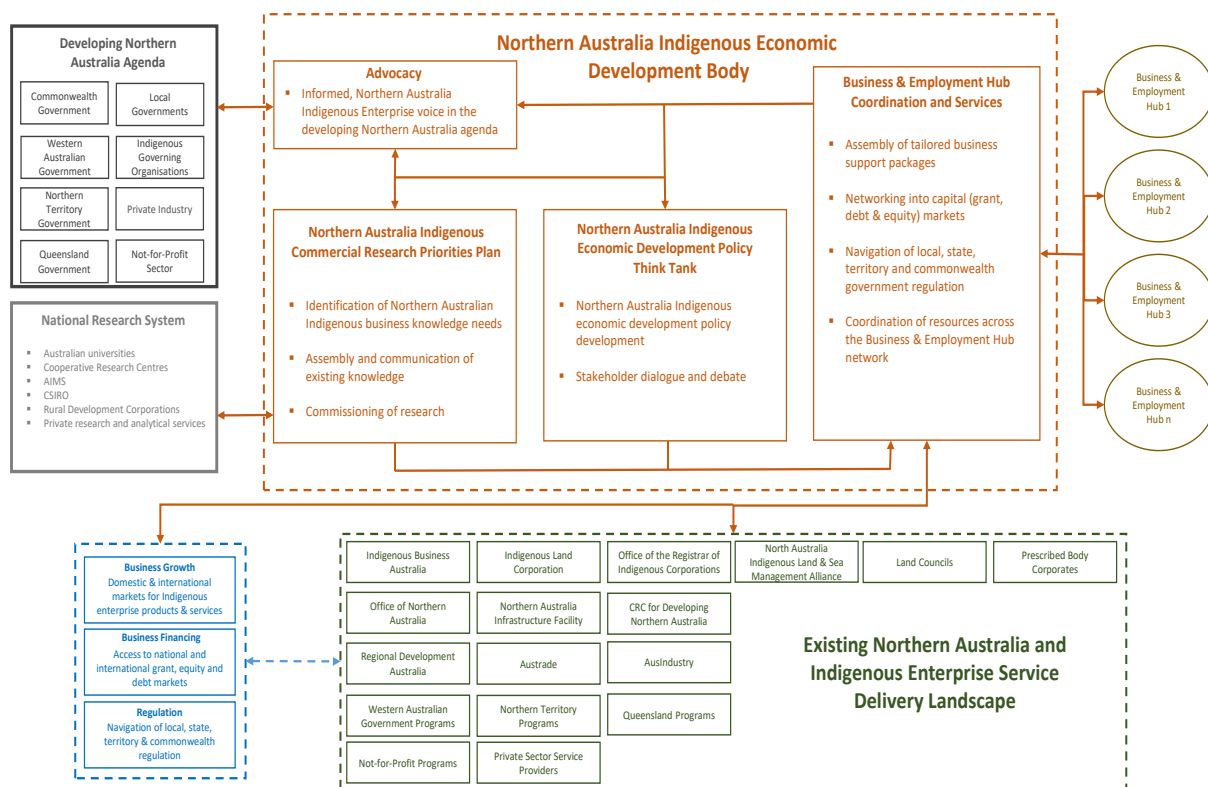


Figure 1 – Functions of the Proposed Northern Australia Indigenous Economic Development Body

Business and Employment Hub Coordination and Services

Supporting and coordinating a network of on-the-ground, business and employment hubs (BEHs) that support Indigenous businesses through an acute case-management model in a particular region is a core function of the NAIEDB, and includes the following activities:

- Business Support Services Sourcing and Packaging**

The function of the BEHs is to acutely understand the business support service needs of sectors of the Indigenous economy and individual Indigenous owned and operated businesses in their specific areas. Given the remoteness of Northern Australia generally, as well as the likely even more remote locations of some of the focus areas, it is unrealistic to envisage the BEHs being able to access and package the wide range of ‘best-in-class’ services that will be necessary to fulfil this function. A key function of the proposed NAIEDB is to work with the individual BEHs to understand the services required, source those services and help package them so that the BEHs can support delivery through their client relationships. The NAIEDB will also assist the BEHs in validating business concepts on an evidence basis. To effectively perform this key function, the NAIEDB will require deep and effective relationships with the existing commonwealth, territory and state government institutions that offer relevant developing Northern Australia and Indigenous economic development services; relevant not-for-profit organisations such as Many Rivers and various chambers of commerce and industry associations; and a wide range of private sector service providers. It will also require the capacity to enter into effective service delivery partnerships with those programs.
- Business Growth – Product and Service Market Development**

In addition to sourcing business support services, it is proposed that the NAIEDB will also perform a role supporting the BEHs to provide their clients with access to wider domestic and international markets for their products and services. It is envisaged that in most cases, the NAIEDB would perform this task in collaboration with existing programs such as Supply Nation or Austrade. However, where existing programs do not have networks in target markets, the NAIEDB may need to perform the role in its own right.

- ***Business Financing***
The NAIEDB will also assist the BEHs network their clients into appropriate grant, equity and debt markets, ensuring efficient access to the best match of capital class and investors within that class for individual businesses. This may also be undertaken in collaboration with the existing service delivery landscape, or independently by the NAIEDB, and may be supported by a dedicated fund designed to lower private investor hurdle rates (see further below).
- ***Navigation of Regulatory Environment***
Navigating project approval and operating regulatory environments in Northern Australia can be particularly complex and is likely a task that will be beyond the capabilities of most BEHs. Another important function of the NAIEDB would be to support the BEHs in assisting their clients with navigating complex multi-jurisdictional regulatory environments. Again, this may be performed by the NAIEDB in isolation or in collaboration with the existing service delivery landscape.
- ***Training and Employment Pathways***
The NAIEDB will work with the BEH hubs, government agencies and the private sector to understand the current and future workforce needs in specific regions in Northern Australia and bring to bear training and employment pathway programs that ensure that the local Indigenous workforce is suitably trained for jobs that are and will be available in the region.
- ***Coordination and Resource Optimisation***
As the network of BEHs grows, there would be opportunity to coordinate resources and leverage opportunities across the various BEH areas. It is envisaged that coordinating the activities of the BEHs and ensuring resources are used efficiently and optimally across the BEHs would be an emerging function of the NAIEDB.

Knowledge Generation and Management

It is proposed that the NAIEDB would perform two separate but closely related knowledge generation and management functions:

- ***Custodian of the Northern Australia Indigenous Commercial Research Priorities Plan***
A key recommendation of the IRG is the development of an end-user driven research roadmap that identifies the specific knowledge and knowledge products that owners and managers of Indigenous enterprise in Northern Australia require to improve their decision-making environment. In other words, a research investment plan whose specific priorities and outputs are determined by the Indigenous managers and business owners who will use the knowledge generated from the research in their strategic, operational and financial decision-making. This roadmap, the Northern Australia Indigenous Commercial Research Priorities Plan, would be used to assemble existing relevant knowledge, commission new research that is required and produce suitable knowledge products that are accessible and usable by Indigenous business owners and managers across Northern Australia. To ensure its integrity with respect to maintaining an acute end-user focus and optimal use, it is critically important that the roadmap is developed and managed by an entity that is end-user (Indigenous managers and business owners) oriented and independent from the research system that provides the knowledge. It is proposed that the NAIEDB is a suitable entity to perform this function. This would involve the NAIEDB developing, through extensive consultation with end-users, the roadmap, monitoring its currency, assembling existing knowledge that is identified by the roadmap, commissioning new research to fill identified knowledge gaps and working with the BEHs to create suitable knowledge products specifically tailored for their clients, as determined by their clients. These clients may include Traditional Owners, or any Indigenous owned and operated business. The NAIEDB will partner with the wider Australian and international public and private research ecosystem to generate the knowledge needs identified under the Northern Australia Indigenous Commercial Research Priorities Plan.

- *Northern Australia Indigenous Economic Development Policy Think Tank*
Through its relationship with the BEHs, the NAIEDB would be in a position to develop a deep understanding of the range of specific issues faced by Indigenous enterprise operating across Northern Australia at a 'grass-roots' level. This, combined with knowledge acquired and generated through the development and implementation of the Northern Australia Indigenous Commercial Research Priorities Plan, would provide the NAIEDB with a depth of evidence-based knowledge on Northern Australia Indigenous economic development issues that is unique. It is proposed that the NAIEDB use this knowledge as the basis for convening a 'think-tank' comprised of Northern Australian Indigenous enterprise owners, global preeminent thought leaders on Indigenous economic development policy and existing Northern Australian Indigenous policy advocates to create a comprehensive, world-class policy agenda for Indigenous economic development in Northern Australia.

Advocacy

The development of Northern Australia is a decadal process. It is critically important that, as a key stakeholder, Indigenous enterprise in Northern Australia has a coordinated and effective professional advocacy voice in the Developing Northern Australia agenda. By virtue of the 'grass-roots' connection the NAIEDB would have with Indigenous business owners and managers through the BEH network, the knowledge generated from the Northern Australia Indigenous Commercial Research Priorities Plan and the policy think-tank, the NAIEDB would be well positioned to provide evidence-based advocacy on behalf of Northern Australia Indigenous enterprise on both immediate issues, and longer term policy settings.

On this basis, it is proposed that the NAIEDB would develop an advocacy function targeted primarily at the Developing Northern Australia Agenda and discussion, and representing specifically Indigenous owned and operated enterprise in Northern Australia. The NAIEDB would partner with other advocates where interests are aligned.

Access to Capital

The *Northern Australia Infrastructure Facility Act 2016* (Cth) makes provision for the Northern Australian Infrastructure Facility to provide financial assistance on more concessionary terms than it currently does. However, the process for achieving this is convoluted requiring approval from multiple Ministers, the current default instrument is a debt instrument and based on the current loan portfolio, the appetite for offering loans on terms that are much below the Commonwealth's cost of capital seems limited. This strongly indicates that the Northern Australia Infrastructure Facility has a risk appetite that is not aligned with the risk profile of the vast majority of Indigenous businesses in Northern Australia.

The IRG is proposing a capital access policy framework for Northern Australian Indigenous business that has the following components:

- *Matching 'Investment Ready' Grants*
Many early and mid-stage Indigenous businesses in Northern Australia struggle to resource work that is required to render the business 'investment ready'. This typically revolves around generating independent knowledge on markets, expert financial modelling, advice on corporate structures, advice on intellectual property and so on that investors require to understand with confidence the risks associated with the business and the potential returns. To this end, a grant program is required whereby the government contributes according to a determined ratio to the cost of professional advice with respect to preparing such work that is required to render Indigenous businesses in Northern Australia ready for investment.
- *Private Investor Incentives*
Most Indigenous businesses in Northern Australia present a risk profile that is more suited to equity investment than the default debt products preferred by NAIF. However, for the market failure reasons discussed in this submission, the hurdle rate for equity investment in many Northern Australia

Indigenous businesses is too high. As such, the IRG is proposing mechanisms that reduce this hurdle rate for private investors. One option is the establishment of a fund whereby the government contributes a portion of the capital against private investor capital for investment in higher risk Northern Australian Indigenous businesses, where the government receives a priority return of its capital and potentially an interest rate at investment exit, potentially also accruing some additional equity for the Indigenous interests so that Indigenous interests are not overly diluted. This structure maintains downside risk for private investors, thus motivating sensible investment decisions, but at the same time increases investor upside in the case of a successful investment outcome, thus lowering the investment hurdle rate. Another option is to use the taxation system to incentivise investment, either through tax rebates or capital gains and/or income tax concessions for equity investment in Indigenous businesses in Northern Australia. Various other options are currently being assessed by the IRG.

- *Capital Markets Reach Program*

The IRG is proposing that supporting both the investment ready and matching equity investment fund is a program that promotes and communicates those programs as well as specific Northern Australian Indigenous business investment opportunities to equity investment markets across Australia and internationally, including private equity markets, angel investor networks and philanthropic markets.

It is proposed that the fund and grants aspect of this framework be managed by the Northern Australia Infrastructure Facility or a similar entity that is at 'arms-length' from the proposed NAIEDB.

The principle of free, prior and informed consent

Adherence of domestic legislation and policy to the *United Nations Declaration on the Rights of Indigenous People's principle of free, prior and informed consent* is fundamental to the integrity of Indigenous land, water and sea rights. If holders of Indigenous land, water and sea interests and rights are not able to be responsible for those lands, waters and seas and make decisions as to what happens on that estate, then the value of those rights and interests is significantly diminished. This position is not to undermine the sovereignty of governments, but rather to elevate holders of Indigenous estate rights and interests to a level of security that is broadly equivalent to other holders of land, water and sea tenure.

Outside of the Northern Territory's unique system of Indigenous land ownership (and to an extent that of Queensland's), the rights that the current main system of laws that allow Indigenous people to pursue and hold in their land, water and sea country, native title, falls short of most other forms of tenure. Famously described as a 'bare bundle of rights' in the *Ward* decision¹, native title can be, and often is, extinguished bit-by-bit as non-Indigenous people use and exploit the Indigenous estate. As they do so, the holders of Indigenous land, water and sea interests and rights are not able to be responsible for that estate, to make decisions as to what happens on that estate, to benefit from those rights and interests or to use and exploit those rights and interests to build their own communities, resilience and prosperity.

Further, the system and process of native title determinations can drag on for decades at huge expense. As of last year, across Australia, there had been a total of 1,864 claimant applications lodged with the National Native Title Tribunal or filed in the Federal Court. Of these, 958 had been dismissed, struck-out or otherwise discontinued. Less than 20 percent of applications made to the National Native Title Tribunal over the last 25 years have resulted in a final determination, and in only 2 percent of cases was a determined litigant able to secure a positive determination over their ancestral land without the consent of developers, government and other intervenors.²

¹ *Western Australia v Ward* (2002) 213 CLR 1

² Hunter, P, *The Native Title Act – The First 25 Years – Old and New Challenges* (2018), delivered for the Richard Cooper Memorial Lecture 2018, Federal Court of Australia, 25 October 2018.

Clearly, further Indigenous land, water and sea tenure, access and control reform is required to give meaningful effect to the United Nations Declaration on the Rights of Indigenous People's principle of free, prior and informed consent in Australian law. As critical as the principle of free, prior informed consent is, reform must be such that it does not overcomplicate agreement making processes where the principle of free, prior and informed consent applies, as overly burdensome administrative processes for achieving free, prior and informed consent risks lost opportunity. The solution to this resides in standardisation of processes for Indigenous Land Use Agreements (ILUA) and resourcing of PBCs and other holders of Indigenous rights and interests to ensure processes are competent, adequately flexible, transparent, predictable and efficient.

Given the extent of Indigenous land and sea estate interests in Northern Australia, this reform is of significant importance.

In addition to the physical estate, what is also needed by Indigenous enterprises in Northern Australia is a way to secure value and derive prosperity from their unique competitive advantage, being the knowledge Indigenous people and their communities hold about their country and intangible cultural assets. Or in other words, their intellectual property. Without a framework to protect and allow this knowledge to be shared and exploited, either individually or with commercial partners, the interests of Indigenous people are open to misappropriation or misuse.

While some progress has been made, the root problem is that most Indigenous intellectual property does not easily fit into the traditional Western-centric notions of classification and protection through trademarks, copyright, litigation, licensing and the like. However, the international community is now well advanced in securing ways to recognise and protect Indigenous Intellectual Property, and Australia is at risk of falling far behind not only best practice, but also potentially our obligations under international treaties.

Broadly, the Intergovernmental Committee (IGC) of the World Intellectual Property Organisation (WIPO) has identified three key areas of Indigenous Intellectual Property, and their relationship to and within the prevailing international intellectual property regime founded on the Paris, Rome and Berne Conventions³. These are summarised in Table 2 below.

³ 828 UNTS 305; 496 UNTS 43; 1161 UNTS 30. Table derived from *Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources*, published World Intellectual Property Organisation, accessed 01/02/19

Definition	Challenges to the Existing Framework
TRADITIONAL KNOWLEDGE	
Knowledge resulting from intellectual activity in traditional context, including know-how, practices, skills and innovations	<p>Traditional Knowledge in its purest form, which frequently has ancient roots and is passed down usually in oral form, is generally not protected by traditional methods such as patent or trademark.</p> <p>Specific practices or innovations may be protectable but determining the ‘owner’ within the understanding of Western individual-centric Intellectual Property protection practices is difficult, and nominating that ‘owner’ may disenfranchise other entitled Indigenous interests.</p>
TRADITIONAL CULTURAL EXPRESSIONS	
Also known as ‘folklore’ this includes music, dance, art, designs, names, signs and symbols, performances, narratives and architecture.	<p>Traditional Cultural Expressions are more amenable to protection under existing systems, usually under the Berne or Rome Conventions. However, Traditional Cultural Expressions are usually bound up in and integrated in a single heritage that also encompasses Traditional Knowledge and Genetic Resources (see below). They are integral to the cultural and social identity of the community, and hence protection through existing channels may lead to artificial segregation and disenfranchisement.</p> <p>In particular, the obligations placed on copyright holders to enforce their rights against all other parties or lose control to public domain is difficult to reconcile with the generally communal nature of Traditional Cultural Expression practices.</p>
GENETIC RESOURCES	
Biological materials that contain genetic information of value, and are capable of reproducing or being reproduced, including medicinal plants, agricultural crops and products of animal husbandry	<p>Genetic Resources as encountered in nature are not creations of the human mind and thus cannot be directly protected as intellectual property. However, innovations based on or developed from Genetic Resources may be protected by mechanisms such as patent or plant breeder’s rights.</p> <p>In many communities, Traditional Knowledge is closely associated with Genetic Resources through the utilisation, protection and conservation of that resource of many generations. In a modern context, Traditional Knowledge often provides researchers with insights to isolate valuable active compounds within Genetic Resources and commercialise them.</p>

Table 2 – Key Indigenous Intellectual Property Focus of the Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

With a mandate to “ensure the balanced and effective protection of genetic resources, traditional knowledge and traditional cultural expressions”⁴, the WIPO Intergovernmental Committee (IGC) has since 2004 published Draft Articles for consideration, review and eventual adoption by the IGC and the wider WIPO Assembly. These have been updated steadily over the years since, with the latest drafts presented at the 32nd IGC meeting in 2016⁵. While still in flux, the Draft Articles focus on preventing misappropriation of Indigenous Intellectual Property through requiring developers and commercial partners to secure the prior informed consent of Indigenous people before using their Indigenous Intellectual Property and reaching mutually agreed terms with them to share any profits.

In addition to this emerging best practice through WIPO, Australia, as a signatory to the Convention on Biological Diversity and an accessor to the voluntary Bonn Guidelines⁶, has obligations to preserve and encourage the customary and traditional use and exploitation of biological resources by Indigenous peoples and communities, and to ensure that they have access to an equitable share of the benefits of those resources, including those that arise from their ‘knowledge, innovations and practices’. In particular, Article 15 of the Convention specifically authorises and encourages States to implement, via domestic laws, an access regime whereby

⁴ *Decision: Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, Assemblies of Member States of World Intellectual Property Organisation, 55 session (October 2015)

⁵ *Draft Provisions/Articles for the Protection of Traditional Knowledge and Traditional Cultural Expressions, and IP & Genetic Resources*, published World Intellectual Property Organisation, accessed 01/09/18

⁶ (1992) 1760 UNTS 79; *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of Their Utilization* - Conference of the Parties to the Convention (6), 2002, The Hague, Netherlands

Genetic Resources may only be utilised where mutually agreed terms and prior informed consent is provided, and an arrangement is entered into so that the commercial and other benefits resulting from research and development are shared fairly and equitably. This has come to be known as an Access and Benefit Sharing Scheme. The Bonn Guidelines, while voluntary, provide further details, processes and precedents as to the implementation of such a scheme.

While Australia has taken only limited steps towards fulfilling this obligation (discussed below) the international community has moved on still further. The Nagoya Protocol⁷, currently ratified by 106 of the State party to the Convention on Biological Diversity but not by Australia, goes significantly beyond the voluntary Bonn Guidelines, and provides concrete definitions and places specific obligations on State. These include legislating to ensure that an Access Benefit Sharing Scheme is in place to share the benefits from Indigenous Intellectual Property with their traditional owners, that prior informed consent is obtained before any exploitation occurs, and that between developers and traditional communities mutually agreement terms are reached and enforced by regulation and State protection.

Finally, the defining Declaration on the Rights of Indigenous Peoples, adopted and endorsed by Australia in 2009, recognises the right of Indigenous people to practice, maintain and protect their culture and all manifestations of it, and to control their cultural heritage, including Traditional Knowledge, Traditional Customary Expressions and Genetic Resources (see Table 2). Fundamental to these protections is support for the notion of prior and informed consent and mutually agreed terms, discussed above. Adherence of legislation and policy to the Declaration's principles is fundamental to the integrity of Indigenous rights and interest in Australia, regardless of the jurisdictional legislative instrument that has given effect to those rights.

Despite these several obligations placed upon Australia, and the emerging international consensus on the fundamental rights of Indigenous people and the protection of their interests, domestic implementation is patchy at best. Following the ratification of the Convention on Biological Diversity by the Australian Government, the Natural Resource Management Ministerial Council produced a set of guidelines known as the 'Nationally Consistent Approach for Access to and Utilisation of Australia's Native Genetic and Biochemical Resources'.⁸ As stated in the Foreword, "...each jurisdiction recognises its responsibility to develop frameworks for access to and utilisation of genetic and biochemical resources consistent with [the Convention on Biological Diversity]...has a responsibility to ensure the fair and equitable sharing of benefits arising...[and] respect Indigenous people's special knowledge of that biodiversity."⁹

Under the Constitution, the Commonwealth Parliament has the power to enact laws necessary to fulfil Australia's obligations under international treaties to which it is a party. Parliament at the time did not do so, instead leaving the specifics of legislation as a matter for individual States after seeking their (non-binding) assent to a broad statement of principles. As might be expected, this has resulted in an extremely fragmented and inconsistent policy approach within Australia to recognition of Indigenous Intellectual Property rights.

Indeed, while all states and territories have notionally endorsed the Nationally Consistent Approach, as summarised in Table 3 below, only the Northern Territory, Queensland and the Commonwealth itself have to date legislated to implement their obligations, and significant differences between their approaches and the degree of protection offered have stymied the broader development potential of Northern Australia in exploiting Indigenous Intellectual Property.

⁷ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from the Utilization of Genetic Resources of the Convention on Biological Diversity*, registered UNTC 12 October 2014, No. 30619

⁸ Natural Resource Management Ministerial Council; Commonwealth Department of Environment and Heritage, 11 October 2002

⁹ *Foreword; ibid*

Jurisdiction	High-level summary of protection, obligations and process
COMMONWEALTH	
<p>Implementation: <i>Environmental Protection and Biodiversity Conservation Act 1999</i> (Cth) and regulations.</p> <p>Basis: permission of ‘access provider’ for access to biological resources on Cth land.</p>	<p>Access to biological resources found on Commonwealth-controlled areas managed via permitting system. The permission of an ‘access provider’ is required before access to biological resources is permitted.</p> <p>Where the land is subject to native title, or owned by an Indigenous corporation, that entity will become an ‘access provider’ and their consent is required. If access is sought for commercial purposes, parties must enter into an Access and Benefit Sharing agreement. Where non-commercial, some exemptions apply, and process subject to Ministerial discretion.</p> <p>Since permitting commenced in 2006, only three commercial permits have been issued to date, all to the Australian Institute of Marine Science. The terms of these and the outcome of their issue is not in the public domain.</p>
NORTHERN TERRITORY	
<p>Implementation: <i>Biological Resources Act 2006</i> (NT).</p> <p>Basis: permission of ‘resource access provider’ required before ‘bioprospecting’ in Northern Territory permissible.</p>	<p>Broadly, the Act aims to protect and recognise the ‘special knowledge’ held by Indigenous persons about biological resources and establish a framework to share the benefits arising from their use. Where ‘indigenous knowledge’ is the source of biological resources, a ‘resource access provider’ (including Land Trusts and native title holders) must agree to allow access and enter into an Access and Benefit Sharing Agreement.</p> <p>‘indigenous knowledge’ is narrowly defined. It must be knowledge coming from a particular defined person or persons and does not include that obtained from scientific or other public documents, or otherwise from the public domain. As noted above, under the current state of Intellectual Property law in Australia, most indigenous Intellectual Property not rigorously guarded from outsiders continuously to the current day is at risk of being deemed public domain.</p>
QUEENSLAND	
<p>Implementation: <i>Biodiscovery Act 2004</i> (Qld); Biotechnology Code of Ethics.</p> <p>Basis: Act requires that State of Qld benefit from all biological material from State lands. Code commits to negotiating ‘reasonable’ benefit share with Traditional Owners where IIP used.</p>	<p>The Act makes no mention at all of Indigenous peoples or communities, and instead seeks to ensure benefit sharing and control of biological resources should accrue to the State of Queensland from material collected from State lands.</p> <p>However, the Code of Ethics recognises the culturally significant aspects of the knowledge of traditional owners and commits to negotiating a ‘reasonable’ benefit-sharing arrangement where Traditional Knowledge is used. No enforcement mechanisms or further details are provided as to the practical implementation of this broadly-worded commitment.</p> <p>The Act has been recently reviewed, with the terms of reference specifically addressing Access and Benefit Sharing and use of Traditional Knowledge in relation to genetic and biological resources. The Queensland government has broadly agreed to all suggested reforms except those relating to Indigenous intellectual property, stating in its April 2018 response that while it ‘agrees in principle’ it requires additional time to consult with the Aboriginal and Torres Strait Islander community.</p>

Table 3 – Australian implementations of Indigenous intellectual property protection

In summary, while some aspects of Indigenous Intellectual Property could arguably be protected under the current regime, the existing intellectual property protection framework within Australia is often not best suited to protection of Indigenous interests. Indigenous Intellectual Property is often qualitatively different from Western-centric commercial, industrial or individualistic artistic endeavours more commonly protected by intellectual property law, and Indigenous knowledge and culture is therefore usually regarded as ‘public domain’, and hence free for anyone to use and appropriate, Indigenous or not. This inability to protect individual or community rights, and to activate the unique heritage and commercial advantage of Indigenous communities within Northern Australia, acts as a significant dampener on economic development and sustainability of the region.

The IRG strongly recommends that Australian Governments prioritise the reform required to give meaningful effect to the United Nations Declaration on the Rights of Indigenous People’s principle of free, prior and informed consent in Australian law as it pertains to rights and interests in the land, water and sea estate. However, all reform in this area must not overcomplicate the agreement process, ensuring key principles of flexibility, transparency, predictability and efficiency are upheld.

The IRG strongly recommends that the Council of Australian Governments seek to harmonise Australian legislation pertaining to Indigenous Intellectual Property based on current best practice as per its obligations under the Declaration on the Rights of Indigenous Peoples, Convention on Biological Diversity and Bonn Convention, as well as world-best-practice recommendations of the World Intellectual Property Organisation and the Nagoya Protocol.

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*

To those operating in the Northern Australian Indigenous economy, case examples of economic development on Indigenous statutory land titles are well known. Indeed, rightly so, they are widely publicised and celebrated. They include Indigenous owned and operated pastoral stations, pastoral sub-leases and horticulture operations (including traditional produce); fishing and aquaculture operations; conventional and cultural tourism assets; land and sea conservation programs; agreements that facilitate minerals and petroleum exploration and production; carbon farming; and infrastructure operations such as airports. In addition to these success stories is a large area of the Northern Australian Indigenous estate that remains undeveloped primarily because the land, water or sea asset does not have conventional economic value.

It less widely discussed and acknowledged, that the establishment of economic activity in what are mostly relatively mature industries on parts of the Indigenous estate has taken over 25 years and cost Australian governments billions of dollars. Most importantly, this predicament has manifested in a significant opportunity cost for Indigenous Northern Australians, the Northern Australian economy and Australian government's that carry the cost of socio-economic disadvantage among the Northern Australian Indigenous community.

The fact that there are many Indigenous owned and operated businesses in Northern Australia that are not based Native Title or other statutory land titles that face the same challenges is also less widely acknowledged and celebrated. An example of what can be achieved outside of the land, water and sea based business paradigm, and in the face of the considerable challenges presented to Indigenous business in Northern Australia, is Aboriginal Broadcasting Australia (ABA), the largest Indigenous owned, managed and staffed television, radio and production media company in Australia. ABA broadcasts, promotes, creates and produces films, documentaries, television and radio content focused on Indigenous people, cultural heritage, land rights, Indigenous businesses and Indigenous issues. It produces a national television and radio Aboriginal news service and operates a Digital Indigenous Resource and Archive Centre for digitising historic and current video, film, television and audio. ABA promotes and supports Northern Australia Indigenous communities; Indigenous corporations; Indigenous business and entrepreneurship; Indigenous education, training, mentoring and employment; digital technologies; local and international Indigenous business, trade and economic development; Indigenous leadership; and Indigenous women in business.

The observations and recommendations in this submission focus on a comprehensive activation of the Northern Australian Indigenous economy that includes land, water and sea-oriented enterprise, but reaches further into other established and emerging sectors of the economy to deliver more success stories such as ABA. However, given the specificity of this particular Terms of Reference, the IRG offers the following examples:

- **Larrakia Development Corporation**

Larrakia Development Corporation is developing the Larakia Cultural Centre that will integrate non-commercial, traditional offerings for the benefit of the Larrakia people and other community members with a range of commercial offerings that revolve primarily around a currently under-served cultural tourism market in Darwin.

- **Dugalunji Aboriginal Corporation**

The Indjalandji-Dhidhanu people are the traditional owners of the eastern Barkly Tableland, in the upper reaches of the Georgina River Basin on the Queensland - Northern Territory border. Spinifex has been part of the Indjalandji-Dhidhanu people's economy for thousands of years. In 2013, a research partnership between Indjalandji-Dhidhanu (under Dugalunji Aboriginal Corporation) and the University of Queensland uncovered the unique properties of spinifex grass. Nanofibrils from spinifex were found to have several potential commercial applications such as in latex, recycled packaging and concrete.






In 2015, these partners signed a Spinifex Research Commercialisation Agreement that recognises traditional-owner knowledge about spinifex and provides shared protection of all of the Spinifex Project intellectual property. This includes not only the Project Intellectual Property developed from the research, but licenses and patents which acknowledge the parties' background Intellectual Property and Traditional Indigenous Knowledge.




The Agreement ensures the Indjalandji-Dhidhanu people will have ongoing equity and involvement in the commercialisation of the nanofibre technology. In recognising the Indjalandji-Dhidhanu people's contribution to the research, the Agreement provides opportunities to participate as an equal partner in commercialisation decisions arising from the research. Agreement is built on consensus and no one group can make a decision without the other's agreement. This also means Dugalunji Aboriginal Corporation effectively has a power of veto over commercialisation of intellectual property.

The partnership has in place a Benefit Sharing Agreement and Deed of Distribution for royalties. Additionally, a percentage of revenue earned from the commercialisation of products is deposited in an Indigenous Education Trust controlled by Dugalunji Aboriginal Corporation. Although the details of the Agreement are confidential, ultimately it manages the process of how Traditional Knowledge and Indigenous Intellectual Property works with Western intellectual property law.

The project goes beyond International, Federal and State legislative requirements. Dugalunji Aboriginal Corporation has also played a key role in the reform of the Biodiscovery Act and Queensland legislation which regulates the use of Queensland native biological material, such as spinifex grass. Dugalunji Aboriginal Corporation are continuing to play a key role in further reform of the Act, to align it with international trade agreements and the Nagoya Protocol.

Attachment 1 – Membership of the Northern Australia Indigenous Reference Group

IRG Member	Background
<p>Mr Peter Yu (Chair)</p> 	<p>Mr Yu is a Yawuru Man from Broome, Western Australia, with over 35 years of experience in Indigenous development and advocacy at a regional, state, national and international level, including leading the Kimberley Land Council during the 1990s and as a key negotiator on behalf of the Yawuru Native Title Holders in the landmark 2010 Yawuru Native Title Agreement.</p> <p>He is currently the Chief Executive Officer of Nyamba Buru Yawuru Ltd (one of the largest Prescribed Body Corporates in Australia), a board member of the North Australia Indigenous Land and Sea Management Alliance (NAILSMA), member of the Australian National University Council, Deputy Chair of the AFL Aboriginal Advisory Committee, Deputy Chair of the Broome Future Alliance Ltd and Trustee of the Princes Trust Australia.</p> <p>Previous roles have included Deputy Chair of the Indigenous Land Corporation, Chair of the Western Australian Aboriginal Housing Board, board member of the Western Australian Museum and board member of the National Museum of Australia.</p>
<p>Mr Lawford Benning</p> 	<p>Mr Benning was born and raised in Kununurra, Western Australia. Throughout his career, Lawford has held senior positions with a number of Aboriginal organisations. He is currently the Chair of MG Corporation, which represents the Native Title interests of the Miriuwung and Gajerrong Traditional Owners. He is also Chief Executive Officer of the Gelganyem Trust for the Traditional Owners of the Argyle Participation Agreement and a board member of Binarrri-binyja Yarrowoo Aboriginal Corporation (Empowered Communities, East Kimberley).</p>
<p>Dr Donna Odegaard, AM</p> 	<p>Dr Odegaard AM is a Larrakia Elder of Darwin and businesswoman with over 40 years' experience. As owner and founder of Aboriginal Broadcasting Australia, Dr Odegaard has four television channels, four radio stations and production company reaching 2,400 Indigenous communities across Australia in over 30 Indigenous languages. Dr Odegaard is a board member of the Indigenous Land and Sea Corporation and the ANZLF Australian and New Zealand Indigenous Business Women's Network, recently endorsed by Prime Ministers Scott Morrison and Jacinta Aarden.</p> <p>Dr Odegaard's leadership in Indigenous affairs and business has been acknowledged throughout her career, including Indigenous Alumni Award (University of Newcastle), Naming Lady and Commissioning Lady for HMAS Larrakia (RAN), Order of Australia (AM) for Indigenous cultural heritage, broadcast media, education, training and reconciliation, and the prestigious Sir John Storey Lifetime Award for Significant Leadership in business and management. Dr Odegaard holds a Masters Degree in Aboriginal Land Rights and PhD on Treaty.</p>
<p>Joe Morrison</p> 	<p>Mr Morrison was born and raised in Katherine and has Dagoman and Torres Strait Islander heritage and has over 25 years' experience working with Indigenous people across Northern Australia and internationally on the management and development of traditional lands and waters.</p> <p>Mr Morrison is current a director of Six Seasons Pty Ltd. He served as the Chief Executive Officer of the Northern Land Council (NCL) from 2014 to 2018 and prior to that was the founding Chief Executive Officer of the North Australian Indigenous Land and Sea Management Alliance (NAILSMA). Mr Morrison has tertiary qualifications from the University of Sydney and is a renowned writer on topics such as Indigenous rights, management of country, economic development and Northern Australia development.</p>
<p>Nigel Browne</p> 	<p>Mr Browne is a Larrakia and Wulna Man living in Darwin. He is currently the Chief Executive Officer of the Larrakia Development Corporation (LDC) and has served on the Board of since 2005, including as Chair for the period 2010 to 2013.</p> <p>Previous positions held by Mr Browne include Crown Prosecutor with the Northern Territory Department of Public Prosecutions, Aboriginal Lands Northern Territory Solicitor and Policy Advisor to the Chief Minister of the Northern Territory. He has also held board positions with the North Australian Aboriginal Justice Agency, Law Society (NT) and Australian Day Council (NT). In 2011, Mr Browne received the accolade of National Indigenous Legal Professional of the Year in recognition of his advocacy, representation and contribution to the Larrakia People.</p>

<p>Cr. Vonda Malone</p> 	<p>Councillor Vonda Malone is currently the first Indigenous female Mayor of the Torres Shire Council and was the first Torres Strait Islander woman to work internationally with the Department of Foreign Affairs and Trade with the United National Office of the Human Rights Commissioner in Geneva. She is also a director of the Islanders Industry Board of Service, a member of the Oxfam Australia Straight Talk Steering Committee, representative on the TCHHS Clinical Safety and Quality Committee and member of the Torres Strait Dementia Project.</p> <p>Previous roles have included Executive Director of Primary Health Care with the Torres and Cape Hospital and Health Service, as well as numerous positions over a 22 year career with the Australian Government including with the Department of Foreign Affairs and Trade and Torres Strait Regional Authority.</p> <p>Cr. Malone is a recipient of the 2001 Centenary Medal and NAIDOC Award of Excellence. She is a Fellow of the Australian Rural Leadership Program and the United Nations Human Rights Commissioner's Indigenous Fellowship Program.</p>
<p>Fiona Jose</p> 	<p>Ms Jose is a Kuku Yalanji and Torres Strait Islander Woman and is currently the Chief Executive Officer of the Cape York Partnership. Prior to this she held a number of executive positions in the region, including Director of Leadership for the Cape York Leaders Program, Chief Executive Officer of Cape York Institute and General Manager of the Cape York Partnership. She has also held senior leadership positions with Education Queensland and in the aviation industry.</p> <p>Ms Jose is a Leader of Empowered Communities, board member of Bama Services and Djarragun College and Chairperson of Jawun Advisory Group.</p> <p>Ms Jose has been recognised through the 2015 Telstra Business Women's Award – Queensland for Purpose and Social Enterprise and the Australian Institute of Management Queensland Not-for-profit Manager of the Year in 2012.</p>
<p>A/Prof. Colin Saltmere</p> 	<p>Associate Professor Colin Saltmere is an Indjalandji-Dhidhanu Man from North West Queensland. He is the Managing Director of the Indjalandji-Dhidhanu Aboriginal Corporation, the Myuma and Rainbow Gateway companies and is an Adjunct Professor with the University of Queensland's Aboriginal Environments Research Centre.</p> <p>In 2002, the Indjalandji-Dhidhanu Traditional Owners, led by A/Prof. Saltmere, established the Myuma Group of Companies which has successfully developed and expanded a suite of Indigenous civil construction, hospitality, catering, labour hire and training businesses. In 2015, the Myuma Group and the University of Queensland entered into a Spinifex research and commercialisation agreement to develop nanotechnology platforms for a range of products based on Spinifex grown in the region.</p>