



Submission to the Australian Law Reform Commission (ALRC): Review of the Future Acts Regime

Introduction The ability of Indigenous communities to fully enjoy their rights is intrinsically tied to their capacity to manage capital and risk effectively. While there has been a significant recognition of native title rights, many Indigenous groups struggle to activate these rights meaningfully. This submission argues that the future acts regime must incorporate legal reforms that incentivise Indigenous capital and risk management, drawing on insights from other jurisdictions. The key to unlocking the full potential of Native Title rights is always the ability of Native Title holders directly to allocate capital (prioritise) and manage risk which includes social, cultural and economic capital.

Cultural Identity and the Enjoyment of Rights Cultural identity is more than a passive heritage; it is a dynamic framework within which Indigenous peoples interact with contemporary economic and governance structures. Enjoyment of native title rights is not merely a legal recognition but requires the infrastructure and capability to exercise those rights effectively. The inability to activate these rights perpetuates economic marginalisation and restricts self-determination.

For example, the New Zealand Māori experience demonstrates the importance of leveraging Indigenous governance structures to enable capital mobilisation. Reportsⁱ on Māori access to capital highlight that structural barriers—such as the difficulty of using communally-held land as collateral—must be addressed to facilitate meaningful economic engagement. Similarly, the Harvard Projectⁱⁱ has repeatedly identified self-governance, stable institutions, and economic adaptability as critical to the success of Native American nations in exercising their rights.

It is important to acknowledge that comparing regulatory environments across jurisdictions has limitations due to the distinct legal structures and historical genesis of Indigenous rights in different nations. However, the ALRC can derive valuable insights by examining successful behaviours of Indigenous and First Nations groups worldwide. While local laws and regulations shape the practical applications of rights, the principles of capital and risk management are global in nature. Capital is inherently mobile, and the skills required to attract and deploy it effectively often transcend local regulatory frameworks, making it imperative to focus on developing Indigenous capabilities in these areas.

The Challenge: Activating Native Title Rights, The Australian experience reveals a disconnect between legal recognition of native title and the ability to derive economic, social, and cultural benefits from those rights. While many groups have obtained either exclusive or

non-exclusive native title determinations, their ability to leverage these rights for sustainable development remains limited. This is largely due to:

1. **Capital and Risk Management Capability** – Indigenous groups often lack the institutional capacity to navigate financial markets, negotiate agreements, and manage investment risks.
2. **Structural and Legal Barriers** – Regulatory frameworks limit the ability to use native title rights in commercially viable ways, such as for securing finance or developing land.
3. **Lack of Incentives for Indigenous Economic Self-Determination** – The current legal framework does not sufficiently encourage behaviours that promote Indigenous-led economic development and long-term wealth creation.

Law Reform: Incentivising Indigenous Capital and Risk Management To overcome these challenges, law reform must include incentives for Indigenous communities to actively manage capital and risk. Potential reforms include:

1. **Establishing an Indigenous Capital and Risk Framework** – Drawing from Māori and American First Nations experiences (along with other jurisdictions), a structured approach to capital management could be embedded within the future act's regime. This could include a requirement for financial literacy programs, Indigenous-led investment funds, requirements that native title holders engage in dialogue directly along with clarifying the role of advisors to refrain from speaking on behalf of native title holders. This would give native title holders direct exposure to capital and risk markets to make informed decisions and participate in a meaningful way of rights activation.
2. **Reforming Native Title Tenure Structures** – Legal reforms should enable native title rights to be used as economic assets without undermining communal ownership. This could involve hybrid models that allow flexible tenure arrangements, some consideration is also required to allow individual native title holders to activate hard won rights without requiring consensus of the broader native title group (this is especially the case where individual native title holders raise capital themselves to activate rights). In short individual native title holders should enjoy some competitive advantage compared to non-native title holders in relation to developing projects on their own lands.
3. **Economic Development Incentives** – The law should actively promote Indigenous economic self-determination by offering tax benefits, preferential procurement policies, and investment incentives for projects developed on exclusive native title land. Developing projects on exclusive native title land remains a nascent industry in Australia it could be incentivised through depreciation acceleration rules for example to compensate for the difficulty in navigating a nascent area of commercial law.
4. **Strengthening Indigenous Governance Capacity** – Government support should focus on building governance structures that empower Indigenous groups to make financial and business decisions. Harvard Project research shows that successful Native American tribes have achieved economic independence by investing in strong governance institutions that separate business from political interference. We must also accept that financial and business decisions require acceptance of risk (with an expectation of reward) – projects succeeding and failing is critical to building capital and risk management skills. Capacity investment should also highlight the cost of

indecision and delay – these risks are often underestimated and result in significant material adverse effects.

Capacity Constraints and the Pathway Forward A critical constraint in activating native title rights is the limited individual and community capacity to engage with complex economic and governance systems. Indigenous professionals often face structural barriers in corporate and financial environments, exacerbated by prevailing narratives that suggest Indigenous identity can only be fully expressed through Indigenous-facing roles. This belief constrains career pathways and reduces the breadth of professional expertise that could otherwise be mobilised for economic and governance leadership. Our community does not have enough earned experience of capital and risk markets, commercial skills and active risk management. We are often over indexed on legal support and complexity which very often cripples projects (and communities) ability to move through a window of opportunity.

The expansion of non-Indigenous advisors in Indigenous affairs has further insulated Indigenous communities from both information and active decision-making. This contributes to a cycle of dependency where Indigenous people are often positioned as passive recipients of external expertise rather than active participants in economic and governance structures. Noel Pearson has described this phenomenon as the "prison of low expectations,"ⁱⁱⁱ where systemic paternalism limits Indigenous agency and reinforces economic marginalisation.

Chief Clarence Louie of the Osoyoos Indian Band in Canada exemplifies leadership that prioritises economic development as a pathway to self-determination. His approach underscores the need to incentivise Indigenous individuals to acquire commercial skills and leverage the competitive advantage hard-won Indigenous rights. Economic empowerment through business creation and strategic investment can dismantle the reliance on external decision-makers and create long-term prosperity for Indigenous communities.

To address these challenges, efforts must be made to:

- **Expand Professional Networks and Leadership Development** – Indigenous professionals must have access to cross-sector mentorship and professional development opportunities that enhance their skills beyond Indigenous-specific roles.
- **Encourage Indigenous Participation in Broader Economic Sectors** – Indigenous leaders should be supported in entering mainstream financial, corporate, and governance sectors, bringing their perspectives into decision-making processes that shape Indigenous futures.
- **Reduce External Dependency and Strengthen Decision-Making Capacity** – Indigenous communities must be empowered with direct access to information, capacity-building initiatives, and pathways to independent governance.
- **Create Institutional Support for Economic Leadership** – Structured programs should be developed to support Indigenous professionals in capital and risk management, equipping them with the tools necessary to transform native title rights into tangible economic benefits.

Conclusion For Indigenous communities to truly enjoy their rights, they must have the capacity to manage capital and risk effectively. The inability to activate native title rights is not just an economic issue but a fundamental barrier to self-determination. Drawing on behaviours from First Nations groups in effectively activating rights, this submission calls for legal reforms that incentivise Indigenous capital and risk management. By embedding these

principles within the future act's regime, Australia can move towards a framework that supports Indigenous prosperity while proudly projecting our cultural identity to the world.

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ⁱ <https://www.rbnz.govt.nz/have-your-say/improving-maori-access-to-capital>

ⁱⁱ <https://indigenousgov.hks.harvard.edu/home>

ⁱⁱⁱ <https://capeyorkpartnership.org.au/noel-pearson-the-soft-bigotry-of-low-expectations/>