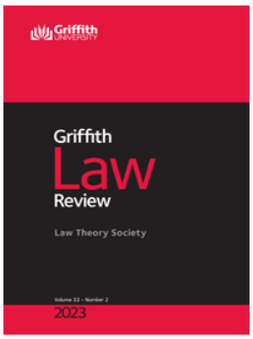

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Building bridges: using existing law to support the cultural self-determination of Aboriginal and Torres Strait Islander businesses and communities*

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ABSTRACT

Aboriginal and Torres Strait Islander peoples have a long and rich history of enterprise that dates to long before European contact. Today, through resilience and ingenuity, Indigenous businesses are one of the fastest growing sectors of the Australian economy and one of the most rapidly expanding providers of employment. Indigenous individuals are achieving these results in spite of the ways that the laws imposed through colonisation placed, and continued to place, First Nations peoples at a profound disadvantage in maintaining economic self-determination. Although law reform in this area is essential, progress is slow and there is often a perception that little can be done by individuals – especially non-Indigenous legal practitioners and businesspeople – until the reform takes place. There are, however, more immediately available options. Using examples, this article advocates for more systematic research into the capacity of existing laws and commercial legal tools to better strengthen First Nations entrepreneurship in Australia while simultaneously supporting Indigenous businesspeople to achieve success not only economically but also in ways that are culturally relevant to themselves and their communities. Importantly, these structures, processes and mechanisms comprise tools to be deployed by non-Indigenous as well as First Nations legal practitioners and businesspeople.

KEYWORDS

Aboriginal and Torres Strait Islander business; law; cultural self-determination

Introduction

Aboriginal and Torres Strait Islander peoples[1] have a long and rich history of enterprise, agriculture and trade, including customary laws to regulate economic

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*All observations in this article are drawn from the perspectives and experiences of the authors as Aboriginal and non-Aboriginal individuals. We not seeking to make authoritative statements about cultural practices of Aboriginal and Torres Strait Islander communities in general. The authors wish to extend their gratitude to the anonymous reviewers for their feedback and suggestions, both of which have improved this article.

[1]Aboriginal and Torres Strait Islander peoples constitute approximately 250 distinct and self-governing nations. We recognise that word choice is political, that different terms carry contested connotations and that no single word

life[2] and international trading relations dating back before European contact.[3] Today, through resilience and ingenuity, Indigenous businesses are one of the fastest growing sectors of the Australian economy and one of the most rapidly expanding providers of employment.[4] Colonial forces nevertheless manipulated their own laws to assert sovereignty and marginalise Aboriginal and Torres Strait Islander peoples,[5] which has resulted in both physical and structural violence, a legacy of dispossession, and intergenerational trauma[6] that continues to place Aboriginal and Torres Strait Islander peoples at a profound disadvantage in achieving economic self-determination.

A wealth of literature exists globally about barriers to entrepreneurship and the importance of economic sovereignty for Indigenous peoples,[7] including a growing body of Australian literature from commercial and academic sources.[8] Much of this literature is oriented towards necessary reforms to the legal system, ranging from constitutional recognition and expanded land rights to addressing the limitations of intellectual property law to capture collective rights in a commercial context. As much as these reforms are essential, progress is slow, and there is a perception that little can be done by individuals – especially non-Indigenous legal practitioners and businesspeople – until reform takes place.

In this article, we advocate for systematic research into the capacity of existing laws and commercial legal tools to better support Indigenous entrepreneurship[9] in Australia. From a scholarly perspective, the objective of the article is to encourage further investigation into Indigenous entrepreneurs' legal needs, the legal barriers that they experience, and opportunities for change. At the same time, we argue more practically that a wealth of existing legal structures, processes and mechanisms may, if systematically analysed, developed and deployed, be able to support Aboriginal and Torres Strait Islander businesspeople to achieve success in ways that are culturally relevant to themselves and their communities. Indeed, despite the law being one of the most brutal tools of the oppression of Aboriginal and Torres Strait Islander peoples, the law offers surprising flexibility to support self-determination. Commercial law,[10] for example, is based on

adequately captures the history and ongoing vitality of the collective Indigenous peoples of the Australian continent and surrounding islands. In this article we have chosen the word 'Indigenous' and the phrase 'Aboriginal and Torres Strait Islander' to refer to these nations and their people.

[2]Gaymarani (2011), p 283:

> The *Ngarra* (Gamurr-guyurra) customary law was used for hundreds of years before the white settlers came ashore in the great land of Australia. … The law played an important role in driving the economy, community wellbeing, welfare, respect, cultural obedience, marriage, ritual, ceremony, moiety system, environmental law, the law of the land and sea, treason, punishment, leadership, management, initiation, sentencing and other cultural obligations.

[3]Altman and Biddle (2015); Brigg (2011).

[4]Department of the Prime Minister and Cabinet / National Indigenous Australians Agency (2018), 4. See also Evans et al. (2021); Aboriginal Affairs NSW (2017); Hunter (2015).

[5]See, eg, Watson (2014), p 509; Moreton-Robinson (2007).

[6]See, eg, Atkinson (2007), p 27.

[7]See, eg, Kalt and Singer (2004); Companion (2004), p 87.

[8]McCreery (2012), p 16; Hewitt (2011); Behrendt (2003). See also Shirodkar et al. (2018); Thomassin et al. (2020).

[9]We recognise that 'entrepreneur' and 'entrepreneurship' are words that carry can carry specific meaning in some areas of the academic literature. Here, we refer to entrepreneurship more broadly as synonymous with general business practice.

[10]As Foley and Hunter explain, '[t]he word "business" in an Australian Aboriginal context is often used to refer to customary forms of ceremony, ritual or kinship issues among family members': Foley and Hunter (2013), p 66. Wherever necessary to avoid confusion, we use the terms 'commercial' and 'commercial law' to avoid confusion with customary practices and law. While the term 'commercial law' can have different meanings in different contexts, it is used here in

principles of merchant autonomy, freedom of contract, and good faith.[11] As Goode observes, 'the primary function of commercial law … is to accommodate the legitimate practices and expectations of the business community in relation to their commercial dealings.'[12] Importantly, access to existing legal tools is available to Indigenous as well as non-Indigenous legal practitioners and businesspeople. The result is enhanced cultural self-determination for Aboriginal and Torres Strait Islander peoples and likewise an opportunity for non-Indigenous individuals and companies to support First Nations communities while simultaneously improving their own business relationships and outcomes.[13]

Our repetition of the word 'culture' here is key. Culture is neither a product itself nor a by-product or 'luxury' that should only be available for focus and investment after a given community has earned an economic profit. Similarly, economic support for Indigenous businesses should not be automatically equated with support for Indigenous culture on the assumption that Indigenous business owners can, if they wish, simply pour profits into culturally beneficial activities. Instead, in both concept and practice, economic sovereignty should be bound with cultural self-determination. Our project seeks to highlight how commercial activity needs to be reconceptualised such that its very starting point is culture, as animated through the culturally driven preferences, practices, and motivations of many Indigenous entrepreneurs. In saying this, our project is not to assume or suggest what these preferences, practices and motivations are for any particular person or peoples, or to assume homogeneity, but rather to offer ways to facilitate better deployment of existing law to cultural ends.

With this goal, Part 1 of this article outlines our methodology and situates the research within a framework of economic self-determination. It explains the importance of entrepreneurship and the small and medium sized enterprise ('SME') sector for Australia generally and for Indigenous communities in particular. Part 2 of the article maps three specific domains in which law and legal culture negatively impact Indigenous enterprises. The first is the legacy of law as an instrument of dispossession.[14] The second is legal cultural barriers – for law, like any form of human knowledge, is culturally contingent. The third is legal rules and structures that derive from legal-cultural norms and which impact the advancement of Indigenous business in some situations. Part 3 explores how commercial agreements can be recalibrated to bridge the gap between the differing needs of mainstream Australian and Aboriginal and Torres Strait Islander businesspeople. Finally, Part 4 connects the mapping undertaken in Part 2 and the strategies explored in Part 3 with our broader research agenda. We describe a project at the Newcastle School

its broadest sense to encompasses laws, policies and practices relating to the world of business and commercial activity, including business formation, contracts, sales of goods and services, intellectual property, tax and dispute resolution.

[11] We do not shy away from the fact that the flexibility of the law, and certainly of commercial law, simultaneously make possible avenues of exploitation that can be used to harm First Nations businesses and communities.

[12] Goode (1988), p 148.

[13] In referring to the potential engagements of non-Indigenous legal practitioners and businesspeople we are careful not to be either naively idealistic or indifferently practical. Instead, we recognise that these relationships and their motivations are complex. Indeed, our combined decades of legal and business experience tell us that the reasons why non-Indigenous legal practitioners and businesspeople may take an interest in First Nations businesses can range from social conscience to economic greed.

[14] Miromaa Aboriginal Language and Technology Centre, 'Aboriginal-Related Terminology', https://www.miromaa.org.au/aboriginal-terminology:

> Colonisation: A process by which a different system of government is established by one nation over another group of peoples. It involves the colonial power asserting and enforcing its sovereignty, or right to govern according to its own laws, rather than by the laws of the colonised.

of Law and Justice that provides legal assistance to Aboriginal and Torres Strait Islander businesses while collecting empirical data. This data in turn will enable the development of further tools and approaches to overcome key barriers facing Indigenous businesses.

Part 1 – Approach and context

1 (a) Methodology and theoretical underpinnings

The purpose of our research, and of this article in particular, is to build a firmer foundation for using existing tools of the law to overcome roadblocks that Indigenous entrepreneurs in Australia often face. These roadblocks not only hinder First Nations businesspeople in their economic and cultural efforts but also prevent non-Indigenous legal practitioners and businesspeople from productively engaging with Indigenous businesses.

We do not pretend to be the first to have come up with the idea of using existing legal tools to assist Aboriginal and Torres Strait Islander communities. First Nations people have of course been doing so for some time, on a myriad of fronts. Instead, we see our contribution from three angles: (1) we want to strengthen the fusing of the tools of law, especially those of mainstream commercial law, with concepts and aspirations of Indigenous culture, and to help spread awareness of these tools to Indigenous businesspeople; (2) we seek to call non-Indigenous legal practitioners and businesspeople to action and to provide pathways for them to engage with, and support, Aboriginal and Torres Strait Islander businesses; and (3) we wish to inspire additional research and engagement in these areas.

With this background, there are two things that this article, and the project outlined in Part 4 that underlies it, do *not* claim to do. First, we do not contend that existing tools are enough to solve all the problems. We recognise the need for – and enthusiastically support efforts to enact – new laws that will support Aboriginal and Torres Strait Islanders in their commercial activities. However, in the absence of robust interventions at the current time, we seek solutions that are readily available and can be harnessed immediately.

Second, we argue that the law provides tools to bridge the sui generis needs of Indigenous businesses with the demands of the mainstream marketplace. Although we here cite some cultural needs as examples, we in fact make no claims about what those needs actually are. In other words, we do not attempt to state or weigh in on what is Indigenous or what should be. This is particularly important given the diversity of cultures and experiences of Aboriginal and Torres Strait Islander people throughout the country – there is no uniform culture or single authoritative set of circumstances or experiences.[15] Instead, we want to help make it possible for Indigenous businesses to grow and thrive in ways that are meaningful for them – and the way in which this occurs will be specific to each entrepreneur or group of entrepreneurs.

1 (b) Self-determination, economic sovereignty and the role of entrepreneurship

This article and our broader project conceive of entrepreneurship and economic activity as part of a broader framework of self-determination, which is the ability to 'make

[15]See, eg, Hansen and Butler (2013), p 1.

meaningful choices in matters touching upon all spheres of life on a continuous basis.'[16] As Behrendt argues, political rights and economic development need to be integrated and mutually reinforced, and progress on both is essential.[17]

Economic self-determination can be defined as the capacity of Indigenous communities to meet their own economic needs. This concept is enshrined in Article 1 of the *International Covenant on Civil and Political Rights,*[18] Article 1 of the *International Covenant on Economic, Social and Cultural Rights,*[19] and Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples.*[20] Government policies typically focus on the benefits of Aboriginal and Torres Strait Islanders running businesses to achieve economic goals. For example, the NSW Government's 2016 report on fostering economic development for Aboriginal people recognises that '[i]ncreasing the economic prosperity of Aboriginal people is critical to improving social outcomes in other areas, including health, education, child protection and community safety.'[21] This 'prosperity thesis' argues that reducing poverty allows individuals and communities to flourish through their newfound ability to spend money on things like health and education.

However, focussing on participation in the economy for the sake of acquiring money is a narrow perspective of economic activity. The assumption here is that money derived from business can be used to achieve other human objectives relating to culture. We, however, take the broader view that self-determination involves the expression of cultural values as part of the fibre of the enterprise. As one participant in research by Behrendt and Vivian explained,

> I see self-determination as having total control over everything that we do. For the Aboriginal community, it would entail control over funding and every aspect to be an effective community. … We need economic development and a strong Koori business sector. We need to see our kids working as qualified tradespeople as well as professionals. The vision is of economic development across the entire spectrum — tradespeople through to professionals and through to small business.[22]

Hindle and Moroz highlight the nature of Indigenous entrepreneurship as having distinct characteristics of 'culturally viable and community acceptable wealth creation' that differentiate it from other forms of entrepreneurship.[23] It is an essential part of self-determination that people are able to undertake entrepreneurial activity in any sector in ways that are culturally acceptable and viable. Research shows that many Indigenous entrepreneurs expressly cite community as an animating factor for starting businesses – they have done so to support and enhance their communities and families rather than to

[16] Anaya (1996), p 82.
[17] Behrendt (2001), p 861.
[18] *International Covenant on Civil and Political Rights*, opened for signature 16 December, 1966, 999 UNTS 171 (entered into force 23 March 1976).
[19] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[20] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007).
[21] NSW Ombudsman (2016), p 3.
[22] Behrendt and Vivian (2010), p 22.
[23] Hindle and Moroz (2010), p 372. See also Frederick and Foley (2006), p 41: ' … the major motivator for being entrepreneurial was to provide for the entrepreneur's children and to give them a better life … a pursuit by the Australian Indigenous entrepreneurs to achieve social control. This is an act of self-determination … ' See also Lee-Ross and Mitchell (2007).

make money for its own sake.[24] While more research is needed,[25] this article is a contribution delineating how, within the legal domain, existing laws can be used to enhance the cultural expression and self-determination of Aboriginal and Torres Strait Islander businesspeople, and allow businesses to reflect their values and cultural identity – not just in terms of what the business does, but in terms of how the business configures itself and interacts with others.[26]

1 (c) Small and medium sized enterprises as a force for economic empowerment

Research emphasises the role of SMEs[27] as a driving force of economic empowerment of Aboriginal and Torres Strait Islander peoples.[28] The role of entrepreneurship has changed dramatically over the past half century, with much greater recognition of the contributions of entrepreneurship to economic growth.[29] This is more pronounced within Indigenous groups: the majority of Indigenous enterprises are small to medium-sized private enterprises and studies have found up to 300% more Indigenous jobs being created by Indigenous businesses than by other Australian enterprises,[30] and Australian Government reports demonstrate that the growth of Indigenous enterprises continues.[31] Supply Nation, in its 2018 report, articulates the benefits of developing Indigenous enterprises:

> Realising the potential of Indigenous businesses will create a new generation of entrepreneurs who grow their own business knowledge, networks, assets and wealth. This will in turn help remove barriers to employment for future generations, and help create a positive cycle of social and economic empowerment.[32]

Estimates of 7000+ self-employed Indigenous business owners are added to by nearly 3000 corporations, registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* ('CATSI Act') and active across the entire economy, particularly in

[24]Rola-Rubzen (2011), p 36:

> The five most common reasons indicated by non-Indigenous entrepreneurs are to improve income, to become one's own boss, to improve lifestyle, to become wealthy and to create employment for oneself or one's family members. On the other hand, to contribute to one's community by providing a needed service was the top reason chosen by Indigenous entrepreneurs. Creating employment for oneself or one's family members came equally second with contributing to one's community by increasing employment opportunities.

See also Frederick and Foley (2006), p 41. This work indicates that an Indigenous Australian entrepreneur is generally motivated more by a need to correct negative social perceptions and racial discrimination than by a need for wealth creation; see also Foley (2004).

[25]Collins et al. (2017), p 38.

[26]The question of criteria for a business to be considered 'Indigenous' is also complex – see further Foley (2013).

[27]A small enterprise, according to the Australian Bureau of Statistics, is one that employs up to 19 people. A medium enterprise employs more than 20 but fewer than 199 people. See Australian Bureau of Statistics, 'Australian Industry', https://www.abs.gov.au/statistics/industry/industry-overview/australian-industry/latest-release, 28 May 2021. For tax purposes, a small business is one with annual turnover of less than $10 million. See Australian Taxation Office, 'Work out if you're a small business for the income year', https://www.ato.gov.au/business/small-business-entity-concessions/eligibility/work-out-if-you-re-a-small-business-for-the-income-year/.

[28]Shirodkar et al. (2018), p 1: 'Indigenous businesses are crucial for the economic self-determination of First Nations communities'; Morley (2014), p 2:

> Indigenous economic development is defined as the involvement by Indigenous people in employment, business, asset and wealth creation in the communities and regions where they live. One key aspect of improving Indigenous economic development is through Indigenous people operating their own private businesses or community-based enterprises. (citations omitted)

[29]Audretsch et al. (2007).

[30]Collins et al. (2017), p 37.

[31]Australian Productivity Commission (2020), Chapter 9 Attachment Table 9A.2.12.

[32]Supply Nation and First Australians Capital (2018), p 2.

health, education, retail, and tourism, but with rapid corporate growth in construction, transport, and mining.[33] The vast majority of these CATSI Act corporations are SMEs.[34]

Part 2 – Mapping legal barriers to self-determination for Indigenous entrepreneurs and their communities

The difficulties of starting and running a business are broadly recognised across business and government sectors.[35] These challenges are reflected in high failure and discontinuance rates[36] as well as by the wide range of grants and assistance offered by the Australian Government to help support the establishment and growth of fledgling businesses.[37] However, Indigenous entrepreneurs face additional, specific challenges that are often overlooked in entrepreneurial literature.

Our analysis below examines three sets of barriers impacting Indigenous entrepreneurs: the legacy of colonialism, legal-cultural issues, and formal legal rules and structures. While these aspects of the legal system seldom discriminate directly or overtly, research shows that they have a significantly higher impact on Aboriginal and Torres Strait Islander peoples.[38] We therefore argue that addressing these barriers is necessary for Indigenous peoples to achieve effective and widespread economic self-determination.

2 (a) The contemporary legacy of formal discrimination and colonialism

Many of the barriers that impact Indigenous entrepreneurs have their origins in the legacy of formal legal discrimination against and marginalisation of Indigenous people throughout Australia's history. While some of the formal, visible discrimination has today has been removed, there remain invisible barriers, as well as entrenched discriminatory attitudes and indirect discrimination.[39] In this section, we provide an overview of some of this legacy and its contemporary impact.

European law and colonialism came to Australia hand in hand. As the British conquered the continent, military power was used to impose British law in ways that negatively impacted Indigenous peoples' systems of governance.[40] In other words, this progressive imposition of British law caused, simultaneously, a concomitant revocation of Indigenous peoples' rights.[41] This relationship should come as no surprise: power and law are of course always tied up together,[42] as are law and culture, and law and the economy.[43] So as the British imposed their law on Indigenous peoples, the

[33]Office of the Registrar of Indigenous Corporations (2017). This is the most recent report available.
[34]Office of the Registrar of Indigenous Corporations (2017). See also PwC Indigenous Consulting and Pricewaterhouse-Coopers Consulting Australia (2018), p iii.
[35]Office of the Registrar of Indigenous Corporations (2010), p 19.
[36]See, eg, Australian Bureau of Statistics, 'Counts of Australian Businesses, Including Entries and Exits, June 2014 to June 2018', https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8165.0June%202014%20to%20June%202018?OpenDocument, 21 February 2019.
[37]A list of many Australian Government business grant and programs is available at: https://www.business.gov.au/grants-and-programs.
[38]Morrison et al. (2014); Morley (2014); Office of the Registrar of Indigenous Corporations (2010).
[39]See further Allison and Cuneen (2022).
[40]Gray (1999); Grose (1995).
[41]Ciftci and Howard-Wagner (2012); Terri Janke and Company (2018).
[42]Sklansky (1995).
[43]Biolsi (2001); Engle Merry (2003).

capability of the Indigenous peoples to maintain their culture, laws, and practices, was disrupted.[44]

This process included erasing the economic foundation of the Indigenous peoples of Australia. As Hunter observes, because of a range of biases in the 'historic record' of the Australian economy, 'there has been a profound loss of cultural and economic institutions that is almost impossible for outsiders to fully comprehend'.[45] While economists are today revisiting and documenting pre-contact economic structures, the impact of colonial law on the economic activity of Aboriginal and Torres Strait Islander peoples is clear. After the arrival of the Europeans, Indigenous peoples' participation in 'the economy' was arbitrarily limited to the agricultural sector and household servanthood, slavery was rife, and where wages were paid, they were 'managed' and stolen by the Australian government and others, along with the rights of Indigenous individuals to engage in commerce.[46] Furthermore, laws requiring English to be spoken led to the rapid decline of Indigenous languages that had been used in personal and entrepreneurial life for millennia.[47]

At the same time as the economic agency of Aboriginal and Torres Islander peoples was being undermined, the law was also being used to take away property. Traditional land ownership systems were erased, and under colonial law, Indigenous peoples were restricted in their capacity to own of land.[48] It is unsurprising that the impact of these restrictions on land ownership would continue into the present. For example, home ownership in New South Wales in 2016 was dramatically less for Aboriginal households (40%) compared with non-Aboriginal households (70%).[49] This has a profound but under-appreciated flow-on effect for entrepreneurs. Mainstream business development relies heavily on capital, and the mortgaging of an entrepreneur's private property – or that of their immediate family – is a key strategy for mainstream business development, meaning Aboriginal and Torres Strait Islander communities today have comparatively limited access to the essential resources necessary to start a business.[50] The intergenerational wealth accrued to many non-Indigenous people at the expense of Indigenous people compounds the comparative disadvantage, as Indigenous entrepreneurs have fewer inherited resources. The attempted 'correction' of these historical thefts through the use of native title does not address the problem of access to capital, as explained below.

Ongoing barriers to equal education have also limited the pool of human capital available to Indigenous entrepreneurs, should they wish to partner with or employ persons with both the relevant skill set and a similar cultural outlook. That is, lower levels of

[44]Watson (1997), p 39. In the international context, see Anghie (2004); Kelly and Kaplan (2001).
[45]Hunter (2014), p 73.
[46]See Jacobs (2017), p 3:

> Historically, Indigenous Australians' participation in the mainstream economy has been restricted … involvement was often limited to the provision of labour in the pastoral industry. From the late nineteenth century until the early 1970s, Aboriginal and Torres Strait Islander people's wages were managed by Australian governments … .

See also Kidd (2006), p 10: 'Most Australians had no idea the governments of various states and territories had controlled the earnings and entitlements of Aboriginal workers for much of the twentieth century.'.
[47]Verdon and McLeod (2015), p 155.
[48]See Jacobs (2017).
[49] NSW Ombudsman (2016).
[50]NSW Ombudsman (2016). The NSW Ombudsman's 2016 Report relatedly notes that: 'Financial exclusion — characterised by lack of access to appropriate and affordable financial services and products — and financial stress are more pronounced for Aboriginal people than other Australians'; further, '[n]ationally, 43% of the Aboriginal adult population was considered severely or totally financially excluded in 2012, compared with 18% of the Australian adult population': p 16.

participation in tertiary education mean that fewer Aboriginal and Torres Strait Islander individuals possess the level of background business knowledge and experience that facilitates emerging entrepreneurs.[51] By way of example, in New South Wales: 'In 2011, only 44% of Aboriginal young adults aged 17–24 in NSW were fully engaged in post-school education, training, or employment.'[52] National estimates suggest that rates of engagement of young Aboriginal and Torres Strait Islander people with post-school education, training or employment have remained fairly static since 2002, sitting at around half the rate of their non-Indigenous peers.[53] This places Indigenous entrepreneurs at a disadvantage in situations where formal learning is beneficial – and makes it much more difficult to access professional services such as legal or accounting advice from a person of the same culture as the entrepreneur.

Ongoing racism toward Aboriginal and Torres Strait Islander people also hampers the development of social capital, obstructing pathways towards leadership in many business organisations and undermining the relationship-building that otherwise forms the bedrock of much business success.[54] As Supply Nation reports, this can have implications for forming relationships such as joint ventures, which it says 'can be particularly challenging for Indigenous businesses, due to limited access to support networks and the skills necessary to establishing a fair and sustainable partnership.'[55]

Aboriginal and Torres Strait Islander peoples' general distrust of the legal system constitutes a significant barrier to effective participation in the business sector.[56] By the same token, distrust arising from the imposition of Australian law has also hindered productive relationships between Aboriginal and Torres Strait Islanders and government institutions, even those intended to assist Indigenous businesses.[57] In 2016, a report by the New South Wales Ombudsman highlighted the crucial role of government in supporting Indigenous businesses:

> While the private sector is the engine of jobs growth and many other aspects of the economy, the government holds a central role in maintaining the supporting legal system and infrastructure for economic activity, creating the policy settings to encourage investment and production, regulating the activity of the markets, and ensuring that all citizens are equipped to participate successfully.[58]

The Ombudsman's report further catalogued many of the barriers that exist for Indigenous businesses in this area, some of which are structural and others that result from suspicion or inexperience by Aboriginal and Torres Strait Islander individuals in dealing with government programs to support entrepreneurs.[59] While there has been some success in improving trust in government and institutions, much remains to be done.[60]

[51] Jacobs (2017); see also Collins and Norman (2018).
[52] NSW Ombudsman (2016), p 3.
[53] Australian Productivity Commission (2020), para 7.23.
[54] In regard to racism against Aboriginal and Torres Strait Islander people in business, see Morley (2014), p 6: 'Developing partnerships and having access to business networks are repeatedly highlighted in the research as critical to success'. In regard to relationship-building in business, see Macaulay (1963); Macneil (1985).
[55] Supply Nation and First Australians Capital (2018), p 7.
[56] Marchetti (2012), p 10 (referring to Aboriginal and Torres Strait Islander people's 'distrust of the justice system as a result of the history of colonisation').
[57] See NSW Ombudsman (2016).
[58] NSW Ombudsman (2016), p 2.
[59] NSW Ombudsman (2016), p 2.
[60] Morley (2014); Jacobs (2017).

In sum, there is a powerful legacy left by Australia's past that directly impacts the entrepreneurial future of its Indigenous people, and which sadly perpetuates discrimination. This contributes to an overall inequitable playing field for Indigenous businesses.[61]

2 (b) Legal-cultural barriers for aboriginal and Torres Strait Islander peoples

While Australia has had a poor record of recognising and responding to the reality of legal pluralism within its borders, we believe that the process of identifying British-received legal culture, and contrasting this with Indigenous legal cultures, are important steps in the process of recognising and understanding the lived experience of this duality for Indigenous entrepreneurs.

The legal principles and policies that govern mainstream business practices in Australia have evolved in accordance with Western – specifically British – cultural norms.[62] As a result, Australian legal rules tend to operate in support of Western business practices, or more precisely, Anglo-Australian business practices. It follows that the same legal rules can inhibit the operation of Indigenous business practices by conflicting with Aboriginal and Torres Strait Islander cultural norms.[63]

Drawing on existing literature, we have identified some typical Australian business practices and Indigenous cultural norms.[64] While these are not absolute, and risk being stereotypes, they do offer a starting point for discussion. With these limitations in mind, common Australian business practices and legal-cultural norms that reflect and reinforce 'Australian' cultural values include prioritising individualism and competition, alongside moderately formal power structures.[65] Translated into a commercial context, these cultural values reflect the following: a separation between 'work life' and 'home life' as well as between 'business assets' and 'individual assets'; a preference for transactions to be based on arm's length legal contracts; use of devices such as corporations as a preferred business vehicle; laws that establish primacy of shareholder interests within a corporation, as opposed to community interests or sustainability; and a preference for someone unconnected with a dispute (such as a judge or professional mediator) to assist when external resolution is required, as opposed to someone who knows the parties well.

As Cairney and colleagues explain, Aboriginal cultural values are

> grounded in spiritual connection to the land, or "country" and practiced as language, law, kinship/family systems and ceremony. Beliefs are holistic with everything being interconnected. People exist as part of an interrelated continuum with all of nature — including plants, animals and the land.[66]

[61] Allison (2013).
[62] See generally Kune (2011). See also Ransley and Marchetti (2001); Marchetti and Ransley (2005).
[63] Frederick and Foley (2006); Terri Janke and Company (2018).
[64] See, eg, Rola-Rubzen (2011); Evans and Williamson (2017); Morrison et al. (2014). Note that in regard to Indigenous businesses, research has suggested that 'there usually is some aspect of cultural legitimacy and Indigenous identity and the desire to positively reflect Indigenous values in the surrounding mainstream community': Office of the Registrar of Indigenous Corporations (2010), p 6.
[65] Hofstede Insights, 'What About Australia?', https://www.hofstede-insights.com/country/australia/.
[66] Cairney et al. (2017), pp 69–70.

While each Indigenous person will have their own unique cultural perspectives and values, we have heard these themes reflected consistently during our work with Indigenous businesspeople, particularly the importance of family obligations and community concerns, as well as the embedded nature of a business within a range of relationships.[67]

On their own, the typical mainstream Australian business practices listed above often pose barriers to Indigenous businesses because they run the risk of steering Indigenous businesses toward unintended and undesired results. Efforts to support Indigenous businesses – including legal support – should therefore take seriously Indigenous cultural self-determination as both a starting point and an end goal, as well as a determinant of business structures, procedures and documents.

2 (c) Contemporary legal rules, processes and structures

In addition to the historic and cultural factors described above, there are numerous contemporary legal rules, processes and structures that impact Indigenous business and entrepreneurial activity. The myth that commercial law is somehow culturally neutral is both pervasive and problematic.[68] As Ainsworth observes: 'No matter how neutral and objective legal categories may appear, they are themselves creatures of a historically and culturally contingent social world, bearing the normative patina of the context from which they were derived.'[69]

Consistent with our remarks above, different individuals in different situations may feel more or less strongly the effects of the cultural clash of contemporary law. What follows in the next section of our analysis should therefore not be assumed as applicable to all Indigenous businesspeople in all contexts, but rather represents a cross section of issues that may impact individuals to varying extents.

A common feature of the contemporary legal process is that when selecting a business structure, advisors will typically default to suggesting a for-profit structure, typically a partnership or a corporation. These structures are based on particular value constructs – for example, in relation to a corporation, directors' duties create in each director an obligation to act in the company's best interest above the interests of relatives or friends.[70] As Apps observes, Australia lags behind other jurisdictions in its diversity of corporation types, with a primarily '"one size fits all" approach to business regulation assum[ing] that all businesses seek to maximise profits at the expense of their customer.'[71] While there is space in the Australian business ecology for corporate entities that are value- and member-based, such as cooperatives, they are often poorly understood by regulators or advisors and reform has been slow.

Property law is another area where regulation has been problematic and reform slow. The work of Wensing illustrates how the native-title model of land ownership presents a barrier to economic self-determination.[72] While most Indigenous individuals do not live

[67] See also Office of the Registrar of Indigenous Corporations (2010), p 7: 'Aboriginal and Torres Strait Islander values may include obligations based on kinship relationships, a different orientation towards time, an importance of consensus decision making and putting family needs before business goals'. See also Keen (ed) (2010); Peterson (2005), p 7.
[68] Cattelan identifies 'a dogma of cultural neutrality for contract and business laws': Cattelan (2013), p 3.
[69] Ainsworth (1996–1997), p 31.
[70] du Plessis (2019).
[71] Apps (2019), p 552.
[72] Wensing (2016).

on native-title land, many of those who share formally recognised native-title rights are amongst the most socio-economically vulnerable people in Australia. However, even for those who have successfully recovered rights in their land, the statutory model of native title is flawed and curtails the way in which land can be used to unlock capital, which is a necessary precursor for business.[73]

Other legal barriers to business activity are less about formal laws and more about the challenges of effective and cost-effective enforcement. For example, the practice of 'black cladding' is an exploitative practice that involves

> a non-Indigenous business entity or individual taking unfair advantage of an Indigenous business entity or individual for the purpose of gaining access to otherwise inaccessible Indigenous procurement policies or contracts. Unfair advantage involves practices and arrangements that result in the disadvantage or detriment to an Indigenous business, or that do not represent a genuine demonstrated level of equitable partnership and benefit.[74]

Rather than make such conduct illegal, the response has been to require those accessing Indigenous procurement policies to be registered with the non-government organisation Supply Nation, which has the power to de-register ventures considered exploitative. At the time of writing, there is no data available in order to evaluate the success of this model of enforcement, nor has research examined whether Indigenous entrepreneurs believe that this model meets their needs and safeguards the integrity of the procurement process, issues that warrant further research.

A final example is intellectual property protection. It is widely acknowledged that existing intellectual property laws are not well suited to protecting Indigenous cultural knowledge. Most Indigenous cultural knowledge is collectively owned, socially based, continuously evolving, and subject to well-defined laws governing usage within different cultural groups.[75] It does not subsist in categories adequately recognised by existing legal regimes of intellectual property protection. Examples abound of the use of Indigenous cultural knowledge contrary to traditional lore, but without any legal consequences under Australian law, such as an Olympic ice-skating routine allegedly 'inspired by' Australian Aboriginal culture but developed without Aboriginal input, and with no legal requirement for its creators to follow cultural protocols or consult with Aboriginal people.[76]

Despite several attempts,[77] and some persuasive arguments for doing so,[78] sui generis legislation to recognise Indigenous people's rights to their cultural and intellectual property have not been implemented in Australia and seem unlikely to be implemented in the near future. Even if sui generis 'culture laws' were implemented, they are unlikely to be a panacea, with some experts arguing such laws would risk further marginalising Indigenous people.[79]

In summary, the default status of many Australian laws is that they do not adequately address the needs of Indigenous businesspeople. We discuss approaches to systematic

[73]Wensing (2016). See also Sobel-Read (2018).
[74]See Supply Nation, 'Black Cladding', https://supplynation.org.au/about-us/black-cladding/.
[75]Janke and Quiggin (2006), p 456.
[76]Janke and Dawson (2012), p 32.
[77]Janke and Quiggin (2006), p 453.
[78]Stoianoff and Roy (2016); Stoianoff and Roy (2016).
[79]Stoianoff and Roy (2016), p 36.

mapping of reforms in Part 4 below but recognise the limits on possibilities for law reform in the short- to medium-term, and the risk that reforms may have minimal impact or unintended consequences. This leads us to an equally important but often-overlooked question: How can we repurpose and recalibrate existing law, including commercial arrangements, to better meet the needs of Aboriginal and Torres Strait Islander entrepreneurs right now? We focus in the following section on one such example – commercial contractual arrangements.

Part 3 – Overlooked opportunities: recalibrating commercial agreements

Contracts are ostensibly neutral instruments. But as parties have the flexibility to shape their own agreements, contracts frequently end up articulating the power of one party over the other and typically privilege the cultural values of the more powerful party. Historic power becomes reflected (and effected) through the seemingly 'neutral' and 'transparent' form of the contract, to the detriment of Indigenous businesses. When non-Indigenous advisors attempt to assist Indigenous businesses, the advisors sometimes suggest that Indigenous businesses must adapt, conform, or 'act like' mainstream Australian businesses, in order to succeed. The message is that Indigenous entrepreneurs should 'learn' that they *must* perform any contractual promise even if that performance ends up violating a cultural norm, such as the need to take care of a relative who becomes ill. We wish to challenge these assumptions.

Change is not only possible, but feasible. From a strictly legal perspective, the choice between Indigenous and Eurocentric norms is, in many cases, not necessary. Rather than asking Aboriginal and Torres Strait Islander businesspeople to conform to the underlying mainstream Australian norms and expectations encapsulated in many commercial contracts, it is possible for legal advisors to learn what is different between the needs and approaches of Indigenous people and mainstream Australians and then to work out how to bridge the gap using the principle of freedom of contract.

Solutions to bridging this gap can be incorporated expressly into a contract, making sure that the obligations and the various ways of meeting them are clear to all the parties.[80] For example, a contract might include an understanding that long-term relationships are being built even while short-term contractual obligations might not be met as anticipated. A contract could also include a requirement to build a stronger network of alternate suppliers or service mixes. However, for a contract to be written in this way, additional education is needed as well as a better understanding of which legal rules and provisions might be effective in which culturally sensitive circumstances. Ascertaining and instrumentalising those rules and provisions is part of the goal of our broader project.

One such example is the contents of the 'fine print' of contracts. Three more detailed examples help to illustrate the changes that we propose to standard boilerplate: no assignment clauses, jurisdiction clauses, and clauses to protect cultural knowledge. We examine each in turn below.

[80]Of course, not every solution needs to be registered in the contract. In some cases, it may be enough for the parties to learn each other's needs and requirements through simple negotiation and mutual understanding.

3 (a) No assignment clauses

'No assignment clauses' are common boilerplate for business contracts. Broadly speaking, these clauses accord well with standard Australian business practices and normative expectations, as businesses typically decide who to contract with and get what they bargained for.

However, such clauses may not optimally address the best interests of Indigenous entrepreneurs. Specifically, a no assignment clause may curtail practical ways that an Indigenous business addresses a business interruption. For example, if Sorry Business requires the presence of a businessperson elsewhere, a no assignment clause may constrain the appointment of an alternative, culturally appropriate community member to perform the contract. In this situation, a no assignment clause will inhibit cultural expression by forcing the Indigenous entrepreneur (or employee) to choose between contractual and cultural obligations, or otherwise risk a breach of contract by delaying performance.

Where the parties are culturally aware, however, they can overcome this challenge. For example, where the parties, at the time of entering into the contract, are aware that it may at any time be necessary for the Indigenous entrepreneur or an employee to take a leave of absence due to Sorry Business, then the focus shifts to how to support the Indigenous entrepreneur to incorporate this into the business model and legal documents. The situation could be predicted and managed in the contract itself, possibly by avoiding a no assignment clause and instead authorising another person to take on the relevant business obligations during such times.

3 (b) Jurisdiction clauses

Governing jurisdiction and dispute resolution clauses are standard boilerplate clauses that are often included in a contract without a great deal of negotiation between the parties. These clauses offer an opportunity to address some of the barriers facing Indigenous businesspeople in accessing civil justice, of which there are many.[81]

It may not be immediately apparent that a clause requiring disputes to be resolved according to the law of, for example, New South Wales, is a barrier for Indigenous businesses. There are, however, barriers that emerge here, some that are explicit and others that are more subtle and pernicious. One of the areas where these barriers play out is in regard to dispute resolution. Indeed, one of the key principles of contract law is that an innocent party, after breach, can invoke the power of the state, through the courts, for purposes of enforcement.

An Indigenous business, in theory, has the choice of a contractual clause to require disputes to be resolved according to Indigenous practices, or mainstream Australian practices. In reality, however, this choice is limited by an amalgamation of biases and structural constraints that result in disputes nearly always being determined according to hegemonic Australian laws and mainstream Australian dispute resolution fora. We have depicted these potential choices in the table below, along with our assessment of the frequency of their use.

[81]Laing and Behrendt (2007).

	Mainstream Australian forum	Indigenous forum
Mainstream Australian law	*nearly always*	*likely rare*
Indigenous law	*only occasionally*[82]	*limited*

In Australia, the most common situation by far is that disputes are resolved formally in court, following the laws of the Commonwealth and relevant state, or, informally according to similar principles with the expectation that a failure to resolve the dispute will result in it being decided in a court of law. For disputes between an Indigenous business and a non-Indigenous party, this paradigm – represented by the top-left box above – is typically the only option available. In other words, regardless of whether a dispute is resolved within the courts or through alternative dispute resolution, essentially all disputes involving Aboriginal and Torres Strait Islander people are resolved according to Anglo-Australian laws within a mainstream forum. The system itself is skewed in favour of non-Indigenous practices. In terms of legal barriers to Aboriginal and Torres Strait Islander people, this is problematic at best and discriminating at worst. This places Indigenous people as the 'other' who must either change their claim to conform with Anglo-Australian requirements, or be rejected.

Further instances of unconscious and conscious biases may enter the system in the form of non-Indigenous judges, a factor highlighted by the wealth of literature on racist biases in Australia of white police and judges. Similar trends of racism have been identified as negatively impacting Indigenous people seeking to resolve civil disputes.[83] As Behrendt confirms, these factors flow even through consensus-based methods such as mediation.[84]

At the same time, there are increasing examples of the successful use of Indigenous law and Indigenous dispute resolution processes in the commercial context. One such example is the Tiddas 4 Tiddas dispute, where Aboriginal communities raised concerns about online content and a proposed book written by two Aboriginal entrepreneurs. As Hatfield explains, there were community concerns that the content projected unhelpful narratives, and that the entrepreneurs were using cultural and intellectual property of Aboriginal women to create their content:

> [I]ssues of content ownership were raised. Allegedly, once content was posted on Instagram, the words and images of black women became the intellectual property of this international social-media platform. It is still unclear what the business arrangement for this was. Now I bet a lot of you are saying: 'Well, yeah. That's how copyright law works.' But that's a very white way of understanding ownership and there are lots of ways in which copyright can remain with the creators or authors of work.[85]

[82]Modified culturally appropriate methods of dispute resolution and Indigenous models of dispute resolution that operate within the form Australian legal systems include:

> Elder arbitration, Aboriginal mediation, agreement-making and other various forms in criminal and civil matters, such as Circle Courts in Nowra and Dubbo and the Aboriginal Sentencing Court in Kalgoorlie, Koorie Courts in Victoria, Nunga Courts in South Australia, and Aboriginal mediators co-mediating matters before Community Justice Centres in New South Wales. Ciftci and Howard-Wagner (2012), p 84.

[83]Laing and Behrendt (2007).
[84]Behrendt (2002), p 178.
[85]Hatfield (2020).

When attempts at negotiation were not successful, those seeking change took action in public online fora, demanding enforcement of appropriate cultural practice. Ultimately, the content was removed from the online environment, and the subsequently published book contained material that its authors assured readers had the appropriate permissions granted to comply with Aboriginal laws.[86]

Without overcoming embedded barriers in respect of dominant Anglo-Australian norms, governing law and dispute resolution will be a challenge. There may be no obvious alterative to determining contractual disputes according to the law of New South Wales (or whichever Australian state) but there is flexibility in drafting and adopting dispute resolution clauses that provide alternative forums and processes for the resolution of disputes. We are interested in exploring the development of a package of legal clauses that establishes alternative dispute resolution processes that would be less biased against Indigenous businesses and more suited to providing equitable or mutually advantageous outcomes. Certainly, obstacles for Indigenous entrepreneurs in negotiating the addition of these new clauses will remain. Greater levels of education among all parties, as well as standardisation in this area, would assist these endeavours, and third party assistance with negotiations is also likely to be helpful.

The main point is that even though there are aspects of contract law that structurally create and allow bias, the flexibility of contract law gives the parties great power to construct the legal universe of their relationship. That power – when used thoughtfully, creatively and with foresight – can in turn overcome many of the default biases that disadvantage Indigenous businesses.

3 (c) Clauses to protect cultural knowledge

As outlined in Part 2, there are many ways in which intellectual property laws fail to meet the needs of Indigenous communities. However, in the commercial context, there are creative ways to address some issues related to intellectual property and cultural knowledge without waiting for law reform. For example, confidentiality agreements are underutilised as a means of restricting the use of Indigenous cultural knowledge. Use of confidentiality agreements cannot work in all instances, especially where cultural knowledge is shared with young people who have not reached the age of majority and cannot be bound by contractual arrangements. However, a confidentiality agreement could help to avoid a number of types of exploitation of an Indigenous partner, such as the use or misuse of cultural knowledge, contacts, and other information that might otherwise be used without appropriate attribution.

Baigent, founder of the cooperative platform Trading Blak, notes,

> We have come across lots of behaviours in the space of exploitation of Aboriginal people trying to earn a living with their art, so we would really love to see a call out for transparency in the space and accountability back to community for selling what is essentially sacred culture.[87]

[86] Silva and Sarra (2020).

[87] ABC News Online, 'Trading Blak Collective Formed to End Exploitation within Businesses Selling Aboriginal Products', https://www.abc.net.au/news/2020-06-30/new-collective-to-end-explotation-in-aborignal-products-industry/12403114, 30 June 2020.

One of the functions of Trading Blak is as a forum for working through disputes about cultural content, with its website explaining, 'Aboriginal business owners across the country have banded together to create a platform that promotes transparency and ethical practices among businesses trading in Aboriginal culture to combat "exploitative" operators.'[88] Similarly, research by Jarrett illustrates that dealings with large purchasing organisations (LPOs) are a common cause of problems, and a relationship in which Indigenous partners often feel that their cultural knowledge is exploited. One of his study participants observed:

> I'm trying to have a trusted advisor relationship by the way of giving information for free, and giving them solutions for free, in the fact that they'll come back to me for me to help them actually design it and implement it in a co-design framework. But it just leads me to think that they're taking my ideas and running with them and doing them themselves. So, I think that that's not a respect to indigenous business.[89]

A services agreement with effective confidentiality clauses could make clear what information is to be provided, how that information can be used, and what steps are to be taken to limit the use of that information when the relationship ended. This would assist in resolving issues around giving information and solutions for free in anticipation of a long-term relationship, where some subsequent work does not transpire.

Industry codes can also be incorporated by reference to help protect cultural knowledge and facilitate ethical behaviour by a non-Indigenous partner. For example, the voluntary Indigenous Art Code ('the Code') established in 2009 replicates standard regulatory protections such as requiring cooling off periods and prohibiting misleading or unfair conduct.[90] However, the Code also goes beyond the existing law by including requirements such as not paying an artist an amount that is against good conscience, not using the name of an artist after their death without first using best endeavours for consent from the artist or their family, and not selling secret, sacred or restricted artworks.[91] Any such codes can be incorporated by reference into a business contract as a foundational basis for the relationship between the parties.

In summary, even with intellectual property law that does not accord with Indigenous practices, particularly relating to communal ownership, consent and decision-making procedures, as well as continuing obligations to maintain cultural integrity,[92] there are possibilities in education, marketing and contractual terms that can reinforce culturally sensitive practices. The greater the extent of research and innovation in this area, the greater the potential to improve existing solutions. This will also no doubt improve consumer knowledge, thereby reducing the risk of consumers being misled or deceived into supporting culturally insensitive imitations of Indigenous products or services.[93]

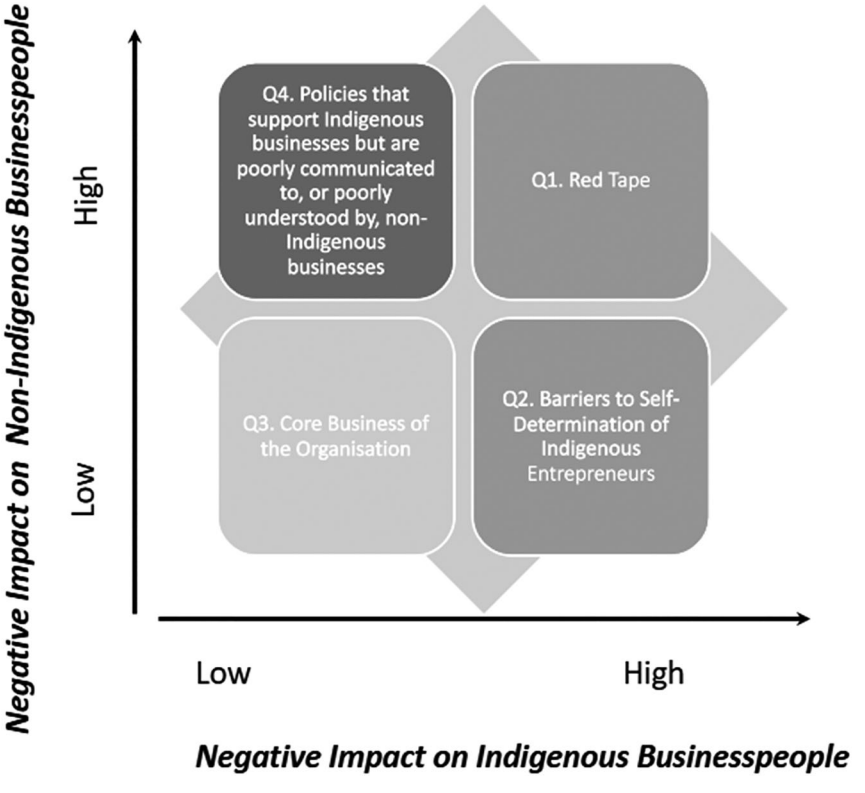
[88]Tradingblak, https://www.instagram.com/tradingblak.
[89]Jarrett (2019), p 182.
[90]*Indigenous Art Code* (2009), paras 2.1 and 2.2.
[91]*Indigenous Art Code* (2009), paras 2.1 and 2.3.
[92]Janke and Quiggin (2006), p 456.
[93]Lai (2014), pp 158–159.

Part 4 – Conceptualising barriers and expanding the evidence base for legal barriers

4 (a) Conceptualising barriers: a quadrant approach

As a result of this initial study outlined above, we have developed a typology for a more comprehensive and data-driven study of commercial law and Indigenous entrepreneurship. This we hope will provide focus to the future deployment of existing commercial law mechanisms as well as support the case for law reform. As the chart below demonstrates, we propose identifying where existing legal rules either (a) facilitate or (b) inhibit the self-determination of Australia's Indigenous entrepreneurs.

In the proposed typology, quadrant 1 consists of rules and practices that cause unwanted obstacles to both Indigenous and non-Indigenous businesses – including what is sometimes described as 'red tape'. Quadrant 2 consists of laws and practices that may be consistent with many Anglo-Australian business practices but fit poorly with Indigenous cultural norms. An example of this might be a contract that does not allow delays or substitution for Sorry Business, or which fails to adequately delineate protection for cultural knowledge. Quadrant 3 includes laws and legal practices that coincide with both dominant Australian business practices and Indigenous cultural norms, and is thus culturally efficient. Finally, quadrant 4 consists of practices and rules that support Indigenous cultural norms but inhibit non-Indigenous business activities in the way that they are actioned or perceived.



This typology is useful not only for our project's data collection, but also as a process for achieving change. For example, issues in quadrant 1 are irritants to all entrepreneurs, and reformers may expect broad consensus if they seek to address them. On the other hand, issues in quadrant 4 are much less likely to see broad-based support, as non-Indigenous entrepreneurs might perceive these rules and practices as inappropriate or experience them as culturally incongruent. In other words, for quadrant 4 issues, it is unlikely that formal law reform efforts will be successful, as they would require the support of a large cross section of stakeholders. At the same time, quadrant 4 issues are those on which we wish to focus our efforts to better identify workaround solutions, such as those articulated in Part 3 of this article.

We note that the greatest impact to Indigenous business practice will be felt from the removal of barriers that correlate most negatively with Indigenous cultural norms. At the same time, it is possible that some positive discrimination actions such as Indigenous-preferential construction and procurement terms and regulations may also need improvement to increase compliance with both Indigenous cultural norms and Australian business practices.[94]

4 (b) Expanding the evidence base for legal barriers and solutions: an ongoing project

Comprehensively mapping barriers to cultural and economic success for Indigenous businesses will require a sensitive and supportive research strategy, developed in collaboration with Aboriginal and Torres Strait Islander elders and business practitioners. At the Newcastle School of Law and Justice, we seek to contribute to this process by developing a project called the First Nations Business Project ('the Project') around these issues. The Project involves programming an elective course that collaboratively connects staff, students and communities, using principles of legal design that are focussed on the needs and 'pain points' of Indigenous entrepreneurs. Key components of the Project are set out below.

First, the Project involves the creation of a resource kit designed to be practical and user-friendly for Indigenous businesses. The kit will comprise materials from areas of law relevant to small or medium-sized businesses, ranging from corporate structure to intellectual property and to tax.[95] The intention is to provide resources not only about the relevant areas of law, but also to begin to suggest tools for achieving success in culturally meaningful ways, along the lines of the strategies explored in Part 3 above.[96]

Second, the Project features an outreach component. Building on the long-standing clinical expertise of the Newcastle School of Law and Justice,[97] teams of students have the opportunity to meet with Aboriginal and Torres Strait Islander entrepreneurs and learn first-hand about their needs, including in regard to their aspirations for the cultural

[94] Jacobs (2017), p 10.

[95] It has been reported that 'Indigenous corporations need support and capacity development in managing the corporation's affairs and not only in the governing of corporations': Office of the Registrar of Indigenous Corporations (2010), p 6.

[96] As has already been noted in the research, 'Indigenous Australians are discovering ways to form businesses that are both commercially viable and culturally affirming': Morley (2014), p 5.

[97] See Newcastle Law School, 'The University of Newcastle Legal Centre', https://www.newcastle.edu.au/school/newcastle-law-school/legal-centre.

context of their businesses. People with legal and cultural expertise are also involved, working with students to identify how to use the existing law to bridge gaps and achieve success for the businesses. Strategies suggested by these individuals are then communicated back to the clients as part of the School's clinical outreach.[98]

Third, the Project will involve a research strategy. Following the outreach phase, the research team will follow up with the entrepreneurs over a 12 to –24-month period. They will ask a key question: which of the proposed strategies worked and which did not? Where strategies did not work, the team will seek to understand why as well as to provide alternative solutions. Additionally, from the resulting data, the original resource kit will be updated to include more useful, and culturally appropriate, legal tools. The resource kit will be made available to interested Aboriginal and Torres Strait Islander businesspeople and others, free of charge.

In sum, we see this Project as one pathway forward for expanding the evidence base for barriers – cultural as well as economic – that prevent the success of Indigenous enterprises. Furthermore, we have devised the Project as an avenue for suggesting and testing legal tools aimed at overcoming these barriers. Our hope is to support individual SMEs while compiling data and resources that we can disseminate broadly in order to benefit the wider community, putting into practice the theory that frames this article. We both welcome and encourage further engagements in these areas.

Conclusions

Law has long been a tool of colonial oppression that has intentionally and unintentionally constrained Indigenous self-determination in Australia, including in the sphere of business and commerce. Today, many aspects of commercial practice, policy and regulation do not adequately serve the needs of the rapidly expanding Indigenous economy.

The study of Indigenous entrepreneurship has led to many advances in identifying and addressing challenges and showcasing best practice.[99] However, it is clear that in the legal sphere, there has been insufficient attention given to the impacts of laws, and in particular commercial laws, on the preferred commercial practices of Indigenous entrepreneurs. It follows that there is much work to be done in terms of considering more broadly how the tools of law can better enhance Indigenous self-determination.[100]

This article has offered the first steps in this analysis, identifying challenges posed by commercial law and how these can fetter the generally-thriving Indigenous business sector. Our focus on the intersection of law and culture leads to the identification of legal barriers that exist by means of their requiring business behaviours contrary to Indigenous cultural norms.[101] As Morley explains, 'one of the cultural challenges that affects Indigenous people is that commercial drivers in business "may sit uneasily with cultural drivers".'[102] These barriers may either prevent Aboriginal and Torres Strait Islander

[98]The NSW Ombudsman's 2016 Report noted the importance of 'ensuring Aboriginal people and communities have access to quality legal and business advice, as well as guidance on setting up sound governance structures': NSW Ombudsman (2016).
[99]Hudson (2016); Shirodkar et al. (2018).
[100]The positive intersections of commerce and human rights have generally not been a topic of much focus, especially in academic literature. See generally Toohey (2017), p 198.
[101]See Collins et al. (2017).
[102]Morley (2014), p 5 (citations omitted).

people from entering into business ventures due to the threat to their cultural norms or require Indigenous people to act within a conflicted business dynamic where their cultural norms are regularly being challenged. There is also a missed opportunity for non-Indigenous businesspeople to engage meaningfully across cultures with a business partner who is able to safely and comfortably express their identity. The result is strengthened and more sustainable business relationships that can be shaped by better-informed mutual understanding and respect.

Engagement with law reform is an often frustrating and undermining process, and the domain of commercial law is no exception. There is a clear need for law reform across many areas – including intellectual property, property law, and corporate law. However, the pace of reform is best described as glacial, and is in many cases non-existent.

Against this background, we have explained that mapping legal barriers and repurposing existing legal tools to improve the environment for Indigenous businesses have received inadequate attention. We have therefore outlined ways to strategically evaluate how to use tools of law to support not only business activity but also self-determination.[103] For example, utilising the inherent flexibilities of contract law it is possible to develop alternatives to standard-form contracts and to revisit boilerplate clauses. In this way, organisations could significantly improve the cultural congruence of standard business arrangements.

We reiterate that the examples above by no means provide an absolute solution but rather present a beginning of a collective conversation. Much work needs to be done on related issues, such as addressing the power imbalances inherent in many business negotiations and the very real effect of resource constraints such as access to informed, skilled advisors. We hope that this article will serve as a platform for additional research and engagement around the issues discussed. Importantly, further analysis will assist in overcoming barriers, not by exhorting Aboriginal and Torres Strait Islander people to 'operate a business like a mainstream Australian' but rather through raising awareness of the differences in Indigenous and non-Indigenous understandings and finding ways to use law to bridge those divides.

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[103]Some research has been undertaken regarding the importance of appropriate and productive cultural practice within Indigenous businesses and enterprises. See, eg, Morley (2014), p 10–11. Here, we are focused on the related but separate issue of bridging those cultural practices with mainstream Australian businesses and economic frameworks.

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