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Submission to the Yoorrook Justice Commission

This submission is authored by researchers from the Indigenous Nation Building and Governance research hub (INBG) within the Jumbunna Institute for Indigenous Education & Research at the University of Technology Sydney. Since 2010, INBG researchers have collaborated with individuals and groups from five First Peoples to investigate the prevalence of and strategies associated with Indigenous Nation Building (INB) within Australia. These collaborations have built on Australian and international evidence that self-government is a necessary precursor for First Peoples'[1] success in fulfilling their cultural, social, economic and political community development goals.[2]

The INBG research team welcomes the opportunity to provide a submission to the Yoorrook Justice Commission investigating the systemic injustices experienced by First Peoples in Victoria in all areas of life since colonisation.

We submit that the formal engagement with First Peoples' sovereignty is a necessary basis for the Commission's overarching mandate: to 'make recommendations for healing, system reform and practical changes to laws, policy and education, as well as to matters to be included in future treaties'.[3]

By making this submission, we hope not only to illuminate the centrality of the concept of Aboriginal and Torres Strait Islander sovereignty to attaining just relations in postcolonial Australia, but also to provide much needed clarity about this concept as a basis for the current work of the Yoorrook Commission and for future discussions regarding healing historical and ongoing injustices affecting First Peoples in the Victorian polity.

The State of Victoria acknowledges 'the ongoing strength and resilience of First Peoples and survival of their living cultures, knowledge and traditions'[4] but has so far been reluctant to acknowledge Indigenous *governance* cultures, *political* knowledge, and traditions of *self-rule* as surviving elements of First Peoples' sovereignty. Our submission explains how systemic injustice arises from Australian

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[1] We recognise the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander Peoples. We know there is no one cultural model or descriptor appropriate for all Aboriginal and Torres Strait Islander collectives. In this submission we will use the term 'Peoples' to refer to self-defined collectives of Aboriginal and Torres Strait Islander people. We use the term 'Peoples' to align with the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) and the definition of 'self-determination' contained within the UN Declaration. We acknowledge that Aboriginal and Torres Strait Islander Peoples use a variety of terms to describe themselves – nation, clan, people, society, mob, community, First Nation – and when referring to a particular People, we will endeavor to use the term they use to describe themselves. With regard to the word 'Indigenous', we are guided by Kerry Arabena's observation that the term should not be seen as one that fails to recognise the diversity and specific identity of Aboriginal and Torres Strait Islander Peoples but is used to refer collectively to the First Peoples of Australia, Aotearoa New Zealand and North America (2007, p. xxiii). Thus, when referring to collectives of Indigenous people throughout the world, we will use the term 'Indigenous People', again in accordance with the UN Declaration.

[2] Among others, these collaborations have included the Australian Research Council y projects: 'Negotiating a space in the nation: the case of Ngarrindjeri' (DP1094869); 'Indigenous nationhood in the absence of recognition: Self-governance insights and strategies from three Aboriginal communities' (LP140100376); and 'Prerequisite conditions for Indigenous nation self-government' (DP190102060). A book detailing our initial inquiries with the Ngarrindjeri and Gunditjmara nations is forthcoming: Rigney et al, *Indigenous Nation Building in Australia* (Bloomsbury, forthcoming). See for example, Alison Vivian, Miriam Jorgensen, Alexander Reilly, Mark McMillan, Cosima McRae and John McMinn, 'Indigenous Self-Government in the Australian Federation', *Australian Indigenous Law Review* 20 (2017): 215-242; Anthea Compton, Alison Vivian, Theresa Petray, Matthew Walsh and Steve Hemming, 'Native title and Indigenous Nation Building: Strategic Uses of a Fraught Settler-Colonial Regime'. *Settler Colonial Studies* (2023); Gertz, 'Gugu Badhun Sovereignty, Self-Determination and Nationhood', PhD diss. (Townsville: James Cook University, 2022); Theresa Petray, and Janine Gertz. 'Building an Economy and Building a Nation: Gugu Badhun Self-determination as Prefigurative Resistance'. *Global Media Journal* 12:1 (2018): Stephen Cornell, 'Processes of Native Nationhood: The Indigenous Politics of Self-Government'. *International Indigenous Policy Journal* 6:4 (2015): Article 4.

[3] Victoria, Yoo-rrook Justice Commission Letters Patent, *Victoria Government Gazette* No S217, 14 May 2021.

[4] Yoo-rrook Justice Commission Letters Patent (n 3) 1.

settler-colonial governments' ongoing refusal to adequately engage with Aboriginal and Torres Strait Islander Peoples as distinct, sovereign Peoples with the inherent right to self-determination *as of right*, despite the fact that Aboriginal and Torres Strait Islander Peoples have never ceded their sovereignty.[5] We seek to explain why attempts to address systemic injustice and advance post-colonial justice require engagement with Aboriginal and Torres Strait Islander Peoples' sovereignty, entailing institutions of legal and political pluralism.

Our aim in this submission is to present a framework through which to understand the systemic nature of injustices faced by First Peoples, which we argue are caused by the nature of relations imposed on First Peoples by the settler state. The Commission has received a number of important submissions concerning the injustices arising in specific areas including health, education, employment and land. Our submission outlines why the injustices in these specific areas can only be understood *systematically* – that is, as structural, pervasive and causally interlinked – when they are viewed in the light of the fundamental logic of settler-colonial governance that denies First Peoples' sovereign rights to collective self-determination.

In our view, there is no possibility for a just future for Aboriginal Peoples in Victoria or for the broader Victorian society unless new relations can be negotiated based on a mutual recognition of overlapping and shared sovereignty, and the negotiated allocation of jurisdictional responsibilities arising from these respective sovereignties. As Eualeyai/Kamillaroi scholar, Distinguished Professor Larissa Behrendt has explained, Aboriginal and Torres Strait Islander sovereignty lies as at the heart of the needed restructuring of the relationship between Indigenous and non-Indigenous Australians.[6] Indeed, in Part 5 we note the Victorian Government's recent policymaking pertaining to treaty-making and engaging with the 'Right People for Country' suggests some engagement with these ideas around structural change.

Please note from the outset that we are mindful that the concept of 'Indigenous sovereignty' is contentious and that some Indigenous scholars and leaders have rejected the concept of sovereignty as being inappropriate to further the aspirations of Indigenous Peoples;[7] while other Aboriginal and Torres

[5] That is, Aboriginal and Torres Strait Islander Peoples are recognised by the settler state as Peoples only for purposes, and against criteria, determined by state and federal governments. However, the reality that Aboriginal and Torres Strait Islander Peoples exist and insist on engaging with settler governments as polities causes deep contradictions at the heart of relations among settler and Aboriginal and Torres Strait Islander Peoples in Australia. On the one hand, there is a multitude of examples of negotiated political, economic and legal agreements between Australian settler governments and First Peoples that as Reilly describes, 'assume the existence of collectives with self-governing capacities and negotiating authority.' See Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28 *Sydney Law Review* 403, 419. Further, legislative schemes exist, such as native title, cultural heritage laws and some states' land rights systems that regulate collective rights of Aboriginal and Torres Strait Islander collectives. Other policy initiatives such as the South Australian Aboriginal Regional Authority (ARA) policy provided for Leader-to-Leader and polity-to-polity relations with ARAs. On the other hand, despite these initiatives that implicitly acknowledge the existence of self-governing Aboriginal and Torres Strait Islander Peoples, the settler narrative explicitly denies the sovereignty of Aboriginal and Torres Strait Islander Peoples, which constrains the capacity of Aboriginal and Torres Strait Islander Peoples to create culturally legitimate self-governing systems and be self-determining.

[6] Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 96.

[7] There are four main arguments including that: (1) the origins of 'sovereignty' in western imperialism are racist and that notions of European sovereignty inevitably frame Indigenous Peoples as inferior; (2) 'sovereignty' does not accord with Indigenous worldviews; (3) acceptance of a diminished form of sovereignty – which would be a minimum requirement from any settler-colonial state – reinforces the power of the settler-colonial state; and (4) it is more strategic to make claims to 'self-determination' than to sovereignty. For example, Gunditjmara man Damein Bell argues that sovereignty in a Western legal sense is a simplistic concept that does not convey the complex relationship that Aboriginal and Torres Strait Islander Peoples have with their Country and their obligation to care for it. See Daryle Rigney, Simone Bignall, Alison Vivian, Steve Hemming, Shaun Berg and Damein Bell, 'Treating Treaty as a Technology for Indigenous Nation Building' in Diane Smith, Alice Wighton, Stephen Cornell and Adam Vai Delaney (eds) *Developing Governance and Governing Development International Case Studies of Indigenous Futures* (Rowman and Littlefield International, 2021) 119. Also, see for example, among many others, Noel Pearson, 'Reconciliation: To Be or not to Be? Separate Aboriginal Nationhood or Aboriginal Self-determination and Self-government within the Australian Nation?' (1993) 3(61) *Aboriginal Law Bulletin* 14

Strait Islander scholars, jurists and politicians continue to utilise the term.[8] We also note that First Peoples and settlers have different conceptions of what it is to be 'sovereign', which has significant political consequences and impacts practical programs for achieving just outcomes for First Peoples.

However, the concept of sovereignty is highly ambiguous and significant uncertainty attends the use of the concept of 'sovereignty', which has been described as 'the most glittering and controversial notion in the history, doctrine and practice of international law', but with 'an emotive quality lacking specific meaningful content'.[9] Thus, sovereignty is both a malleable and a 'loaded term' precisely because 'it deals with assertions of ultimate authority and its use is often wedded to a strong rhetorical purpose'.[10] Accordingly, we use 'sovereignty' here as an imperfect shorthand to place it in the same analytical frame as settler sovereignty, and to emphasise ongoing power relations in Australia.

Executive Summary

It is well established that systemic and entrenched injustice and intergenerational harm experienced by Indigenous Peoples throughout the world have their origins in the prevailing logic of settler-colonialism, which seeks to replace Indigenous societies with settler-colonial societies.[11] Diverse research evidence demonstrates that Peoples – Indigenous and non-Indigenous – experience collective wellbeing when they live according to their own cultural worldviews that provide them with structure, meaning, and significance. Conversely, when Peoples are prevented from living according to their own systems of interrelated knowledge, practices, and social meanings – their worldviews– they experience intergenerational trauma manifest in negative social and well-being outcomes.[12] Such findings resonate with almost 40 years of internationally consistent Indigenous nation building research that has found that stable, *culturally-legitimate* political governance is a pre-requisite to Indigenous Peoples being able to achieve their cultural, social, economic and community-development aspirations.[13]

<http://www.austlii.edu.au.ezproxy.lib.uts.edu.au/au/journals/AboriginalLawB/1993/>; Taiaiake Alfred 'From Sovereignty to Freedom: Towards an Indigenous Political Discourse' (2001) 3 *Indigenous Affairs* 22; Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford University Press, 2nd ed, 2009); Audra Simpson, 'Paths Toward a Mohawk Nation: Narratives of Citizenship and Nationhood in Kahnawake' in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 113; Robert A Williams, Jr, 'The Algebra of Federal Indian Law: The Hard Trail Of Decolonizing and Americanizing the White Man's Indian Jurisprudence' (1986) *Wisconsin Law Review* 219; Michael Dodson, 'Sovereignty' (2002) 4 *Balayi: Culture, Law and Colonialism* 13; Antony Anghie, 'Western Discourses of Sovereignty' in Julie Evans et al (eds), *Sovereignty. Frontiers of Possibility* (University of Hawai'i Press, 2013) 19.

[8] Referendum Council, *Final Report of the Referendum Council* (Final report, 30 June 2017) 49-50 <https://nla.gov.au/nla.obj-749655424/view>. As McHugh notes, Indigenous Peoples are aware of themselves existing in time and space, with a sense of coherence as a polity exercising authority that western political thought has termed 'sovereignty'. See P G McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, 2004), 61-63.

[9] Oona A Hathaway and Scott J Shapiro, 'The Power to Refuse' (WZB Berlin Social Science Center, draft 28 June 2012) <http://www.wzb.eu/en/veranstaltungen/the-power-to-refuse>.

[10] Sean Brennan, Brenda Gunn and George Williams, '"Sovereignty" and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26 *Sydney Law Review* 307, 314.

[11] Patrick Wolfe, 'Settler-colonialism and the elimination of the native' (2006) 8(4) *Journal of Genocide Research* 387; Lorenzo Veracini, Settler *Colonialism: A Theoretical Overview* (Palgrave McMillan, 2010).

[12] See, for example, Alison Vivian and Michael Halloran, 'Dynamics of the policy environment and trauma in relations between Aboriginal and Torres Strait Islander peoples and the settler-colonial state' (2022) 42(4) *Critical Social Policy* 626. See also Steve Hemming, Daryle Rigney, Major Sumner, Luke Trevorrow, Laurie Rankin Jr and Chris Wilson, 'Returning to Yarluwar-Ruwe: Repatriation as a Sovereign Act of Healing' in Cressida Fforde et al (eds), *The Routledge Companion to Indigenous Repatriation: Return, Reconcile, Renew* (Routledge, 2010) 796.

[13] For an overview of the Harvard Project on American Indian Economic Development, see Miriam Jorgensen (ed) *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007); Harvard

From this foundation, this submission argues:

(1) that structural and entrenched injustice and intergenerational harm arise from the fact that settler governments in Australia have systematically prevented Aboriginal and Torres Strait Islander Peoples from exercising their inherent rights to self-determination as distinct, sovereign Peoples;
(2) that settler-colonial injustice and harm will prevail for so long as non-Indigenous governments continue to obstruct First Peoples' exercise of self-determination by refusing to acknowledge First Peoples' sovereign status;
(3) that formal engagement with First Peoples' sovereignty, therefore, is a necessary starting point for exiting from colonisation, or becoming 'ex-colonial'.[14] This is a peace-building process that requires structural change and refuses the constitutive conditions of exclusive settler-colonial governance, instead establishing sovereign-to-sovereign relations;
(4) it follows that the State of Victoria's formal engagement with First Peoples' sovereignty requires structural change that concerns the institution of legal and political pluralism;
(5) and furthermore, that following the attempted destruction of Indigenous political cultures and governance traditions throughout the course of colonisation, *fair* sovereign-to-sovereign engagement amongst settler states and First Peoples in legally and politically plural conditions will require a priori support for Indigenous nation rebuilding, enabling First Peoples to revive their inherent sovereign capacities and act with self-determination and political legitimacy in order to thrive.

This submission thereby seeks to provide answers to two fundamental questions: what does it *mean* – ethically, legally and politically – to insist that the formal engagement with First Peoples' sovereignty is a necessary starting point for understanding and addressing past and ongoing systemic injustices? And, what does this claim *require* by way of a practical response or set of responses from the settler state government?

In Parts 1 and 2 of our submission, we explain that post-colonial Australia exists in an ongoing state of intercultural conflict and systemic injustice affecting Aboriginal and Torres Strait Islander Peoples because settler states contend they are the only relevant sovereign authority overseeing legal and political governance matters, even as First Peoples insist their originary sovereignty endures.

Part 3 outlines the reality that First Peoples unceded sovereignty means that Australia is, and indeed always has been, legally and politically plural in nature.

Part 4 then explains how the ongoing refusal of First Peoples sovereignty and, consequently, the denial of the reality of legal and political pluralism, results in the systematic embedding of settler-colonialism in government policy, programs and practices. This alienates Aboriginal and Torres Strait Islander people from their fundamental right to be self-determining and their capacities to live according to their own worldviews. We consider this to be *the* fundamental injustice affecting Aboriginal and Torres Strait Islander Peoples because it is the primary mechanism through which harm and intergenerational trauma are perpetuated.[15] It follows that there is little prospect of thriving Aboriginal and Torres Strait Islander societies while their worldviews are subjugated by settler-colonial policy and law, undermining the very

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Project on American Indian Economic Development. *The State of the Native Nations: Conditions Under U.S. Policies of Self-Determination* (Oxford University Press, 2008).

[14] 'Ex-colonialism' is elaborated in works by Simone Bignall including: Simone Bignall, 'The Collaborative Struggle for Ex-Colonialism' (2014) 4(4) *Settler Colonial Studies* 340; and Simone Bignall, *Postcolonial Agency: Critique and Constructivism* (Edinburgh University Press, 2010).

[15] Vivian and Halloran (n 12).

objectives that policies in the Aboriginal and Torres Strait Islander affairs arena are supposed to achieve; namely, improving the social, economic and physical wellbeing of Indigenous people.[16]

Noting (in Part 5) how the Victorian Government has recently inaugurated some important structural shifts towards 'seeing' First Peoples as self-determining collectives, the final Parts 6-8 of our Submission consider what it will take for Australia to 'exit colonialism'. To address the systemic and structural injustices affecting First Peoples, it is necessary for Australian legal and political society to break definitively with the fundamental logic of settler-colonial governance that denies First Peoples' sovereign rights to self-determination (Part 6). This break will be achieved only through a concerted effort to restructure political relations amongst First Peoples and settler state formations, so that they can proceed on a pluralist (sovereign-to-sovereign, nation-to-nation, or government-to-government) basis, ensuring parity in the negotiation of shared and overlapping jurisdictions (Part 7). For this to happen, First Peoples must be supported to rebuild their sovereign capacities in readiness for equitable interactions with settler state powers (Part 8).

The settler state will also need to prepare for such interactions. We conclude with a set of Recommendations outlining responsible actions that the Victorian Government can take to provide appropriate support to First Peoples, and also to engage their own processes of self-transformation in readiness for the structural changes that are required.

Our discussion accordingly comprises the following parts:

1. First Peoples' sovereignties
2. Settler sovereignty and settler-colonialism
3. The reality of pluralism
4. 'Indigenous Affairs': Settler government policymaking
5. Seeing 'Peoples': Victorian Government policy
6. 'Exiting colonialism'
7. Negotiating overlapping jurisdictions
8. Indigenous nation building: capacity building to enable just relations
9. Recommendations: the role of settler governments

[16] Elizabeth Strakosch, *Neoliberal indigenous policy: settler colonialism and the 'post-welfare' state* (2015, Palgrave Macmillan); Ash Wright, Paul Gray, Belle Selkirk, Caroline Hunt and Rita Wright, 'Attachment and the (mis)apprehension of Aboriginal children: epistemic violence in child welfare interventions' (2024) *Psychiatry, Psychology and Law*, 1 <https://doi.org/10.1080/13218719.2023.2280537>; Aileen Moreton-Robinson, 'The possessive logic of patriarchal white sovereignty: The High Court and the Yorta Yorta decision' in WD Riggs (ed), *Taking up the challenge: Critical whiteness studies in a postcolonising nation* (Crawford House, 2007), 109; and Steve Hemming and Daryle Rigney, 'Unsettling sustainability: Ngarrindjeri political literacies, strategies of engagement and transformation' (2008) 22(6) *Continuum* 757.

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Part 1: First Peoples' sovereignties

1. Aboriginal and Torres Strait Islander sovereignties are ongoing and enduring. In the words of Crystal McKinnon, they 'preceded and exceed colonialism'.[17]
2. The structural inequality and harm experienced by Aboriginal and Torres Strait Islander Peoples and people is largely a product of the exclusive nature of settler-colonial sovereignty in Australia, which results in the formal denial of First Peoples' enduring sovereign rights as self-determining Peoples capable of self-government. This limits Aboriginal and Torres Strait Islander Peoples from realising their aspirations to live according to their own worldviews.
3. First Peoples continue to assert their right to exist as distinct, self-defined, autonomous political, social cultural and economic sovereign collectives with the inherent right to self-determination as defined in the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration).[18] The Barunga Statement and the final report of the Joint Select Parliamentary Committee into the proposed Voice to Parliament, for example, emphasise that Aboriginal and Torres Strait Islander sovereignty was never ceded, relinquished or validly extinguished.[19]
4. Prior to invasion, there were over 250 distinct Aboriginal and Torres Strait Islander Peoples, (nations, clans, societies, language groups etc) with systems of organisation interconnected with distinct regions of Country.[20] All areas of interest to these nations were under their exclusive jurisdiction.
5. These Peoples were (and in many instances are) governed by complex and diverse systems of interrelated knowledge, practices, and social meanings – worldviews – which provide them with structure, meaning, and significance. According to Goenpul scholar Moreton-Robinson, the ontologies and worldviews of Aboriginal and Torres Strait Islander Peoples are interconnected with the land, nature, and ancestors and are reflected in their Dreaming stories; an ancestral time when nature and humans came into being.[21] Consistent with that view, Aboriginal and Torres Strait Islander Peoples assert holding social beliefs, values, attitudes, and practices that emphasise interdependence, connection, collaboration, and reciprocity between ancestors, community, kin, the law, Country (or tribal lands), and people.[22] Such practices are also described as responsibility or obligation to, as and for Country.[23]

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[17] Crystal McKinnon, 'Expressing Indigenous Sovereignty', PhD thesis (La Trobe University, 2018), 2.

[18] The United Nations Permanent Forum on Indigenous Issues notes in its recent Report on the twenty-third session (15–26 April 2024): 'The right to self-determination and autonomy is central to strengthening Indigenous Peoples politically, socially, culturally and economically, and to enabling Indigenous Peoples to design their own future consistent with their views and cultural norms. The advancement by States of the right to self-determination is essential to enable Indigenous Peoples to protect and fully realize all other rights set forth in the United Nations Declaration on the Rights of Indigenous Peoples, including the right to make decisions regarding their people, lands, territories and resources'. See UN Permanent Forum on Indigenous Issues. *Report on the twenty-third session (15–26 April* 2024) Economic and Social Council Official Records, 2024 Supplement No. 23, E/2024/43-E/C.19/2024/8

[19] Referendum Council, (n 8) 49-50.

[20] Council for Aboriginal Reconciliation, *Walking Together: The First Steps* (Canberra: Australian Government Printing Service, 1994) 4.

[21] Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015); See also Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous sovereignty matters* (Routledge, 2007).

[22] Heather Anderson and Emma Kowal, 'Culture, history, and health in an Australian Aboriginal Community: The case of Utopia' (2012) 31(5) *Medical Anthropology* 438.

[23] Steve Hemming, Daryle Rigney, and Shaun Berg, 'Ngarrindjeri Nation Building: Securing a Future as Ngarrindjeri Ruwe/Ruwar (Lands, Waters and All Living Things)' in William Nikolakis, Steve Cornell and Harry Nelson (eds.)

6. First Peoples' (ongoing) law emerges from this source. Country produces the continuing practices of lawmaking – the socially, culturally and politically regulated existences – that exist amongst First Peoples across the continent.[24]
7. That is, First Peoples' 'originary sovereignty'[25] emerges from its own source of authority, and does not derive power or authority from a separate, colonial sovereign. [26]
8. Aboriginal and Torres Strait Islander Peoples thus do not require recognition by the nation-state for legitimacy. Aboriginal and Torres Strait Islander sovereignty, jurisdiction and self-governing authority are distinct from, and not reliant on, authorisation or validation from Australian settler-colonial institutions. Nonetheless, we acknowledge the damage caused by settler-colonialism can adversely impact Aboriginal and Torres Strait Islander assertions of sovereignty and exercise of self-determination.
9. For Aboriginal and Torres Strait Islander Peoples, it is the exclusive nature of settler-colonial assertions of nationhood and sovereignty that underlies the alienation and cultural domination experienced as ongoing effects of invasion and settler-colonialism (Part 2).
10. Directly countering this emphasis on exclusive nationalism, many people describe themselves as 'dual citizens', as both citizens of Australia and citizens of their respective Aboriginal or Torres Strait Islander nations or members of their Aboriginal and Torres Strait Islander community. This corresponds in some ways with the 'Indigenous lifeworld' described by Walter and Suina, which 'has as its base the dual intersubjectivities of first world dispossessed Indigenous peoples' and encompasses:[27]
    - intersubjectivity within peoplehood and the ways of being and doing of those peoples; inclusive of traditional and ongoing culture, belief and systems, practices, identity and ways of understanding the world and their own place, as a people, within it: and
    - intersubjectivity as colonized, dispossessed marginalized peoples whose everyday life is framed through and directly impacted by their historical and ongoing relationship and interactions with the colonizing nation state.
11. The notion of 'dual citizenship', corresponding with the 'dual subjectivities', suggests that many First Peoples' claims to enduring sovereign status do not compete with the fact of settler state sovereignty, but rather co-exist in a conceptual framework that allows for multiple and overlapping powers of government.
12. Of course, Aboriginal and Torres Strait Islander people understand that settler Australia's claim to sovereignty is formally recognised by the international laws of statehood, but reject settler claims to the exclusive rule of the settler nation-state. Rather than amounting to a competing claim to exclusive sovereignty over the territories now known as Australia, First Peoples' original sovereignty is, then, best understood as coexisting with the more recent introduction of settler state sovereign formations upon the establishment of the Australian colonies, which, in law and politics, is remarkably uncontroversial in a federation.

Reclaiming Indigenous Governance: Reflections and Insights from Australia, Canada, New Zealand, and the United States (University of Arizona Press, 2019) 71.

[24] Christine F Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2011); Moreton-Robinson, *The White Possessive* (n 21); Elizabeth Povinelli, *Geontologies: A Requiem to Late Liberalism*. (Duke University Press, 2016).

[25] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans, University of Chicago Press, first published 1934, 2005 ed) 6.

[26] See Black (n 24); Mary Graham, 'Some thoughts about the philosophical Underpinnings of Aboriginal Worldviews' (1999) 3(2) *Worldviews: Environment, Culture, Religion* 105; Moreton-Robinson, *The White Possessive* (n 21).

[27] Maggie Walter and Michele Suina, 'Indigenous data, Indigenous methodologies and Indigenous data sovereignty' (2019) 22(3) *International Journal of Social Research Methodology* 233, 234-235.

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Part 2: Settler sovereignty and settler-colonialism

13. Settlers conceive of 'sovereignty' differently. The term is frequently associated with the claim to absolute, indivisible sovereignty of the nation-state; that is, 'Westphalian sovereignty' or 'state sovereignty'. Sovereignty in this sense is claimed to be an attribute of independent political units, each with absolute authority within its territorial limits and not subject to any external power (internal and external sovereignty respectively).[28]
14. In fact, claims to territorial integrity and absolute authority within territorial boundaries have always been overstated and concepts of sovereignty are consistently evolving. For example, although claims of the demise of territorial sovereignty in its entirety are premature,[29] the concept of sovereignty is not bound to the independence of nation states, leading to jurisprudence holding that 'one state may be bound to another state by an unequal alliance without ceasing to be a sovereign state itself.'[30] A century ago, Viscount Finlay held that it was 'consistent with sovereignty that a sovereign power could be reliant upon another power'.[31] This was evident for a substantial period of Australia's history where Britain exercised foreign affairs on Australia's behalf.[32] More recently, territorial integrity also has been undermined by human rights and humanitarian law, global commerce, the rise of supranational entities such as the European Union and claims to universal jurisdiction over certain crimes.[33]
15. Similarly, the idea that nation states, such as Australia, have absolute internal authority is also misplaced. Instead, according to a more 'modern "realist" conception, sovereignty is divisible and capable of being shared or pooled across different entities or locations'.[34] Wilkinson contends that, in the modern sense, sovereignty connotes legal competence rather than absolute power and is reflected in the power of a people to make governmental arrangements.[35] That is, sovereignty connotes the right to govern.
16. In Australia, sovereignty is qualified and shared, rather than absolute.[36] Internal sovereignty is divided, with power allocated among the various commonwealth and state jurisdictions. In practice, this division is not often apparent but was made extremely clear during the COVID-19 pandemic when states exercised their authority against all others.
17. Nonetheless, in line with the narrative of sovereignty as absolute authority and its entrenchment within Western legal systems, Australian case law holds that Aboriginal and Torres Strait Islander sovereignty and self-governing power were superseded on the

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[28] Kent McNeil, 'Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions' in Julie Evans et al (eds), *Sovereignty: Frontiers of Possibility* (University of Hawai'i Press, 2013) 37, 40.

[29] Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction,* (Routledge-Cavendish; 1st edition, 2012) 41; Tod Moore, 'Indivisible Sovereignty: A Reply to Pitty and Smith' (2011) 46(3) *Australian Journal of Political Science* 551.

[30] J A Andrews, 'The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century' (1978) 94 *The Law Quarterly Review* 408, 424.

[31] *Duff Development Corporation v Kelantan* [1924] AC 797 per Viscount Finlay at 814 cited in Andrews (n 30) 424.

[32] Brennan et al (n 10) 320

[33] Roderic Pitty and Shannara Smith, 'The Indigenous Challenge to Westphalian Sovereignty' (2011) 46(1) *Australian Journal of Political Science* 121; Dorsett and McVeigh, *Jurisdiction* (n 29) 41; Neil MacCormick, 'Beyond the Sovereign State' (1993) 56(1) *Modern Law Review* 1.

[34] Brennan et al (n 10) 312 (references omitted).

[35] Charles F Wilkinson, *American Indians, Time, and the Law. Native Societies in a Modern Constitutional Democracy* (Yale University Press, 1987) 54.

[36] Brennan et al (n 10) 320

'acquisition' of British sovereignty (and later, 'Australian' sovereignty), precluding parallel law making.[37]

18. The existence of Australian 'domestic dependent Indigenous nations entitled to self-government' has also been consistently denied.[38] Nation-to-nation and government-to-government relations that are present in the United States, Canada and Aotearoa New Zealand are not an aspect of Australian settler law or policy to date.[39] Instead, the Australian state has continuously attempted to co-opt, ignore or reject the existence of Aboriginal and Torres Strait Islander Peoples and their parallel legal and governing systems.[40] A nationalist narrative asserts there is a single, indivisible Australian sovereignty and that all citizens, regardless of their origins, belong to a single multicultural society with the same civil, political, social, cultural and economic rights.[41] That is, the settler state seeks to treat Aboriginal and Torres Strait Islander Peoples as citizen stakeholders or interest groups, frequently positioning Indigenous Peoples, as explained by Walter and Suina, 'within a deficit discourse under the guise of "objectivity".'[42]
19. This claim to exclusive and sole jurisdiction over all matters in Australia ignores how, at its heart, settler sovereignty is an iterative and demonstrably malleable response to the ongoing existence of First Peoples' sovereignties.
20. The sovereignty of the Australian state is operationalised through what has been termed 'settler-colonialism'. Put simply, the organising logic of settler-colonialism is for settler-colonial societies to effectively replace Indigenous societies.[43] Settler-colonialism requires Indigenous Peoples to disappear; whether physically eliminated or displaced, having one's cultural practices erased, or being 'absorbed', 'assimilated' or 'amalgamated' in the wider population.[44] That is, the aspiration of settler-colonialism is that autonomous Indigenous Peoples are eliminated, and Indigenous *individuals* are 'incorporated' or 'domesticated' into

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[37] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 [44] (Gleeson CJ, Gummow and Hayne JJ).

[38] *Coe v Commonwealth* (1979) 24 ALR 118 *[Coe No 1]* per Gibbs J at 128-129; *Coe (on behalf of the Wiradjuri tribe) v Commonwealth of Australia* (1993) 118 ALR 193 *[Coe No 2]* per Mason CJ at 200; *Walker v New South Wales* (1993) 182 CLR 45 per Mason CJ at 48; *The Wik Peoples v Queensland* (1996) 187 CLR 1 per Kirby J at 214; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422 at [43]ff.

[39] By contrast, the self-governance authority of Indigenous nations is overtly recognised in other prominent settler states. In Canada, First Nations' inherent right to self-government is protected by s 35 of the Canadian Constitution and was recognised in federal government policy in 1993. Moreover, the negotiation of contemporary self-government agreements is rooted in existing treaties or in case law that notes that treaties *should* exist. (See, for example, See for example *R v Sparrow* (1990) 70 DLR (4th) 385 (SCC) 411; see also Kent McNeil 'Reduction by Definition: The Supreme Court's Treatment of Aboriginal Rights in 1996' (1997) 5 *Canada Watch* 60; Kent McNeil 'How can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified' (1997) 8 *Constitutional Forum* 33; Peter Grose, 'Developments in the Recognition of Indigenous Rights in Canada: Implications for Australia? (1997) 4 *James Cook University Law Review* 68.) In the United States, the commerce clause of the constitution recognizes Indian tribes along with foreign powers, a recognition clarified in the so-called 'Marshall Trilogy', which explain that tribes are 'domestic dependent nations'. (See *Johnson v McIntosh* (1823) 21 US 543 at 574; *Cherokee Nation v Georgia* (1831) 30 US 1 at 16, 17, 20 and 53; *Worcester v Georgia* (1832) 31 US 515 at 544-545 and 559. In particular: Marshall CJ in *Cherokee Nation v Georgia* (1831) 30 US 1 at 17. See also Marshall CJ in *US v Percheman* (1833) 10 US 393 at 396-397.) In Aotearoa New Zealand, the Treaty of Waitangi has provided the political impetus for socio-political and economic change. Dr Robert Joseph notes that 'in Aotearoa New Zealand, Māori may not have actual self-determination, self-government and autonomy in law, but they do have considerable political, economic and cultural influence in fact. There are guaranteed political seats in Parliament and some local government councils. Māori occupy key social service delivery roles. There is a central education system outside the mainstream from pre-school to tertiary levels. The Māori language has been revived as a living language and is a recognised official, economic and growing civic language. Māori culture is visible strongly in the public and private sectors of the country. There is a growing Māori economy. Māori do not have an ability to control the local legal framework in Aotearoa New Zealand like Indigenous peoples can in North America, but they do have strong political, educational, social, cultural and economic influence or a degree of self-determination in fact.' See The United Nations Permanent Forum on Indigenous Issues, Thirteenth Session on Good Governance and Human Rights, New York, 12-23 May 2014. Address by Dr Robert Joseph of Te Mata Hautū Taketake – the Māori and Indigenous Governance Centre, University of Waikato, New Zealand. Robert Joseph, 'Indigenous Peoples' Good Governance, Human Rights and Self-Determination in the Second Decade of the

the dominant society to be treated as minorities, stakeholders, or interest groups within a broader democratic society.[45]

21. The result is that Australian settler-colonial legal and political institutions acknowledge neither Aboriginal and Torres Strait Islander Peoples' legal status as autonomous political collectives nor their inherent rights to self-governance or self-determination *as of right*.[46] Efforts to suppress Aboriginal and Torres Strait Islander nationhood also remain 'parasitically enmeshed' throughout settler institutions and social, political and cultural systems.[47] We discuss the effects of settler-colonialism on settler government policymaking in Part 4.

Part 3: The reality of pluralism

22. The core problem with this claim to a sole and exclusive 'Australian' sovereignty is that 'other laws do not just go away because we assert that they are not there or have never been there.'[48]
23. Aboriginal and Torres Strait Islander Peoples' continued existence as distinct political, cultural, social and economic societies[49] with continuing (sovereign) obligations to Country, culture and community is self-evident. As put by Mohawk scholar, Audra Simpson, in describing the Mohawks of Kahnawà:ke, Indigenous peoples '*simply refuse to stop being themselves'*.[50]
24. Many First Peoples continue to separate themselves – both conceptually and, in many instances, practically – from the settler state, maintaining that they are distinct polities with inherent sovereign rights outside of the boundaries of the nation state. Regardless of the continuation of settler-colonialism, many First Peoples in Australia are working to 'identify,

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New Millennium – A Maori Perspective (2014) *Maori Law Review* < http://maorilawreview.co.nz/2014/12/indigenous-peoples-good-governance-human-rights-and-self-determination-in-the-second-decade-of-the-new-millennium-a-maori-perspective/>.

[40] For an overview, see Patrick Wolfe's seminal text, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (Cassell, 1999).

[41] Moreton-Robinson (ed), *Sovereign Subjects* (n 21).

[42] Walter and Suina (n 27) 233.

[43] Lorenzo Veracini, 'Introducing settler colonial studies' (2011) 1 *Settler Colonial Studies* 3 contrasts 'settler-colonialism' with 'colonialism' as arguably the antithesis of each other (although self-evidently there are numerous common characteristics). The drive of colonisation is the exploitation of the colony's 'resources', including the labour of the colonised, and the '*permanent* subordination of the colonised', whereas land is the focus of settler-colonisation that requires the removal of the existing peoples (Veracini 2011: 3). There is a vast range of literature on the global formations and tenets of settler-colonialism. See also Wolfe, 'Settler-colonialism and the elimination of the native' (n 11).

[44] Lorenzo Veracini, 'Containment, elimination, settler-colonialism' (2018) 51/52 *Arena Journal* 18.

[45] James Tully, 'The struggles of Indigenous peoples for and of freedom' in Duncan Ivison, Paul Patton and Will Sanders (eds) *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 36 (emphasis added)

[46] Vivian et al (n 2). We note, however, that Victoria is well advanced in developing a process to negotiate treaties with the Aboriginal Peoples and people of Victoria and Queensland, the Northern Territory, Tasmania and New South Wales have announced their intention to create treaty negotiation processes.

[47] Alison Whittaker, 'Not My Problem: On The Colonial Fantasy', *Sydney Review of Books*, 8 November 2019, https://sydneyreviewofbooks.com/review/maddison-colonial-fantasy/. See also Strakosch, 'The Technical is Political'.

[48] Shaunnagh Dorsett and Shaun McVeigh, 'Section 223 and the shape of native title. The limits of jurisdictional thinking' in Lisa Ford and Tim Rowse (eds), *Between Indigenous and Settler Governance* (Routledge, 2013) 162, 165.

organise and act' as *nations*.[51] Regardless of whether such action is recognised as sovereign by the settler state, nations are demonstrably exercising their sovereignty in a range of areas, and steadily increasing their real authority (see Parts 7 and 8).

25. The Australian state (reflected in its law, policy, and institutions) is thus caught in a conundrum between the reality of legal and political pluralism and its fiction of a singular sovereignty. The result has been that Australian jurisprudence has had to adopt increasingly convoluted rationalisations for Australia's continuing status as 'settled' territory, being forced to adapt to Aboriginal and Torres Strait Islander Peoples' claims and evidence that can no longer be ignored, while continuing to maintain the status quo.[52]

26. Conceptually, such pluralism is not difficult to comprehend. That numerous formal and informal legal systems can exist within the one society has been acknowledged by legal scholars for decades.[53] The suggestion that numerous communities coexist within Australian society and have allegiances to laws other than those of mainstream law is also widely accepted.[54] By extension, an understanding that Aboriginal and Torres Strait Islander Peoples continue to have allegiances to laws and governing systems with origins that predate the invasion of Australia by millennia should be unremarkable. However, this has not been the case and formal recognition by Australian settler-colonial society of pluralism including Aboriginal and Torres Strait Islander societies has been highly constrained.

27. Because the subject matter of native title determinations relates to the elements of Aboriginal and Torres Strait Islander sovereignty that can be acknowledged and enforced in settler courts, this jurisprudential challenge is at the forefront of native title jurisprudence.[55] Courts have been forced to acknowledge the existence of Aboriginal and Torres Strait Islander societies

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[49] Australian settler-colonial jurisprudence acknowledges the continuance of Aboriginal and Torres Strait Islander societies in native title law. There is no 'technical, jurisprudential or social scientific criteria for the classification of groups as 'societies', instead the ordinary meaning of a 'body of people forming a community or living under the same government' applies. See *Alyawarr* (FCA) at [78]. Put another way, the native title system acknowledges the existence of Aboriginal and Torres Strait Islander societies that have their own governments.

[50] Audra Simpson, 'The ruse of consent and the anatomy of 'refusal': Cases from Indigenous North America and Australia' (2017) 20(1) *Postcolonial Studies* 18, 27-28 (emphasis added).

[51] Following Cornell (n 2).

[52] Australian jurisprudence has had to resort to increasingly convoluted rationalisations to legitimise Australia's continuing claims to an exclusive sovereignty, being forced to adapt to evidence that could no longer be ignored. The legal fiction of *terra nullius*, which provided the original justification for the 'acquisition' of British sovereignty over the Australian continent was held to be good law through the application of the doctrine of precedent, most notoriously in the much criticised judgment of *Milirrpum v Nabalco*, until the 1992 *Mabo [No 2]* judgment. The High Court ostensibly rejected *terra nullius* as 'an unjust and discriminatory doctrine' that was no longer acceptable, but it contrived to maintain the status quo by creating a new legal fiction, that of the 'settled colony'. The Court explained that its legal reasoning would be constrained if recognising Aboriginal and Torres Strait Islander rights and interests were to fracture a skeletal principle of our legal system. In other words, the Court has explained that it will remain blind to legal pluralism.

[53] As early as the mid-1980s, Griffiths contrasted the reality of 'legal pluralism' (the coexistence of a social group of legal orders which do not belong to a single 'system') to the ideology of 'legal centralism' (law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions), describing the former as 'fact' and the latter as 'myth, an ideal, a claim, an illusion'. See John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1, 4.

[54] Reilly (n 5) 404.

[55] While we seek to make the point that native title jurisprudence exists at the intersection of Indigenous and non-Indigenous legal systems, that is, at the intersection of Indigenous and non-Indigenous sovereignties, we are mindful that the enormous power disparity between Aboriginal and Torres Strait Islander Peoples and the settler state has resulted in a highly

that bear the attributes of sovereignty, while simultaneously claiming that such sovereignty is superseded.[56]

28. This structural ambiguity can lead people to forget that the native title system is at the intersection of two normative systems, such that settler courts in native title jurisprudence need to question which elements of another legal system can be acknowledged and enforced. It is not a case of the settler-colonial system having the authority to subsume the other (although it may frequently operate like that in practice). At issue in the *Western Australia v Ward* case was whether certain native title rights and interests were extinguished so far as the settler system was concerned. In his dissenting judgment, Justice North reminds us that, in fact, Australia is a plural society:[57]

> This use of the word extinguishment is convenient as a shorthand reference. But it is inaccurate in a significant way. Whilst native title is not recognised by the common law in circumstances amounting to extinguishment, and is therefore ineffective under the common law system, native title does not cease to exist as an operative force among aboriginal people. It does not cease to exist for all purposes, only for the purposes of the common law. The use of the word extinguishment is apt to suggest that native title suffers a greater destruction than is the fact.

29. Please note that we are mindful of the extreme challenges created by settler-colonialism to legal pluralism in Australia and, consequently, to the assertion of Indigenous sovereignty and exercise of self-determination. The Aboriginal nations we work with are not naïve to the obstacles they face in asserting a distinct, sovereign identity. However, we consider it critical that the reality of Australia being a pluralist society is plainly stated and put against a settler-colonial narrative that there is no pluralism.

30. Outside of the Australian legal system, actions taken by settler-colonial governments, industry and other non-Indigenous entities in relation to Aboriginal and Torres Straight Islanders reveal an accumulation of political, economic and legal agreements[58] that assume the existence of

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unsatisfactory system. The system is condemned by claimants and respondents alike for being overly technical, narrowly legalistic, complex and exceptionally slow, for its immense cost and for not providing just outcomes, often leaving claimants disillusioned and disenchanted. See Compton et al (n 2).

[56] For example, in a highly controversial judgment in *Members of the Yorta Yorta Aboriginal Community v Victoria*, the High Court paradoxically acknowledged the existence of continuing Indigenous societies bound by evolving normative systems, composed of binding and enforceable traditional laws and customs, but simultaneously rejected that parallel law making systems could continue after the acquisition of British sovereignty. See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

[57] *Western Australia v Ward* [2000] FCA 191, [688] (North J in dissent).

[58] Examples are numerous and include: (1) a multitude of agreements that Australian federal, state and local governments, industry, business entities, and the non-government sector have negotiated with Indigenous collectives (See Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004). Such agreements include, for example, those between the Ngarrindjeri Nation and the South Australian Government regarding management of Country: Steve Hemming, Daryle Rigney and Shaun Berg, 'Ngarrindjeri Futures: Negotiation, Governance and Environmental Management' In Sarah Maddison and Morgan Briggs (eds.) *Unsettling the Settler State: Creativity and Resistance in Indigenous Settler-State Governance* (The Federation Press, 2011), 98.

See also the work of the Agreements, Treaties and Negotiated Settlements Project that seeks to develop a comprehensive database illustrating the variety of agreements between Indigenous and non-Indigenous people <http://www.atns.net.au/>. The Agreements, Treaties and Negotiated Settlements (ATNS) Project began examining agreement-making with Indigenous Australians in 2002. In 2006, its focus expanded to agreement implementation. Around this time, research confirmed that agreements - particularly those with a focus on good practice, benefit maximisation and diversity of opportunity - were critical in fostering the socio-economic development of indigenous and local communities. See *Project Outline 2010: Poverty in the Midst of Plenty: Economic Empowerment, Wealth Creation and Institutional Reform for Sustainable Indigenous and Local Communities* <http://www.atns.net.au/page.asp?PageID=6>.); (2) Indigenous decision-making bodies with delegated authority and quasi-judicial bodies (Consider for example, the Victorian Aboriginal Heritage Council and the numerous circle sentencing courts throughout Australia.); and (3) legislation enacted to create Indigenous corporations, land councils and local government councils.

collectives with self-governing capacities and negotiating authority.[59] These myriad agreements and co-management arrangements, and quasi-judicial and political bodies exist at the interface of Indigenous/non-Indigenous relations.

Part 4: 'Indigenous Affairs': Settler government policymaking

31. As a case in point, settler government policymaking since the 1967 Referendum has seen all jurisdictions grapple, to at least some extent, with attempting to operationalize the fiction of exclusive settler sovereignty against the lived reality of legal and political pluralism.
32. Since 1967, the settler state has undertaken varied approaches to Aboriginal and Torres Strait Islander Australian citizens, often positioning this group as a homogenous population within the Australian nation, but alternatively, in some highly circumscribed instances, as separate Peoples requiring different responses from the state.[60]
33. Changes within 'Indigenous Affairs' over the past 50+ years are a response to First Peoples' individual and collective advocacy against the impacts of settler-colonialism. Settler governments have implemented piecemeal, issues-based approaches that, while (mostly) instigated in good faith,[61] have failed to fundamentally address structural relations or issues of sovereignty. As such, many of the developments and changes in settler policy have not led to the specified outcomes.
34. These changes are usually traced to the emergence of Federal 'self-determination'[62] policy under the Whitlam Government from 1972, which largely involved government funding for community-controlled services, leading to the creation of what has been termed the 'Indigenous Sector'. As it stands, the Indigenous Sector is, as Rowse puts it, 'essential to the representation and satisfaction of Indigenous wishes'.[63] It is also now entrenched in the settler legal-political landscape; [64] as a complex and convoluted 'program and funding maze'.[65]
35. For the most part, the Indigenous Sector comprises organisations funded by settler governments to administer responses to specific 'issues' caused by settler-colonialism, which is manifest in alarmingly high, disproportionate, and ongoing negative health, social and wellbeing outcomes.[66]

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[59] Reilly (n 5) 419.

[60] Following Tim Rowse, *Rethinking Social Justice: From 'Peoples' to 'Populations* (Aboriginal Studies Press, 2012).

[61] Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002).

[62] There is ongoing disagreement over the meaning and content of self-determination. For an overview of the varied meanings the concept has held, see Laura Rademaker and Tim Rowse (eds), *Indigenous Self-Determination in Australia: Histories and Historiography* (Australian University Press, 2020).

[63] Tim Rowse, 'The Indigenous Sector', in Diane Austin-Broos and Gaynor Macdonald (eds.) *Culture, Economy and Governance in Australia: Proceedings of a Workshop held at the University of Sydney, 30 November – 1 December 2004* (Sydney University Press, 2005), 39.

[64] Patrick Sullivan, *The Aboriginal Community Sector and the Effective Delivery of Services: Acknowledging the Role of Indigenous Sector Organisations*, Working Paper 73 (Desert Knowledge CRC, 2010), 1-2; and Diedre Howard-Wagner, Karen Soldatic, Kim Spurway, Janet Hunt, Morgan Harrington, June Riemer, John Leha, Chris Mason, Ros Fogg, Cheryl Goh and Jack Gibson, 'First Nations Organisations and Strategies of Disruption and Resistance to Settler-Colonial Governance in Australia' in Karen Soldatic and Louise St Guillaume (eds) *Social Suffering in the Neoliberal Age: State Power, Logics and Resistance* (Routledge Taylor & Francis Group, 2022), 211.

[65] Sara Hudson, 'Mapping the Indigenous Program and Funding Maze', *Research Report Snapshot* 18 (Centre for Independent Studies, 2016), https://www.cis.org.au/wp-content/uploads/2016/08/rr18-Full-Report.pdf

[66] Tom Calma, Pat Dudgeon and Abigail Bray et al., 'Aboriginal and Torres Strait Islander Social and Emotional Wellbeing and Mental Health', (2017) 52(4) *Australian Psychologist* 258 <https://doi.org/10.1111/ap.12299>.

36. Settler governments frame these issues (e.g. health, disability, housing, education and schooling, teaching, employment, legal aid, and generalised economic development)[67] as part of their *own* jurisdictional responsibilities[68] and, in so doing, position Aboriginal and Torres Strait Islander peoples as a disadvantaged class within a singular *Australian* 'population' group.
37. This deficit narrative is exacerbated by the nature of data production, which characterises the 'problematic Indigene compared pejoratively to the non-Indigenous norm'.[69] The bureaucracy administering the resulting policy asserts that such policy and its implementation are 'essentially culture-free, embodying the universal human values that underpin the delivery of services in a neutral manner to all citizens alike'.[70] Since the 1980s (under 'New Public Management' frameworks), the Sector has also been 'paradoxically overregulated'[71] and deeply underfunded, pitting Aboriginal organisations and communities against each other.[72]
38. As Perheentupa has argued, the intention of government policies of 'self-determination' was not to support First Peoples self-government or self-determination (as this is understood under the UNDRIP, for example). Instead, the intention was to enable Aboriginal and Torres Strait Islander people an assimilatory form of engagement within settler legal, political and economic systems.[73]
39. In 2020, the National Agreement on Closing the Gap was signed between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all (settler) Australian governments, designed to address the abject failure of settler governments to 'close the gap' since 2008. The Agreement sees decision-making 'shared' between Aboriginal and Torres Strait Islander people and settler governments. It is considered to be an 'unprecedented shift in the way governments have previously worked to close the gap'.[74] However, as suggested by Howard-Wagner et al., under the new arrangement, Aboriginal community-controlled organisations remain 'situated' within a service-delivery 'mindset',[75] where Aboriginal peoples are construed as 'populations'. As Gertz puts it, rather than radical acceptance or

[67] We recognise the somewhat problematic distinction we've made in repeating the assumption that 'health' or 'legal' services, for example, as issues (partly) shared with non-Indigenous Australians. The community-controlled sector is clear that such issues do not affect Aboriginal peoples in the same as non-Indigenous people, and require culturally safe and responsive practice. Recent research has also highlighted that Indigenous health and wellbeing has specific political determinants, and thus INB both strengthens, and is informed by, nation health: Rigney et al, *INB and the Political Determinants of Health and Wellbeing* (n 97).

[68] Strakosch (n 16).

[69] Walter and Suina (n 27) 235.

[70] Patrick Sullivan, Disenchantment, Normalisation and Public Value: Taking the Long View in Australian Indigenous Affairs' (2013) 14(4) *The Asia Pacific Journal of Anthropology* 353, 354.

[71] Sullivan, *The Aboriginal Community Sector* (n 64) 7; Howard-Wagner et al., 'First Nations Organisations' (n 64); Janet Hunt, 'Between a Rock and a Hard Place: Self-determination, Mainstreaming and Indigenous Community Governance' in Janet Hunt and Diane Smith (eds) *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (Australian National University Press, 2008) 27.

[72] Sullivan, *The Aboriginal Community Sector* (n 64) 5; and Alexander Page, 'Fragile Positions in the New Paternalism: Indigenous Community Organisations During the 'Advancement' Era in Australia' in Diedre Howard-Wagner, Maria Bargh, and Isabel Altamirano-Jiménez (eds) *The Neoliberal State, Recognition and Indigenous Rights: New Paternalism to New Imaginings* (Australian University Press, 2018) 189.

[73] See Johanna Perheentupa, 'Aboriginal Organisations and Self-Determination in Redfern in the 1970s', in Laura Rademaker and Tim Rowse (eds.) *Indigenous Self-Determination in Australia: Histories and Historiography* (Australian University Press, 2020), 189.

[74] Australian Government, 'A New Way of Working Together', https://www.closingthegap.gov.au/.

[75] Diedre Howard-Wagner et al., *Looking Beyond Indigenous Service Delivery: The Societal Purpose of Urban First Nations Organisations*, Discussion Paper (2022) (301) (Centre for Aboriginal Economic Policy Research, Australian National University, 2022), 2.

supporting of self-government, the 'government's preferred version of self-determination' remains 'a model where Indigenous organisations implement government policy through service delivery contracts under the premise of being self-managed'.[76]

40. In effect, settler-colonial policy targeting issues such as health, education and legal services positions these as matters shared with non-Indigenous people. While such policies are ostensibly designed to alleviate Aboriginal and Torres Strait Islander disadvantage through equal rights and opportunities, because they are designed and implemented by the settler-state on behalf of First Peoples they have instead perpetuated the relations that produce inequality, ultimately leading to repeated failure of policies to achieve their stated aims of improving Indigenous wellbeing.
41. While the rise of Aboriginal community-controlled organisations has provided enormous benefits for Indigenous people and in some instances, Indigenous *nations*, the fact that First Peoples have persisted and continue in many instances to thrive within this policy environment points less to the particular merits of settler policy and more to the ability of First Peoples to utilise bodies and tools established in settler law or by settler governments for their own purposes (see Parts 7 and 8).
42. Of course, Aboriginal and Torres Strait Islander Peoples reject Australian settler-colonial governments' attempts to equate them with other minority or ethnic groups and government characterisations of them within a deficit model. First Peoples and pan-Indigenous organisations remain bound to settler-state policy, despite its limitations, because they are primarily concerned with meeting the pressing and everyday needs of Indigenous people.
43. Beyond assuming particular areas of responsibility for Indigenous 'populations', all settler jurisdictions have been forced to reckon with the ongoing existence of Aboriginal and Torres Strait Islander collectives in *some* form. In response to continuing advocacy, the state has attempted to enforce its own social-political systems, worldviews and forms of organising into areas that it (partly) acknowledges remain under the jurisdiction of First Peoples, such as native title, 'land rights' and 'heritage'.[77] These are the moments in which Aboriginal populations are conceptualised, for limited and particular purposes, as 'Peoples' (or, in the case of native title, as 'societies').
44. Within these spaces, First Peoples are recognised – if implicitly – as having authority for certain areas of jurisdiction.[78] We consider that these spaces therefore come much closer to issues of 'sovereignty', since they involve settler recognition of First Peoples' enduring obligations to Country, worldviews and practices. It is also where we are aware of many examples of First Peoples extending their authority from within these spaces (see Part 8).
45. The ways in which this has happened has, for the most part, been 'repressive'.[79] While the settler state has responded to First Peoples with (occasional) 'acknowledgement', or 'recognition', it is only for purposes, and against criteria, determined by state and federal governments.[80] For example, many First Peoples have been unable to make a claim to native title (or other 'rights' to land), that is legible to settler courts.
46. The engagement on offer is also deeply piecemeal, limited to particular 'rights' determined by settler governments. We maintain that the intent of such engagement is evidently not to

[76] Gertz (n 2) 190.

[77] These moments have also been present since the so-called self-determination era described above, arguably commencing into active government policy 1976 *Aboriginal Land Rights (Northern Territory) Act*.

[78] See Compton et al (n 2).

[79] Following Patrick Wolfe, 'Nation and MiscegeNation: Discursive Continuity in the Post-Mabo Era' (1994) (36) *Social Analysis* 93.

[80] Reilly (n 5) 407.

transform relations between the state and First Peoples, or to engage with First Peoples as self-determined collectives whose sovereign aspirations may exceed the confines of the particular piece of legislation and/or policy. There is often accompanying explicit or implicit acknowledgement that the settler sovereignty that frames the terms of relations must not be undermined.

Part 5: Seeing 'Peoples': Victorian Government policy

47. In response to the continued advocacy of First Peoples within Victoria, the Victorian Government has exerted considerable efforts to attend to First Peoples futures through a variety of policy measures, signalling a willingness to listen to the aspirations voiced by Aboriginal *peoples*. This effort to enable and listen to Aboriginal political collectives marks a significant and very positive departure from other jurisdictional approaches to 'Indigenous Affairs'.
48. In response to the relative lack of native title determinations in Victoria and at the instigation of Aboriginal people, the state passed the *Traditional Owner Settlement Act 2010* to 'recognise' Traditional Owners in the Victorian legal system and provide land rights while resolving native title claims.[81] Benefits of this approach to First Peoples who have utilised it include, for example, the handback of parcels of land alongside provisions for some land rights usage in other areas comparable to native title rights.[82]
49. Further, the *Aboriginal Heritage Act 2006* establishes the Victorian Aboriginal Heritage Council to 'provide a state-wide voice' and assess applications for Traditional Owner groups to become Registered Aboriginal Parties (RAPs). The purpose of RAPs is to enable Traditional Owners 'to be involved' in decision-making.[83]
50. The state has also recognised that First Peoples continue to 'exist' outside of these processes. Between 2015-2023, the 'Right People for Country' (RPC) program aimed to enable First Peoples people to come together to make agreements under the TOSA, become a RAP or pursue native title.[84] RPC provided support to Traditional Owner Groups to 'prepare for and make agreements' 'between' and 'within' groups around membership, representation, and the boundaries of Country. [85] This included support for activities such as facilitation; training; mapping of Country; and resources to hold meetings etc.[86] It aimed to ensure that it is not 'governments and courts making decisions' for Traditional Owners about their Country and identity.[87]
51. Connected to RPC, in 2019 Victorian Government also provided an 'Indigenous Nation Building' funding pool for 'formally recognised' Traditional Owner Groups. Activities will

[81] Toni Bauman, Sally Smith, Anoushka Lenffer, Tony Kelly, Rodney Carter and Mick Harding, 'Traditional Owner Agreement-Making in Victoria: The Right People For Country Program' (2014) 18(1) *Australian Indigenous Law Review* 78; and ATNS, 'Comprehensive Settlements'.

[82] PBC, 'Alternative Settlements', https://nativetitle.org.au/learn/native-title-and-pbcs/alternative-settlements.

[83] To apply to become a RAP, groups must apply to the Victorian Aboriginal heritage Council, a statutory body composed of Victorian Traditional Owners established under the Heritage Act.

[84] For detailed history including pilots from 2011 see Bauman et al (n 81).

[85] First Peoples - State Relations, 'Traditional Owner Agreement Making' <https://www.firstpeoplesrelations.vic.gov.au/right-people-country-program#traditional-owner-agreement-making>.

[86] Ibid.

[87] Ibid.

be undertaken until June 2024.[88] The package includes streams of 'Foundation', 'Formation' and 'Nation', designed to assist Traditional Owners to 'prepare for future treaty negotiations' and come together ways that can be recognised by the state.[89] This type of policymaking is unique and highly significant.

52. Moves towards treatymaking have shown further recognition of the existence of nations outside of native title. To lead towards treaty negotiations, the First Peoples' Assembly of Victoria and Victorian Government agreed to a Treaty Negotiation Framework and Self-Determination Fund. The Framework set out 'ground rules for negotiating treaties to ensure a fair Treaty process' while the Self-Determination Fund is a resource to enable 'equitable treaty negotiations'.[90] Its explicit purpose is to enable 'First Peoples to have equal standing with the State in Treaty negotiations.'[91] The funding can be used to become a Traditional Owner group as a RAP, NTRB or under the TOSA, whilst further enabling groups to 'form First Peoples' Treaty Delegations' (FPTD).[92]
53. While Traditional Owners with 'Existing Status' are automatically able to form a FPTD, the 'door is also open for Traditional Owner Groups without Existing Status to meet the Minimum Standards' (determined by the Assembly), accessing support from the Self Determination Fund.[93] This is in recognition of the fact that 'not all Traditional Owners have been able, or wanted, to engage with existing processes' including native title, the TOSA or through becoming a RAP. [94]
54. Such moves recognise (if implicitly) that First Peoples' forms of organising and existing exceed colonial structures. They are also inherently practical. Evidence from the Assembly suggests that Aboriginal people in Victoria are interested in negotiating both a state-wide and individual Traditional Owner treaties.[95]

Part 6: Exiting colonialism

55. The shifts being made by the State of Victoria towards acknowledging the ongoing reality of legal and political pluralism constitute the first necessary step toward advancing justice in settler-colonial situations. When settler governments are prepared to accept the reality of pluralism, they are better able to acknowledge how the capacity for collectives - whether Indigenous or non-Indigenous - to live according to their own worldviews requires them to operate in a legal and political environment consistent with that worldview. In other words, peoples who are self-determining need to have decision-making control over the factors that

[88] Support outside of the three streams is provided for Traditional Owner Groups that are not recognised. The Fund also aims to create 'wealth and prosperity' For First Nations, and will be used into the future to create future wealth, to 'support the purposes of the Fund, in perpetuity'

[89] First Peoples – State Relations, 'Traditional Owner Nation-building and Treaty Readiness Support' <https://www.firstpeoplesrelations.vic.gov.au/nation-building>.

[90] First Peoples – State Relations, 'Establishment of the Treaty Negotiation Framework and Self-Determination Fund' <https://www.firstpeoplesrelations.vic.gov.au/establishment-treaty-negotiation-framework-and-self-determination-fund>.

[91] First Peoples Assembly of Victoria and the State of Victoria, *Self-Determination Fund Agreement* (Melbourne: Victorian Government, 2022), 8 <https://www.firstpeoplesrelations.vic.gov.au/sites/default/files/2022-10/Self-Determination-Fund-Agreement.pdf>.

[92] Ibid 7.

[93] First Peoples Assembly of Victoria and the State of Victoria, *Treaty Negotiation Framework* <https://www.firstpeoplesrelations.vic.gov.au/treaty-negotiation-framework>.

[94] Ibid.

[95] First Peoples Assembly of Victoria, 'Empowering Traditional Owners' <https://www.firstpeoplesvic.org/treaty/treaties/>.

they consider define and support their unique cultural way of life as 'a People'.[96] Another way of stating this is to say that Indigenous Peoples can achieve wellbeing when they can exist as distinct sovereign polities, able to exercise their inherent sovereign rights and live according to their self-defined cultural worldviews.[97]

56. Because settler-colonisation is the systematic refusal and attempted elimination of First Peoples' sovereignty, the injustices it perpetuates are structural and pervasive; affecting all areas of social life.[98] The settler-colonial refusal of Aboriginal sovereignty corresponds with the entrenched suppression of Indigenous Peoples' worldviews and the erosion of collective capacities to determine and enjoy chosen ways of life, signalling the need for profound reform that goes to the heart of how relations are positioned and conducted among Aboriginal and Torres Strait Islander Peoples and settler-colonial governments.[99]
57. This type of profound relational reform, enabling the systematic transformation of structural injustices, requires Australian society to 'exit from colonisation' or to become 'ex-colonial'.[100]
58. Exiting from colonisation calls for a societal shift that is significantly different from the paradigm of 'reconciliation' and the proposed models that have, to date, (unsuccessfully) shaped public and political agendas for addressing the injustices and inequities experienced by Aboriginal and Torres Strait Islander people.[101]
59. Roughly conceived, 'reconciliation' is concerned with forging unity where there has been division; it strives for equality of opportunity and uniform enjoyment of rights to address the disadvantage and injustice that disproportionately affect Indigenous Australians. It 'levels up' Aboriginal and Torres Strait Islander citizens to a national standard measured by settler experiences of justice, opportunity and entitlement.
60. By contrast, rather than viewing justice as achievable through incremental equalisation via policy and legislation that is designed, authorised and assessed by the settler-colonial state, 'ex-colonialism' holds that there can be no justice or equality without Australian political society first systematically *breaking with* the fundamental organising principle of singular

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[96] This understanding informs the United Nations position on the Rights of Indigenous Peoples. The Report of the 23rd Session of the UN Permanent Forum on Indigenous Issues notes at Point 6 of its Discussion that the 'right to self-determination and autonomy is central to strengthening Indigenous Peoples politically, socially, culturally and economically, and to enabling Indigenous Peoples to design their own future consistent with their views and cultural norms. The advancement by States of the right to self-determination is essential to enable Indigenous Peoples to protect and fully realize all other rights set forth in the United Nations Declaration on the Rights of Indigenous Peoples, including the right to make decisions regarding their people, lands, territories and resources'. Accordingly, at Point 9, the Permanent Forum 'recalls that the right to self-determination of Indigenous Peoples is grounded in the Declaration, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Permanent Forum calls upon all Member States to redouble efforts to fully realize the right of self-determination for Indigenous Peoples by ensuring that Indigenous Peoples remain at the centre of all decision-making processes that affect their Peoples, their communities, their lands, their territories and their resources'. See UN Permanent Forum on Indigenous Issues. *Report on the twenty-third session (15–26 April* 2024) Economic and Social Council Official Records, 2024 Supplement No. 23, E/2024/43-E/C.19/2024/8.

[97] Daryle Rigney, Simone Bignall, Alison Vivian & Steve Hemming, *Indigenous Nation Building and the Political Determinants of Health and Wellbeing* Discussion Paper, (Lowitja Institute, 2022), DOI: 10.48455/9ace-aw24

[98] Wolfe, 'Settler colonialism and the elimination of the native' (n 11).

[99] Vivian and Halloran (n 12); Steve Hemming and Daryle Rigney, 'Decentring the new protectors: transforming Aboriginal heritage in South Australia' (2010) 16(1) *International Journal of Heritage Studies* 90.

[100] The political philosophy of ex-colonialism is defined in a series of recent publications by Simone Bignall. See Bignall, *Postcolonial Agency* (n 14); Bignall, 'The Collaborative Struggle for Excolonialism' (n 14); and Simone Bignall, 'Colonial Humanism, Alter-Humanism and Ex-colonialism' in Stefan Herbrechter, Ivan Callus, Manuela Rossini, Marija Grech, Megen de Bruin-Molé and Christopher John Müller (eds) *Palgrave Handbook of Critical Posthumanism* (Palgrave, 2022).

[101] Bignall, *Postcolonial Agency* (n 14).

settler-state sovereignty and associated control of decision-making powers.[102] As we have argued above, this structuring principle is Australia's ongoing colonial legacy. It is untenable because Aboriginal and Torres Strait Islander leaders continue to assert their enduring unceded sovereignty; the settler-state's denial and suppression of this existing legal and political pluralism is the root source of the structural injustices experienced by First Peoples.

61. Exiting from settler-colonialism then primarily involves a systematic process of 'restructuring relations', to reorganise society on a pluralist basis.[103] Mutual recognition of sovereign status amongst First Peoples and settler-colonial states would allow for restructuring relations in a way that enables First Peoples' self-determination and self-government. In line with Article 46 of the United Nations Declaration on the Rights of Indigenous Peoples, the acknowledgement of First Peoples' sovereign status does not entail the radical secession of First Peoples from the Australian nation state. Importantly, however, with the institution of sovereign-to-sovereign partnerships, the historically unjust relationship begun with colonisation can now take a new and more just form moving forward.

62. Two elements are crucial for Australian ex-colonialism. The first concerns the systematic institution of new sovereign-to-sovereign partnerships amongst First Peoples and settler-states. It is important for settler-states to appreciate that sovereigns (according to their nature as independent self-determining powers) meet as culturally, legally and politically diverse entities. Furthermore, as a consequence of this diversity, settler-states must appreciate that sovereign powers engaged in diplomacy will likely agree in some respects but are unlikely to agree on everything; political disagreement is inevitable and should be respected rather than ignored or coerced into an unhappy form of "agreement" or "consent". It follows that the institutions of diplomacy – such as treaty processes – that will establish and guide the new forms of intergovernmental relations must be carefully designed to facilitate the respectful negotiation of overlapping and shared jurisdictions and their potential co-management by First Peoples and settler state governments. The following Part 7 of our submission outlines some guiding principles and some possible models for transforming standing political relations to enable this kind of intergovernmental engagement in legally and politically plural societies such as Australia.

63. A second (prerequisite) element necessary for forging a pathway of exit from colonisation is that many First Peoples will need to reinforce their sovereign capabilities in readiness for equitable political interactions with settler states, since these capabilities have been eroded over the course of colonisation. This is no surprise, since a key aim of settler-colonisation is to deny First Peoples sovereign status and, accordingly, settler-states characteristically refuse Indigenous People their practices of self-governing authority. It follows that settler-states, having instigated the erosion of First Peoples' capacities for governing, should now play a role in supporting their political recovery. In the final Part 8 of this submission, we explain how First Peoples are currently engaged in rebuilding their sovereign capabilities and outline what settler states should do to fairly support these efforts.

Part 7: Negotiating jurisdiction

64. In their various struggles to practically enact the sovereignty they assert endures in principle, Indigenous political collectives strive to enhance their institutional capacity to exercise and increase their *jurisdiction*. This is a word we understand in the way that Dorsett and McVeigh

[102] Ibid.

[103] Rauna Kuokkanen, *Restructuring Relations: Indigenous Self-determination, Governance and Gender* (Oxford University Press, 2019).

use the term, as 'the practice of pronouncing the law' and declaring 'the existence of law and the authority to speak in the name of the law.'[104]

65. A simple way of visualising ex-colonial relations between Indigenous and non-Indigenous Peoples is to think of those relations in jurisdictional terms. Which issues are exclusive to settler or to Aboriginal and Torres Strait Islander Peoples and which are shared or overlapping? How should jurisdiction be allocated?
66. If relations among Aboriginal and Torres Strait Islander Peoples and the Australian nation-state are to be transformed into sovereign-to-sovereign or government-to-government relations, Indigenous and non-Indigenous institutions must engage with new formulations of negotiated jurisdiction.
67. The many Aboriginal nations and communities with which we have worked do not seek secession or exclusive jurisdiction over every issue but do seek to exercise jurisdiction over the issues that matter most to them. Furthermore, they *do not* seek to exercise general jurisdiction over non-Indigenous people. However, they *do* expect to be able to exercise nation-specific jurisdiction, which has sources of sovereignty (and therefore jurisdictional authority) that are distinct from that of the settler-colonial legal and political systems.[105]
68. Of course, prior to invasion, all areas of interest to First Peoples would have been under their exclusive jurisdiction. Further, prior to the destructive impacts colonisation dealt to their sovereign boundaries and political institutions, multiple First Peoples co-existed across the continent now known as Australia and were obliged to engage one another as neighbouring sovereigns with complex trade relationships and overlapping responsibilities for Country and its interconnected ecologies.[106] In these circumstances, Aboriginal and Torres Strait Islander leaders required highly honed skills as inter-National diplomats and negotiators.
69. It follows that many First Peoples which assert their enduring sovereignty have continuing knowledge regarding the nature and function of their Indigenous political institutions, including cultural protocols for the negotiation of overlapping jurisdictions. First Peoples could thus assist settler governments to understand how to proceed towards the novel negotiation of legal and political pluralism in contemporary Australia. Such protocols continue to inform the principled political behaviours and expectations of many First Peoples, even while some practical political capacities may currently have become diminished through the course of colonisation. First Peoples aspire to reclaim practical jurisdiction over all the matters *that are important to them*.
70. The jurisdictional responsibilities and aspirations of First Peoples are diverse, but often include fulfilling responsibilities to Country as a primary objective. Matters that Aboriginal and Torres Strait Islander peoples argue should fall under their exclusive jurisdiction often relate to what settler-colonial institutions call 'cultural heritage' and 'natural resource management', Indigenous property claims, cultural or political identity, First Peoples' citizenship, Indigenous law and lore, language, and spiritual matters. In other jurisdictional areas, particularly those concerning the rights of all citizens within the Australian nation-state – including health, education, child welfare, justice, employment and training, and so forth – shared or overlapping jurisdiction and/or delegated authority may be appropriate.
71. In certain areas, then, Aboriginal and Torres Strait Islander jurisdiction may be concurrent with that of the settler-colonial state. Because Aboriginal and Torres Strait Islander jurisdiction relates to geographies, populations, issues and resources over which the

[104] Dorsett and McVeigh (n 29) 4.

[105] Black (n 24).

[106] Mark McMillan, 'Koowarta and the rival Indigenous international : our place as Indigenous peoples in the international' (2014) 23(1) *Griffith Law Review* 110.

Australian state also now exercises authority, we understand Indigenous and non-Indigenous realms of authority to encompass 'multiple and overlapping … types of governance and jurisdiction',[107] 'parallel sovereignty'[108], 'relational sovereignty'[109], or as Tully describes it, '…the recognition of indigenous peoples as free, equal and self-governing peoples under international law, with *shared* jurisdiction over lands and resources on the basis of mutual consent'.[110]

72. To reiterate our argument from above: it is important for governments – settler states and Indigenous governing bodies alike - to appreciate that 'recognition' by the Australian legal system might make Aboriginal and Torres Strait Islander Peoples less vulnerable to external interference and make it possible for the nation-state to 'see' and acknowledge certain aspects of Aboriginal and Torres Strait Islander law and jurisdictional prerogative; but recognition by the powers of the settler state is not innately relevant to the continued existence of First Peoples. Rather, their source of lawful authority and responsibility predates the emergence of the nation-state by millennia.
73. However, in the absence of such state-sanctioned recognition, the question of what Aboriginal self-government looks like in an ex-colonial context – or what it could look like – are live questions for nation-building researchers and practitioners alike. Reconstructing Indigenous powers of self-government not only requires (re)defining the areas of jurisdiction nations are seeking to exercise (their) authority within, but also concerns the vehicles that nations can use to exercise that authority.
74. As First Peoples 'have no legal personality' as of right in settler Australia, they are expert at using "tools that are at their disposal".[111] Such tools include structures formed under settler law, such as peak body corporations, community corporations or native title representative bodies, to pursue their political goals.[112]
75. In some instances, First Peoples are utilising such structures to interact with settler political and legal systems, frequently for uses beyond their legislated remit, or to 'act' as a nation.[113] An example of this kind of activity is frequently observed in Native Title bodies corporate.
76. In other instances, First Peoples leaders utilise such structures to create a collective, 'trans-National', regional representation with the authoritative potential to expand Aboriginal and Torres Strait Islander control over key issues of common concern to all First Peoples within a particular regional jurisdiction. An example of this kind of strategic governance innovation including representatives from multiple Aboriginal communities across Victoria is the Koori Caucus, which in 2018 expressed its aspiration for an Aboriginal controlled criminal justice system in the State of Victoria. The Caucus is a 'self-determining body that provides state-

[107] Andrea Muehlebach, 'What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism' (2003) 10 *Identities: Global Studies in Culture and Power* 241, 258-259.

[108] Siegfried Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' (2008) 41 *Vanderbilt Journal of Transnational Law* 1141, 1166-1167.

[109] Simone Bignall, 'Relational Sovereignty' in Rosi Braidotti, Emily Jones and Goda Klumbyte (eds) *More Posthuman Glossary* (Bloomsbury Academic, 2023) 128-130.

[110] Tully (n 45) 56.

[111] Vivian et al (n 2).

[112] See, for example, Heidi Norman, Therese Apolonio and Maeve Parker, 'Mapping Local and Regional Governance: Reimagining the New South Wales Aboriginal Sector' (2021) 13(1) *Cosmopolitan Civil Societies* <https://doi.org/10.5130/ccs.v13.i1.7644>; Miriam Jorgensen, Alison Vivian, Anthea Compton, Donna Murray, Debra Evans and Janine Gertz, 'Yes, The Time Is Now: Indigenous Nation Policy Making for Self-determined Futures' in Nikkie Moodie and Sarah Maddison (eds) *Public Policy and Indigenous Futures* (Springer, 2023); Compton et al (n 2).

[113] Cornell (n 2).

wide Aboriginal representation, leadership and a strong voice'.[114] At the Federal level, constituted bodies - such as the former ATSIC or the current Coalition of Peaks - provide relevant examples of institutions established to expand First Peoples realms of influence with respect to governmental decision-making and policy formation.

77. In both cases, First Peoples act through dedicated organisations to (re)claim certain powers of jurisdiction over matters of specific concern. This action requires settler state powers to acknowledge enduring Indigenous authority and, at times, to enter into novel governance arrangements.

78. Nonetheless, such expressions of Indigenous authority are usually made through organisations incorporated under the instruments of settler state law. Unfortunately, this accommodation to settler-colonial law and policy can create confusion between the governance of Indigenous community organisations and the governance of Indigenous communities. It follows that an aspect of the challenge for Aboriginal and Torres Strait Islander Peoples is to transition from 'corporate governance' (management of community organisations) to 'political governance' (governing of polities). The shift might also be described as a transition from self-management to self-determination.

79. Settler states likewise need to widen their foci around change. While, as we detail in Part 8, First Peoples must be supported to build their own capacity for self-governance, the settler state must also seek to become 'ready' for such negotiations and sharing of jurisdiction. The state must understand itself as entering into negotiations with other sovereigns. This may involve, for example, moving beyond an insistence that such sovereigns must utilise particular forms of organisation (for example, 'Traditional Owner' bodies). Such insistence may inadvertently assume (and thus curtail) the varied aspirations First Peoples hold.

80. If relations among Aboriginal and Torres Strait Islander Peoples and the Australian nation-state are to be transformed into sovereign-to-sovereign or government-to-government relations, as we have argued is necessary, then Indigenous and non-Indigenous institutions must develop new formulations of negotiated jurisdiction allowing for First Peoples authority to be grounded in First Nation sovereignty and coded in the instruments of Law/lore professed by Aboriginal and Torres Strait Islander peoples. In other words, settler state governments will need to learn how to share governing authority and jurisdiction: not only with Indigenous *corporations* operating under settler state powers and legislation; but also – and primarily - with First Peoples *governments*, these being diverse political bodies that will not necessarily take the legislated forms mandated by the settler state. Of course, the principle of sovereign self-determination means that the forms of political and legal institution that First Peoples create and use to express their sovereign powers will be a matter for their own decision and cannot be directed or controlled by the settler state.

81. Although settler state governments across Australia currently lack the structural interfaces required for systematic sovereign-to-sovereign interaction with First Peoples, there is historical precedent for such intergovernmental interaction evident in some places. For example, following the destructive impact of the Hindmarsh Island Bridge litigations during the 1990s, the Ngarrindjeri people in South Australia reasserted their collective political identity in the form of the Ngarrindjeri Regional Authority (NRA). On the foundation of the sovereign political authority they had vested in the NRA, the Ngarrindjeri Nation began a process of agreement-making with the South Australian State Government; the resulting series of 'Kungun Ngarrindjeri Yunnan Agreements' (KNYAs – 'Listen to Ngarrindjeri Speaking as Country') embodied formal legal contracts binding both governments. Importantly, KNYAs included elements of Ngarrindjeri Law (such as the right/obligation to

[114] Victorian Government, *Aboriginal Justice Caucus* <https://www.aboriginaljustice.vic.gov.au/aboriginal-justice-caucus>.

'Speak as Country') alongside elements of settler law (such as the principles of contract or tort).[115]

82. A significant positive outcome of the KNYA innovation was the radical improvement of the relationship between Ngarrindjeri and the South Australian Government, which in turn led to improved collaboration in governance, and especially for natural resource management concerning Ngarrindjeri Country.[116] In 2009, the NRA used a whole-of-government KNYA to establish regular leader-to-leader meetings for the negotiated development of policy in areas of particular concern to Ngarrindjeri. Known as the 'KNYA Taskforce', this innovative institution for intergovernmental collaboration proceeded through principles of overlapping sovereign interest and the intention to facilitate shared decision-making and policy-planning.[117] While Taskforce negotiations were not always easy and often required mutual compromise, the process of sovereign-to-sovereign engagement was the crucial generative condition for a fundamental shift towards improved justice and empowerment felt by Ngarrindjeri people during this time. Accordingly, in our view, this era of South Australian politics marked an important inclination towards 'exiting from colonialism', introducing a fundamental break with long-standing colonial habits of exclusive governmentality, political domination and unjust interaction.

83. Unfortunately, the vagaries of settler state government election cycles has meant that these particular transformative movements of ex-colonialism were short-lived in South Australia.[118] The Taskforce has not survived successive generations of settler state government there. Nonetheless, the historical example of the joint Taskforce remains an instructive model for Australian settler state governments seeking to understand how to broach shared sovereignty and negotiate matters of overlapping jurisdiction with First Peoples governments. We suggest settler state governments would benefit from close attention to the range of similar examples across Australia, where Indigenous communities are known to be acting as sovereign Nations to advance self-government and expand their jurisdiction over Country through negotiated partnerships with settler state powers.

84. Furthermore, settler state governments might turn to the legal and political operations of the Australian federation itself to appreciate the conceptual and practical feasibility of pluralism.

85. By design, federal structures accommodate distinct orders of sovereign authority,[119] and provide for a 'union' of interests rather than the amalgamation of those interests into 'unity' with the state.[120] Although federalism commonly is associated with the hierarchy of governments within nation-states,[121] scholars have noted that some features of federalism also

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[115] See Hemming, Rigney and Berg, 'Ngarrindjeri Futures' (n 58).

[116] Daryle Rigney, Simone Bignall and Steve Hemming, 'Negotiating Indigenous Modernities' (2015) 11(4) *AlterNative* 334. See also NRA and Government of South Australia, *Kungun Ngarrindjeri Yunnan Agreement (KNYA): Listen to Ngarrindjeri People Talking Report 2014 and 2015* (Department of Environment, Water and Natural Resources, 2016), <https://cdn.environment.sa.gov.au/environment/docs/knya-taskforce-2014-15-rep.pdf>.

[117] Steve Hemming, Daryle Rigney, Simone Bignall, Shaun Berg, and Grant Rigney, 'Indigenous Nation Building for Environmental Futures: *Murrundi F*lows Through Ngarrindjeri Country' (2019) 26(3) *Australasian Journal of Environmental Management* 216.

[118] As of July 2024, the South Australian Labor Government has also abandoned its former Aboriginal Regional Authority policy and its commitment to treaty negotiations with ARAs.

[119] Martin Papillon, 'Adapting Federalism: Indigenous Governance in Canada and the United States' (2012) 42(2) *Publius: The Journal of Federalism* 289, 292.

[120] Reilly (n 5) 412 (References omitted).

[121] Ibid.

provide a promising framework for accommodating the self-governing aspirations of Aboriginal and Torres Strait Islander Peoples.[122]

86. This promise resides largely in the way federations can be described as negotiated distributions of jurisdiction. As such, federations continuously review and reallocate jurisdictional power and have considerable capacity to evolve and display high levels of adaptability and innovation.[123] In fact, such evolution points to a realpolitik corollary to the features of federalism: within federal structures, the allocation of jurisdiction is rooted not only in formal law but also in the pragmatic concerns of the united polities.
87. Australia itself is a federation of sovereign states, the reality of which became highly apparent during Covid. Concepts of multiple and divided sovereignty are commonplace, especially in federal states such as Australia,[124] the United States and Canada, where, as Dicey explains, apparently inconsistent claims of national sovereignty and state sovereignty are reconciled through the creation of a constitution under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate states.[125]
88. In the United States the sovereignty of Native Nations has always been acknowledged; first through the 'negotiation' of treaties with European nations and later in a series of three cases referred to as the 'Marshall Trilogy' between 1823 and 1832, where Chief Justice Marshall held that British sovereignty had diminished tribal sovereignty but had not extinguished it. His Honour held that tribes are 'domestic dependent nations' with a relationship to the United States like that of a 'ward to its guardian'.[126] The result is that the relationship between Native Nations and the federal government is that of sovereign-to-sovereign and US states do not exert exclusive authority over Native Nations.
89. Accordingly, creating an institutional framework to support the existence of Aboriginal and Torres Strait Islander Peoples as distinct, self-governing entities within the Australian state is conceptually possible, albeit potentially politically difficult for the settler-state to countenance. Indeed, we acknowledge the challenges that settler-colonial governments may face in recognizing and supporting the exercise of Aboriginal and Torres Strait Islander sovereignty. Such challenges might include, for example, resistance from the settler community; and the reluctance of some Indigenous academics, commentators, and leaders to endorse the concept of 'sovereignty' when its use at law and in politics has been dominated by Western definitions of the term.
90. Nonetheless, we firmly believe the ongoing state of intercultural conflict and the systemic injustices affecting First Peoples in Australia will not recede until the original political status of First Peoples as self-determining, self-governing peoples is properly acknowledged and, furthermore, enabled to continue in contemporary 'ex-colonial' forms.
91. Certainly, from a First Peoples political theoretical perspective, it is clear that the notion of shared sovereignty and the associated negotiation of overlapping jurisdictions is both conceptually and practically feasible. Furthermore, from our research partnerships with

[122] Ibid 403; Papillon (n 119); Will Kymlicka, 'American Multiculturalism and the "Nations Within"' in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 216; Tully (n 45) 36; David C Hawkes, 'Indigenous Peoples: Self-government and Intergovernmental Relations' (2001) 53 *International Social Science Journal* 153.

[123] Ibid.

[124] Brennan et al (n 10) 319-320.

[125] A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1st ed 1885, 10th ed 1959) 143 cited in Blackshield, T & Williams, G, *Australian Constitutional Law & Theory. Commentary & Materials* (Federation Press, 1998) 23.

[126] See Johnson v M'Intosh 21 US 543 (1823); Cherokee Nation v Georgia 30 US 1 (1831) and Worcester v Georgia 31 US 515 (1832).

Indigenous communities engaged in nation rebuilding it is evident to us that First Peoples are already demonstrating how Australia can proceed towards the institution of First Peoples sovereignty as an integral feature of Australian government and law.

Part 8: Indigenous nation building: capacity building to enable just relations

92. The clear and consistent message from a broad range of research evidence is that 'recognition'[127] of Aboriginal and Torres Strait Islander sovereignty alone (*de jure sovereignty*) will not be sufficient to remedy the ongoing and perpetuating harm caused by settler-colonialism. Rather, it is the exercise of sovereignty through self-determination (*de facto sovereignty*) that is the critical element in sustained wellbeing.
93. The evidence that groups must have the capacity to live according to their own worldviews in order to thrive,[128] correlates with interdisciplinary research conducted in North America and Australia (including by the authors), which demonstrates that effective and *culturally legitimate* Indigenous self-government which enables Indigenous self-determination (*de facto sovereignty*) is the precursor to Indigenous Peoples' prosperity and wellbeing. [129]
94. Research over an almost 40-year period by the Harvard Project on American Indian Economic Development (Harvard Project)[130] and its sister institution, the Native Nations Institute (NNI) has found that the defining characteristic common to thriving North American Native nations is *stable political governance.* For Native Nations in North America, stable political governance is a more important indicator of Indigenous community prosperity than abundant natural resources, high education levels, readily available markets, or reliable transport, although these, of course, can be utilised to great effect by Indigenous communities which have effective self-government.[131]
95. Stable political governance is manifest in five characteristics common to Indigenous nations which are achieving their goals: (1) decision-making control over a nation's affairs; (2) effective and (3) culturally legitimate institutions of self-government (whether newly created or reinvigorated); (4) long-term strategic direction and planning; and (5) community-spirited leadership.[132]

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[127] Recognition politics is exemplified in Australia and other jurisdictions in 'Reconciliation' movements but has largely been dismissed and discredited as a means of recalibrating relations among Indigenous peoples and the Australian state. Simpson derides recognition politics as a 'political language game and largely state-driven performance art that attempts to move elements of history forward in order to 'move on' from the past': Simpson, 'The ruse of consent' (n 50) 23-24. See also Povinelli, *The Cunning of Recognition* (n 61); Glen Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (2014, University of Minnesota).

[128] Andrew M Subica and Bruce G Link, 'Cultural trauma as a fundamental cause of health disparities' (2022) 292 *Social Science & Medicine* <https://doi.org/10.1016/j.socscimed.2021.114574>; Calma et al (n 66).

[129] See, for example, Rigney et al, *INB and the Political Determinants of Health and Wellbeing* (n 97).

[130] Significantly, there is no single 'Harvard study' or 'NNI study' about Indigenous nation building. The Harvard Project and NNI have conducted multiple studies and research projects and have produced hundreds of papers, reports and advisory documents for Native nations, Native-serving organisations and the general public that address various aspects of INB. The Harvard [Project on] Indigenous Governance and Development is located in the Harvard Kennedy School, Harvard University.

[131] Jorgensen (ed) (n 13).

[132] See Stephen Cornell and Joseph P Kalt, 'Two Approaches to the Development of Native Nations: One Works, the Other Doesn't' in Jorgensen (ed), *Rebuilding Native Nations*, *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007) 3.

96. *Collective self-determination*, manifest in Indigenous communities or nations having decision-making control over their internal affairs (a process that in Australia has been described as exercising 'political jurisdiction'[133]), is therefore key.[134] Indeed, the co-founders and co-directors of the Harvard Project, Stephen Cornell and Joseph Kalt claim that they cannot find in the United States 'a single case of sustained economic development in which an entity other than the Native nation is making the major decisions about development strategy, resource use or internal organisation.'[135]
97. While the input of settler-colonial governments can assist nations (Part 9), this input is not the root cause of development within nations (and arguably is more likely to impede development). Instead, such opportunities are more likely to yield lasting benefits when self-determined and self-governing Native nations put them to effective and strategic use.
98. Together these principles comprise the process of Indigenous nation building (INB) or Indigenous nation *re*-building. Currently the term INB is widely used in Australia across a range of contexts, including the Victorian government's Traditional Owner Nation-building and Treaty Readiness Support fund.[136] Following the HPAIED and NNI, we use the term to describe the process by which an Indigenous nation strengthens its own institutional capacity for effective self-government and self-determined community development.[137]
99. The empirical evidence from North America measuring the linkage between collective self-determination and improved outcomes for Indigenous Peoples is well settled. Within Australia, data collected about Aboriginal and Torres Strait Islander people is generally collected at the level of the individual, such that the impact of the self-determination of Aboriginal and Torres Strait Islander Peoples on social, cultural and economic outcomes is not measurable.[138]
100. Nonetheless, and despite the differing constitutional, historical, political and legal circumstances in the North American and Australian nation states, Harvard Project and NNI INB research has been reinforced in Australia. For example, Janet Hunt and Diane Smith from the Centre for Aboriginal Economic Policy Research conducted a five-year research program looking at community governance in Indigenous communities, from which they concluded that ongoing socioeconomic development and resilience is realised when Indigenous governance is based on genuine decision-making powers, practical capacity and legitimate leadership at the local level.[139]
101. More recently since 2010, researchers (including the authors of this submission) from the Jumbunna Institute for Indigenous Education and Research at UTS (Jumbunna IIER) and the Native Nations Institute at the University of Arizona (NNI) have partnered with the Gunditjmara People, the Ngarrindjeri Nation, and individuals and groups from the Gugu

[133] Michael Dodson and Diane Smith, 'Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities' (Discussion Paper No 250, Centre for Aboriginal Economic Policy Research, Australian National University, 2003) 9.

[134] For an overview of the research of the Harvard Project on American Indian Economic Development and the Native Nations Institute for Leadership, Management and Policy see Jorgensen (ed) (n 13). See also Harvard Project on American Indian Economic Development (n 13). For additional publications see http://www.hks.harvard.edu/programs/hpaied.

[135] Cornell and Kalt (n 132) 22.

[136] For further analysis of the term's usage and history, see Jorgensen et al (n 112).

[137] Miriam Jorgensen, 'Editor's Introduction', in Jorgensen (ed) (n 13) xii.

[138] Impact of self-determination in service delivery is measurable in North America has been reported in a range of areas, including health, education and economic development. Many examples are discussed in Jorgensen (ed) (n 13).

[139] Janet Hunt and Diane Smith. 'Understanding and Engaging with Indigenous Governance: Research Evidence and Possibilities for Engaging with Australian Governments' (2011) 14(2-3) *Journal of Australian Indigenous Issues* 30, 31

Badhun, Nyungar and Wiradyuri nations to explore INB in Australia. These research partnerships have found that Aboriginal and Torres Strait Islander Peoples have the same aspirations for self-government as was understood in North America, and are taking steps to achieve them. That is, Indigenous nation building is occurring in Australia and has always occurred.

102. Since this time, INB research within Australia has expanded as a First Peoples-led field that reflects the specific concerns of Aboriginal and Torres Strait Islander nations.[140] Among other findings, what our research and that of others has found is that some First Nations are: creating institutions and processes for self-governance, so as to increase their capacity to define their priorities; strategically plan for and implement these priorities; and enter into mutually beneficial partnerships with governments (state and local in particular) and other entities. In this way, many Aboriginal and Torres Strait Islander nations are undertaking 'stealth governance': working to rebuild their governing foundations, strengthen their community governance and advance *collective* goals despite, and in response to, settler-colonialism.[141] We reflect below on some of these key strategies utilised by Aboriginal and Torres Strait Islander nations to exercise and extend their jurisdiction.

103. As a result of evidence garnered from Indigenous nations in Australia and North America, the Jumbunna-NNI research team has produced a descriptive model of Indigenous nation building consisting of the iterative processes *Identify as a nation → Organise as a nation → Act as a nation* (IOA).[142] These processes are not necessarily consecutive, and may take place concurrently dependant on the context of the nation in question (both internal and external) and the nation's strategic purpose.

Identify as a nation

104. Political scientist Benedict Anderson has argued that a nation is an 'imagined' political community, a collective that emerges from peoples' shared norms, values and aspirations and that has 'finite, if elastic boundaries, beyond which lie other nations.'[143] Echoing Anderson, Stephen Cornell argues that the collective self of Indigenous nationhood is a grouping that encompasses and expresses the values, norms, lore and law of its people and allows them to project their existence as a distinct People to others.[144] The ideas encompassed by the collective are prominent in their lives, generating and sustaining allegiance to the group over time and, in times of need, inspiring action. Thus, Cornell argues that a pre-requisite to exercising collective self-determination is conscious reflection on collective identity; in essence, ascertaining the 'self' in self-determination.[145]

105. A crucial INB strategy shared by individuals and groups from the Gugu Badhun, Gunditjmara, Ngarrindjeri and Wiradyuri Nations has been an ongoing commitment to control the narrative about their respective nations, so as to tell stories of sovereign identity and an inherent right to self-determination.

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[140] For example, see Rigney et al, *Indigenous Nation Building in Australia* (n 2); Gertz (n 2).

[141] Cornell (n 2).

[142] Ibid.

[143] Benedict Anderson, *Imagined Communities* (Second edition) (Verso, 2006) 7.

[144] Cornell (n 2).

[145] See, for example, Stephen Cornell, 'That's the Story of Our Life', in Paul Spickard and WJ Burroughs (eds) *We are a People: Narrative and Multiplicity in Constructing Ethnic Identity* (Temple University Press, 2000) 41; Stephen Cornell, 'Reconstituting Native Nations: Colonial Boundaries and Institutional Innovation in Canada, Australia, and the United States', in Ryan Walker, Ted Jojola and David Natcher (eds) *Reclaiming Indigenous Planning* (McGill-Queens University Press, 2013) 35.

106. As part of a range of community-based nation building initiatives, citizens of the Wiradyuri Nation, for example, are utilising a university program developed by Wiradyuri Elders and nation builders, initially on the instruction of the Wiradjuri Council of Elders.[146] Under control of a Wiradyuri governance committee, the Graduate Certificate in Wiradyuri Language, Culture and History at Charles Sturt University works to build understandings of Wiradyuri citizenship and worldviews. Building this political 'identity' is crucial prefigurative INB work that necessarily precedes self-government.
107. The Gugu Badhun and Gunditjmara Nations have chosen to write books detailing their respective sovereign histories told from their perspective. In 2009 and 2010 two books were published – *The Gunditjmara Land Justice Story*[147] and *The People of Budj Bim*[148] – that tell stories of the Gunditjmara People from a Gunditjmara perspective. While Gunditjmara people may consider it worthwhile to tell their story, this doesn't come at the cost of making all information public. Publishing your own books allows you to control the content and form in which information is distributed. Similarly, arising out of an oral history project led by Gugu Badhun Elder, Yvonne Cadet-James, the book, *Gugu Badhun: People of the Valley of Lagoons*,[149] tells the story of Gugu Badhun resilience in the face of adversity. This work is based on conversations with Gugu Badhun people, interspersed with commentary and analysis by four co-authors. The award winning, soon to be published PhD thesis of Dr Janine Gertz performs a similar function, melding academic rigour with community-led and endorsed research focussed on Gugu Badhun community priorities.[150]
108. In an aligned strategy of sovereign control, the Gugu Badhun, Gunditjmara and Ngarrindjeri Nations have demonstrated their intent to fulfil responsibility for Country (in Ngarrindjeri terms – speaking ***as*** Country, see below) by creating comprehensive planning documents.[151]
109. The discussion by Ngarrindjeri citizen and Indigenous nation building practitioner Daryle Rigney and non-Indigenous advisor to Ngarrindjeri leadership, Steve Hemming about the *Ngarrindjeri Nation Yarluwar-Ruwe Plan (Caring for Ngarrindjeri Sea Country and Culture)* ('Yarluwar-Ruwe Plan') (2006) could equally apply to the Gugu Badhun and Gunditjmara planning documents. Hemming et al. outline how Ngarrindjeri well-being can be achieved when Ngarrindjeri are fulfilling their cultural obligations to speak *as* Country. With its declaration of ongoing sovereignty, a constitutional account of identity and jurisdiction, and a clear set of goals and strategies, Hemming et al. describe it as both a planning tool *and* a constitutional document.[152]

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[146] Donna Murray and Debra Evans. 'Culturally Centred, Community Led: Wiradjuri Nation Rebuilding through Honouring the Wiradjuri Way' in Diane Smith, Alex Wighton, Stephen Cornell & Alex Vai Delaney (eds) *Developing Governance and Governing Development: International Case Studies of Indigenous* Futures (Rowman and Littlefield International, 2021) 165.

[147] Jessica Weir, *The Gunditjmara Land Justice Story* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2009).

[148] The Gunditjmara People with Gib Wettenhall, *The People of Budj Bim: Engineers of Aquaculture, Builders of Stone House Settlements and Warriors Defending Country* (emPRESS Publishing for the Gunditj Mirring Traditional Owners Corporation, 2010).

[149] Yvonne Cadet-James, Robert Andrew James, Sue McGinty and Russell McGregor, *Gugu Badhun People of the Valley of Lagoons* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2017).

[150] Gertz (n 2).

[151] For example, the Gunditjmara Budj Bim Master Plan (building on the 1993 Lake Condah Heritage Management Plan and Strategy, known as the blue book; 2002 Lake Condah Sustainable Development Project Master Plan; and 2012 Budj Bim Sustainable Development Project Plan), the Ngarrindjeri Yarluwar-Ruwe Plan (2006), and the Gugu Badhun Community Plan each sets out agreed-upon collective goals developed through comprehensive community engagement processes.

[152] Steve Hemming, Daryle Rigney, Shaun Berg, Clyde Rigney, Grant Rigney and Luke Trevorrow. 'Speaking as Country: A Ngarrindjeri Methodology of Transformative Engagement' (2016) 5 *Ngiya: Talk The Law* 22.

110. Their comprehensive community plans support these Aboriginal nations to be proactive rather than constantly reactive. Not only do such documents support consistent focus over the long term for the relevant Indigenous nation; they also support nations to have their strategies, policies and processes influence settler-colonial government departments through formal adoption of the plans. Examples include the Murray Darling Basin Authority's adoption of the Yarluwar-Ruwe Plan; and agreements such as the Ngootyoong Gunditj Ngootyoong Mara (Healthy Country, Healthy People) co-management plan, which the Gunditj Mirring Traditional Owners Aboriginal Corporation (GMTOAC) negotiated with Parks Victoria and the Department of Environment and Primary Industries for the area over which GMTOAC is the Registered Aboriginal Party under the Victorian *Aboriginal Heritage Act (2006)*.[153]

Organise as a nation

111. To achieve stable political governance, First Peoples need to 'organise' through bodies or other mechanisms that enable them to undertake collective decision-making. Crucially, INB research finds that such bodies must not only be effective and robust; they must also have 'cultural match' with the collective. This is crucial when the legitimacy of the leadership relies upon the lawful processes of collective decision-making necessary for justly representing a diverse citizenry with multiple goals.[154]
112. As indicated above, First Peoples have shown enormous initiative in using a range of vehicles to exercise their capacities for self-governance and become self-determining.[155] Such tools include structures formed under settler law such as peak bodies, or native title representative bodies, to pursue their INB ends.[156] Whether or not these organisations are being used as a nation's self-government body, First Peoples are regardless utilising such structures more generally to interact with settler political and legal systems, frequently for uses beyond their legislated remit.[157]
113. Gugu Badhun Nation are utilising their Prescribed Body Corporate (PBC), which has been adapted to suit 'cultural protocols', to undertake collective decision-making about nation business.[158] Regardless, the nation is ultimately working towards an institution of self-government that exists outside of settler structures.[159]
114. The Gunditjmara People, Ngarrindjeri Nation and Wiradyuri Nation have utilised different types of structures to undertake collective decision-making and achieve collective aspirations.
115. From 2003 to 2018, the vehicle for Gunditjmara nationwide decision-making (i.e., self-government) was a monthly community-wide forum called the Gunditjmara Full Group (Full Group), auspiced by the Gunditjmara People's Prescribed Body Corporate, Gunditj Mirring Traditional Owners Aboriginal Corporation (GMTOAC).[160] The Full Group was initially established to generate instructions regarding the Gunditjmara People's native title application, but evolved over time into a forum for deliberation and decision-making for *all* issues affecting the Gunditjmara People.

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[153] Gunditj Mirring et al, *Ngootyoong Gunditj Ngootyoong Mara South West Management Plan* (Parks Victoria, 2015) <www.parks.vic.gov.au/-/media/project/pv/main/parks/documents/management-plans/ngootyoong-gunditj-ngootyoong-mara-south-west-management-plan.pdf>.

154 Cornell and Kalt (n 132) 28-29.

[155] Vivian et al (n 2).

[156] Compton et al (n 2); Norman, Apolino and Parker (n 112).

[157] See Rigney et al, Treating Treaty as a Technology (n 7) 119; Cornell (n 2); Jorgensen et al, (n 112); Compton et al (n 2).

[158] Petray and Gertz (n 2); Gertz (n 2).

[159] Gertz (n 2).

[160] Rigney et al, *Indigenous Nation Building in Australia* (n 2).

116. Operationally, with its responsibility for Country, culture and community, Full Group decisions were made in a culturally legitimate manner that suited Gunditjmara political culture; according to Gunditjmara lore/law, values and principles with a strong preference for consensus. Decisions were made by the Full Group but implementing decisions was the work of GMTOAC, an incorporated organisation capable of holding land, resources, entering into contracts and engaging with external parties.
117. Therefore, it may be most accurate to think about the Full Group as a meeting of the Gunditjmara People that used GMTOAC as a corporate vehicle for land holding and funding and for negotiation with governments and other external parties. In other words, GMTOAC was the vehicle for the Gunditjmara People to exercise rights to collective self-determination.
118. Under the Full Group, the Gunditjmara People made remarkable gains for the community, returning significant parcels of land to Gunditjmara ownership, entering into a range of partnerships to further Gunditjmara interests, undertaking regional planning for major eco-tourism development, providing employment opportunities for Gunditjmara people, fostering Gunditjmara economic development and entrepreneurial opportunities, and gaining world heritage status for the Budj Bim cultural landscape, all while remaining focussed on the prime objective of exercising responsibility for Gunditjmara Country.
119. Following its formal establishment in 2007, the Ngarrindjeri Regional Authority (NRA) similarly enabled a transformation of relations between the Ngarrindjeri Nation and the South Australian Government.
120. In 2015, the Weatherill Labor Government announced that the NRA and Narungga Aboriginal Corporation Regional Authority were catalysts for South Australia's statewide Aboriginal Regional Authority policy. In 2017, the Weatherill Government commenced treaty negotiations with the Ngarrindjeri Regional Authority and two other Aboriginal governing bodies, the Narungga Regional Authority and Adnyamathanha Regional Authority.[161]
121. Senior Ngarrindjeri Elders, leaders and advisers stated plainly that their intention in creating the NRA was to develop a Ngarrindjeri government for the nation. As the late Uncle Tom Trevorrow explained, the aspiration for the NRA was that it would eventually evolve into a 'fourth tier of government', alongside local, state and federal governments.
122. During its years of operation, the NRA acted as a regional body with considerable authority and was highly respected for its skill in inter-governmental relations, in particular, through the KNY negotiation and agreement making process (described in Part 7). The NRA provided a consolidated voice, allowing it to become a leader in natural resource management on Ngarrindjeri Country through implementation of the Yarluwar-Ruwe Plan and the effective uptake of the Yannarumi assessment framework (discussed below).[162]
123. By growing the nation's governing capacity, the NRA enabled the Ngarrindjeri Nation to set its own agenda and influence the agenda of local and state governments. It enabled the nation to develop its own planning policy; create an identifiable point of call for interactions between the Ngarrindjeri Nation and local, state and federal governments; and devise community development strategies, while embodying Ngarrindjeri identity and values.

Act as a nation

124. In the context of continued settler-colonialism and lack of formal recognition of their sovereignty, many Aboriginal and Torres Strait Islander Peoples undertake deliberate action to demonstrate their nationhood. In this way, they 'act' as nations.

[161] The Narungga Nation, whose Country extends throughout what is now known as the Yorke Peninsula, established a regional authority in 2011. The Adnyamathanha Traditional Lands Association was recognised as the regional authority for the Flinders Ranges region in 2016. See Hemming, Rigney and Berg, 'Ngarrindjeri Nation Building' (n 23).

[162] For a more detailed discussion of Ngarrindjeri led natural resource management, see Hemming et al (n 152).

125. Acting as a nation involves the assertion of jurisdiction wherever possible (frequently over Country); the implementation of long-term strategic planning to extend jurisdiction and authority; the use of law (whether settler or Indigenous nation) to further the nation's own interests and rights; and the enacting of government-to-government relationships with outside bodies, through continued assertion of sovereignty.[163] Essentially, acting as a nation is the performance of effective nationhood; where, as Rigney et al write, rights can 'materialise in practice'.[164] We describe two examples of such 'acting', drawn from the experiences of the Gunditjmara People and Ngarrindjeri Nation.
126. For Ngarrindjeri, what non-Indigenous people call 'natural resource management' is part of Ngarrindjeri cultural responsibility to Speak ***as*** Country (Yannarumi).[165] Yannarumi is an ancient Ngarrindjeri concept with a traditional meaning which has been reconceptualised to account for the impacts of settler-colonialism and contemporary understandings of the impact of activity on Ngarrindjeri Ruwe/Ruwar (body, spirit, lands and waters, and all living things).[166] The Ngarrindjeri concept of Speaking as Country does not separate humankind and nature as subject and object but sees the relationship as reciprocal between people, lands and waters and all living things.[167]
127. Ngarrindjeri leaders and their allies understood that the health of Ngarrindjeri Country and Ngarrindjeri people depended on them taking control of what happens on Country, which led them to launch the Ngarrindjeri Nation Yarluwar-Ruwe Plan (2006). The NRA, which was established shortly after the Ngarrindjeri Yarluwar-Ruwe Plan was launched in March 2007, had a coherent blueprint for healthy Ngarrindjeri people, Country and interconnected lifeforms (ngartjis) and could provide a centralised body to implement the plan. Ngarrindjeri leaders subsequently combined the values and principles in the Yarluwar-Ruwe Plan with the NRA's goals and a theorised form of nation (re)building to produce a Yannarumi (Speaking *as* Country) assessment framework to assess Ngarrindjeri wellbeing.[168] Using the Yannarumi framework, Ngarrindjeri Elders and leaders can make decisions according to whether projects, practices, partnerships, plans, or other activities are healthy, lawful and contribute to Ngarrindjeri wellbeing based on the cultural principles passed down by their ancestors.[169]
128. The Yannarumi well-being and risk-management framework was central to the Ngarrindjeri Nation's development of the intergovernmental agreements and Taskforce forum described above in Part 7. The success of the Ngarrindjeri approach to 'acting as a Nation' is clearly demonstrated by these political innovations, and the improved policy outcomes and relationships achieved by Ngarrindjeri during this time.
129. Attaining UNESCO World Heritage listing for the Budj Bim Cultural Landscape (BBCL) for its 'outstanding universal value', a goal conceived in the 1980s and realised in 2019, is perhaps the most high-profile among all the Gunditjmara People's achievements. It is similarly demonstrative of Gunditjmara 'acting' as a nation and utilising such action to extend their (recognised) authority.

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[163] Cornell (n 2) 16-18.

[164] Rigney et al, *INB and the Political Determinants of Health and Wellbeing* (n 97) 2.

[165] Steve Hemming and Daryle Rigney, *Restoring Murray Futures: Incorporating Indigenous knowledge, values and interests into environmental water planning in the Coorong and Lakes Alexandrina and Albert Ramsar Wetland* (Goyder Institute for Water Research Technical Report Series No. 16/8, 2016) 16.

[166] Ibid 29.

[167] Ibid 29.

[168] Ibid; Hemming et al, (n 152).

[169] Hemming and Rigney (n 165).

130. Certain clear strategies are apparent in the accomplishment. The first and most significant is that, although nominations to UNESCO's World Heritage Committee are made by State Parties, the Gunditjmara People controlled the nomination process throughout. Gaining World Heritage status was a Gunditjmara initiative and Gunditjmara people drove the process, determined the shape and scope of the nomination, collected the necessary data and conducted necessary analysis; this was an exercise of self-determination and not a negotiated role. In fact, when it appeared that the federal government might not nominate the BBCL, the Gunditjmara People was prepared to assert its status as a distinct and sovereign Indigenous nation and nominate the BBCL itself. Ultimately, the Gunditjmara People did not have to test UNESCO's admission boundaries. The Australian Government lodged the nomination in February 2018 and the BBCL was inscribed on the World Heritage List in July 2019.
131. The world heritage status of the BBCL has provided the basis for the next stage of community planning needed to generate the kind of successes that the Gunditjmara community has created over the last 40 years. At the time of writing, this planning is underway with the completion of the Budj Bim Cultural Landscape master plan and the development of a Gunditjmara Nation Building and Economic Strategy. The recognition of the BBCL, and of the Gunditjmara's continued sovereign obligations for their Country, has also been utilised by the nation in their external negotiations with outside governments and other industry bodies, particularly in relation to leading initiatives for the BBCL to become the premier tourist destination in Victoria.

Part 9: Recommendations: the role for settler governments

132. Reflections on Aboriginal and Torres Strait Islander self-government and the culturally legitimate exercise of authority ultimately turn to 'sovereignty' because it deals with the 'most fundamental questions of legitimate power and authority'.[170] However, we note that significant uncertainty attends the use of the concept of 'sovereignty', which has been described as 'the most glittering and controversial notion in the history, doctrine and practice of international law', but with 'an emotive quality lacking specific meaningful content'.[171] Thus, sovereignty is both a malleable and a 'loaded term' precisely because 'it deals with assertions of ultimate authority and its use is often wedded to a strong rhetorical purpose'.[172]
133. The institution of sovereign-to-sovereign, nation-to-nation, or government-to-government relations amongst Indigenous polities and settler state formations is essential for addressing the systemic injustices experienced by First Peoples in all areas of life since colonisation. This is how Australia can begin to exit from colonisation. Towards this end, First Peoples' relational, shared, negotiated conceptions of sovereignty, arising in part as a consequence of dynamic occupation and shared use of territories and resources, mean that they are uniquely able to *show* settler governments what such relations and associated shared jurisdiction can look like.
134. The Australian and international INB research findings have profound significance. They challenge foundational settler-colonial approaches to 'success' and 'development' in Indigenous communities (see Part 4). Further, they suggest that it is Indigenous *nation* action, rather than settler state action, that precedes the futures to which many Aboriginal and Torres Strait Islander Peoples aspire.

[170] Brennan et al (n 10) 309.

[171] Hathaway and Shapiro (n 9).

[172] Brennan et al (n 10) 314.

135. The first clear implication of this research, then, is that First Peoples should commence or continue the work of creating collective decision-making institutions that are effective and culturally appropriate, and that enable them to exercise collective self-determination.
136. While the evidence is straightforward, the extreme challenge for Indigenous Peoples worldwide is that Indigenous self-government and Indigenous self-determination are precisely what settler-colonialism has targeted and continues to target, which has impacted and continues to impact Indigenous Peoples' *capacity* to be self-governing. Ongoing settler-colonialism is antithetical to thriving First Peoples whose wellbeing is enabled by Indigenous self-government.[173]
137. It follows that the second implication of this research is that settler governments should support (but not interfere with) First Peoples' efforts to increase their capacity for self-determination.
138. We contend that *the* critical role for the settler state – if it is serious about its stated intention to address systemic injustices stemming from colonisation – is to support Aboriginal and Torres Strait Islander Peoples to (re)develop institutions and mechanisms for self-government and engage sovereignly in INB. Indeed, this is a necessary prerequisite for the kinds of sovereign-to-sovereign, nation-to-nation, or government-to-government interactions we argue are necessary if Australian society is to effectively break with colonial legacies of systematic and structural injustice affecting Aboriginal and Torres Strait Islander Peoples.
139. This is not a 'quick fix'. We do not support the constant recycling of policy systems by Australian governments that inevitably fail and which thereby create significant strain on First Peoples communities and organisations involved. Instead, the Victorian Government must take a longer-term view, with any preventative efforts centred on the recognition of First Peoples' rights to exercise sovereignty and self-determination. The below recommendations reflect this premise.

Recommendations

- the Victorian Government should support the effective articulation of legitimate First Peoples sovereignty in Victorian political and legislative processes, by co-creating a framework for engaging with Aboriginal governing bodies as polities with inherent rights to self-determination;
- rather than imposing a representative model for the Aboriginal governing bodies to adopt and emulate in order to be treated as 'sovereign', the Victorian Government should agree to a set of principles developed by First Peoples to support First Peoples' self-government and self-determination. This framework should more deliberately facilitate and support Victorian Aboriginal nations, communities and groups to self-determine the roles and functions of their governing bodies and means of political expression appropriate to their aspirations, develop their own authority for the expression of their political identity, and implement their own processes for designing their governing institutions;
- towards this end, the Victorian Government should support the development of Aboriginal governing bodies as political collectives (rather than corporate bodies), by resourcing Indigenous Nation Building in Victoria.
- the pursuit of 'ex-colonial' justice should include clear mechanisms of action and responsibility for the Victorian Government, which should not simply be obliged to 'hear' the sovereign claims of First Peoples but also respond appropriately;

[173] See Rigney et al, *INB and the Political Determinants of Health and Wellbeing* (n 97); Michael J Chandler and Christopher E Lalonde 'Cultural Continuity as a Moderator of Suicide Risk Among Canada's First Nations' in Laurence Kirmayer and Gail Valaskakis (eds) *Healing Traditions: The Mental Health of Aboriginal Peoples in Canada* (University of British Columbia Press, 2008) 221.

- this response by the Victorian Government to First Peoples sovereignty must include a willingness to share jurisdiction when First Peoples reason this is necessary; and must therefore involve the co-development of institutions for negotiating the allocation of jurisdictional responsibilities;
- The Victorian Government must commit to consistent and long-term support for reflective processes that allow Indigenous nations, communities and groups to assess and express their developing political governing capacity, and adapt and evolve their institutions over time;
- The Victorian Government should enlist a comprehensive education program for settler government personnel, settler politicians and First Peoples politicians, to ensure a thorough grounding in fundamental Indigenous governance and nation-building principles. This will maximise the potential for successful institution building preliminary to the pluralist intergovernmental agreement-making we have argued is fundamental for achieving justice.
- ultimately, we recommend the Victorian Government should separate the two processes of (1) supporting the establishment of self-determined institutions of authority to govern and facilitate political expression by Aboriginal Peoples as nations, communities or groups (thereby enabling First Peoples' sovereignty to be legitimately exercised, expressed and heard); and (2) entering into negotiations or agreements with such First Peoples governing institutions. This process of negotiated agreement-making is the proper subject of a sovereign-to-sovereign treaty process, which we also recommend the Government of Victoria pursues. However, it is crucial for all parties to appreciate that treaty can only proceed fairly, on an even footing, when First Peoples have substantially recovered their sovereign capacities through nation rebuilding.

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Daryle has served the Ngarrindjeri Nation as a strategist asserting self-determination and sovereignty, as an elected board member of the Ngarrindjeri Regional Authority (NRA), director of Ngarrindjeri Ruwe Contracting (NRC), Ngarrindjeri Ruwe Empowered Communities (NREC) and the Ngarrindjeri People Native Title Compensation Charitable Trust and was the Ngarrindjeri co-negotiator and appointed Ngarrindjeri spokesperson on treaty negotiations in 2016-17 with the State of South Australia. In 2013 Daryle was acknowledged as the South Australian National Aboriginal and Islander Day Observance Committee (NAIDOC) South Australian Aboriginal person of the year.

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Alison Vivian is a non-Indigenous woman born and raised on Gunai Kurnai Country and now lives in Naarm (Melbourne) in what is now Victoria. Alison is an Associate Professor with the INBG research hub at Jumbunna IIER and her primary research focuses on Indigenous nation-building and Indigenous self-governance as an exercise of sovereignty and self-determination. Alison has partnered with groups and individuals from the Gugu Badhun, Gunditjmara, Ngarrindjeri, Nyungar and Wiradyuri Nations for almost 15 years in research projects co-conducted with the Native Nations Institute at the University of Arizona.

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Steve Hemming is committed to working with First Nations, peoples and communities to achieve justice, self-determination, wellbeing and healthy futures. Steve's experience

spans policy development, program management, Indigenous governance and engagement, nation building, treaty negotiation and business development. This work is long-term, collaborative, applied, transformative, theoretical, inter-disciplinary and multi-disciplinary.

Steve's work with Indigenous nations began in the early 1980s as a museum curator and over four decades he engaged in social, cultural and political research with First Peoples. This experience includes a decade-long cultural research project focussing on the Ngarrindjeri Nation and the importance of the Creation Law Story Ngurunderi (Creator of the River Murray with Pondi the Giant Cod) resulting in award winning films, publications and major exhibition in the SA Museum.

At Jumbunna IIER, Steve contributes to the development of strategic and collaborative Indigenous research programs in Australia and internationally as a member of the INBG research hub.