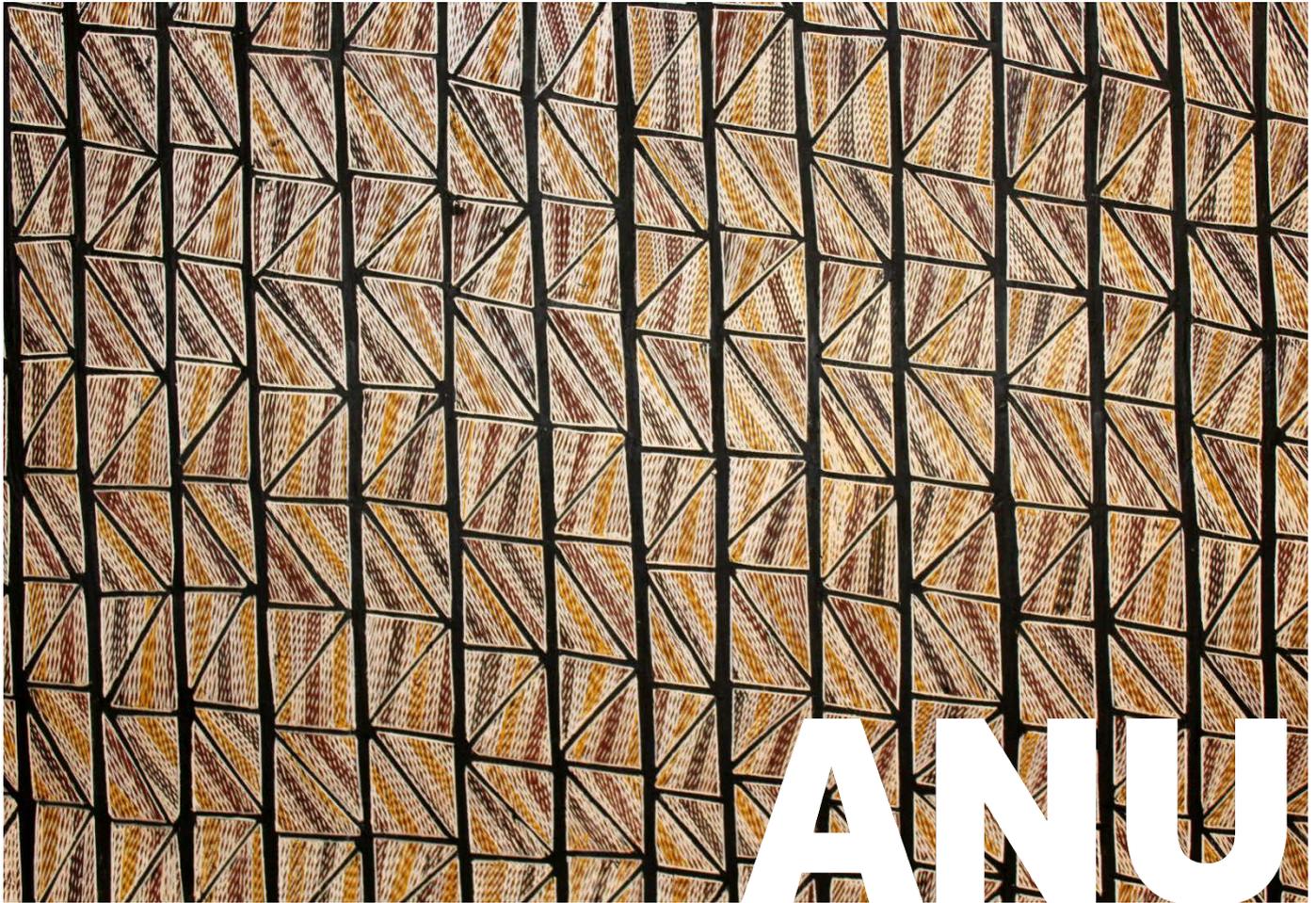




Australian  
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OVERCOMING INDIGENOUS EXCLUSION:  
VERY HARD, PLENTY HUMBUG

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Centre for  
Aboriginal Economic  
Policy Research  
ANU College of  
Arts & Social  
Sciences

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## Series note

The Centre for Aboriginal Economic Policy Research (CAEPR) undertakes high-quality, independent research to further the social and economic development and empowerment of Indigenous people throughout Australia.

For more than 25 years, CAEPR has aimed to combine academic and teaching excellence on Indigenous economic and social development and public policy with realism, objectivity and relevance.

CAEPR maintains a substantial publications program, including Research Monographs, Discussion Papers, Working Papers and Topical Issues.

The CAEPR Policy Insights: Special Series marks the Centre's 30th anniversary in 2020. This series focuses on assessing and taking stock of the past 30 years of Indigenous public policy, and discusses the development of policy over the coming decades. This Policy Insights: Special Series Paper has been internally peer reviewed. All CAEPR publications are available in electronic format for free download from CAEPR's website:

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June 2019


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# Overcoming Indigenous exclusion: Very hard, plenty humbug

## ND Westbury and MC Dillon

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### Abstract

The systemic and structural issues that underpin the longstanding policy failures of governments in Indigenous Affairs are central to the nation's future. The strategic policy choices facing both policymakers and Indigenous interests are complex and challenging.

Our aim is to provide a high level and accessible overview of the policy and political forces which operate in the Indigenous policy domain. We begin with an analysis of the lessons of the last 30 years which emerged from the nation's experiment with a legislated Indigenous voice from 1990 through to the mid 2000s when the Aboriginal and Torres Strait Islander Commission (ATSIC) came into existence, and was ultimately dismembered and disbanded. We then turn to the current national debate on future Indigenous policy around the Uluru Statement from the Heart and the proposals for a constitutionally entrenched national Indigenous Voice to Parliament and a truth telling process termed a *Makarrata*.

We draw on the emerging literature on political settlements to develop the argument that Indigenous exclusion is deeply structural in nature, and will not be easily reversed by a single policy or constitutional change. We examine a number of case studies of systemic exclusion. It will require systemic reform, which given the risks will need to be pursued incrementally and sustained over time. We provide a high level overview of the steps leading to the current state of play in constitutional recognition of Indigenous peoples in Australia, and make various suggestions for the design of the proposed Indigenous Voice, drawing in the first instance on the lessons from the nation's experience with ATSIC. We conclude that while greater inclusion in key national institutional frameworks will be challenging, it is also the only way forward that is truly in the national interest.

## Acknowledgments

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We would also like to particularly thank Denise McFayden for sub-editing and Hilary Bek from HB Editing Services for sub-editing and production services.

It is also important to note this work was completed prior to the outcome of the Federal election held on 18 May 2019.

Finally, we both owe a significant debt to the Indigenous and non-Indigenous colleagues we have worked with over the span of our careers. Nugget Coombs, whom each of us worked closely with at different times, has been a particular and long-standing inspiration. Nugget combined an interest in ideas and a mastery of administration and policy with a deep appreciation of the importance of placing the nation on an ethical and just foundation.

Above all, this Policy Insights paper is inspired by the extraordinary resilience of the many Indigenous people we have worked with across Australia. Their contribution to the nation has been systematically ignored and under-appreciated. Their potential further contribution to the nation has been and continues to be systemically constrained. It would be national tragedy if the nation were not able to remedy this in the future.

## Acronyms

ACTU	Australian Council of Trade Unions
ADC	Aboriginal Development Commission
AIHW	Australian Institute of Health and Welfare
ALP	Australian Labor Party
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cwlth)</i>
ANAO	Australian National Audit Office
ATSIC	Aboriginal and Torres Strait Islander Commission
ATSIS	Aboriginal and Torres Strait Islander Services
ANU	Australian National University
CDC	Commercial Development Corporation
CDEP	Community Development Employment Projects
CEO	Chief Executive Officer
COAG	Council of Australian Governments
DAA	Department of Aboriginal Affairs
FCAATSI	Federal Council for the Advancement of Aborigines and Torres Strait Islanders
GST	goods and services tax
IBA	Indigenous Business Australia
LNP	Liberal National Party (Coalition)
MPRC	Murdi Paaki Regional Council
NAC	National Aboriginal Conference
NACC	National Aboriginal Consultative Committee
NACCHO	National Aboriginal Community Controlled Health Organisation
NDIS	National Disability Insurance Scheme
NTA	<i>Native Title Act 1993</i>
NGO	non government organisation
NAIF	North Australia Infrastructure Facility
RDA	<i>Racial Discrimination Act 1975</i>
TSRA	Torres Strait Regional Authority
UN	United Nations
US	United States of America

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## Foreword

As the new Director of the ANU's Centre for Aboriginal Economic Policy Research (CAEPR), I am keen to see the Centre continue to make a constructive and engaged contribution to the key policy issues facing the nation in relation to First Nations peoples.

Since it was established almost 30 years ago, the Centre has evolved into a powerhouse of policy-relevant research, and CAEPR researchers have made significant contributions to the Indigenous affairs policy domain in fields as diverse as land rights and native title, employment policy, demography, resource development agreements, community development, welfare and social policy, education, local government, public administration, and more. One of the Centre's strengths has been the diverse disciplinary backgrounds of its staff, including demographers, statisticians, anthropologists, economists, linguists, political scientists, geographers, sociologists and educationists.

A strong unifying element woven through CAEPR's output has been a commitment to policy relevance, seeking to facilitate and support the development of effective policies by governments relating to Indigenous affairs, and seeking to lay out a critical and constructive foundation and evidence base from which First Nations peoples and their organisations can engage with policymakers.

Notwithstanding the successes of the past, I am determined that CAEPR not rest on its laurels going forward.

In 2020, CAEPR will celebrate its 30th anniversary. One of ways in which we intend to mark this 30-year milestone is to establish a new Policy Insights: Special Series of publications, focused on assessing and taking stock of the past 30 years of Indigenous public policy in particular areas, and more importantly, making a rigorous and constructive contribution to the development of policy over the coming decades.

The present publication, authored by two experienced public policy specialists, both of whom also have long associations with CAEPR, is the first volume in this series of special discussion and other papers. While it was not explicitly written for this purpose, fortuitously, its core subject matter spans both the 30 years of CAEPR's existence and addresses the policy options and opportunities for the future in Indigenous affairs. It represents a strong starting point for the new Policy Insights publication series, and more importantly, encourages readers to think anew about the opportunities facing the nation in relation to engagement with First Nations.

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Professor of Indigenous Policy  
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## Preface

*If our vision of Australia is generous enough for us to see and enjoy the differences of this so different civilisation we may learn much from it, and their dreams may be realised in friendship and respect. If they are it is my belief that our lives will be the richer.* HC Coombs (1978:126)

In 2007 we co-authored a book on Indigenous policy titled *Beyond Humbug: Transforming Government Engagement with Indigenous Australians*. In that book, we sought to make the case that successfully addressing Indigenous disadvantage had two elements: addressing the structural issues that underpinned Indigenous disadvantage and making substantive improvements to the quality of engagement between policymakers and Indigenous citizens. The title of our previous book was drawn from the words of one of anthropologist Bill Stanner's informants, who described Europeans as 'Very clever people, very hard people, plenty humbug' (Stanner 1964).

This shorter work picks up on many of the themes we addressed in *Beyond Humbug*, and seeks to interrogate in greater depth the reasons why the systemic and structural challenges facing both policymakers and Indigenous interests are so difficult to overcome. Accordingly, it seems appropriate again to draw on the perceptive insight of Stanner's unknown informant for our title.

Our aim in writing this short monograph is to provide a high-level overview of the policy and political forces that operate to shape the Indigenous policy domain.

Each of us began our professional lives working with remote communities in northern Australia. We eventually made the transition from working directly with communities to working on policy formulation, implementation and delivery. We have been actors in various roles at the interface of policy and politics as it pertains to Indigenous affairs. We have observed at close quarters over four decades the impacts – both positive and negative – of government policies on Indigenous lives and life opportunities. Our primary focus is not on Indigenous people and organisations *per se*, nor on the decisions made by Indigenous interests, but rather we focus on the policy frameworks, processes and decisions of governments. In particular, we seek to identify the underlying structural forces that shape policy development for Indigenous affairs in Australia.

We do not set out merely to describe or assess government policies with the aim of demonstrating that policy is defective or failing. Instead, we acknowledge that 'policy' is an inherently amorphous, malleable, and ultimately ambiguous concept. Our aim is to disentangle the complex dynamics that underpin government policies and their accompanying narratives in relation to Indigenous citizens. In so doing, we identify continuing systemic social, economic and political exclusion as an enduring reality for many Indigenous citizens, notwithstanding the progressive removal of formal institutional barriers to participation in Australian society over the past century. The ramifications of ongoing systemic exclusion (albeit largely *de facto* rather than *de jure*) are to create a disjunction or discontinuity between the policy objectives of successive governments and the policy outcomes. We term this policy failure, while acknowledging that this is an inherently subjective and 'loaded' term (McConnell 2015, 2016).

Moreover, we point out that it would be possible to mount an argument that policy outcomes in the Indigenous domain represent 'policy success', particularly from the perspective of those interest groups who shape and benefit from the current political settlement in Australia. The policy outcomes effectively allow the continuation of the current configuration of the nation's underlying 'political settlement' with no dilution in the benefits flowing to core beneficiaries of that notional compact. We flesh out the concept of the 'political settlement' in chapters one and three.

This leads us to begin the process of identifying policy approaches that can transcend what has been an enduring and seemingly intractable policy challenge. Our intention is to move beyond abstracted analysis, and undertake an exercise in engaged policy analysis that seeks to identify directions for productive policy formulation going forward. We seek to inform policymakers, and by outlining a new way of conceptualising the Indigenous policy domain based on the implications for Indigenous interests of the extant political settlement in Australia, assist policymakers to ‘shift gear’ and mindsets, and explore truly innovative policy approaches.

Implicit in our approach is a starting point, widely shared in policy and academic circles as well as among Indigenous people, that governments at all levels, and over at least 50 years, have failed to address the challenges facing Indigenous citizens; or more radically, that governments are in large measure responsible for those challenges. The evidence for government failure in addressing challenges is overwhelming, and is reinforced by the synergistic nature of the poor outcomes. It can be seen in the failure of governments to make progress on Closing the Gap (Morrison 2019). It can be seen in the extraordinary levels of incarceration of Indigenous people across the nation. It can be seen in poor employment rates; in poor educational outcomes; in the extraordinary rates of out-of-home care of Indigenous children across the nation; and in a plethora of other indicators. The evidence on causality is much less obvious. Our approach is to suggest that governments do what they choose to do<sup>1</sup> due to underlying structural forces related to the political settlement on which our political and economic systems are in large measure based.

Notwithstanding the ongoing existence of these challenges, and the concomitant policy failure, it does not follow that everything governments touch must turn to dross. Nor does it follow that our starting point, potentially characterised as ‘deficit discourse’, somehow reflects negatively on Indigenous peoples’ capacity for agency, resilience, persistence and resistance. Indeed, the existence of these strengths throughout the Indigenous domain provides the potential platform for overcoming persistent policy failure by governments.

The current national debate on Indigenous policy is largely focused on the Uluru Statement from the Heart and the proposals for a constitutionally entrenched national Indigenous Voice to Parliament and a truth-telling process termed a Makarrata. Accordingly, we decided it would be valuable to examine in some detail the lessons that emerged from the nation’s experiment with a legislated Indigenous voice in the 1990s and early 2000s when the Aboriginal and Torres Strait Islander Commission (ATSIC) came into existence, and was ultimately dismembered and disbanded.

Our findings and conclusions are primarily directed towards encouraging in the wider Australian community a better understanding of the relevance and importance of these issues to the nation as a whole. In particular, we argue that addressing the place of Indigenous peoples within the nation’s institutions is in the long-term economic and social interest of all Australians. The analysis also identifies a number of issues that reflect the debate already occurring among Indigenous Australians themselves.

Major conclusions include:

1. In relation to Indigenous affairs policy, the nation has currently reached a dead end. Over the last 30 years, no Australian Government has developed, resourced and effectively implemented a comprehensive overarching long-term policy reform strategy in Indigenous affairs. Current policy settings are not fit for purpose, and governments appear bereft of ideas or proposals capable of addressing the deep-seated challenges that exist.
2. The ongoing *de facto* or implicit exclusion of Indigenous citizens from mainstream institutional frameworks and the nation’s preparedness to pursue policies that implicitly discriminate against Indigenous citizens lies

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<sup>1</sup> This is the focus of the academic discipline of public policy analysis (McConnell 2016:668).

at the heart of this conundrum.<sup>2</sup> They in turn point to the existence of a two-tier society, of included and excluded interests, which progressively dissolves the nation's social fabric, undermines the sense of national unity, and impairs the nation's capacity to address important mainstream challenges.<sup>3</sup>

3. Indigenous exclusion is deeply structural in nature, and will not be easily reversed by a single policy or constitutional change. Through examining a number of case studies of systemic exclusion we argue that this will require structural reform, to be pursued incrementally and sustained over time.
4. After assessing the current state of play in constitutional recognition of Indigenous peoples in Australia, we make various suggestions in relation to the implementation of the proposed Indigenous Voice, drawing in the first instance on the lessons from the nation's experience with ATSIC. We also highlight both the rationale and the critical importance to the nation as a whole of amending the constitution to prevent future Australian Governments being able to pass legislation that discriminates on the basis of race.
5. While moves towards greater inclusion (which we argue must involve explicit recognition of notions of shared sovereignty) in key national institutional frameworks will be challenging, it is the only way forward that is truly in the national interest.

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<sup>2</sup> To be clear, we use the concept 'discrimination' here not merely in the sense that Indigenous and non-Indigenous Australians are treated differently, but that non-Indigenous Australians are treated better and Indigenous Australians are treated adversely within the nation's institutional frameworks. Indeed, one might argue that the acknowledgment of 'difference' lies at the heart of Indigenous aspirations for constitutional recognition. See Merlan (2018) for an extended and largely anthropological analysis of the dynamics of difference in Indigenous and non-Indigenous interactions since settlement.

<sup>3</sup> Sassen (2014) points to the existence of similar groups of excluded or 'expulsed' citizens within the global economy. Her analysis suggests that the pressures to exclude or expel those individuals who, for one reason or another, do not meet the requirements of the global economy are increasing.

# 1. The Indigenous Policy Challenge for the Nation

*While Australians today embrace aspects of Indigenous culture in ways that would have been unimaginable only fifty years ago, and while our communities show an increasing willingness to listen to Indigenous voices and stories, the state lags far behind.* Mark McKenna (2018:63)

## Introduction

We live in an uncertain and perplexing world. Over the coming 50 years, Australia will confront myriad challenges. Some are global such as climate and technological change, the impact of mass migration and people movements, and international conflicts and wars into which we are drawn as a result of our treaty commitments, or which impact us as a result of their extent and severity. National security in an uncertain world is largely about ensuring the wellbeing of citizens and protecting national institutions and the Australian continent itself to provide the maximum assurance that our children, and their children, will be safe into the future.

Australians find it easy to focus on external threats, and to take advantage of external opportunities such as the technological benefits of globalisation. We are less inclined to focus on internal domestic threats to our wellbeing: the state of our cities, the protection of the environment, the resilience and integrity of the nation's institutions, and the achievement of unity in the face of diversity. Yet internal and external threats are interconnected. Success in addressing global challenges and in grasping opportunities will influence domestic wellbeing, and success in pursuing domestic opportunities and challenges will affect Australia's global influence and standing and its capacity to chart an independent course in international affairs.

A crucial determinant of sustained success in both international and domestic domains is the quality of governance, the robustness and resilience of institutions,<sup>4</sup> the quality of life afforded to citizens, and the quality of policies in relation to key issues: climate change, the economy, and national security. An additional and crucial determinant of sustained success is the nation's capacity to transform society and its institutions in positive and constructive ways to meet new and emerging challenges. All these determinants of our future are inter-related, and their effectiveness in keeping Australia a vibrant, secure, open and innovative society depends in very large measure on the maintenance of trust in institutions across the breadth of Australian society. Maintaining institutional trust requires that the big policy challenges facing the nation are addressed and resolved by Australian institutions and governance processes.

Unfortunately, the evidence of the last five decades suggests Australia's quality of governance is sub-standard and in decline (Tingle 2015; Daley et al. 2019:ch.12). Australia's political and social systems appear incapable of adjusting to new priorities and pressures, leading to a deep erosion in the levels of trust in our political system and institutions (Stoker et al. 2018). Australia's inability to devise effective policy responses to climate change is perhaps the most obvious current example. On issues related to high-level governance, our political systems offer no clear pathway to resolving our anachronistic constitutional arrangements. The system of constitutional referendums appears largely unworkable and unfit for purpose when even common-sense proposals, such as reforming the dual-citizenship prohibition for federal parliamentarians, are considered too difficult to attempt.

What then are the key high-level policy issues that will directly shape the future of Australia? The economy, climate change, the rise of China, demographic change, infrastructure provision, technology, national security

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<sup>4</sup> We use the terms 'institutions' and 'institutional frameworks' to refer in broad terms to 'the rules of the game'. See the discussion on 'Defining Institutions' in Brennan & Castles (2002:3–6). In particular, we adopt Brennan & Castles summary of the key elements of institutional analysis. Namely that it occupies a middle ground between 'structure' and 'agency', that institutions are resilient, that institutions are more than a mere 'organisation' and extend to rules and norms and, finally, that the 'rules and norms that count are the ones that actually apply – not the ones that may be formally specified'.

are all obvious candidates. Less obvious, but no less significant in our view, is achieving a settlement with Australia's First Peoples.

## The national challenge of Indigenous affairs

In a global environment where social and political disruption is ubiquitous, where the pressures of globalisation permeate our political and social fabric, concerns related to the position and place of Indigenous peoples struggle to remain on the nation's political agenda, attracting only intermittent or cursory attention from the media and political players.

Yet the history of Indigenous dispossession is incontrovertible. The consequences continue to play out within the Indigenous population and their ramifications affect wider society. Notwithstanding the progress made on a range of fronts over the past 50 years – for example, in granting land rights, pursuing reconciliation, and increasing budget allocations across the breadth of service delivery – the stubborn continuation of Indigenous poverty and disadvantage is incomprehensible to many international observers, especially given the low absolute numbers of Australia's Indigenous citizens. Richard Mulgan has pointed to the challenge this history presents for the establishment of a shared political community in Australia, and to the uncertainties flowing from it that undermine the legitimacy of notions of citizenship. He argued (Mulgan 1998:193) that the existence of differing views on the legitimacy of the nation's colonial history suggests that 'the hope of true reconciliation, in the sense of genuine consensus on cultural values between Aboriginal and non-Aboriginal people, may be over-optimistic'.

He went on to argue for a greater focus on the recognition and legitimation of conflicting values and interests, albeit within processes of 'peaceful mutual adjustment'.

There are two significant forces arrayed against the greater recognition and acknowledgement of Indigenous aspirations and values within the Australian nation.

The first is a result of the rise of so-called 'identity politics' and, more importantly for our argument, the inevitable backlash directed at policies supporting the recognition or acknowledgment of racial, ethnic or cultural identities. Critics of 'identity politics' and advocates for 'colour blind policies' are ubiquitous and continue to influence high-level policy debates.<sup>5</sup> Policies attuned to the recognition of Indigenous identity are therefore likely to be automatically opposed or treated as 'just another category' of special pleading based on identity rather than national citizenship. If we are to go on building a nation based on the continuing injustice of dispossession – implemented initially through policies of subjugation backed by endemic violence including the near genocidal destruction of the Tasmanian Indigenous population (Hughes 1987; Boyce 2010; Ryan 2012; Lawson 2014), then segregation, later assimilation, and more recently by policies characterised as 'self-determination' or 'Closing the Gap', but in reality lacking substantive content – then our identity as part of the liberal and democratic order is fundamentally tainted.<sup>6</sup>

The second potentially serious threat to the acknowledgment of First Peoples' place in the Australian nation arises from the demographic changes in play within Indigenous society (Markham & Biddle 2018a). Increasing numbers of individuals, primarily urban-based and comparatively well-educated, are identifying as Indigenous,

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<sup>5</sup> See e.g. the 'Additional Comment' of Senator Amanda Stoker in the Final Report of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander peoples (Dodson & Leeser 2018).

<sup>6</sup> The philosopher Elizabeth Anderson (2010) has pointed to similar underlying dynamics in race relations in the United States of America (US). She points to the anti-democratic implications of segregation and 'colour-blind' policies, while making an argument for integration (akin in some respects to Australia's policy of multiculturalism). Even so, she acknowledges that 'Identity politics...was a necessary moment in the struggle for racial equality' in the US (Anderson 2010:188). See also Stanley (2012) for a discussion of the tensions and potential alignment between Iris Marion Young's notion of black 'differentiated solidarity' in her book *Inclusion and Democracy* (Young 2000) and Anderson's advocacy of black and white integration.

embracing (as is their right) multiple layered identities. The possibility emerges that governments will frame policy challenges in partial ways, directed at addressing the aspirations and needs of this rapidly expanding, newly identified cohort. The deep-seated structural exclusion of Indigenous citizens from more remote or more disadvantaged backgrounds could be overshadowed or ignored (Rowse 2017:432–442). The partial way in which the Closing the Gap targets have been framed means that it would be technically possible to meet the targets while effectively ignoring the challenges facing the most disadvantaged Indigenous Australians. The heterogeneity of Indigenous Australia is reflected in the fact that levels of income inequality within the Indigenous population exceed those in mainstream Australia (Markham & Biddle 2018b).

We argue that achieving a settlement with Australia's First Peoples is an imperative. Our failure to do so leaves the nation incomplete and its core identity flawed, neither according with mainstream Australia's self-perceptions nor allowing all Australians to benefit from an inclusive society. Indigenous Australians are not going away; their concerns are real and the nation will be morally, economically and socially poorer if it does not conclude a settlement with Indigenous Australians.

A key element in our argument is that such a settlement must be structural in nature. It is imperative that institutional frameworks be adjusted and changed.

## **A two-tiered society of included and excluded interests**

Our analysis sets out to explore the underlying forces that contribute to Indigenous disadvantage.<sup>7</sup> These encompass not just statistical 'gaps', but the structural gaps deriving from institutional exclusion. Most importantly, we seek to identify the forces and dynamics that contribute to the nation's inability to address either Indigenous disadvantage or Indigenous aspirations to make their own lives on their own terms. Our primary focus is not on Indigenous people and communities themselves, but on how the nation deals with its Indigenous citizens, their aspirations and their place in our society.

While there are many ways to approach the issues of Indigenous aspiration, achievement, dispossession and disadvantage, our approach is unashamedly on policy and, in particular, we focus on substantive policy—not because we come from the world of policymaking (we do), but because substantive policy, understood as 'what governments do rather than say', is the domain where the institutions that shape the opportunities available to all citizens, including Indigenous citizens, are developed, implemented and sustained. We readily acknowledge that a large, perhaps even the major part, of policymaking concerns what governments say rather than what they do. Policy and political narrative are crucial in persuading citizens, and the particular targets of policy action, that a policy intervention is legitimate and well intentioned. This narrative can crucially affect a policy's success or otherwise. In addition, circumstances also arise where governments pursue what McConnell (2015:228) has referred to as a 'placebo policy', aimed at keeping an issue or issues off the policy agenda, and creating the appearance that an issue is being addressed when in fact it is not.

Even where Indigenous interests decide to pursue their aspirations independently of governments, events emanating from the policy realm have the potential and capacity to restrain, constrain or destroy independent Indigenous initiatives.

Domestically, the ongoing exclusion of Indigenous citizens from mainstream institutional frameworks is evident from the nation's inability to come anywhere near Closing the Gap in key social indicators, despite a decade of

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<sup>7</sup> There is potentially a trade-off between maintaining fundamental differences (which go to the maintenance of Indigenous identity and culture) and removing statistical disadvantage, colloquially referred to as Closing the Gap. To the extent that maintaining difference is an overriding priority for at least some Indigenous people, the focus by policymakers on Closing the Gap will be seen by those Indigenous people as assimilationist and/or punitive. The almost ubiquitous preference of policymakers for nationally consistent programs and policies is thus potentially deeply flawed.

focus and government rhetoric (Australian Institute of Health and Welfare (AIHW) 2018; see also Morrison 2019).

Government policies are invariably associated with a policy narrative or rationale that focuses problems or social conditions assumed to originate in behaviours and actions detrimental to individuals, families and communities. In the Indigenous policy domain, these include high levels of lateral violence and substance abuse in many Indigenous communities, poor school attendance, poor compliance with welfare rules and conditions, poor diets, high levels of smoking, poor compliance with laws, poor health practices, poor child-care practices, and so on. To justify government policies, government narratives, which often resonate strongly in the broader community, often emphasise (either explicitly or implicitly) the lack of responsibility of those who behave or act in these ways. The risk is that the sheer breadth of these issues leads to attitudes in the broader community that blame Indigenous citizens, and may ultimately emerge in racist sentiment and discrimination.

While many Indigenous advocates seek to downplay this so-called 'deficit discourse', our view is that the existence of problematic behaviours should be acknowledged and addressed. Just as it is important to recognise Indigenous agency in political and social contexts, we should acknowledge the need for individual responsibility where relevant.<sup>8</sup> Nevertheless, contextualising the drivers and causes of problematic actions and behaviours among Indigenous people is also important. High levels of intergenerational trauma and concomitant mental illness, arising from both original dispossession and continuing discrimination, are contributing factors, and there are likely to be many others.

What, however, is indisputable is that over at least 50 years, government policies and programs focused on incentivising behavioural change have invariably failed to reverse or mitigate substantively widespread problematic actions and behaviours. The detailed reasons differ across policy sectors. Social scientists and most public policy analysts readily acknowledge the intersectional links and relationships between problematic behaviours in different areas: for example, between poor school attendance and poor diet, or substance abuse and lateral violence. However, the policy and program-development process is invariably undertaken within bureaucratic 'silos', which guarantees either partial focus at best, or outright failure at worst. The inability of one policy or program to address problematic behaviours contributes to and reinforces the inability of other programs to address different behaviours. The continuation of one person's problematic behaviour has ramifications for other individuals in that person's social network and affects their capacities and capabilities. The impacts are felt by a much wider group than the individuals targeted by government policy and program interventions.

Given this failure, each of these policies on its own contributes to growing the preconditions for social and political dysfunction. An accumulation of policies and programs has failed to shape and incentivise Indigenous actions and behaviours in ways that ameliorate disadvantage and encourage expanded capabilities; this represents a fundamental and systemic policy failure. The conditions these policies and programs were/are ostensibly designed to ameliorate continue unabated and with enduring negative impacts on the life opportunities of Indigenous citizens. This thoroughgoing failure requires both explanation and, in a rational world, a reassessment and fundamental reconceptualisation.<sup>9</sup>

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<sup>8</sup> This view echoes views expressed by Pearson (2000) in an essay titled 'Our right to take responsibility'.

<sup>9</sup> Of course, there is a deeper and more fundamental issue related to the legitimacy of government attempts to impose behavioural change on Indigenous and indeed other citizens. We do not adopt the view that all government policy interventions are necessarily illegitimate, although we do acknowledge that, in many cases, a cogent argument can be made against unilateral policy interventions. See Altman (2018) for an example of an argument questioning the legitimacy of government policy interventions in relation to homelands in remote Australia.

Many would argue that the result has been to create and sustain (whether planned or not) a two-tier society of included and excluded interests, the existence of which progressively dissolves our social fabric, undermines the legitimacy and unity of the nation and impairs its capacity to address other important challenges.

We turn this argument on its head. It is not that policy failure leads to non-inclusive institutional frameworks. Rather, it is non-inclusive social, economic and political institutions that drive substantive policy failure. In particular, the structure of the Australian 'political settlement' incentivises established and powerful interest groups to devise and support institutional frameworks that constrain policy options; policy must serve the dominant coalition of interests and ensure that economic benefits are primarily directed to those included within the settlement.<sup>10</sup>

This is a new way of analysing the reasons for the continuation of both substantive policy failure and ongoing and deep-seated Indigenous disadvantage. We outline the theoretical underpinnings of our analysis below and return to it in chapters three and four.

## **Institutional frameworks and political settlement theory**

In 2012 economists Daron Acemoglu and James Robinson published their book *Why Nations Fail: The Origins of Power, Prosperity and Poverty*, summarising for a wider audience some 15 years of published research into high-level policy failure. Their core thesis is that national prosperity is determined by the quality of a nation's economic and political institutions, defined in terms of whether or not they are inclusive or extractive in nature (Acemoglu & Robinson 2012). While not without its critics, their work has been widely acclaimed as offering important insights into the ways institutions operate to shape societal outcomes, for good and for bad.

The arguments made in *Why Nations Fail* implicitly raise analogous issues regarding the Indigenous policy domain in Australia.

Institutions are, in Douglass North's words:

...the humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, traditions and codes of conduct), and formal rules (constitutions, laws, property rights). Throughout history institutions have been devised by human beings to create order and reduce uncertainty in exchange (North 1991:97).

A more succinct definition, widely accepted, is that institutions are 'the rules of the game' that govern human activity within society (Brennan & Castles 2002:3–6).

It is important to understand the form and shape of a society's institutional framework given the broad acceptance among social scientists that institutions are crucial contributors to the determination of societal outcomes; the quality and nature of a society's institutions determines in large measure the social, economic and political wellbeing of its citizens. It follows that Australia's institutions (including both mainstream and Indigenous) are, for better or worse, key determinants of outcomes in the Indigenous policy domain.

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<sup>10</sup> To take just one random example, we would argue that the chronic inability of governments to institute effective policies to minimise alcohol-related harm among disadvantaged Australians is in very large measure a function of the influence of commercial interests associated with the manufacture and retailing of liquor. In particular, those interests are strongly averse to policy measures that focus on limiting supply, and allocate significant resources to ensuring these options are not proposed by governments (d'Abbs 2015).

The institutional framework in place in a society has a substantial role in determining 'how political power is obtained, used, and controlled, how economic activity occurs and how relations between individual and groups and the state are structured' (Leftwich 2011:5).

The term 'political settlements' emerged from the literature on conflict and state building, along with the political-economy literature focused on the politics of development (Hickey et al. 2015; Ingram 2014; Menocal 2015). It has gained increasing traction within international development agencies as they seek to find pathways to support and facilitate 'development' in nations with high levels of poverty (Department for International Development 2010; World Bank 2011).

Sue Ingram has identified three separate interpretations or usages of the term 'political settlement'. For present purposes, the third form she identifies has most relevance: 'the interdependent arrangement of political power and institutions on which a regime is based' (Ingram 2014:3). The key element here, following Khan (1995), is that institutional performance is not merely a function of the character of each institution within society, but is critically dependent on the balance of power among the classes and groups affected by the institution. This balance of power is not the result of formal bargaining or negotiations, but emerges as an equilibrium among potentially competing elite interests that is consistent with the distribution of organisational power in society, and is sustainable over time (Khan 2010:4; World Bank 2017).

Khan calls that balance of power the 'political settlement' and argues it is:

a description of the social order that describes how a society solves the problem of violence and achieves a minimum level of political stability and economic performance for it to operate as a society.

He also argues that 'at a deeper level, a political settlement implies an institutional structure that creates benefits for different classes and groups in line with their relative power' (Khan 1995:77, cited by Ingram 2014). Similarly, Di John and Putzel (2009:4) define political settlements as 'the balance of or distribution of power between contending social groups and social classes, on which any state is based'.

In a later monograph, Khan notes that once a 'social order emerges, the distribution of power becomes embedded in institutional arrangements that sustain it' (Khan 2010:4–5, cited by Ingram 2014). Thus, 'it is the underlying political settlement which determines political and developmental outcomes' in each society (Di John & Putzel 2009:6).

As a consequence, proposals for change to the institutions which are, or are perceived to be, potential threats to the extant 'political settlement' will inevitably be opposed by the most powerful interests in society, and are unlikely to succeed easily. It is also the case that shifts in the underlying balance of power among the dominant coalition of interests within a society will not lead to immediate shifts in the institutional framework; indeed this leaves substantial scope for those who have lost power to seek to retrieve it without being immediately disadvantaged.

This dynamic is reinforced by the fact that the relevant institutions are often the informal ones, and may continue to operate 'under the radar'. Perhaps more importantly, one characteristic of institutions is that they are resilient to change and require sustained and targeted pressure to be removed or, as most often occurs, to be modified.

Nevertheless, when the underlying balance of power among the dominant interests within a society changes, the momentum for consequential institutional change grows, and over time opportunities to change the 'rules of the game' arise. The importance of institutions and institutional frameworks arises from the fact that they lock in the balance of power or extant political settlement within society at any point in time, and operate to reinforce that settlement. Institutions are the primary means by which a dominant coalition of interests maintains social

and political stability and as necessary exerts power and influence. The dominant coalition is protected against potential competitor coalitions since the institutions in place at any point in time direct economic, social and political benefits toward the dominant coalition, and away from those excluded from the dominant coalition. Not only do political settlements shape the institutional framework, but that framework also shapes and supports the political settlement.

In every nation state, the relative positions of dominant interests, and their potential challengers, will be fluid, and will change over time. Moreover, the utility of institutions in place will similarly change, as will the distribution of economic and political benefits from a particular institutional configuration (Khan 2010:22), and consequently political settlements simultaneously exhibit characteristics of substantive continuity along with a degree of elasticity or malleability.

To summarise, societal outcomes are largely, but not entirely, determined by the existing institutional arrangements in place. These are a product of a 'political settlement' between the dominant interests across society (or a particular sector), and this settlement is in turn a product of an implicit bargaining outcome largely determined by respective accumulations of power by the contending elites. As Khan points out, it is relative power not absolute power that is crucial in determining the outcome of the implicit bargaining and negotiation among competing interests. He explicitly emphasises what he terms 'holding power', the capacity of an interest group to hold out and resist competing challengers, as a crucial determinant of the shape of political settlements (Khan 2010:30).

In addition, as Hickey (2012, 2013) and the World Bank (2017) both emphasise, ideas and ideology play a role in sustaining a 'political settlement', and in determining whether minority groups and interests will be given access to the dominant coalition. The 'dominant coalition' comprises those interest groups that have accrued the power to participate in the implicit bargaining that determines the form and shape of the institutions that make up the current political settlement. The membership of the dominant coalition is fluid from issue to issue, and from policy sector to policy sector. Coalition members are likely to be members of organised interest groups, but in some cases have the size and critical mass to operate unilaterally.

The implications of this analytic framework for the Australian nation state's engagement with its Indigenous citizens are far reaching. The framework suggests that good policy intentions will mean little in the face of institutions that are not substantively inclusive of Indigenous interests.

Moreover, even where Indigenous interests gain a modicum of political power, they may not allocate their political capital to seeking institutional change. Even where they do so, the reality of institutional resilience and inertia will mean that change will not be guaranteed, will take time to achieve, and will be subject to countervailing pressure ('pushback') from those interests perceiving themselves to have lost power relative to Indigenous interests. Moreover, while institutional exclusion is always problematic for Indigenous interests, inclusion does not guarantee that Indigenous interests will benefit. As Hickey et al. (2015:5–6) point out, 'inclusion on adverse terms in dominant political, economic and social orders can be disempowering for weaker groups, including women and minority ethnic groups'.

The 'political settlements' framework also assists in considering the issue of how Indigenous interests might accrue increased political influence and power within Australian society. There are three high-level possibilities. The first is to seek to join the dominant coalition. However, under this option, the risk for Indigenous interests is that they would be required to prioritise non-Indigenous norms and values over Indigenous norms and values, and that Indigenous voices would effectively be subsumed and sink without trace without the bargaining coin of substantial independent political power. The second possibility is to seek to challenge the dominant coalition from outside in order to force the establishment of a new revised coalition that includes Indigenous interests. A

third possibility is to accept marginalised outsider status in perpetuity. The inherent heterogeneity of Indigenous Australia makes it likely that some Indigenous groups and individuals will explore each of these options.

In addition, Indigenous interests aiming to accrue increased political power could look to form coalitions with like-minded interest groups, including with the public at large. They could also look to strengthen their advocacy capacity; or they could seek to strengthen their economic influence through greater engagement in commercial activities, which aligns closely with the ideology of the dominant coalition in Australia.

Interest-group competition is unending; as circumstances change, political gains can dissolve and wane. Even where institutions are established, they require ongoing defence and vigilance. The success of Indigenous interests in accumulating and retaining greater political power over the next five decades will in large measure depend on the calibre and commitment of Indigenous advocacy organisations and the Indigenous leadership. Success will require imagining and creating new opportunities to accumulate increased influence within the Australian polity; just as importantly, success will require proactive defence of the gains made and any made in the future.

## **A new way of seeing Indigenous affairs**

Our key starting assumptions are set out here.

- Notwithstanding huge changes to the economic and social status of most Indigenous citizens over the past 50 years, entrenched disadvantage continues to mar and constrain the life opportunities of a substantial proportion of Australia's Indigenous population.
- Indigenous Australia is deeply heterogeneous, not just in terms of their pre-contact diversity, but also in terms of their post-contact experience and histories. Yet Indigenous people are unified by a common sense of identity as First Nations and an experience of dispossession and settler colonialism, albeit one that affected different parts of the country at different times spread over two centuries.
- While most measures of disadvantage are worse in remote regions, it would be a mistake to think that the trauma of dispossession and exclusion does not continue to affect the lives of Indigenous citizens in regional and urban Australia.<sup>11</sup>
- The policies of successive Australian governments have failed to remove this deep-seated and ongoing disadvantage, or in colloquial terms, to 'close the gap'.
- Remedying this failure is in the national interest; policy approaches that assume this is entirely an Indigenous issue are misguided and unlikely to succeed.<sup>12</sup>
- By the same token, the nation must seriously engage Indigenous citizens in finding solutions and pathways forward.

Underpinning our examination of the state of Indigenous affairs, and the prospects for the future, is the reality that Australians collectively, through mainstream institutions, make choices every day – even when they do not realise it – which impact on and shape Indigenous Australia. An important part of our analysis then focuses on the choices made by and through mainstream institutions.<sup>13</sup> The decisions and operations of these institutions

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<sup>11</sup> To take just one example, recent research has found that Indigenous citizens Australia-wide are more likely to have unresolved criminal justice matters than non-Indigenous Australians (Wei & McDonald 2018).

<sup>12</sup> It might be argued that it is the aspiration for recognition, notions of Indigenous exceptionalism and 'identity politics' that creates the dynamic which sees this as an issue to be resolved solely by Indigenous people. We acknowledge that such risks exist, but take the view that most Indigenous people increasingly span both domains, and the consequences of policy failure in relation to an enduring Indigenous settlement similarly span both domains. See the discussion of layered identities in Pearson & Sanders (1995) and Pearson (2014:29–32).

<sup>13</sup> We use the term 'mainstream' to refer to the arrangements, frameworks, institutions, etc. that apply to the whole community (including Indigenous citizens) and which are not just directed to Indigenous citizens.

are the currency of inclusion or exclusion. They establish a thick web or network of relationships that facilitates the sharing of societal benefits among those included and ensure those interests not included do not share in the finite benefits available.

Our thesis is simple. It is that the history of Indigenous affairs since colonisation and settlement has been the history of substantive Indigenous exclusion from key institutions and institutional frameworks. Over the past 50 years, the complexity of government and its interactions with the citizenry have expanded enormously, and so too have the shape and dynamics of the political settlement that determines the form of Australia's institutional framework. The interest groups that 'own' the nation's political settlement are in a state of perpetual re-negotiation, directed primarily at internal competitors. However, they are also eternally vigilant against threats from potential external competitors.

To take the example of alcohol policy in remote regions, the dominant coalition will likely comprise the producers of alcohol products, the retailers of alcohol, owners of licensed premises, and potentially the police union. Interest groups outside the dominant coalition seeking to gain entry will include community health non government organisations (NGOs), other social service groups, and informal coalitions of health professionals. Policymakers will likely allow the dominant coalition to frame the policy issue (in this case not as harm to drinkers and their families, but as threats to 'urban amenity' and 'law and order') while seeking to persuade the relevant electorates that policy solutions that ignore supply restrictions will be effective (d'Abbs 2015:462–3). Given that policymaking comprises a complex array or matrix of overlapping and interfused policy issues, the dominant coalitions for each policy sector organically arrange themselves in higher order coalitions framed around broader sets of interests; for example, commerce, free trade, or labour, which in turn coalesce into national peak bodies such as the Business Council of Australia, the Australian Council of Trade Unions (ACTU), and so on.

The dominant coalition that controls the Australian political settlement has an interest in resisting the inclusion of new coalition members. Thus, as Indigenous interests have progressively fought for, and won, formal recognition of a wide range of citizenship rights, including rights of association and free movement, voting rights, employment rights, and of course the more recent recognition of their native title rights, those interests standing to lose argue for institutional changes that protect the status quo ante. As a consequence, the expected flow of economic, social and political benefits toward Indigenous interests has often been compromised or diffused. We provide some examples in later chapters. While the explicit forms of Indigenous exclusion may have lessened over that period, its informal or implicit impact has arguably expanded as the pervasiveness of government regulation and rule making has grown.<sup>14</sup> In turn, ongoing exclusion has led to the struggle to gain access to the entitlements, opportunities and benefits that flow automatically to those interests included within the political settlement and its associated institutional framework.

In exploring this history, our focus is on the real world, on *realpolitik*, on comparative power relations. As mentioned above, we are not as interested in what governments or Indigenous interests, or businesses or NGOs, say (important as that can be<sup>15</sup>), but in what they do. We are interested in substantive outcomes, not inputs or process.

Our focus is also necessarily selective rather than comprehensive. Our aim is to open a door to a largely new way of seeing the Indigenous affairs policy domain. In our analytic perspective, the shape of this policy domain arises from the existence of a mainstream or national political settlement dominated by interest groups with mainstream focuses. These interest groups include trade unions, a diffuse range of businesses, academia,

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<sup>14</sup> Anderson (2014) and Sassen (2014) have explored the ubiquity of these processes within contemporary market-based liberal societies.

<sup>15</sup> Indeed, the political-settlements literature acknowledges the way in which ideas and ideology are crucial to shaping the emergence and forms of interest group behaviour and thus complement and reinforce the exercise of political influence. See e.g. Hickey et al. (2015:23, 26).

churches, and other organised lobby groups such as those representing retirees. The political settlement determines the shape and extent of the nation's institutional frameworks, mediated by the political system that is in large measure itself shaped by the constraints and parameters imposed by the national political settlement. The internal dynamics of national political settlements are inevitably fluid and almost never made explicit. Indeed we can conceptualise the political settlement as both a network of real interests and a heuristic tool that enables us to understand the underlying political dynamics of the nation.

A determinant of policy failure in Indigenous affairs is that there is no underlying imperative for the 'owners' of the political settlement to bring Indigenous interests into the settlement. Inclusion of new interest groups by definition reduces the share of benefits, whether economic or political, of the pre-existing owners. Moreover, new entrants upset the existing balance of power within the settlement, and open up risks of adverse outcomes for existing beneficiaries over and above the reduced share that flows from increased numbers of beneficiaries. Consequently, the beneficiaries of the extant political settlement inevitably resist substantive policy reform, particularly at a structural level, and instead advocate policies that are strong on rhetorical force, but weak on substance. While governments are in theory elected by and responsible to the electorate at large, the reality of Australian democracy (and most liberal democracies) is that the institutions that comprise our political systems privilege organised interests and in particular the dominant coalition.<sup>16</sup> Governments are thus strongly incentivised to pursue 'placebo policies' which are symbolic or rhetorical in nature (McConnell 2010:228) rather than driving structural reforms that will lead to substantive institutional change.

## The Indigenous policy quagmire

After 70 years of post-war national development, Australia has become one of the wealthiest and safest nations on earth.<sup>17</sup> This development was built on the successful experiment in multicultural immigration, huge shifts in our national focus from Europe to Asia, a post-war wool boom and the more recent resources boom, sustained economic growth and a significant expansion in our urban infrastructure.

Over that same period, our Indigenous population has grown significantly. A number of demographic trends are apparent. The Indigenous population is much more youthful than mainstream Australia. More than half of the Indigenous population is under 25 years of age. A large proportion of the growth is in southeastern Australia, with increasing numbers of mixed Indigenous–non-Indigenous families. This in turn drives increased identification as the children of these families reach adulthood. Research by Markham and Biddle (2018b) based on the 2016 Census indicates that levels of inequality within the Indigenous population are greater than those within mainstream Australia. This wider spread of inequality is primarily because middle-class Indigenous people in urban Australia have an entirely different economic profile from regional and remote residents who are among the most disadvantaged citizens in Australia.

Income levels and income inequality are one metric for measuring the success of policy. However, disadvantage is more complex than income, or wealth; incarceration levels, inter-generational trauma and mental illness, mortality levels and educational outcomes are all important. Against all these metrics, substantial proportions of Indigenous people are deeply disadvantaged. Their life opportunities are severely constrained both quantitatively and qualitatively compared to most Australians. Moreover, disadvantage is both complex and

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<sup>16</sup> Australia's democratic institutions are more complex than mere voting systems, and include campaign financing laws, media laws, constraints on transparency and free speech (e.g. defamation laws), and the role of political parties that are themselves highly attuned to powerful interest groups. Moreover, notwithstanding the separation of powers, the executive arm of government dominates the Parliament (Galligan 1995:141, 158) thus facilitating the capacity of powerful interest groups to shape laws and institutions via a targeted focus on the Executive, and the political parties that effectively determine the composition of the Executive.

<sup>17</sup> See e.g. the Organisation for Economic Co-operation and Development (OECD 2017) better life index in relation to Australia.

interconnected. A range of inter-related social determinants heavily influences poor health. Poor education outcomes are the result of poor housing. Poor housing links to poor education.

There have been a number of responses to the slow disaster that rolls out in front of the nation, year in and year out. Increasingly, successful Indigenous citizens have sought to ensure that notions of disadvantage, incompetence or failure do not define their Indigeneity. They have sought to shift the focus to areas of Indigenous achievement and success, and characterised those who focus on Indigenous disadvantage as being in thrall to a mindset based on 'deficit discourse'.

Within mainstream Australia, governments have searched for the silver bullets that will unlock the apparently intractable issues that persist, often oblivious to the ways in which their policies, programs and rhetoric are experienced and interpreted by Indigenous citizens in an intercultural framework. As Mark McKenna (2018: 62–3) recounts in his Quarterly Essay, quoting Djiringanj man Warren Foster at a 2016 gathering of local historians and writers in Bega:

Foster reflected with considerable regret that non-Indigenous Australians remained largely ignorant of Indigenous forms of knowledge. 'You just don't know' he insisted, 'you don't understand how we live.' He admitted that he still felt like an 'outsider' in his own country. Foster had heard many whitefellas speak of acknowledging history and 'moving on,' as if the past was a commodity that could be selectively embraced and abandoned at the nation's convenience. But he was unable to leave history behind him. He lived its consequences every day.

There are numerous examples of radical policy fluctuations visited upon Indigenous Australians. Government policies have swung from supporting outstations in the 1970s to opposing them in the 1990s. They switched from opposing land rights and native title to supporting land rights, before realising that land rights (limited and constrained as it was) was not on its own sufficient to drive economic development. And policies have gyrated from supporting self-determination and self-management to the unilateral abolition of the elected Aboriginal and Torres Strait Islander Commission (ATSIC) and the coercive and racially discriminatory impact of the 2007 Northern Territory Emergency Response – the so-called 'intervention'.

The current policy obsession at the federal level is with business development, Indigenous procurement targets, effective education, a refresh of the Closing the Gap framework based around indicators of 'prosperity', tougher incentives on welfare recipients to seek employment while simultaneously quarantining significant proportions of more than 20,000 of the same Indigenous welfare recipients' entitlements. The only certainty with the current policy framework is that it will transform over the coming decade into some new priority.

Of particular note are the policy failures and concomitant withdrawal of Australian Government support from a wide range of programs with disproportionate impacts on remote communities. At present, we have an Australian Government with a substantial policy and program footprint in remote Australia, but without an overarching remote policy framework, and with both of its two largest programs in remote Australia, the Community Development Program and the Remote Housing Strategy, subject to deep-seated uncertainty.

At a systemic level, it is apparent that governments of all stripes have struggled to sustain strategic policy momentum in Indigenous affairs. A series of important but partial policy initiatives over the past 30 years, notably the creation of ATSIC in 1989, the passage of the Native Title Act in 1993 and the initiation of 'Closing the Gap' in 2008, reflect efforts to address policy challenges. Yet no Australian Government in the last 30 years has developed, resourced and implemented a comprehensive overarching long-term policy reform strategy in Indigenous affairs. Such a policy would involve a national focus, led by the Australian Government, and would actively engage State and Territory governments, local government and, importantly, Indigenous people. In addition, it seems clear that the heterogeneity of Indigenous Australia means that, at the very least, such a

framework would have two distinct elements: an urban and regional policy framework, and a rural and remote framework.

Perhaps the Closing the Gap strategy came closest to comprising such a comprehensive strategy. However, it was flawed insofar as it failed to explicitly allocate and link available and new funding to particular targets, failed to distinguish achievable or feasible targets from long-term aspirations, and incorporated a number of sub-optimal design features such as time-limited target specifications and targets that sought to bridge only half the gap in some cases. Notwithstanding these shortcomings, the Closing the Gap process has operated to focus public attention on Indigenous disadvantage at the beginning of each parliamentary year. The current moves to 'reform' the targets by expanding their number and shifting to a 'prosperity' focus will undoubtedly undermine the strategy's overarching effectiveness even further.<sup>18</sup>

As former Prime Minister Kevin Rudd (2018) pointed out early last year 'the uncomfortable truth is that a major reason we are falling short of meeting all our Closing the Gap targets is the steady withdrawal of Commonwealth policy and funding effort over the last four years'. He pointed out that in 2014 the current Government withdrew \$500 million from the strategy almost as soon as they took office and has failed to renew a number of National Partnership Agreement programs established in 2008 to close the gap. These involved significant Australian Government expenditures on early-childhood development, health, economic participation, remote Indigenous internet access and remote service delivery. The Government has also discontinued a National Partnership Agreement for the Northern Territory for the improvement of local policing, and has drastically and unilaterally cut funding for a longstanding National Partnership Agreement for remote housing.

In place of any policy framework, the current Morrison Government appears to have decided that addressing remote challenges is just too hard; instead, it is easier to adopt a political strategy of blaming the states and the Northern Territory for any issues that emerge. The Government is effectively ignoring the Commonwealth's overarching stewardship responsibilities in Indigenous affairs and, as the major funder in remote Australia, the fact that it has a responsibility to work with jurisdictions to develop coordinated and coherent policy frameworks.

Governments often seek to soften their most punitive actions with policy balm in other areas. For example, the current Government's focus on increasing the level of government contracts going to Indigenous-owned businesses has the effect of 'buying' political support from one part of the Indigenous constituency and offsetting the criticism of those subject to funding cuts. Similarly, the current Closing the Gap refresh appears cleverly targeted at two objectives. The first is to remove the stark reminder at the start of each parliamentary year that Australia has once again failed to reach its Closing the Gap targets (which in many cases seek to close only half the relevant gaps). The second is to play to the aspiration of many Indigenous citizens, particularly those who are not deeply disadvantaged, to see government supporting 'strength based' initiatives and moving away from 'deficit discourse'.

Or, to take an example central to the themes to be discussed in this chapter Prime Minister Howard in the lead up to the 2007 election committed to a referendum on Indigenous constitutional recognition within 18 months, if elected. This can be read as an attempt to offset the negative fallout from his Government's decisions to abolish ATSIC, and later to initiate the Northern Territory intervention in a successful attempt to wedge the Labor Opposition. Howard's announcement initiated the decade-long national discussion on constitutional recognition that currently appears to have stalled.

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<sup>18</sup> Refer to Markham, Jordan & Howard-Wagner (2018) and Dillon (2018c) for more detailed critiques of the current Closing the Gap refresh approach.

## The Indigenous response and the pushback

In response to the failure of governments to deliver substantive outcomes across the board, the Indigenous leadership (or at least key elements within it) have increasingly focused on more fundamental and structural relationships.

The stand out leader and intellectual force among Indigenous interests has been Noel Pearson. Over the past two decades, he has moved from his advocacy of radical welfare reform (in *Our Right to Take Responsibility*), and radical curriculum reform in Indigenous schools, to being the intellectual driving force behind a close-knit leadership group seeking to find a way through the notoriously prickly thicket of constitutional reform in Australia.

Pearson was a key player in the Expert Panel on Constitutional Recognition established by the Gillard Government whose report recommended the amendment of section 51 of the Constitution, the constitutional prohibition of racial discrimination, and the recognition of Indigenous languages (Dodson & Liebler 2012). Neither Labor nor the Liberal National Party (LNP) Coalition were prepared to support the Expert Panel's recommendations unequivocally. As a consequence in 2012 the issue was referred to a parliamentary committee (Wyatt 2015), the weapon of choice for governments wishing to dispatch inconvenient proposals.

The Joint Select Committee on Constitutional Recognition handed down its report in June 2015. Surprisingly and inconveniently for the major political parties, it recommended a referendum on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution. The committee also recommended that the referendum be held at a time when it had the highest chance of success. Most significantly, the committee acknowledged that Indigenous people 'will accept nothing less than a protection from racial discrimination in the Constitution' (Wyatt 2015:Chair's foreword). This finding was unacceptable to an influential bloc of conservative interests within the Government, and led to a decision by the Government to withhold endorsement of the committee's recommendations.

Instead, Prime Minister Turnbull and Opposition Leader Bill Shorten in December 2015 established the Referendum Council, comprising 14 prominent Indigenous and non-Indigenous citizens, most with a history of engagement on the issue of constitutional recognition. The council's remit was to consult Indigenous people, and advise the two parliamentary leaders on progress and next steps towards recognition of Indigenous Australians in the Australian Constitution.

Over the course of the council's considerations, and no doubt because of the lack of substantive progress, the Indigenous leadership reconsidered their position. In particular, Pearson was persuaded that the Expert Panel key recommendations regarding recognition and the prohibition of racial discrimination<sup>19</sup> and the 2015 Joint Select Committee's recommendations on a constitutional prohibition on racial discrimination would be strongly opposed by conservative interests, and therefore not likely to receive the requisite support in a referendum. Pearson turned his attention to establishing a dialogue with key conservatives<sup>20</sup> and developed an alternative strategy, which he took to a series of national consultations among Indigenous groups, culminating in a major meeting at Uluru, convened by the Referendum Council, involving hundreds of Indigenous leaders from around the country.

The meeting overwhelmingly backed Pearson's revised model, and the resulting 'Uluru Statement from the Heart' (2017) proposed the establishment in the Constitution of a requirement for Parliament to establish an

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<sup>19</sup> The Expert Panel recommended inter alia the repeal of the current section 51, its replacement with a new section 51A recognising Indigenous peoples and providing for a legislative head of power, and a new section 116A prohibiting racial discrimination (Dodson & Liebler 2012).

<sup>20</sup> Refer to Freeman & Morris (2017) for further information on this strategy.

Indigenous advisory body to be consulted on all laws that affect Indigenous citizens. This came to be known as the 'Indigenous Voice' proposal. In addition, the Uluru Statement proposed a non-constitutionally enshrined Makarrata Commission, akin to the truth and justice commission operating in South Africa after the end of the apartheid era. The Referendum Council's final report endorsed the Uluru Statement from the Heart (Referendum Council 2017).

On 26 October 2017, then Prime Minister Turnbull, under pressure from conservatives within his ranks, announced that the Government had decided not to proceed with a constitutional referendum on the Indigenous Voice. Pearson and the Indigenous leadership felt utterly betrayed. We know this to be the case, because shortly afterwards Pearson (2017b) penned an essay suffused with white-hot anger. Titled 'Betrayal', it documents what Pearson describes as his 'long game' approach to achieving 'ambitious Indigenous reform'. Prime Minister Morrison has, however, confirmed his predecessor's approach.

Subsequently, in March 2018, the Government proposed the establishment of a further Joint Select Committee on Constitutional Recognition, with terms of reference that required consideration of the previous reports of the Referendum Council, the Uluru Statement from the Heart, the 2015 Joint Select Committee, and the 2012 Expert Panel. Julian Leeser MP (one of Pearson's key conservative interlocutors) and Senator Patrick Dodson jointly chaired the committee. The terms of reference also required the committee to consider a range of other issues which go to consultation processes, in particular options for constitutional change 'which meet the expectations of Aboriginal and Torres Strait Islander peoples and which will secure cross party parliamentary support and the support of the Australian people'. The committee finalised its report in November 2018. We examine the report's findings and recommendations (such as they are) in chapter four. The effect of establishing this further process was effectively to defer any substantive policy focus on Indigenous constitutional recognition to a point beyond the next federal election.

All the evidence leads to the inexorable conclusion that Indigenous affairs policy in Australia is stuck in a political quagmire. The Australian Government under Prime Ministers Turnbull and Morrison has killed the prospect of a referendum on constitutional recognition in the near future.<sup>21</sup> The Government is pulling back from funding Indigenous-specific programs where it can. More fundamentally, it lacks any vision of ways Indigenous initiative and self-determination can be supported. Indeed, government support for Indigenous initiative and self-determination appears non-existent.

These setbacks, and in particular the bogged down decade-long constitutional recognition process, are the culmination of decades of non-engagement by governments with the core issues facing Indigenous Australia. Not for the first time, Indigenous expectations have been raised and then shattered, and the prospects for the nation providing Indigenous peoples with improved and more secure access to the nation's institutions have drastically receded.

## What next?

The Indigenous leadership is grappling with how to answer the question: 'What next?'

Pat Turner, the CEO of the National Aboriginal Community Controlled Health Organisation (NACCHO), publically advocates a strategy of proactive independence, arguing persuasively that governments are not going to come to the party, so it is up to Indigenous people themselves:

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<sup>21</sup> Notwithstanding earlier comments to the contrary, the Morrison Government's 2019 Budget appeared to change course and allocated \$7.3 million for 'the co-design of options for a Voice to Parliament for Aboriginal and Torres Strait Islander peoples' (Treasury 2019:154). The Labor Opposition has committed to hold a constitutional referendum in their first term, if elected. To date, neither the Government nor the Opposition has outlined a credible timeline or pathway forward.

I think that what our people and our communities have to do is just take total control of their own affairs. Don't wait for government, don't wait for them to provide the solutions. Work it out ourselves and just move on (Turner 2018).

While this sentiment reflects a deeply realist assessment of current government policy capability, its inherent limitation is that it assumes that government and the wider society are essentially anodyne, and will leave Indigenous citizens alone to pursue their own agendas.

While Pearson has not made any definitive statement to this effect, he has clearly given up on the current LNP Government in Canberra. He appears to be turning his attention to laying a pathway forward that might be implemented by a future Labor Government. In a 2017 article in *The Australian*, he lauded Paul Keating's Redfern Speech as akin to Lincoln's Gettysburg Address (described by American cultural commentator Garry Wills as 'words that made a nation') and went on to characterise Keating's speech as 'the first instalment in ours'. He praised Keating's capacity to 'imagine the future, to take his colleagues and the country forward with a story, and to organise the power necessary to make that future come to pass'. Most telling, Pearson was at pains to define what he meant by reform:

When I say reform I mean reform to systems, structures and institutions...Reform means changing the operating system itself. Paradigm shifts are involved in true reform...We need reforms that set Australia up for the future. It cannot just be about managing the present – as important as that is – but reform by definition must imagine the future for our country and our people (Pearson 2017a).

If Redfern was the first instalment, Pearson appears to see substantive constitutional recognition as the second instalment.

There are a number of ways to read Pearson's *The Australian* article. As straight analysis, laying out at a high level what is required. To remind then Prime Minister Turnbull and prime ministerial aspirant Abbott of how far they fell short of what is required, in terms they would understand. As a signal that Pearson has been forced to re-assess his long-held view that only the political right can lock in constitutional recognition (based on his oft-repeated metaphor that it was Nixon who had to go to China<sup>22</sup>). Or perhaps he sees a change of government as likely and is sending a not-so-subliminal message to the Labor 'government in waiting' about the challenge in front of them. Perhaps all of the above. There appears little doubt that advancing the 'Indigenous Voice' proposals in the short to medium term will require a change of government.

The Australian Labor Party (ALP) has committed in its 2019 Federal election policy manifesto 'A Fair go for First Nations People' to 'enshrining a Voice for First Nations' people in the constitution' and 'creating regional assemblies for First Nations' (Shorten & Dodson 2019).

One option open to Pearson and the Indigenous leadership would be to seek the legislative enactment of the Indigenous Voice before re-opening the case for its constitutional entrenchment. Alternatively, they could seek to persuade a new government of the merits of their proposal for constitutional change.

A legislation-first strategy would address one potential issue facing constitutional recognition of an Indigenous voice. The proposal was always that the detailed design would be a matter for the Parliament; however, the uncertainty around how it would operate will always be a point of vulnerability in the campaign leading up to a referendum. This suggests that there may be merit in legislating the Indigenous Voice proposal

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<sup>22</sup> See Kelly (2014). Kelly notes: Pearson believes it to be a political truism that – à la 'only Nixon could go to China' – only a conservative leader can bring true reconciliation between indigenous and non-indigenous Australians. Pearson (2017b:26) discusses this in his lacerating critique of the Turnbull Government's policy on constitutional recognition, 'Betrayal'.

first and seeking its inclusion in the Constitution later. Indeed we go further and in chapter four outline an argument for establishing the Indigenous Voice initially by executive fiat (much like the current Government has done with the Prime Minister's Indigenous Advisory Council), before moving to legislation and ultimately constitutional amendment.

There are risks with such an approach. Any institution with such an ambitious charter and remit will inevitably attract intense external scrutiny and criticism, and will face the inevitable exigencies of internal conflict (both ideological and personal), trade-offs between short-term wins and longer-term sustained effectiveness, and the challenges of developing strategic coherence. The risk is that the metric of success required to ensure subsequent constitutional entrenchment would be beyond virtually any organisation, let alone a new and untested institution. More fundamentally, the more successful such an organisation is in advancing Indigenous aspirations and interests, the more intense the countervailing opposition will be from groups who see their interests being constrained or adversely affected. The paradox facing the Indigenous Voice is likely to be that the more successful it is in doing its intended job, the less likely it is that it will be accepted across the breadth of the political spectrum.

## The challenge for mainstream Australia

Just as the Indigenous leadership is grappling with 'what next,' mainstream Australia should be asking itself the same question. It is not in the nation's overarching national interest to have a disempowered racially defined minority. Nor is ongoing substantive policy failure in the national interest.

The challenge Australia faces is that, while there is a broad consensus among the politically informed and engaged citizenry that Indigenous citizens ought to be included within our national settlement and institutions, the terms of those inclusive arrangements are unclear, patchy, shallow and in national terms ultimately ineffective. Moreover, the rise of xenophobic populism represents a threat to this informed consensus and, for the reasons outlined above, not all key interest groups will support the informed consensus.

Australia has come a long way from its settler colonial origins. The sheer numerical impact of our ethnic diversity has finally overwhelmed the overt expression of racist notions of a hierarchy of 'civilised races'. One of the two broad precedents set aside by the High Court in its 1992 *Mabo* decision was a 1919 Privy Council decision that related to Southern Rhodesia. This stated, as a general principle, 'that some peoples were so low in the scale of human organisation that their usages and conceptions of rights and duties could not be reconciled with the institutions or legal ideas of civilised society. There was it was said, a gulf which could not be bridged'.<sup>23</sup> The nation no longer reverts to such overtly racist rationales to justify its institutional choices and actions. The High Court overturned the doctrine of *terra nullius*, the second available precedent that dated from a Privy Council case in 1889.<sup>24</sup>

As a nation, Australia has moved well beyond these discriminatory and self-serving rationales for the dispossession of Indigenous peoples. All Australian jurisdictions had amended their electoral laws to give Aboriginal people the vote by the mid-1960s;<sup>25</sup> and in the 1967 Referendum, the nation's voters overwhelmingly allowed the Commonwealth to legislate in relation to Aboriginal and Torres Strait Islander peoples. Moreover, legislation was enacted to provide for limited statutory land rights in the Northern Territory and some States in the 1970s and 1980s; and legislation to recognise native title was enacted in 1993. Since 1972, budget allocations have progressively increased for Indigenous programs at both State and federal levels, albeit with the occasional setback. Over the past 50 years, there have been more than 20 ministers for Indigenous affairs

<sup>23</sup> Referenced by Wootten (1995) citing *In re Southern Rhodesia* [1919] AC 211 at 233–4.

<sup>24</sup> *Cooper v Stuart* (1889) 14 App Cas. 286 at 291.

<sup>25</sup> The Commonwealth Electoral Act was amended in 1962 to provide for Aboriginal enrolment and voting. In 1965, Queensland amended its electoral legislation to allow Aboriginal citizens to vote, the last jurisdiction in Australia to do so (Australian Electoral Commission n.d.).

at the federal level, and probably more than 100 at State and Territory levels. The majority have been well intentioned and keen to make a positive difference. There have been at least 18 ministers with Indigenous backgrounds in federal, State and Territory governments over the past 20 years.<sup>26</sup> Their bona fides in seeking to advance positive change is unquestioned.

Yet somewhat paradoxically, and for many, frustratingly, Indigenous citizens are still far from equal participants in Australian society. They are vastly over-represented in our prisons, in our welfare-recipient populations, in our health system, and our mental-health statistics. They are deeply disadvantaged across a vast array of indicators.

## The importance and constraints of political leadership

Much of the public debate around politics is tethered to the capacity and capabilities of Prime Ministers. This raises the question whether our lack of progress as a nation in settling with Indigenous citizens is at core a lack of leadership.

Certainly, political leadership is crucial in making progress on national challenges, and it is possible to track the influence and in some cases determinative influence of particular Prime Ministers in driving developments in Indigenous affairs policy through the major milestones in their terms.

Gough Whitlam's role in transforming the policy landscape from 1972 stands out in contrast to the colonial attitudes of previous incumbents, and is perhaps best exemplified by Mervyn Bishop's iconic photograph of Whitlam pouring red soil into Gurindji elder Vincent Lingiari's hands at Wattie Creek in August 1975. Malcolm Fraser was instrumental in seeing the Northern Territory Aboriginal Land Rights Act enacted later the following year, and in negotiating approval for the Ranger uranium mine with Northern Land Council chair Galarrwuy Yunupingu. Bob Hawke legislated ATSIC. Paul Keating stared down the States and the Northern Territory over the appropriate response to the High Court *Mabo* decision, and his Redfern Speech acknowledging the violence of the process of dispossession was a major milestone. John Howard refused to say sorry at the 2000 Reconciliation Convention, and his decisions to enact the Wik amendments to the *Native Title Act 1993* (NTA), to abolish ATSIC, and to initiate the Northern Territory intervention were regressive for Indigenous interests and will forever place him on the wrong side of history. Kevin Rudd's resonant and timely Apology, and his financial and policy commitment to Closing the Gap (albeit inadequate) contrast with Julia Gillard's inability to identify opportunities to move the Indigenous affairs policy agenda forward. Tony Abbott, Malcolm Turnbull and Scott Morrison appear destined to be defined by their inability to move constitutional recognition of Indigenous Australians beyond rhetoric and mere aspiration.

Such a rendition of a civic lineage<sup>27</sup> of the roles of Prime Ministers in shaping Indigenous affairs policy over the past 50 years leaves out more than it includes. Nevertheless, it reveals an essential truth: Prime Ministers do have the power to set the tone for their governments on crucial issues, and Indigenous affairs is one of those issues that define the nation's development and progress. Sometimes purely by force of personality, a Prime Minister can encourage or veto the detailed work required to develop the robust policy and institutions necessary to drive policy progress.

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<sup>26</sup> In no particular order: Ernie Bridge, Ben Wyatt in Western Australia; Jack Ah Kit, Marion Scrymgour, Elliott McAdam, Matthew Bonson, Malarndirri McCarthy, Karl Hampton, Alison Anderson, Adam Giles, Ken Vowles, Bess Price, Selena Uibo in the Northern Territory; Kyam Maher in South Australia; Linda Burney in New South Wales; Chris Bourke in the Australian Capital Territory; and Mal Brough and Ken Wyatt in the national Parliament.

<sup>27</sup> This term is borrowed from Macintyre (1992:15) who used it to quote at some length Gough Whitlam's colourful assessment in 1971 that the fates of our 'chief men and our chief efforts [since colonisation] have been singularly associated with failure and frustration...'.

Yet this reality camouflages the deeper constraints that all Prime Ministers face: the demands of maintaining unity across their party, the pressures of broader community acceptance and understanding, the influence of commercial and other interests in shaping the parameters of 'acceptable' policy (that is, the extant political settlement), the exigencies of electoral and political conflict, and the demands of executive government. Notwithstanding the widely shared predisposition to see Prime Ministers as unconstrained, deeper forces are at play in constructing Indigenous policy settings that Prime Ministers can shape but not definitively determine or necessarily control. The parameters within which Prime Ministers and their Cabinets can operate are constrained. They may have greater degrees of freedom at critical junctures when external events upset the internal balance of the extant political settlement. This was most recently the case with Paul Keating and the High Court's *Mabo* decision. Ultimately, to understand the Indigenous policy domain, we must look beyond day-to-day politics, and the actions and capacities of particular Prime Ministers or ministers and seek to understand and map the underlying structural and institutional forces that shape and determine Indigenous policy outcomes.

## Justifications for doing nothing

Despite the incremental and substantial progress in Indigenous affairs over the past 50 years, it is clear that the nation's institutions are not delivering outcomes consistent with the nation's self-image as the land of the 'fair go'. As we will seek to show in the subsequent chapters, Indigenous citizens and interests are structurally excluded from equal participation in the nation's social and economic life. Moreover, the impacts of that exclusion are distributed unequally among the Indigenous population. Disappointingly, the nation ignores much of that structural inequality and discrimination, not least because it is in many respects structurally invisible and opaque.

One of our motivations in analysing the Indigenous policy space is to lay out for mainstream Australia the case for addressing the structural inequities that underpin the deep disadvantage of many Indigenous peoples. We come from a starting point that Indigenous affairs is at its core about the place of Indigenous peoples within the nation.

For too long, Australia has adopted a form of wilful ignorance, what Stanner (1969) referred to as a 'cult of forgetfulness'.<sup>28</sup> The implicit assumptions have been that Indigenous disadvantage is primarily the responsibility of Indigenous people, and that it is neither caused by mainstream Australians nor is it their responsibility to address. Nor has mainstream Australia been able to grasp that the First Peoples of this continent have, and will always seek to maintain, a separate and unique cultural identity, irrespective of the devastating and continuing impacts of colonisation and assimilation or for that matter the passage of time itself. Formal recognition of Australia's First Nations' unique heritage and quite separate and distinct cultural identity necessarily lies at the core of any enduring settlement from which the nation can move forward.

Of course, mainstream Australia (which encompasses the dominant coalition of interest groups, but extends to all non-Indigenous citizens) develops elaborate justifications for doing nothing, or at least doing nothing substantive. It assumes or claims that Indigenous self-determination means that non-Indigenous Australians should not have or express views on issues relating to Indigenous issues. Or it implicitly assumes that the existence of successful Indigenous people proves that the rest have not tried hard enough. Or mainstream Australia suspects that welfare recipients are lazy and don't deserve assistance. The rationalisations are

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<sup>28</sup> Stanner's quote (1969:29) is worth setting out at greater length: '...inattention on such a scale cannot possibly be explained by absent-mindedness. It is a structural matter, a view from a window which has been carefully placed to exclude a whole quadrant of the landscape. What may well have begun as a simple forgetting of other possible views turned under habit and over time into something like a cult of forgetfulness practiced on a national scale. We have been able for so long to disremember the aborigines that we are now hard put to keep them in mind even when we most want to do so.'

endless. One particular rationalisation comes easily to many in mainstream Australia: the issue is diabolically complex, and best left to the 'experts' or more often to 'Indigenous people'.

The challenges and realities of cross-cultural differences and hybrid intercultural ways of seeing, communicating and living, do not mean that non-Indigenous Australians should patronise Indigenous people and hold back from making judgments about their actions and strategies. Indigenous peoples rights to self-determination, or to put it more plainly, to live their lives on their own terms, does not mean that they should be immune from constructive feedback, engaged dialogue, and if necessary respectful criticism, just as the non-Indigenous citizen's right to live her own life on her own terms does not place her above external scrutiny.

Unless mainstream Australians see the impact of mainstream institutions on Indigenous affairs as their responsibility, they vacate the field to the complex interplay between weakly organised Indigenous interests and more powerful and influential interest groups that pursue limited and self-interested objectives in ways that are fundamentally opaque and cumulatively hold Indigenous interests at bay.

One of our key arguments is that addressing Indigenous structural exclusion is not only an issue of social justice; it is also an issue central to advancing the national interest. Australia will be a safer and more secure society if it minimises gross distortions in living standards, if it maximises the inclusiveness of its institutions, and if it thereby strengthens its capability to advance the economic and social aspirations of all citizens. We will now take these arguments up in detail in the following chapters.

## 2. Lessons from ATSIC

*The scale and moral urgency of the Indigenous predicament so far exceeds the power of Indigenous participation in the country's democratic process.* Noel Pearson (2014:38–9)

### Introduction

Over the past two years, the most discussed issue in Indigenous affairs has been the proposal in the Uluru Statement from the Heart for a constitutionally enshrined Indigenous Voice to Parliament (Referendum Council 2017). This is at once both simple – as an idea, and complex – as a potentially fraught mechanism to design, implement, and make effective.

Whether or not the Indigenous Voice is designed and legislated first, and constitutionally entrenched second, or vice versa, its successful implementation will depend in large measure on the effectiveness of the Indigenous Voice in representing Indigenous interests and in articulating Indigenous views persuasively to the Parliament. The design and structure of the Indigenous Voice will be a crucial element in determining its effectiveness and thus its success or failure.

These issues might usefully be informed by an examination of the development, operations and demise of ATSIC, a previous legislated 'national Indigenous voice', albeit one situated in the executive arm of government rather than the parliamentary domain.

### The origins and development of ATSIC

In large measure ATSIC derived from the perceived need across the breadth of government to have ready access to interlocutors within the Indigenous domain. One or more peak bodies represent most significant interest groups in society. These are supplemented by a plethora of organisations and civil society forums. The establishment of an Indigenous affairs portfolio within the Australian Government following the 1967 Referendum and the election of the Whitlam Government in 1972 highlighted the absence of any such framework representing Indigenous interests.<sup>29</sup>

The Whitlam Government established first the National Aboriginal Consultative Committee (NACC) in 1973. Then, following structural problems that emerged and a critical review by anthropologist Les Hiatt, the Fraser Liberal National Government established a new elected body in 1977, the National Aboriginal Conference (NAC), to replace it. The NAC too failed to meet government expectations, and was the subject of a review by Dr H.C. Coombs that reported in 1984. The Coombs Review (1984) was critical of the NAC on a number of fronts; in particular, for being out of touch with Indigenous communities and organisations. The Hawke Government abolished the NAC in 1985 and engaged Lois (Lowitja) O'Donoghue (1986) to consult about a new organisation.<sup>30</sup>

Both the NACC and NAC were established administratively (that is, by executive fiat without a statutory basis) and were designed as consultative forums without formal decision-making powers over funding or policy. Thus they had limited influence within government. The Indigenous leadership were frustrated by the existence of the

<sup>29</sup> We note that one of the Indigenous criticisms of ATSIC was that it treated Indigenous peoples as a mere interest group like any other, rather than acknowledging the unique status of First Nations peoples. For example, see Mick Dodson (1997:34) who commented that Indigenous people were seen as little more than another interest group to be consulted rather than as separate nations or peoples. See also Bradfield (2006:88).

<sup>30</sup> The history of these events is only briefly outlined here. Further details are available in Hiatt (1976); Senate Standing Committee on Constitutional and Legal Affairs (1983:ch.8); Coombs (1984); O'Donoghue (1986); Read (1990:273–91); and Rowse (2000:107–130). Senate Standing Committee on Constitutional and Legal Affairs (1983:ch.8), Rowse (2000:107–30), Read (1990:273–91), Hiatt (1976), Coombs (1984) and O'Donoghue (1986).

Department of Aboriginal Affairs (DAA); many argued that Indigenous interests should administer the then Aboriginal affairs portfolio through a statutory commission.

In July 1987, Prime Minister Hawke reshuffled his ministry, replacing Clyde Holding with Gerry Hand as Minister for Aboriginal Affairs. Hand, a left faction powerbroker, came to the portfolio with deep links to a range of Indigenous organisations, in particular the Northern Territory land councils that had been deeply suspicious of Holding.

In 1985 Holding had proposed a national land rights model that would have addressed the absence of comprehensive land rights in States such as Western Australia and Queensland. The model was based on principles that would have watered down some elements of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (ALRA) – in particular, the right to veto mining on Aboriginal land, an issue that went to the core of the land councils' political power. Holding's model was criticised from both the left and the right. In the event, Holding's national land rights model was jettisoned at the instigation of the Burke Labor Government in Western Australia, itself heavily influenced by mining interests intent on minimising Aboriginal rights to control mining on their traditional lands. Holding had established a close relationship with Charles Perkins who had been appointed as Secretary of the DAA. Originally from Alice Springs, Perkins had graduated from Sydney University and his power base spanned both remote and urban Aboriginal interests, which meant he reflected a broad national Indigenous constituency and maintained a network of allies and supporters that vied for influence with the more organised and singularly-focused land councils.

In unveiling his new Ministry, Hawke also announced that the Government intended to establish a new commission to replace the DAA, which was perceived as bureaucratic and paternalistic by many if not most Indigenous people. Hand then set about establishing the new commission, setting up a small taskforce to develop it led by senior DAA official Bill Gray.<sup>31</sup> On 10 December 1987, Minister Hand issued a blueprint, *Foundations for the Future*, which laid out the proposed framework for the new commission. During the first quarter of 1988, Hand personally led a monumental national consultation on his proposals, visiting scores of communities on a 40-day circuit of the nation.<sup>32</sup> Minister Hand introduced the legislation to establish the commission in April 1988 and, following a Senate Select Committee report that raised a range of largely technical concerns, the Bill was substantially revised. Finally, after the then longest debate in Senate history, the ATSIC legislation passed in November 1989 and ATSIC came into existence on 5 March 1990.

In developing the more radical and innovative ATSIC proposal, Hand overcame substantial internal opposition within the Government, perhaps driven by factional conflict and a sensitivity among some Cabinet members to the potential reaction of important interests such as the mining and pastoral industries.<sup>33</sup> Initially, Indigenous interests did not universally welcome the ATSIC proposal. In particular, prominent members of the Aboriginal Development Commission (ADC) were opposed, perhaps because they expected the remit of the ministerially-appointed members of the ADC to expand to meet Prime Minister Hawke's announcement. The establishment of the entirely new and more democratic ATSIC model subsumed the ADC.

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<sup>31</sup> In a submission to the later review of ATSIC, Gray noted that the taskforce had sought to build on previous policy experience: 'In a sense, the Taskforce divined the structure and functions of ATSIC from an examination of the previous history of the administration of Aboriginal Affairs, including the experiences of the NACC and NAC. It also gave close consideration to the publicly enunciated aspirations of representatives of the Indigenous community as to how the concept of self-determination should find expression with the administration of Aboriginal Affairs on a national basis' (Gray 2003:4).

<sup>32</sup> Foley (1999) offers a critical description of these consultations as part of a broader critique of ATSIC.

<sup>33</sup> This observation, based on the personal experience of the authors, suggests that the analyses of Indigenous commentators such as Foley (1999) and Coe (1994) require careful consideration. They argue that ATSIC's structure meant the government effectively controlled it, whereas senior government members were concerned that ATSIC would be too independent; see Behrendt (2005) for a more balanced assessment.

The Opposition, led by John Howard, vehemently opposed the ATSIC legislation, arguing that it would effectively amount to an Indigenous parliament, and thus detract from the overarching sovereignty of our national parliamentary institutions. In particular, Howard argued that:

...if the Government wants to divide Australians against Australians, if it wants to create a black nation within the Australian nation, it should go ahead with its Aboriginal and Torres Strait Islander Commission ...The ATSIC legislation strikes at the heart of the unity of the Australian people. In the name of righting the wrongs done against Aboriginal people, the legislation adopts the misguided notion of believing that if one creates a parliament within the Australian community for Aboriginal people, one will solve and meet all of those problems (Howard 1989, cited by Pratt & Bennett 2004).

These arguments are eerily similar to those mounted by the Turnbull Government in justifying the rejection of the Uluru Statement's proposed Indigenous Voice, a rejection subsequently reaffirmed by Prime Minister Morrison.

While the subsequent operation of ATSIC appears to refute this line of argument since no 'black nation within the nation' emerged, ATSIC's unique and innovative structure made the prospect of a separate 'black nation' an attractive line of attack for those who sought to maintain the status quo. Moreover, the argument resonated because ATSIC was explicitly designed to have both executive and representative functions in an attempt to provide Indigenous interests with a voice inside government that had legitimacy and could not be overlooked on the grounds that it did not represent Indigenous citizens.

As initially established, ATSIC's representative structure was based on 60 Regional Councils, comprised of elected members (see Smith 1996:23; Sanders 2004a). The Australian Electoral Commission ran elections, and voting was non-compulsory and open to all adult Indigenous people. The legislation utilised a three-pronged definition that required descent, identification as Indigenous, and acceptance by the Indigenous community.<sup>34</sup> The members of each Regional Council elected a chair and deputy. Regional Councils were arranged into 17 zones and council members in each zone elected a Commissioner to represent the Indigenous citizens in the zone. As Sanders (2004a) reports, in 1993, after an internal review, ATSIC's regional structure was streamlined, with the numbers of Regional Councils reduced to 36, and the innovative cross-jurisdictional zone arrangements rationalised.<sup>35</sup> The government initially appointed the ATSIC Chairperson and two other Commissioners, although this provision was later removed at the instigation of Minister Robert Tickner to allow the elected Commissioners to choose their own national chair.<sup>36</sup>

Structurally, ATSIC's representative functions were built from the regions up,<sup>37</sup> and provided a mechanism whereby the heterogeneity of Indigenous circumstances and aspirations would be incorporated and Indigenous voices from across the nation transmitted to the Commission for policy consideration and adoption if agreed. Implicit in the representative nature of ATSIC's structure was an expectation that ATSIC would advocate to advance Indigenous interests, not just publicly, but within government. In retrospect, the ATSIC structure gave

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<sup>34</sup> This contrasts with the more recent attempt by the Australian Government to utilise a single criterion based on membership of the Aboriginal race or descent from an Indigenous inhabitant of the Torres Strait in a Bill establishing a new Indigenous Commissioner in the Productivity Commission; see e.g. Thorpe (2018 b). In the event, to secure its passage, the Government backtracked and removed the definition from the Bill.

<sup>35</sup> Sanders notes: 'While they existed, these cross-jurisdictional arrangements made ATSIC a particularly bold experiment in Australian political regionalism. However all except one of these cross-jurisdictional arrangements...disappeared in 1993. At that point ATSIC in a sense became a considerably more conservative experiment in Australian political regionalism, reflecting government administrative priorities and wishes more than the preferences of Aboriginal people' (Sanders 2004a:57).

<sup>36</sup> In *Taking a Stand: Land Rights to Reconciliation*, his account of his term as Minister for Aboriginal and Torres Strait Islander Affairs, Robert Tickner (2001:61) notes that the Howard Government legislated in 1996 to delay the implementation of this change until after the 1999 Regional Council elections which allowed them to appoint Gatjil Djerrkura as ATSIC Chairperson from 1996.

<sup>37</sup> One of the major changes to emerge from Minister Hand's national consultations was a shift from constituting the Regional Councils from members of Indigenous organisations in each region to directly electing members. This resulted in reliance on voluntary voting – and low voter turnouts were later used by critics on both the left and the right as evidence that ATSIC was not truly representative (Foley 1999; Howson 2004).

comparatively greater emphasis to remote populations when compared to the demographic profile of the Indigenous community nationally. The ATSIC structure was focused on representation of different (geographically-based) groups, rather than a proportionate representation of the Indigenous population overall.<sup>38</sup> At the time ATSIC was established, very little demographic research was available analysing the composition of the national Indigenous population. The tension between group representation and numerical weight will inevitably arise in the design of any Indigenous Voice, especially if it seeks to include a regional structure.

The opportunity to operate within the institutional framework of government emanated from ATSIC's executive functions, which in essence were similar to those of a department of state. The Minister (then named the Minister for Aboriginal and Torres Strait Islander Affairs) had significant influence both formal and informal over the Commission's activities.<sup>39</sup> In particular, the Minister approved the Commission's estimates of expenditure each year, had the capacity to issue general directions to the Commission, was the conduit for all Cabinet submissions from the portfolio, and was consulted on the appointment of the ATSIC Chief Executive Officer (CEO). More informally, the ATSIC structure required the Minister and the ATSIC Chairperson and CEO to work together if it was to be effective. So ATSIC and in particular its staff (who were public servants) provided advice to the Minister, and had access to the Cabinet process, both in lodging submissions and in commenting on the submissions of other ministers and portfolios. ATSIC was also subject to the accountability processes that applied to other departments, attended Senate Estimates hearings and other parliamentary committees, and so on. There was clearly a potential for tension and conflicted loyalties and accountabilities, especially for the CEO who was required both to serve the Commission and to provide objective and high-quality advice to the Minister.<sup>40</sup> On the other hand, there was also a huge opportunity for Indigenous interests to contribute to public policymaking from a vantage point within government while representing a particular segment of the community.

There are two comments to make about ATSIC's innovative structure, one practical and the other theoretical. In theoretical terms (and arguably the structural reason for ATSIC's eventual downfall), the tension established within a single government agency between the more general public interest and a particular sectoral interest appears undesirable and inappropriate. In defence of the ATSIC arrangements, it might be argued that it is not uncommon for sectoral interests to 'capture' the arms of government whose role is ostensibly to regulate a sector. This proposition is supported both by a substantial academic literature and by contemporary experience. Examples include the National Party's insistence on taking the Agriculture portfolio (and other regional-related portfolios) when in government, or the determined reluctance of the Liberal Party to establish a royal commission into the banks (only overturned after the National Party stepped in), or the ALP's protective approach to the regulation of the unions. The ATSIC arrangements might therefore be seen as an attempt to 'jump-start' greater Indigenous influence within government via a more overt form of the regulatory capture that more powerful organised interests achieve informally via their lobbying, advocacy and close connections to the major political parties.

With the benefit of hindsight, such an effort by the architects of ATSIC appears misguided. ATSIC, as the intended primary source of advice to government on Indigenous affairs, at times needed to be able to take a broader view than would be expected of an advocate for Indigenous interests (notwithstanding the extreme powerlessness of the Indigenous voice within government). Yet its structure virtually ensured this could not be the case. The subsequent establishment of an Office of Indigenous Affairs within the Department of the Prime

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<sup>38</sup> The rise in the Indigenous population of southeastern Australia has potentially sharpened this potential tension. The 2011 and 2016 Census outcomes confirm a significant shift towards residence in urban and regional Australia within the Indigenous population (Biddle 2012; Markham & Biddle 2018a).

<sup>39</sup> See Howson (2004) for a contrary view.

<sup>40</sup> Following the *Mabo* High Court decision in 1992, the Keating Government significantly upgraded the capacity of the Department of the Prime Minister and Cabinet to provide advice on Indigenous issues, establishing an Office of Indigenous Affairs. This was clearly in recognition of the need to ensure government retained a source of independent advice on Indigenous issues in addition to the advice provided by ATSIC.

Minister and Cabinet went some way to addressing this structural problem, but the widespread perception within government policy circles that ATSIC was an agency incapable of serving the wider public interest continued.<sup>41</sup>

The more practical observation, however, is that ATSIC was just one of more than 20 portfolios, and sat at the bottom of the order of precedence. The potential for exercising influence depended crucially on the skills, capabilities and inclinations of both ATSIC's Minister and the ATSIC CEO. This potential was inevitably circumscribed by the structural reality that competition among interest groups frames policy issues and determines policy outcomes; in terms of mainstream issues, other interest groups were deeply entrenched in the Australian political system. Notwithstanding the real, but diffuse, impact of mainstream policies on Indigenous interests, the ATSIC structure gave much greater scope for exercising influence in relation to Indigenous-specific issues where mainstream interest group competitors were comparatively weak or non-existent.

Moreover, elected members of the Commission were largely uninterested in seeking to exercise influence over mainstream policy at either national or State and Territory levels – perhaps as a pragmatic response to the inherent challenges of such a contested policy area.<sup>42</sup> Instead, much of their considerable energy was spent on internal politicking around the distribution of what was in fact a limited pool of Indigenous-specific funding. Despite the potential and opportunity the ATSIC structure provided to influence mainstream policy, in practical terms Indigenous interests had strong incentives to focus on Indigenous-specific issues. Over time the expectation among Indigenous people that they would have a predominant role in decision-making on Indigenous-specific issues strengthened. Once ATSIC was eventually dismantled, the discontent and disenchantment have been both palpable and enduring.

The pre-existing funding responsibilities of the former DAA were taken over by ATSIC, as well as some of the programs of the former ADC. Early on (1994) responsibility for Indigenous health shifted to the Department of Health. ATSIC saw itself as a 'supplementary' funder in most cases, supplementing the provision of mainstream programs across the nation. Yet it also sought to take over Indigenous-specific funding programs in mainstream agencies. This was arguably wrong-headed insofar as it undermined the policy position that ATSIC was a supplementary funder, and allowed mainstream agencies to walk away from their responsibilities to the needs of Indigenous citizens.

In remote regions where mainstream programs were largely non-existent, ATSIC became the primary funder. This inevitably led to increasing structural tension – largely over funding – between remote and urban/regional interests within the Commission, tensions that have become sharper in recent years notwithstanding ATSIC's disappearance. ATSIC's major programs included employment programs (in particular the popular Community Development Employment Projects [CDEP] program), housing and infrastructure programs, law and justice programs funding Indigenous legal services, and a suite of minor programs such as Indigenous broadcasting, cultural heritage, and the like. Total funding hovered just above \$1 billion per annum, an amount substantially overshadowed by the quantum of government funds allocated to Indigenous-related mainstream functions.

The ATSIC tendency to privilege Indigenous-specific concerns and resource allocations over mainstream issues will also be a challenge for the Indigenous Voice. In the 30 years since ATSIC was established mainstream policies and programs have an even greater impact on Indigenous lives. It would be a serious mistake if the Indigenous Voice were designed to overlook or ignore mainstream policies affecting First Nations citizens.

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<sup>41</sup> See Sanders (2004b) for an argument supporting ATSIC's prioritisation of its role as an independent national Indigenous voice.

<sup>42</sup> There were a number of exceptions to this assessment. ATSIC was successful in persuading COAG to endorse the National Commitment to Improved Service Delivery to Aboriginal and Torres Strait Islander People; and contributed influential responses to a number of important inquiries and reports such as the Royal Commission into Aboriginal Deaths in Custody, the National Aboriginal Health Strategy, and the *Bringing Them Home* Report (Behrendt 2005). See also Sanders (2004b:18) who recounts ATSIC's efforts to work with the States and Territories.

## Regional Councils – undermined intentions and unrealised potential

Perhaps the key innovation in the ATSIC structure was the establishment of the Regional Councils. ATSIC's architects originally intended that these would have the flexibility to allocate all Commonwealth Indigenous-related funding in their regions, thus ensuring that Indigenous priorities would be paramount. From the start however, this aspiration foundered. The federal budget management system required that funds appropriated for particular programs be allocated for those purposes. To facilitate this, it was decided there would be a series of 'national programs' (comprising the bulk of available funding) that the Commission would allocate region-by-region. Regional Councils would then determine the recipients of national programs within their regions, but had virtually no ability to change the quantum or purpose of the funding. Regional Councils did have access to relatively small amounts of regional funding, but too little to give them real capacity to determine overall priorities on the ground.

These arrangements effectively undermined the influence of Regional Councils in relation to funding priorities, and laid the foundations for the structural tension that would emerge from time to time between regional interests and the national Commission. As Larissa Behrendt (2005) notes, Regional Councils were, however, much more successful in representing Indigenous interests within their regions in a wide range of forums, including with state and territory governments, sectoral interests, and other Australian Government agencies, albeit in most cases in a reactive and responsive rather than proactive mode. There were, however, indications that more proactive strategic engagement could emerge as Regional Councils gained experience. For example, the Murdi Paaki Regional Council (MPRC) actively sought to leverage its role as a regional representative for Indigenous interests in western New South Wales by forming an alliance with local shires to lobby governments for a better deal for the State's west. MPRC also commissioned (via the ATSIC State office) research on potential alternative banking services (Westbury 2000) and, in a forerunner of recent moves by Indigenous groups to take control of their data, MPRC and the zone Commissioner, Steve Gordon, initiated demographic research on existing and projected population growth as a basis for future planning (Ross & Taylor 2000). Above all, Regional Councils provided an acknowledged and democratically legitimised voice for local and regional Indigenous interests, an institutional structure that had never existed previously on a nation-wide basis.

In addition, ATSIC had a range of more policy-related responsibilities. Notwithstanding the absence of an explicit State/Territory interface in the legislation (Behrendt 2005:3), ATSIC took seriously its statutory function to engage with States and Territories to encourage them to lift their game in the delivery of services.<sup>43</sup> In 1992 it was a key driver of an early Council of Australian Governments (COAG) agreement on driving effective Indigenous service delivery.<sup>44</sup>

ATSIC also played an important role in land rights policy, particularly in relation to the administration of Commonwealth legislation such as ALRA in the Northern Territory, and Aboriginal heritage protection legislation. Perhaps most saliently, ATSIC played an important role in the negotiations leading up to the passage of the NTA. ATSIC's Chairperson, Dr Lowitja O'Donoghue, was a key member of the Indigenous negotiating team.<sup>45</sup>

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<sup>43</sup> As mentioned above, ATSIC's structure of regions and zones was placed entirely within (and not across) State and Territory boundaries, thus creating an implicit structural incentive for Regional Council chairs and Commissioners to engage with a particular State or Territory government. This design feature was not part of the original ATSIC design, which was based on cultural blocs rather than what were seen as artificial State boundaries; see Sanders (2004a, 2004b) for a more detailed discussion.

<sup>44</sup> The *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders* was endorsed by COAG in Perth on 7 December 1992.

<sup>45</sup> Coe (1994) argues this was a fundamental conflict of interest given that O'Donoghue was a government appointee, and ATSIC was part of the executive arm of government.

## The success of the Torres Strait Regional Authority

The establishment of ATSIC also saw the creation of two portfolio bodies that deserve some attention. The Torres Strait Regional Authority (TSRA) was established in 1994 and has survived to this day. The TSRA was based on the original Torres Strait Regional Council, which from the start was constituted differently to other Regional Councils, as it was based primarily on the membership of the pre-existing Island Coordination Council. Following a review in 1993, the TSRA was established to respond to calls for greater autonomy from Torres Strait Islanders. Following its establishment, the TSRA was allocated appropriations in its own right and exercised ATSIC-like functions that meant it had a role in both representing Torres Strait Islanders resident in the Torres Strait and in service provision for programs administered by ATSIC.<sup>46</sup> The TSRA has been largely immune from the ideological and political battles that undermined ATSIC, and demonstrates in microcosm the unfulfilled potential of the ATSIC model.

## The continued legacy of the Commercial Development Corporation

The other portfolio body was the Aboriginal and Torres Strait Islander Commercial Development Corporation (CDC), established in 1990 and renamed Indigenous Business Australia (IBA) in 2005 following the abolition of ATSIC. The CDC was established to engage directly in commercial activities on behalf of Indigenous interests with the aim of both providing a friendly joint-venture partner for less experienced Indigenous businesses, and developing an Indigenous presence in mainstream business networks, particularly in regional Australia. It was initially envisaged as operating off the budget balance sheet, and was allocated some \$60 million in start-up capital. IBA's current asset base is valued at \$1.3 billion, and it invests in a wide range of commercial ventures.<sup>47</sup> The CDC/IBA is important as it established a critical mass of expertise and capital to prise open commercial opportunities for Indigenous interests in locations and sectors where there had been extreme reluctance to finance Indigenous businesses and entrepreneurs. In effect, it laid the groundwork and policy foundation for the more recent government focus on commercial development in the Indigenous sector.

## Indigenous push for reform

By 1998, after some eight years' experience, the natural evolution of ATSIC meant that a consensus was emerging within the Commission that a number of issues needed to be addressed either through changes to the ATSIC legislation or through administrative reforms. These potential reforms had been largely identified by Indigenous interests over a number of years (see Palmer 2004), and reflected widespread calls for the establishment of Indigenous regional authorities. ATSIC's own 1998 internal review and subsequent submission to then Minister John Herron concluded that 'one of the strongest messages to come from consultative meetings and submissions has been the desire of Aboriginal and Torres Strait Islander people to see more power devolved from the centre to the local and regional levels' (ATSIC 1998). These widely shared views included:

- proposals for much greater financial devolution to ATSIC's regional structures with a view to improving coordination of program and service delivery at a more local level
- calls to strengthen the powers and functions of Regional Councils and move towards the establishment of regional authorities

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<sup>46</sup> See Macdonald (2007:43–54) for a more comprehensive account of the history and role of the TSRA. There was also a Torres Strait Islander Advisory Board established within the ATSIC structure to represent the interests of the considerable number of Torres Strait Islanders living in mainland Australia. This has not survived the abolition of ATSIC.

<sup>47</sup> See the IBA Annual Report 2016–17 (IBA 2017). IBA also delivers a number of programs for government: an Indigenous home loan program and a business advisory service. The use of IBA to deliver government programs is arguably retrograde as it undermines the commercial nature of IBA's mandate and weakens Indigenous control since government programs operate within ministerially determined parameters.

- a push for ATSIC to rid itself of its centralist approach, devolve decision making, and strengthen its field presence.

These views recognised that there was a growing mismatch between the Commission's structure and its strategy, and that the organisational structure was failing to keep pace with new service delivery and policy challenges.

In August 1998 Minister Herron sought advice that emerged as an internal ATSIC reform discussion paper.<sup>48</sup> The discussion paper argued that since ATSIC's establishment in 1990, policy results and outcomes had been mixed at best. The listed outcomes in the discussion paper mirror those that would be identified today: high rates of Indigenous incarceration; overcrowding and underinvestment in Indigenous housing; low life expectancy; lack of job skills and high unemployment (particularly in remote regions); and extremely poor school retention rates.<sup>49</sup>

The paper also identified an underlying demographic trend that would see the comparative socioeconomic status of Indigenous Australians worsen, primarily because of population growth, but also because of the enormous difficulties of economic catch up in a rapidly changing and globalising world economy. The anticipated trend and its outcomes have proven to be substantively correct, evidenced by the failure of governments to close the gap. However, the 1998 paper did not anticipate the increased levels of Indigenous identification emerging in recent censuses; this has moderated to some extent the projected fall in socioeconomic status while exacerbating levels of income inequality within the Indigenous population (Markham & Biddle 2018b).

The paper went on to advance a comprehensive agenda to strengthen ATSIC. The major reform proposed was to move from 35 Regional Councils to 17 regional authorities across Australia, based on the existing zones used to elect Commissioners. The chair of each regional authority would automatically sit on the national Commission. The regional authorities would have greater financial autonomy, and their role in the planning, coordination and delivery of services would be formalised, including a capacity to enter into service delivery agreements with the three levels of government, other NGOs and private suppliers. Oversight arrangements would be established to monitor regional authority performance against relevant policy requirements.

Unfortunately, the ATSIC reform proposals did not progress, as Minister Herron was unable to persuade Prime Minister Howard to support them. Prime Minister Howard had long been antagonistic to ATSIC.<sup>50</sup>

## The demise of ATSIC

The demise of ATSIC can be traced to the fundamental political conflicts that emerged almost immediately it was proposed. These differences, which were in large measure ideological, were in evidence during the protracted parliamentary debate that saw it established, and came to the fore again immediately the Howard-led Coalition Government took office in 1996.

The first Cabinet meeting of the incoming Government was devoted to a consideration of the options for dismantling ATSIC. A Special Auditor was appointed to examine the financial documentation of the 1200 or so organisations that were recipients of ATSIC program funding, aimed at determining whether the organisations were 'fit and proper' recipients of public moneys. The audit found that some 95% of funded organisations were compliant, while most of the breaches of the remaining 5% were technical in nature (Ivanitz & McPhail 2003).

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<sup>48</sup> Unpublished paper held by the authors.

<sup>49</sup> The fact that these issues continue to have salience 13 years after ATSIC's demise provides further evidence that policy failure in Indigenous affairs was not a function of the existence of ATSIC, but has deeper causes.

<sup>50</sup> Indeed the Howard Government came to office in 1996 determined to rein in ATSIC. Eventually, Prime Minister Howard came to a *modus vivendi* with ATSIC, even co-hosting annual cricket matches at Manuka Oval with the ATSIC Chairperson.

The Minister's appointment of the Special Auditor was later determined by the Federal Court to be beyond his powers. Noting statistics showing widespread occurrence of fraud in the Australian private sector, Ivanitz and McPhail (2003) conclude: 'Given these findings, it is clear that the Coalition assertions regarding a sweeping lack of financial accountability were unfounded.'

In its 1998 Budget documentation titled *Addressing Priorities in Indigenous Affairs*, the Government was indicating its intention to drive further changes. The following year the Minister introduced a Bill to give the Commonwealth Grants Commission a role in assessing and allocating ATSIC funding based on comparative needs rather than at the discretion of the Commission (Ivanitz & McPhail 2003). The Bill lapsed.

The Government subsequently initiated a review by the Commonwealth Grants Commission in 1999 designed to increase pressure on the Commission to allocate funding according to need. The *Report on Indigenous Funding 2001* found that mainstream services were largely the responsibility of the States, were being utilised by Indigenous citizens at much lower rates than non-Indigenous citizens, and that barriers to accessing government services were widespread. The Grants Commission noted that need was not the primary driver of existing funding distribution and pointed to the particular challenges facing remote residents. The report concluded:

It is clear from all available evidence that mainstream services do not meet the needs of Indigenous people to the same extent as they meet the needs of non-Indigenous people.<sup>51</sup>

Notwithstanding this finding, the then Government continued on its path to limit ATSIC's role and functions. In November 2002, the Government appointed a review panel to examine the role and functions of ATSIC and in particular how Aboriginal and Torres Strait Islander people might best be represented in the development of Commonwealth policies and programs to assist them.<sup>52</sup>

The review panel issued an interim discussion paper in June 2003 and a final report in November 2003 titled *In the Hands of the Regions: A New ATSIC* (Hannaford et al. 2003). The discussion paper identified a number of principles that should underpin future reforms to ATSIC. These included that ATSIC should be the peak advocate for the development of Indigenous communities; that Regional Councils' role in policy development and coordination should be enhanced; and that ATSIC's role in monitoring and evaluating the performance of mainstream agencies should be strengthened (Pratt 2003). The final review report called for urgent structural change – in particular, an overhaul of ATSIC's representative structure to end a perceived disengagement between local Indigenous communities and the national board, stronger regional planning processes, and greater delineation of the respective roles of elected representatives and the Commission's administrative arm. In short, the review panel recommended reform around strengthening ATSIC's regional structures, not its abolition.

Despite the recommendations of the Hannaford review, ATSIC did not survive. Among the triggers of ATSIC's demise were the election of Geoff Clark as Chairperson in December 1999 joined by Ray Robinson as Deputy Chairperson, and their subsequent re-election in 2002, notwithstanding a range of legal issues being raised in relation to both of them. Allegations emerged of personal conflicts of interest and inappropriate personal use of ATSIC funds. Clark also faced serious criminal and civil allegations relating to his alleged involvement in sexual misconduct as a young man. These allegations ultimately led to civil litigation and the award of damages against him. The Government was concerned that the leadership of a major statutory agency was seriously compromised, and found itself unable to take remedial action within the terms of the legislation, since removal of

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<sup>51</sup> Commonwealth Grants Commission *Report on Indigenous Funding 2001*, ch.4, cited in Pratt and Bennett (2004).

<sup>52</sup> The panel comprised former NSW Liberal Minister John Hannaford as chair, Indigenous academic Jackie Huggins and former federal Labor Minister Bob Collins.

Clark for misbehaviour would see him replaced by Robinson who had a similarly problematic personal history.<sup>53</sup> In April 2003, Minister Ruddock foreshadowed reallocating ATSIC's \$1.2 billion budget, and in July issued a 'show cause' letter to Clark foreshadowing his removal from office. The Minister subsequently suspended him in August 2003.

## **The Labor Opposition opens the door for ATSIC's abolition**

In the end, the then Labor Opposition leader, Mark Latham, provided an opportunity for the Government to move when he suddenly announced in March 2004 that, if successful at the next election, Labor would abolish ATSIC and replace it with a new structure more focused on regional aspirations (Latham & O'Brien 2004). It seems clear that the ALP announcement was designed as a diversionary manoeuvre to distract attention from a concurrent and damaging Government attack on Latham's credibility over a policy announcement on troop withdrawals from Iraq, and associated allegations that Latham had misled Parliament over briefings from intelligence agencies (Duffy 2004:371–375). This turn of events provides further evidence of the comparative weakness of Indigenous interests and the vulnerability of Indigenous-related policy initiatives once wider political issues are in play.

The Howard Government took Labor's announcement as a green light to move against the Commission; it quickly announced its intention to abolish ATSIC, including its Regional Councils, despite attempts by then Minister Vanstone to retain these. There followed a multi-stage process of stripping ATSIC's budgetary appropriations and placing them with a new administrative agency under ministerial control, Aboriginal and Torres Strait Islander Services (ATSIS), followed by the abolition of the Commission first, and the Regional Councils later. By mid-2005, ATSIC had been entirely dismantled; from 2004–05 its former programs had already been dispersed from ATSIS to a number of mainstream agencies.

While there was undoubtedly a crisis of leadership and governance within ATSIC, the immediate trigger for its abolition was the failure of the national Commission to take action to have Clark and Robinson step aside. This was magnified by deep scepticism about the legitimacy of the Commission, within the Government, the Labor Opposition and large segments of the community. The Government was presented with a political opportunity to move against ATSIC. ATSIC's shallow electoral constituency beyond the minority of Indigenous voters spread thinly across most electorates meant that it had no reserve of natural and committed support to fall back on when confronted by a crisis of legitimacy. Indeed, one might argue that many non-Indigenous voters were inclined to hostility and there was no net political cost associated with the separate and slightly differing decisions by the Labor Opposition and then the Coalition Government to abolish the Commission.

A number of analysts have sought to identify the underlying dynamics that contributed to the Government's decision to abolish ATSIC. Behrendt (2005) examines a number of possible drivers, including ATSIC's experimental structure and the alleged lack of Indigenous support. While acknowledging these dynamics, she argues that ATSIC's abolition can be traced fundamentally to a desire to silence increasingly effective Indigenous dissent on Indigenous policy issues. Howson (2004) argues the decision was an acknowledgment by the Howard Government that Indigenous separatism was ineffective policy. Foley (1999) points to what he considers fundamental flaws in ATSIC's design that meant that it did not truly reflect Indigenous aspirations. Morris (2004:324) argues that the abolition of ATSIC was systemic and 'part of a broader process of major change in forms of state governance', which he identifies as neoliberalism and a reassertion of 'the primacy of market over social life'. Pratt and Bennett (2004:10) report that Indigenous leaders associated with ATSIC saw

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<sup>53</sup> See e.g. Chamberlin (1996).

the decision as scapegoating designed to avoid blame for wider policy failure across government. Cunningham and Baeza (2005) point to the Howard Government's ideological commitment to mainstreaming as a key driver.

Clearly, multiple explanations exist and vie for acceptance, and most will provide useful insights and ways of assessing what occurred. Each seeks to explain why ATSIC was subjected to sustained criticism, albeit from different directions. What is clear is that ATSIC ultimately experienced a deep crisis of legitimacy from which it failed to recover.

This crisis of legitimacy can be traced back to the debate about the appropriate role of ATSIC, its combined representative and executive functions, and the misconceived, but widely accepted, assertions that its very existence represented an illegitimate intrusion into parliamentary sovereignty.<sup>54</sup> The loss of support from both the Latham-led Labor Opposition and the Howard Government was thus merely the culmination of a deeper loss of support and this points to the need for a structural explanation of ATSIC's demise.

The unique and innovative structure of ATSIC, and its increasing profile as an external critic of government, including in international forums, and its growing strength as an increasingly independent representative body (Sanders 2004b:15–6; Sanders 2018:116) signified its gathering threat to the balance implicit in the then extant political settlement in Australia. ATSIC represented or was perceived as a threat to virtually every influential high-level interest group in the nation: to business interests, to key players in the health sector, to mining and petroleum interests, to the justice system in the States and Territories, and to land and property interests. This threat was magnified by the freight of ideological opprobrium particularly on the conservative end of the political spectrum, that attached to Indigenous activism and advocacy and that had been associated with ATSIC from its genesis. The media play a key role in articulating and framing issues perceived to threaten the existing balance within the dominant coalition, and their treatment of issues related to ATSIC was no exception.<sup>55</sup> Substantive institutional reform and innovation (notwithstanding inevitable deficiencies and imperfections) will inevitably attract serious and sustained opposition from interests believing they are adversely affected by the creation of the new institutional arrangement.

## ATSIC's no-win position

Over the 15 years of ATSIC's existence, and notwithstanding the structural tensions that infused ATSIC, its operations and programs were largely effective, and within public sector norms. It was subject to the accountability challenges confronting any government agency, and had its share of critical audit reports and the like. It also confronted a series of cultural challenges that derived from the fact that elected Regional Councillors and Commissioners did not necessarily have a deep grounding in the normal governance principles that underpin most public sector administration. This led to tensions from time to time between the elected arm and the Commission's staff. Nevertheless, at a systemic level, the Commission had no fundamental performance issues. Its challenges were of a different nature.

On the one hand, it provided a useful foil for governments; any lack of progress on the seemingly intractable issues of Indigenous policy could be directed towards ATSIC. And from the Indigenous side, expectations were raised and high, yet funding was limited; processes were often poorly understood; and the ubiquitous politics in resource-allocation decisions (the corollary of Indigenous control and decision making) meant that ATSIC's reputation within the Indigenous community was brittle and subject to erosion and degradation. This situation was compounded by government refusal to action a series of necessary reforms to ATSIC that had been largely identified by the Commission itself and by the Government's own review.

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<sup>54</sup> See Heinritz (2005) for an analysis of the role of the media, and in particular *The Australian*, in bringing down Geoff Clark and ATSIC.

The combined effect was to place ATSIC in a no-win position. Governments set the key parameters for its operations and funding, but took no responsibility for any implementation failures (despite the ministerial controls that were available). The Indigenous community held the Commission and its bureaucracy responsible for everything it could not do (whether for lack of resources or because the proposed action was deemed outside normal policy parameters).

Moreover, in the decade following ATSIC's establishment, the Commission's operating environment was evolving. Continuing economic change and the so-called 'new public management' reforms across the public sector all impacted the policy environment in Indigenous affairs. Governments responded with program budgeting reforms, accrual-based accounting, outsourcing and competitive tendering.

Meanwhile, policymakers were becoming more conscious that Indigenous socioeconomic disadvantage was spread unequally and that different regions faced different challenges and circumstances, which influences both needs and outcomes. John Taylor's path-breaking demographic work at the Australian National University (ANU) led to the emergence and analysis of demographic and economic data at national and regional levels that pointed to a lack of service coordination and planning based on comparative identified needs.<sup>56</sup>

This played into increased community demand for improved and measurable outcomes, and effective coordinated service delivery. Demands for resource allocation based on need and for more flexible policy frameworks in relation to funding were more muted, and invariably fell on deaf ears within the Canberra bureaucracy.

## **The consequences of abolishing ATSIC**

As predicted at the time (Robbins 2004; Sanders 2004b), the abolition of ATSIC continues to have profoundly negative structural implications for Indigenous Australians. The reversal of the ATSIC reform innovation meant that Indigenous interests lost access to the legislated guarantee and requirement to be formally consulted and actively involved in the shaping and implementation of programs and policies across government. Indigenous interests also lost the benefits flowing from ATSIC's ability to negotiate with State and Territory governments and the opportunities inherent in ATSIC's capacity to develop policy and form economically and socially significant partnerships with both public and private sectors in advancing Indigenous interests. The adverse consequences of ATSIC's abolition are now both more apparent and widely acknowledged. Voices as diverse as the former Labor South Australian Minister for Indigenous Affairs, Kyam Maher, and the former Minister for Indigenous Affairs at the time ATSIC was abolished, Amanda Vanstone, acknowledge that ATSIC, and in particular its regional structure, fulfilled a crucial role (Fitzpatrick 2018 a).

## **Lessons and implications**

It is now 30 years since the ATSIC legislation was introduced into the Parliament, and 13 years since ATSIC was dismantled. This distance potentially facilitates a more objective assessment of ATSIC's strengths and undoubted flaws.

It also allows an assessment of the post-ATSIC policy environment in Indigenous affairs. What is clear is that those who worked to dismantle ATSIC failed to replace it with a policy framework that adequately addresses the substantial challenges that infuse the Indigenous policy domain. The most obvious recent example has been the failure of successive governments to make substantive headway in Closing the Gap, thus necessitating the

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<sup>56</sup> See e.g. Taylor (2006). It is worth acknowledging that ATSIC provided funding for the ANU Centre for Aboriginal Economic Policy Research where John Taylor was based, which led to a very significant corpus of Indigenous policy relevant research, including demographic research, over the past 28 years.

current bureaucratic moves focused on ‘refreshing’ the framework. The hard reality, however, is that the targets were always partial, many framed in terms of only halving the relevant gaps, and even so, governments have failed to make significant headway (Biddle 2019; Morrison 2019). Moreover, much of the progress that has been made, or is in train, appears to be due to significant (and largely unexplained) demographic growth in urban and regional Indigenous populations, whereas the 20% of Indigenous people in remote regions continue to confront devastating and deep disadvantage across virtually all social indicators (Markham & Biddle 2018a, 2018b). What is clear is that current policy settings are not fit for purpose, and governments appear bereft of ideas or proposals capable of addressing the significant challenges that exist.

In a context where current policy frameworks are not effective, there is a much stronger case for reassessing the key lessons from ATSIC, and in particular for reconsidering whether ATSIC’s positive elements might be revisited while avoiding the negative outcomes and flaws that emerged over its 15-year lifespan.

## **So what were ATSIC’s positive and negative attributes?**

Undoubtedly, the two most successful attributes of the ATSIC model were the substantive inclusion of representative Indigenous interests in the processes of developing policy, and the architecture of ATSIC that gave primacy to representation of regional Indigenous interests (Sanders 2004b; Behrendt 2005<sup>57</sup>).

In terms of access to policy development, ATSIC had a direct conduit to Cabinet (subject to persuading its Minister that its proposals were worthwhile), and the opportunity to both comment on and perhaps most importantly advise its Minister on the numerous Cabinet submissions prepared in other portfolios. This work occurred within government, and rarely if ever entered the public domain. We have already pointed to one policy success: in 1992, in a forerunner to the Closing the Gap framework, ATSIC proposed and successfully obtained agreement from COAG for an intergovernmental agreement, the National Commitment to Improved Outcomes.

The representative architecture of ATSIC ensured that Indigenous interests from across the nation were included in its formal structures and hence its decision-making processes. This meant that the heterogeneous nature of Indigenous society across Australia was reflected in ATSIC and its deliberations. This was the message of the Hannaford review (Hannaford et al. 2003), and is a widely shared perspective among Indigenous interests and academic commentators. Nevertheless, in an incisive observation made in 2004, Noel Pearson pointed to the challenges ATSIC faced in building a national leadership from the ground up. In particular, he argued that the ATSIC representative system (as it finally emerged) was flawed because the only elections were local. He stated:

Local Aboriginal politicians whose competence and narrow support bases made them more suitable for a regional role essentially elevated each other (after power struggles and deals) up to the highest offices of ATSIC (Pearson 2004).

He went on to argue for the separation of the election of regional representatives from the election of national leaders. We note that strong arguments can be made for both electoral models (that is, an upward cascade, and separate regional and national elections). In fact, Pearson’s recent commentary appears to favour a stronger regional-based model over a focus on purely national representation. He noted that:

ATSIC was a pyramid, and we’re talking about flipping the pyramid, putting the regions at the forefront rather than the national structure.

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<sup>57</sup> Sanders (2004b) argues that the political participation of Indigenous people in ATSIC elections and ATSIC’s independence from government were also strengths.

If we're going to learn from our ATSIC experience, there's the right of each region to insist on their own view and to stand on their own position. We need a structure that enables each region to decide their own destiny (Pearson in Fitzpatrick 2018c).

Pearson's shifting views and analysis points both to his focus on influencing contemporary political debates and, importantly, to the complex and finely balanced judgments that are inevitably involved in designing national representative institutions.

One of the major constraints that adversely influenced ATSIC's effectiveness was the comparative absence of robust and professionalised advocacy organisations beyond the public sector. This meant that the full weight of developing policy proposals and narratives fell on ATSIC, without the discipline and advantages that come from having to engage with a range of external voices with both functional expertise and community linkages. The most effective advocacy organisations were the land councils, though their focus was in large measure on their own jurisdictions. During ATSIC's existence, Australia had nothing like the National Congress of American Indians that has been in existence since 1944, and is a sophisticated lobbying and advocacy organisation based in Washington DC.<sup>58</sup> The ongoing success and viability of the Torres Strait Regional Authority is both evidence of the importance of these attributes in the Indigenous policy domain, and a window into the broader opportunity cost of the Howard Government's decision to discard the regional elements of the ATSIC model.

Less successful attributes were the amalgamation of executive and advocacy functions and the provision of decision-making powers over funding allocations, even if these discretionary funding powers were extremely limited in practice.<sup>59</sup> In particular, governance issues were a major contributor to ATSIC's loss of legitimacy, and while Ministers held various 'balancing' powers under the ATSIC legislation, in practice they were not prepared to intervene decisively.

A contextual issue that has increased in significance over the 30 years since ATSIC was conceived is the greater presence and impact of mainstream programs (and policy settings) in Indigenous citizens' lives and the concomitant increases in Indigenous engagement with mainstream programs.<sup>60</sup> Since Indigenous interests are a minority, this makes finding ways and opportunities to represent Indigenous interests in mainstream policymaking processes even more challenging, but arguably also more important.

A second contextual issue that emerges from the ATSIC experience relates to the issue of entrenchment of Indigenous gains. The ATSIC legislation entrenched the Commission to a degree, but once the Commission lost bipartisan support, the legislation was overturned. This suggests that there is merit in proponents of structural reform developing reform strategies that are based on a strong element of bipartisan acceptance or support that is in turn supported by key mainstream interest groups. Such a consensus does not emerge easily or without sustained attention to, and reinforcement of, the arguments in favour of the structural reform. It may also require a degree of compromise, and the recognition that structural reform is a process rather than an end point. The obverse of this point is that any effective institutional reform will upset the balance of existing interests and, as a consequence, there will be both opposition and, if the reforms are successful, the likelihood of a sustained rearguard action. Indigenous interests and their non-Indigenous supporters need to be cognisant of these risks

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<sup>58</sup> Today, advocacy organisations such as the National Congress of Australia's First Peoples and in particular NACCHO are increasingly effective advocates for Indigenous interests, although in our assessment they still lack the sophistication and capability of their US counterpart.

<sup>59</sup> See the discussion on funding in Pratt & Bennett (2004); they point out that ATSIC's total appropriation of \$1.3 billion represented only 46% of Indigenous-specific funding in 2003–04; of that amount, some 85% was quarantined by government on particular programs including CDEP and the Community Housing and Infrastructure Program. Consequently, the amount of discretionary funding controlled by the Commission was around \$200 million, or only 7% of all Commonwealth Indigenous-specific funding.

<sup>60</sup> Our point here needs to be distinguished from policies of 'mainstreaming' in Indigenous affairs that have waxed and waned over recent decades. Those policies refer to the differing approaches of governments to the responsibility for Indigenous-related programs, and/or to the design of programs, in particular, to policies which de-emphasise Indigenous-specific programs and policies; see Sanders (2018) for a brief discussion. Our point is that mainstream institutions and policy frameworks invariably impact on Indigenous citizens, yet Indigenous voices and input are usually mute in the ongoing processes of policy development and implementation.

and ideally devise strategies to counter them or constrain their impact. This leads us to suggest that, in terms of institutional reform, incremental policy development is most likely to be sustained. Nevertheless, eternal vigilance against institutional ‘pushback’ from competing interest groups is also necessary. We return to this issue in our discussion of the implementation strategy for the Indigenous Voice.

A further lesson from the nation’s experience with ATSIC is that any structural representative mechanism for Indigenous interests will involve a high degree of complexity. There will necessarily be a large number of moving parts. In any complex structure, there will be unintended consequences, some potentially positive, but inevitably others will be negative. Accordingly, there will be a need to address emerging issues, and to fix problems before they become fatal flaws. ATSIC relied on a series of legislated checks and balances that ultimately did not work because Ministers were reluctant to initiate remedial actions that could create potential political problems. In any future representative ‘voice’ for Indigenous interests, there would be benefit in creating a separate and independent oversight mechanism (akin to the independent audit committees which exist in many public sector bodies), but with a broader governance and effectiveness remit.

A more radical critique of ATSIC has been offered by Noel Pearson (2007:366–7) who argued that ATSIC was in effect a ‘client commission’ subject to direction by the Minister and accountable to the Government. However, in Pearson’s view,

This accountability was not mutual; it did not impose return obligations on the federal government, and no attempt was made to establish equality between ATSIC and the government.

Pearson was arguing that ATSIC did not go far enough, and that it did not construct an interface that creates greater parity and mutual accountability. He noted that such an interface would:

...require governments to agree to limitations on their existing powers and prerogatives and to make accountability a two way street. It would also require governments to be bound not just by policy commitment but by law.

In effect, Pearson was arguing for constitutional change.

While ATSIC offers a series of insights and lessons, it is also apparent that its experience is part of a long-standing pattern in Indigenous public policy. This pattern involves the initiation of policy and institutional reforms, the subsequent emergence of sustained criticism, followed eventually by the termination and elimination of the reforms. Examples include the CDEP; the former representative bodies the NACC and the NAC; and various Indigenous-related National Partnerships established by COAG in 2008. The result is that Indigenous interests must adapt to entirely new institutional and policy frameworks, and all that entails. This is not what generally occurs in mainstream policy and institutional contexts; policy and institutional development is more likely to involve incremental and accretive change, both positive and negative. This difference is yet another indication that, at a structural level, Indigenous interests remain excluded and on the margin. This is perhaps the most salient lesson to be drawn from the ATSIC experience as we look forward to a new set of institutions and policies.

One of the missed opportunities arising from the decision to abolish ATSIC rather than pursue its reform, is that the nation lost a legislated Indigenous Voice. The Morrison Government has set Indigenous calls for a constitutionally entrenched Indigenous Voice aside, ostensibly because it is not apparent how it might work. Had ATSIC been strengthened, reformed and continued to exist, it may well have provided such a platform, and a set of positive experiences upon which a constitutionally entrenched voice might have been constructed. Instead, we are left to start afresh – to start in a place from which no one would choose to start.

### 3. Policy Responses to Indigenous Exclusion

*The world is being undone before us...If we here in Australia do not reimagine ourselves we will be undone too.* Richard Flanagan (2018)

For mainstream Australia, Indigenous Australia is another world. Indigenous Australia is a realm beyond its ken, familiar yet unknowable. It is rich in cultures that are synonymous with the land but in ways many Australians find impossible to comprehend. It is a repository of languages few non-Indigenous Australians ever learn, but which provides place names for thousands of landmarks. It is a producer of great artists and footballers, but a domain not thought about too deeply. For most Australians, Indigenous Australia is a province (both metaphorical and real) considered too fraught and risky to enter, let alone traverse.

These tropes are deeply ingrained in the Australian psyche, resonating with Bill Stanner's (1969) description of the 'great Australian silence'.

Yet paradoxically, the description above is both true and false, as mainstream Australia confronts the reality that Indigenous Australians are progressively stepping into spaces that have traditionally been robustly 'mainstream'. Indigenous actors, playwrights, writers, filmmakers, tradespeople, farmers, business owners, bankers, lawyers, doctors, graduates, bureaucrats, journalists, intellectuals and politicians are increasingly visible in what is becoming a multicultural nation within a globalised world. At the same time, and at the other end of the spectrum, even Indigenous citizens who actively choose to retain a traditional lifestyle are inexorably being drawn into mainstream institutional engagement via the social security and health systems, engagement with the legal system, including native title processes, the geographic expansion of commercial markets and the ubiquity of new technologies and social media.<sup>61</sup> Anthropologists have increasingly recognised the importance of an intercultural reality within the Indigenous domain (Merlan 1998). As Hinkson and Smith (2005:165) note in their introduction to a special edition of the journal *Oceania* devoted to 'figuring the intercultural in Aboriginal Australia':

The notion that Aboriginal people might simply make a choice between two worlds, or simply move between them, selecting the best both have to offer, fails to comprehend the processes through which representations, cultural identities and lifeworlds are produced and reproduced. An intercultural analysis matters because it is arguably the only frame through which our conceptualisations of culture might be made to articulate with its lived expressions.

Slowly, but surely, mainstream Australia is being settled, but not colonised, by Indigenous people.

We say settled and not colonised, because overwhelmingly the mainstream acceptance of Indigenous 'settlers' is occurring on terms which *require* the Indigenous settlers to accept, comply with, and ultimately to absorb mainstream values and modes of existence. Even where Indigenous contributions are concentrated and high profile such as in the Australian Football League and National Rugby League competitions, they do not appear to have comprehensively reshaped the sports in the way that Maori have 'colonised' and defined the international presentation of New Zealand rugby over more than a century through their significant participation and the performance of the haka by Maori and Pakeha players alike. Perhaps the exception that proves the rule is the defining 'colonisation' of Australia's international artistic corpus by Indigenous artists and musicians where it is now virtually impossible to discuss or describe this domain without reference to the Indigenous contribution,

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<sup>61</sup> The anthropologist James Weiner (2006:18) has argued that the ongoing preoccupation with cultural difference is undermined by the social reality of the Indigenous–non-Indigenous relationship reflected in 'the tremendous burgeoning of the institutional relationships, buttressing, laws, procedures, and so on, between any indigenous community and the governments, companies, non-government organisations (NGOs)...'; see also Rowse (2012:xx) who cites Weiner.

and where it is widely accepted that the Indigenous contribution has shaped this domain in extremely positive ways.

This is not to say that Indigenous people engaging in mainstream domains give up their Indigenous identities in the process. Instead, they generally adopt what Noel Pearson has termed 'layered identities' (Pearson & Sanders (1995:6) and Katherine Thorburn (2007)<sup>62</sup> has portrayed as a 'repertoire of identities'. The ubiquity of hybrid or layered identities only adds to the complexity of relations between the Indigenous and mainstream domains, and makes it harder to discern the discriminatory or exclusionary forces that continue to operate on those with Indigenous identities. The exclusionary institutional frameworks that regulated and controlled Indigenous people's lives for the past 200 years are able to continue to exist and shape the choices open to Indigenous citizens whether they live in remote communities or Sydney and Melbourne. Importantly, the traction and influence of those institutional frameworks differs across geographical dimensions, and among individuals depending on their educational and social backgrounds.

Mainstream and Indigenous domains are thus no longer completely separate, but overlap in complex ways which, at least in part, emanate from and contribute to hybrid identities. Just as mainstream Australia is no longer a monoculture and is undergoing enormous change, Indigenous Australia is also changing: demographically, culturally, socially and economically. Indigenous Australia was never homogenous; after all, it encompassed in excess of 250 distinct languages in 1788. But the inherent heterogeneity of Indigenous Australia is evolving rapidly, at different paces and potentially in divergent directions in disparate parts of Australia.

We are not anthropologists, sociologists or demographers, and do not propose to delve too far below the surface of these changing social and cultural realms. Our focus is on policy and policymaking, and the ways in which the Australian nation state, its policymakers and institutions affect Indigenous Australia. In particular, our focus is on the structural issues that underpin the continuing exclusion of Indigenous people from the national settlement we discussed in chapter one, and which influence the potential for greater or lesser inclusion of Indigenous interests within Australian political and economic life.

Indigenous policy operates at multiple levels, from the micro such as the minutiae of grant conditions, the meso level where governments focus on particular themes and issues (to the exclusion of others), and the macro, the high-level thematic and ideological constructs that frame the relationship between government and Indigenous peoples, and ultimately between the nation state and Indigenous citizens. Of course, these levels are interconnected, subject to cyclical changes in emphasis and significance as the external environment ebbs and flows, and are moderated and influenced by the equivalent policy frameworks in subsidiary jurisdictions, and to a lesser extent by the private sector. From time to time critical junctures such as major court decisions or a change of government, or exogenous changes such as a financial crisis or a shift in budget priorities, drive major change that reverberates through every level of policy.

## Self-determination

If one had to identify the overarching aspirational policy principle to describe the last half-century of Indigenous policy, it would be difficult to go past the concept of self-determination. While the concept gained widespread recognition and traction during the Whitlam Government, its roots go back at least 80 years. The campaigns for Aboriginal rights in the 1930s by Aboriginal activists such as William Cooper, Jack Patten and Bill Ferguson laid the foundation. The campaigns in support of Aboriginal rights by the Communist Party and progressive elements in the churches beginning in the 1940s and 1950s maintained political and social momentum

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<sup>62</sup> Rowse (2012:225) cites Thorburn's use of this term.

eventuating in the establishment of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI). FCAATSI led the campaign which resulted in the 1967 Referendum.<sup>63</sup> On Australia Day in 1972 Prime Minister McMahon, in association with an announcement on the purchase of land at Daguragu in the Northern Territory, stated:

The Government recognises the rights of individual Aborigines to effective choice about the degree to which and the pace at which they come to identifying themselves with [Australian] society...

The role of government should increasingly be to enable [Aborigines] to achieve their goals by their own efforts.<sup>64</sup>

The Whitlam Government committed to restoring Indigenous Australians 'their lost power of self-determination in economic, social and political affairs' and 'being able to decide the pace and nature of their future development' and 'take a real and effective responsibility for their own affairs'.<sup>65</sup>

Over the last half-century, self-determination has been both an aspiration of Indigenous interests and their advocates, and a marker against which government policies have been assessed and judged by governments, their oppositions, and the public at large. Part of its attraction has been its ambiguous meaning, interpreted differently within both Indigenous and non-Indigenous domains, and between them. For most Indigenous citizens, self-determination suggested greater control over their lives, and a reversal of the consequences of colonialism and dispossession. For a majority of ordinary Australians, Indigenous self-determination suggested an aspiration for individual autonomy akin to the freedoms that most citizens take for granted. Most citizens did not perceive the language of economic and social self-determination as threatening.<sup>66</sup>

Of course within both domains (the Indigenous and the mainstream), policy entrepreneurs pushed the term's definition to extremes. Many Indigenous political theorists and progressive advocates see it as akin to unconstrained Indigenous sovereignty, whereas more conservative non-Indigenous theorists and commentators argue that self-determination is a concept in international law and not relevant as a descriptor of domestic political aspirations. But the more extreme interpretations on both sides have largely been ignored, and the concept gained widespread rhetorical ascendancy.<sup>67</sup>

The self-determination policy framework underpinned in large measure the adoption by both governments and Indigenous interests of corporations as the 'carapace' from within which they might advance their aspirations and social and economic agendas.<sup>68</sup> The policy framework reinforced the momentum towards land rights at least until the mid-1980s when the mining industry launched a decade-long campaign against land rights and later native title. Self-determination underpins the successful operation of more than 100 community-controlled health services in more than 300 locations across Australia. It also underpins the increasingly contested

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<sup>63</sup> Refer to Atwood (2003) for a detailed account of these struggles. See also Chesterman & Galligan (1997) who interpret the establishment of ATSIC as an ultimately unsuccessful attempt to establish an institutional base for self-determination. On the role of the Communist Party, see Boughton (1999).

<sup>64</sup> Quoted in Deane (1996) 'Some signposts from Daguragu', Lingiari Lecture, Council for Aboriginal Reconciliation, Canberra.

<sup>65</sup> These quotes are from speeches by Prime Minister Whitlam and then Minister for Aboriginal Affairs Jim Cavanagh (Bennett 1999:62).

<sup>66</sup> Morphy (2007:100) makes this same point, albeit within a more linguistic frame of analysis.

<sup>67</sup> See Brennan (1995:148–155) for a discussion on self-determination in international law, and the contrasting analysis of Commissioner Elliot Johnson in his National Report of the Royal Commission into Aboriginal Deaths in Custody. Johnson concluded self-determination was a principle rather than a 'right', but forcefully argued that it was a principle which was both legitimate and which should be implemented through the involvement of Aboriginal people at all levels in the decision-making process, including policy design as well as service delivery (Brennan 1995:154).

<sup>68</sup> Charles Rowley (1971:11) first proposed that the use of corporations might be a 'carapace'. As he noted: 'At the same time, they [Indigenous corporations] may, by making necessary the leadership with which government or enterprise deals, provide that carapace which the Aboriginal social group has always lacked, the protective shell within which inter-personal and inter-familial adjustments to change, and new patterns of leadership and organisation, relevant to the challenges of new possibilities, may be worked out by interaction with a minimum of "outside" interference.'

rationale for Indigenous-specific programs and services that comprise around one-fifth of the \$30 billion in government-sourced expenditures each year directed to Indigenous affairs (Productivity Commission 2018c).

This is not to say that Indigenous interests have achieved self-determination. Indeed as the half-century has progressed, one might mount a persuasive argument that, despite material gains, Indigenous citizens' sense of control over their lives as Indigenous peoples has lessened. Indeed, some critics of government policy argue that the policy content of self-determination has been diluted (Coombs 2018; Davis 2018b),<sup>69</sup> and consequently self-determination has become a mechanism governments use to shift responsibility for government failure on to Indigenous people. Attwood (2003:349) argues that in abandoning assimilation for self-determination:

...the relationship between Aborigines and the Australian nation state did not change and has not changed in any fundamental respect. Government has tried to incorporate Aborigines in new ways but for the same end. It has solicitously nurtured Aborigines and Aboriginality in new political and cultural forms, rather than repressing them as of old, but it has largely done so in order to strengthen the nation and control the Aboriginal minority.

Moreover, as Dylan Lino (2018:253–257) persuasively argues, concepts and processes such as Indigenous recognition, and by extension Indigenous self-determination, are inherently partial and provisional, based as they are on fluid and malleable identities and unequal and shifting power relationships.

Over the last 20 years, and particularly the last decade, there has been a growing view among academics, largely on the left, that the policy frame of self-determination has been set aside by governments in favour of neoliberal-inspired policies of punitive paternalism and intervention.<sup>70</sup> On the government side, the failure of the nation's political system to deliver land rights in the States, particularly Western Australia, undermined the momentum that had built over the previous 30 years. The *Mabo* decision and the subsequent NTA increased opportunities for Indigenous self-determination, but were anomalies engendered by the High Court arguably against the tide of political developments. The subsequent 'Wik amendments' to the NTA stripped out many of the potential benefits flowing from the 1996 High Court decision in *Wik Peoples v the State of Queensland*, and further undermined the status of self-determination as an overarching principle.

The evaporation of broad mainstream acceptance of the concept of self-determination was unambiguously confirmed by the actions of the Australian Government in 2004–05 in abolishing ATSIC and in initiating the 2007 Northern Territory intervention. In the latter the symbolism associated with the use of the Australian Defence Force ostensibly to impose order on some 70 remote Northern Territory communities, along with the compulsory acquisition (initially without compensation) of five-year leases over community lands, exploded any pretence that governments could be relied upon to listen or respond to Indigenous aspirations. Perhaps as a consequence, Indigenous interests and many analysts appear to have shifted away from the use of the language of 'self-determination' to explain Indigenous demands in favour of terms such as empowerment, recognition and sovereignty.<sup>71</sup> While substantive self-determination continues to be seen as necessary by Indigenous people and their advocates, it is no longer seen as sufficient in terms of its aspirational and rhetorical force.

<sup>69</sup> See also Chesterman & Galligan (1993:212–216, especially at 216) for an argument that ministerial responsibility seems destined to prevail over self-determination in the administration of Aboriginal affairs.

<sup>70</sup> See e.g. Howard-Wagner (2018:1332–1351). On the right of the political spectrum, academics and think tanks argue that self-determination is an inappropriate aspiration that erodes individual responsibility in favour of collective rights. These commentators argue that governments need to move further towards 'market-based' policies based on a shift towards individual property rights and a policy objective of replacing 'separatism' with integration into modernity and the mainstream; e.g., see Johns (2011:41–55).

<sup>71</sup> See e.g. Lino (2018) for an extended discussion which moves seamlessly between these concepts, but which is primarily articulated in terms of the concept of recognition.

Simultaneously, governments have shifted towards a rhetorical narrative of ‘working with Indigenous people’ that implicitly leaves open the potential (many would argue ‘the inevitability’) that governments rather than Indigenous interests will determine core outcomes. Indigenous groups and communities seem prepared to give the ‘working with’ model a chance, presumably on the basis that it at least gives them a seat at the table. The Empowered Communities initiative is perhaps the best example of this thinking among Indigenous interests.<sup>72</sup> However, this initiative has yet to be evaluated or independently assessed. It is as yet unclear whether scepticism of the ‘working with’ model is warranted.

There is now a widespread sense that the change of narrative direction under the Howard Government and in particular the Northern Territory intervention, represented an inflexion point, or critical juncture in terms of macro narratives to explain Indigenous policy in Australia. On the government side, policymakers have dealt with this overarching narrative uncertainty by focusing more on the meso level of policy development than the macro level. The Rudd/Gillard Government focused on Closing the Gap, albeit without an explicitly linked investment plan, and on a series of well-resourced National Partnerships under the rubric of the National Indigenous Reform Agreement agreed with COAG. These encompassed remote housing, Stronger Futures in the Northern Territory, remote service delivery, and early childhood interventions. The Abbot/Turnbull/Morrison Government has largely shifted its policy narrative away from remote Australia towards the urban and regional Indigenous majority, and focused on economic development, and in particular on Indigenous business development, as opposed to social and land programs.<sup>73</sup> Where governments have focused on macro-level policy, they have been tentative and reluctant to move beyond rhetorical aspiration to detailed proposals.

## Policy failure: six rival analyses

In chapter one, we pointed to the existence of systemic policy failure in the Indigenous policy domain. There are a number of competing yet overlapping interpretations of the causes. Each involves an associated inference or implication that identifying the cause will enable policymakers to address the policy failure. While these various explanations are conceptually separate, and arguably directed at different notions or conceptions of policy failure, they are often articulated in ways that suggest degrees of overlap and similarity. In what follows, we outline briefly, in no particular order, six of the most influential and widely accepted theoretical diagnoses.<sup>74</sup> Our intention is not to undertake a comprehensive critique of each interpretation, but rather to emphasise the absence of a commonly accepted explanation. Our own approach seeks both to build on and to transcend the various analytical explanations propounded to support our argument that policy failure is embedded in institutional structures that emanate from the extant Australian political settlement.<sup>75</sup>

## Implementation failure

In the first interpretation, governments and policymakers tend to articulate policy in terms of the need for improved program delivery, improved coordination and implementation, and the failure of past governments to work with (or in public sector jargon, engage effectively with) Indigenous people. These issues are generally

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<sup>72</sup> See the Empowered Communities website for more details: [www.empoweredcommunities.org.au](http://www.empoweredcommunities.org.au). More recently, a group of peak organisations led by NACCHO have persuaded government to give them a seat at the table in the formulation of refreshed Closing the Gap targets (NACCHO 2019).

<sup>73</sup> This narrative shift has been accompanied by substantive cuts to remote programs such as housing and the regional network along with tougher (and arguably discriminatory) administrative policies related to welfare and income management (Auditor-General 2018:26–27; Venn & Dillon 2018). See also Shirodkar et al. (2018) for an analysis of the growth in Indigenous businesses that are highly concentrated in urban Australia over the decade to 2016. It is unclear whether this change is being driven primarily by policy or by increased numbers of people identifying as Indigenous, particularly in southeast Australia.

<sup>74</sup> We do not claim that we have been comprehensive in listing all theoretical critiques of the Indigenous condition in Australia. For example, many Indigenous people would merely assert that dispossession and the loss of Indigenous sovereignty has caused their ongoing exclusion and that nothing short of the return of exclusive Indigenous sovereignty would address the issue.

<sup>75</sup> Policy failure is an inherently ambiguous and complex concept as it inevitably raises issues such as who determines the criteria for policy success and failure, over what timeframes, and in whose interests (McConnell 2010). See the discussion in chapter one.

supplemented or underpinned by a recurring set of assumptions that both assume a solution is at hand and respond to the tenor of recent public discourse and debate. For example, at various times policymakers' focus has been on the importance of addressing dispossession with land rights, improving business opportunities, fighting drug and alcohol abuse, expanding jobs and employment as a counter to the insidious impact of passive welfare, strengthening culture and language, improving school attendance, reducing overcrowding, and addressing child abuse, domestic violence and crime generally. The premises on which these policy efforts are based are given different emphases as governments change; they are usually, but not always, framed in terms of deficits that can be remedied. They all share a number of characteristics: they provide a platform for governments and policymakers to be seen to be doing something; they wax and wane in significance, often driven by media attention; and most importantly, they primarily reflect the pressures and concerns that affect policymakers at particular points in time rather than those that impinge on Indigenous people over the longer term. We might gloss this policy response as 'implementation failure'. Implementation failure is an ever-present risk for policymakers, but it does not provide on its own a persuasive explanation for long-term policy failure in any area, even the Indigenous policy domain. Nor does it explain the continued existence of systemic disadvantage.

## Economic policy analyses

In the second interpretation, there is a related diagnosis based on the economic analysis of policy settings. While this economic approach is most evident in the one adopted by the Productivity Commission (and recently the Queensland Productivity Commission) to Indigenous disadvantage, it is an extremely influential component of much policy design within government. The economic approach to Indigenous policy analysis is particularly evident in the almost zealous faith placed in the power of incentives to change and influence behaviour and of program and policy evaluation to drive better outcomes. Thus over the past couple of years, policymakers have resorted to ever more punitive program designs, and we have seen a number of influential policymakers advocate for greater use of evaluation in Indigenous affairs.<sup>76</sup>

Supporters of evaluation are apparently oblivious to the risks associated with the propensity of governments to privilege contracted private-sector consultants rather than truly independent reviewers. The Government decision in 2017 to allocate \$10 million per annum over four years to Indigenous program evaluation (Scullion 2017) aligns with the economic approach to analysing Indigenous policy, but lacks a commitment to transparency and independence implicit in the theoretical underpinnings of such approaches. Key challenges for the economic analysis perspective are the inability of policymakers to accept that the impact of cultural norms often outweighs the effects of incentives as well as governments' increasing propensity to undermine the independence of the evaluations they commission.

This economic perspective reflects both the significant representation of economists in the senior echelons of the public sector and the intellectual attraction of 'rational' modes of analysis. This mode of policy analysis flows through to the design of major programs, with a strong emphasis and focus on utilising incentives to change behaviour. Thus, for example, the Community Development Program is designed around an assumption that remote residents will respond to the prospect of financial penalties by devoting greater effort to job search and program compliance protocols. When the program appears not to be working, the reaction is to double down on the assumption and make the penalties tougher. Yet it has been clear for at least 15 years that a significant proportion of remote 'jobseekers' (to use the jargon adopted by the bureaucracy) is prepared to disengage from

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<sup>76</sup> In the Productivity Commission's media release accompanying the 2016 Overcoming Indigenous Disadvantage Report, Deputy Commissioner Karen Chester was quoted as stating: 'If we are to see improvements in outcomes we need to know which policies work and why. But the overwhelming lack of robust, public evaluation of programs highlights the imperative for Indigenous policy evaluation.'

the social security system rather than respond to policymakers' incentivised inducements.<sup>77</sup> Recent reports place the number of disengaged individuals at around 6000 (Allam 2018b).

## The 'neoliberal turn'

Third, there is an interpretive diagnosis most associated with left-leaning academic theorists that places responsibility primarily on the ongoing impact of dispossession and colonisation reinforced by the 'neoliberal turn' in government policy directions, both globally and nationally. The neoliberal analysis of Indigenous policy issues emphasises the shift in policy and program priorities away from self-determination and Indigenous rights and towards interventions designed to change behaviour, target community dysfunction, and drive greater integration of Indigenous communities and citizens in mainstream economic life. These trends are seen to be reinforced by the increased reliance on outsourcing and the consequent reductions in the use of Indigenous organisations to deliver services. Elizabeth Strakosch (2015) argues that the shift from social to neoliberal framings of citizen–state relations is particularly significant in Indigenous contexts because 'ongoing settler colonial hierarchies have been rearticulated through, rather than revived or transcended by, neoliberal frameworks'. She argues that neoliberal practices of exclusion often operate at *de facto* levels despite the existence of *de jure* inclusion. This leads her to argue that an 'unreflective defence of social liberalism also forgets that inclusion itself is a powerful and subtle colonising practice' (Strakosch 2015:5–7).<sup>78</sup> While critiques of policy based on the ongoing impact of settler-colonialism and the adoption of neoliberal policies by governments often provide acute insights into Indigenous policy, they implicitly focus on the role of 'the state' as a malign actor, and adopt normative assumptions predisposed to a critique of state agencies and policymakers.

## Rights based analyses

A fourth interpretive line of analysis often associated with a focus on dispossession is a normative call for Indigenous rights to be respected and implemented. Rights-based interpretations seek to highlight the gap between universal human rights – or the international principles that governments either claim to respect, or that they have formally ratified or supported – and the actual practices that fall short of those benchmarks. Much of the legal analysis of issues in the Indigenous policy domain falls into this category, the implicit assumption being that if only governments would respect and implement their obligations under international and national law, Indigenous policy outcomes would improve. For example, Shelley Bielefeld has analysed in a series of papers the shortcomings of the Northern Territory intervention, including issues related to compulsory income management, compulsory acquisition of property, and conditional welfare policies utilising this frame of analysis.<sup>79</sup>

## Critiques of 'separate development'

The fifth interpretation involves an alternative diagnosis most associated with right-leaning academic theorists and their affiliated think tanks such as the Centre for Independent Studies and the now defunct Bennelong Society. These theorists argue that misguided nostalgia for traditional life and communal solutions continues to underpin much policy in Indigenous affairs. The results are poorly conceived and executed government interventions and poorly defined or absent property rights based on notions that incorrectly assume the social, cultural and economic viability of traditional Indigenous cosmologies. Consequently, the imperative (as they

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<sup>77</sup> The focus of policymakers implementing the 2007 Northern Territory intervention on 'humberging' was at least to some extent a bureaucratic reinterpretation blaming the victim for the impact of punitive social-security policies that led to disengagement by erstwhile welfare recipients.

<sup>78</sup> Strakosch appears to be referring to processes of *de jure* inclusion that camouflage *de facto* exclusion.

<sup>79</sup> See Bielefeld (2014) for one example.

conceptualise it) for Indigenous communities and society to adapt and transition into modern Australian society is undermined.<sup>80</sup>

## Thwarted empowerment

The sixth and final interpretation is an increasingly influential diagnosis that identifies a substantive and endemic failure of governments and policymakers to grant Indigenous interests greater say and control over their own affairs. This approach is generally articulated in terms of greater empowerment creating space for increased Indigenous agency along with institutional reforms to remove structural barriers that maintain Indigenous disadvantage. Thus, for example, Cape York peoples recently developed a policy agenda under the rubric of *Pama Futures* (2018) which they promulgated as a submission to State and federal governments. Ciaran O'Faircheallaigh (2017), an academic with close ties to Cape York, recently made a strong case for greater Indigenous autonomy, and argued that much policy failure stems from the failure of governments to grant Indigenous peoples effective autonomy and self-government.

## Inadequacies of current analyses: the need for a major refocus

While across these different approaches there are substantial disagreements at the margins between the diagnoses and thus the proposed solutions,<sup>81</sup> there is also a sense in which each of the six perspectives provides a worthwhile way of conceptualising and analysing the Indigenous policy domain and its challenges. This is particularly the case because the inherent complexity and heterogeneity of the Indigenous domain means that different perspectives may gain more traction in relation to some elements of the Indigenous policy space than others. In other words, when different policy perspectives and approaches are being proposed and propounded, they may in fact be directed to different components or sub-spaces within the Indigenous policy domain.

There are also two senses in which each of these perspectives are partial and inadequate given their implicit focus on an identifiable and conceptually distinct Indigenous policy domain. First, there is no consensus regarding the notion of policy success and policy failure; in particular, each analytic interpretation deals with a different notion of both. It is not surprising then that they offer differing policy solutions to addressing it. Second, as discussed above, the reality is that the mainstream is progressively impinging on the Indigenous policy domain, and Indigenous citizens' lives are progressively shifting to span both the Indigenous domain and spheres dominated by mainstream norms and institutions. This dynamic shift is irregular and is driving change at different rates in different locations. It potentially undermines the utility of those conceptual policy approaches premised on the universal existence of a separate Indigenous domain that is part of, but largely distinct from, the mainstream.

The fact that after decades of policy attention, existing analytic approaches have failed to gain the acceptance and traction to drive effective policy outcomes suggests that the nation has overlooked a more fundamental and systemic cause of policy failure. It is not that the policy critiques and approaches outlined above have no merit, or are misdirected; rather it seems likely that they represent (to varying degrees) partial and incomplete analyses. Above all, to a greater or lesser extent, they under-emphasise structural and systemic factors. In particular, they miss the importance of mainstream interest groups in shaping institutional frameworks and the absence of structures that enable Indigenous interests to engage and shape policy. Together, these dynamics

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<sup>80</sup> Key academic representatives of this school of thought include Hughes (2007), Johns (2011) and Dillon (2013). Among high profile Indigenous voices, individuals such as Warren Mundine, Wesley Aird, Bess Nungarrayi Price and Jacinta Price are most clearly aligned with this politically conservative perspective. Peter Sutton (2009) might be confused with this school of thought, but his approach is more theoretically based and arguably *sui generis*. See also Austin-Broos (2011) and the review by Rowse (2011).

<sup>81</sup> Or perhaps more accurately among the ideological assumptions and mindsets that underpin different approaches.

create the structural impediments to substantive Indigenous inclusion in the nation's wider institutional frameworks.

As a result, there is the appearance of policy change over time, sometimes for the better, other times for the worse. As the electoral cycle turns and partisan political fortunes wax and wane, different phases emerge where the macro-policy process emphasises varied elements or themes, and the debate is articulated with new language and conceptual frameworks.<sup>82</sup> However, at a deeper and more fundamental level, there is less variability and much more continuity in the limited preparedness of political and policy systems to address substantively issues of Indigenous exclusion. The more things change, the more they stay the same.

## Towards greater inclusion

While we have seen a significant shift over the past half-century to relegate overt racism to the margin of public discourse and make it unacceptable in most quarters, the latent blindness to Indigenous interests (which many would label as racism) embedded in most mainstream institutions makes addressing Indigenous disadvantage or Indigenous aspirations a task of Sisyphean dimensions.

The rise of nationalist populism globally and its flow-on to Australia increases the risk that these gains will erode over coming decades. Even if such an outcome is avoided, the task for progressive and liberal democratic citizens is a second and arguably more difficult challenge; it involves pushing the latent racism within the existing political settlement to the margins of our nation's institutional frameworks. To put it another way, the task is both to stave off a reversion to overt racism and to include progressively Indigenous interests within the national political settlement, not just in some Indigenous policy ghetto, but across the board.

The challenge implicit in this analysis is how to operationalise it. No single policy initiative will deliver the required change. There is no single policy panacea. Moreover, in most cases, it will require policymakers to be authorised and encouraged not merely to identify particular stand-alone Indigenous initiatives, programs or policies, but to identify where mainstream policies and institutions are structurally blind to Indigenous interests. We explore a number of policy cases below that demonstrate the existence of exclusionary outcomes. They include Rent Assistance, the allocation of infrastructure investment, the impact of out-of-home care programs on Indigenous families, and the impact of fiscal equalisation on remote Indigenous communities. We could easily list another half dozen policy areas where mainstream policy and program structures are blind to Indigenous needs. Each of these policy areas adversely affects Indigenous interests yet the process is largely disguised and opaque.

Operationalising this next phase of building institutional inclusion will be a formidable and inevitably long-term task, given an underlying environment and dynamic in which existing members of the political settlement have a strong interest in keeping the coalition to the smallest possible size. It will be facilitated if the 'necessary but not sufficient' macro-policy approaches identified above (or at least a judicious mix of them) are pursued. It will also require strategies by Indigenous interests, hopefully supported by enlightened government policies that are designed to drive greater Indigenous inclusion in mainstream institutions.<sup>83</sup> There will be no single policy fix in meeting this challenge. It will require persistent and sustained focus from Indigenous interests and, importantly, from at least a core of progressive and visionary non-Indigenous interests. This latter group will comprise those who have concluded that the national interest will be strengthened by removing a potential source of social

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<sup>82</sup> Will Sanders (2014) has written extensively on the cyclical nature of Indigenous policy. In particular, he has pointed to the way in which policy momentum has oscillated across the competing principles of equality, choice and guardianship.

<sup>83</sup> Hoff & Walsh (2017) argue that institutions have cognitive foundations that function like lenses through which individuals see themselves and the world. As a result, abolishing or reforming a discriminatory institution may have little effect on these lenses. Groups previously discriminated against by law or policy may remain excluded through habits of the mind even after the discriminatory institutions have been reformed.

discord, or in a worst case scenario violence,<sup>84</sup> through broadening the political compact or settlement that underpins Australian society to include Indigenous interests and to remove the potential for latent racism to become overt.

## Barriers to inclusion and the structural risks of exclusion

The existence of the structural exclusion of Indigenous citizens and communities in Australia is potentially contested. It might be argued that indisputable progress in Australia over the past century in the expansion of Indigenous civil and political rights undermines our argument. In such an account, Indigenous citizens are an included population with formal and legally enforceable access to the same rights and responsibilities as any other citizen. While disadvantage continues, it does not amount to structural exclusion, but rather to 'deep-seated disadvantage', or social and political disadvantage that exists within what is fundamentally an inclusive society. Such an argument emphasises the formal equality of all citizens under the law; or to utilise North American terminology, emphasises the existence of 'colour-blind' laws and institutions.

In contrast, we argue that Australian society is characterised by social and political inclusion and exclusion, and that Indigenous interests both face substantial structural barriers to inclusion and confront increased structural risks of exclusion within the nation's overarching institutional framework. In chapter one, we refer to this framework of institutions as the extant 'political settlement'. These structural barriers and risks derive in large measure from the operation of informal rules and norms;<sup>85</sup> indeed, the political settlement itself is largely the result of arm's length mutual adjustment among competing interests<sup>86</sup> rather than formal and explicit negotiations. The existence of this informal accommodation is largely unacknowledged and therefore more difficult to challenge than an explicit and visible coalition of interests.

Our argument is buttressed by an extensive international literature that points to the existence of inclusive and exclusionary structures, and a more limited Australian literature that identifies Indigenous social and political exclusion as a national challenge. We do not propose to review these literatures in their entirety, but it is worth pointing to some key arguments if only to provide a stronger foundation for our argument, which is built on a number of case studies explored below.

Political philosophers Iris Marion Young (2001) and Elizabeth Anderson (2010) both make persuasive cases for the utility of the concepts of structural or systematic inequality. Anderson, whose major focus is policies of segregation in the US, devotes a chapter to 'the folly and incoherence of colour blindness' as a policy ideal. Young explores the necessity to look beyond methodological individualism to the existence of groups when seeking to understand structural or systemic inequality. Young explains systemic inequality by likening it to a wire birdcage. Each wire on its own does not constrain the bird, but when the wires are arranged together into a cage, the bird is unable to fly. She elaborates, making clear that the concept of structure should not be reified, and that 'social structures exist only in the action and interaction of persons; they exist not as states, but as processes' (Young 2001:13).

These analyses are primarily conceptual rather than empirical.<sup>87</sup> As Young (2001:18) notes:

Discovering one such pattern on one parameter, however, does not yet take us to a judgment of injustice. We must discover that such inequality is systemic by finding a pattern of average difference in level of

<sup>84</sup> Mick Dodson recently warned that a failure to make good for past wrongs could easily lead to violence in the future (Fitzpatrick 2018b).

<sup>85</sup> Brennan & Castles (2002:5) make clear that, in seeking to understand the role of institutions within society, 'the rules and norms that count are the ones that actually apply – not the ones that may be formally specified'.

<sup>86</sup> To be clear, dominant interests compete for influence and power and reach an accommodation, which we term the political settlement. They are aligned, however, in seeking to exclude non-dominant interests from joining that accommodation.

<sup>87</sup> Although they are empirically informed.

status or well-being along several parameters. When we find that Native Americans as a group have the lowest incomes, highest infant mortality rates, least education, and so on, of any group in American society, then we are entitled to say that members of this group probably suffer injustice. We are not warranted in the full evaluation, however, unless we can tell a plausible structural story that accounts for the production of the patterns. To complete the analysis and evaluation, we must explain how institutional rules and policies, individual actions and interactions, and the cumulative collective and often unintended material effects of these relations reinforce one another in ways that restrict the opportunities of some to achieve well-being in the respects measured, while it does not so restrict that of the others to whom they are compared, or even enlarge their opportunities. This story will be aided, moreover, by evidence that the basic configuration of the patterns shows little change over decades.

A number of case studies discussed later in this chapter seek to tell such a 'plausible structural story' in relation to Indigenous exclusion. Our account is supported by an influential, but perhaps neglected, Australian literature that also points to ongoing Indigenous structural exclusion.

In 2002, the final volume in a major ANU research project on Reshaping Australian Institutions was published. It was titled *Australia Reshaped: 200 Years of Institutional Transformation* (Brennan & Castles 2002). Across nine chapters authored by some of the most eminent social scientists in Australia, the book surveyed the state of play in the nation's economic, political, legal and social institutions. In their introduction, Brennan and Castles identify two common themes that had emerged from their work,<sup>88</sup> the second of which they described as:

...the issue of the appropriate treatment of Aborigines – and the failure of our institutions in the past to deal with this issue satisfactorily – is seen as being the major issue for the Australian democratic project.

They went on to point out that, in relation to Aboriginal concerns, there had been a shift in the nature of the issue:

The shift is away from perceiving the problem as one of *policy* towards conceiving it as one of institutional reshaping or reform...there is consensus that the strategy of 'liberal inclusion'...is not in itself enough (Brennan & Castles 2002:23).

The chapter by Braithwaite on 'Globalisation and Australian institutions' examines the historical foundations of the Australian colonies, and concludes, *inter alia*:

We can be certain that in the century when convicts were being reintegrated, Aborigines were being exterminated and almost totally excluded from labour market opportunities in the dominant society...The very distinctive property institutions that included the one group [ex-convict] excluded the other [Aboriginal peoples]...

...So the history of Australia is a history of a unique kind of rule of law – a procedural law and property law...that created extreme forms of inclusion and exclusion (Braithwaite 2002:97–98).

Dryzek in his chapter 'Including Australia: a democratic history' notes that formal citizenship rights do not necessarily connote full inclusion in the state or polity more generally. He concludes that

Aboriginal inclusion in the politics of the liberal state...has been partial, contested, sometimes resisted by more radical activists, and often ambiguous in institutional terms...

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<sup>88</sup> The first common theme related to labour market reform issues.

...When it comes to Indigenous Peoples, there is an important body of concerns that cannot easily be expressed in the language of individualism, of liberalism, even of rights (Dryzek 2002:129–131).

Stokes, in his chapter 'Australian democracy and Indigenous self-determination, 1901–2001' concludes:

On most of the social and economic criteria that accompany liberal inclusion, a great proportion of Indigenous people remain excluded. As a social and economic project, liberal inclusion remains radically incomplete (Stokes 2002:209–210).

Of course, acknowledging the existence of deep-seated structural exclusion is only the first step. Our aim is to go beyond identifying its existence, and begin the process of laying out a roadmap for policymakers and the nation to begin the transformation required to achieve a more inclusive nation.

Indigenous structural exclusion is not a binary state or process, with clear boundaries between the included and the excluded. Rather, it involves a spectrum of institutionally structured behaviours and relationships between mainstream public and private interests on one hand and Indigenous citizens on the other. These are overlain by the reality that different Indigenous individuals and groups will be positioned at various points on the inclusion/exclusion spectrum and that individuals may be at different points or stages of the spectrum during their lifetimes. This suggests there is unlikely to be a single institutional switch that in one decisive moment will shift Indigenous Australians from exclusion to inclusion; it also provides cause for hope that an accumulation of small steps will ultimately tip the balance towards greater substantive inclusion.

The crucial element in ascertaining the levels of inclusion or exclusion are the accumulated points of interaction between those public and private interests substantively included in the Australian nation state's overarching political settlement, and Indigenous citizens and interests. This is why the quality of government engagement with Indigenous interests not only in terms of institutional engagements but also in terms of face-to-face engagement is critical.<sup>89</sup> Private-sector engagement is also potentially significant, but this is largely (though not entirely) shaped and regulated by the institutional frameworks governing markets and commercial activity, which themselves form part of public sector institutions.

## **The structural underpinnings of Indigenous policy failure**

In chapter one, we suggested that more fundamental processes of elite and interest group bargaining led to the creation of a dominant coalition of interests that shapes the nation's mainstream institutional frameworks. In turn, this influences both government resource allocations and the opportunity for rent seeking by vested interests.<sup>90</sup> We referred to this as the extant political settlement.

In what follows, we lay out our own views on the prospects of Indigenous interests successfully reforming the nation's mainstream institutional framework to make them more inclusive. We adopt a high-level normative standpoint, namely one based on our view that the continued structural exclusion of Indigenous interests is counterproductive to advancing Australia's national interest, and ethically unsustainable. Our perspective is also heavily influenced by descriptive considerations, namely that we need to take into account (and not assume away) existing mainstream institutional frameworks and in particular the notional compact or political settlement underpinning the existing institutional framework.

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<sup>89</sup> This is a point on which Fred Chaney has particularly focused; see Chaney (2018).

<sup>90</sup> Rent seeking refers to the practice of undertaking unproductive expropriative activities that bring positive returns to the individual (or corporation) but not to society. See Krueger (1974) and Tollison (1982) for a theoretical overview. Rent seeking is implicated in widening income inequality (Stiglitz 2012:32). For a recent popular account of the extent of rent seeking in Australian economic and political life, see Murray & Fritjers (2017).

The reason why Closing the Gap, or addressing Indigenous disadvantage, or reducing extraordinary Indigenous incarceration rates, or excessive out-of-home care rates for Indigenous children, is so difficult is that the systemic institutional exclusion of Indigenous interests has been and continues to be endemic. This is not necessarily the result of direct or even indirect racism (although both these processes continue to exist<sup>91</sup>); rather it is largely the result of non-Indigenous groups pursuing their own interests in ways that crowd out other interests. The fact that Indigenous citizens comprise just 3% of the population merely reinforces the likelihood that their interests will be pushed aside. The result is a fundamental imbalance that undermines the capacity of comparatively powerless interests to influence current and future policies. In turn, these power imbalances frame the institutions and their social and economic outcomes and operate intergenerationally to lock in deep-seated Indigenous disadvantage. In other words, Indigenous interests are not part of the processes that make the rules of the game; as a result, we should not be surprised when Indigenous interests find it hard to score any points, let alone win.

To be clear, while we argue that the extant political settlement largely excludes Indigenous interests (in ways largely invisible to those engaged in democratic and public discourse), we are not suggesting that the political settlement that underpins the nation's political and ultimately institutional framework is some secret conspiracy. The academic research on political settlement theory argues that these notional compacts emerge to manage and ultimately remove violence from societal processes (North et al. 2009). In other words, a political settlement is inevitable and ubiquitous in all societies that have moved beyond anarchy. The dynamics underpinning the development of political settlements in liberal democracies tend to produce the smallest possible coalition that will guarantee security and non-violence so as to maximise benefits to coalition members. The fundamental issue is the degree to which particular political settlements are inclusive of a broader range of interests.

To sum up, we argue that Indigenous policy failure can be traced to an overarching structural dynamic. The nation's 'political settlement' is in a constant state of flux; it must not exclude so many interests as to encourage violence or disunity, and groups within the dominant coalition vie continuously for advantage. The benefits available for members are maximised if other less powerful interests are excluded. The primary reason that macro-policy failure has persisted in Indigenous affairs for over half a century is that Indigenous interests are not part of the dominant coalition that effectively 'makes the rules' and shapes the nation's overarching institutional frameworks. Institutions are in effect 'the rules of the game' and mechanisms for allocating benefits to interest groups within the nation. Institutional frameworks, largely determined by the dominant coalition, unsurprisingly tend to privilege members of the dominant coalition over interests outside it.

## **The nature of government engagement with Indigenous Australia**

Mapping in detail government engagement with Indigenous Australia is a complex task beyond the scope of this monograph. Instead, we will focus on the broad sweep of government engagement and consider a number of examples that serve as archetypes of mainstream institutional engagement with Indigenous interests.

At the formal apex, public sector engagement with the Indigenous domain involves in each jurisdiction a relatively small policy unit or units with a function of providing policy advice to government, engaging with key Indigenous interest groups, and allocating relatively small amounts of funding directed to issues that are symbolically important. In the Australian Government, this agency is currently located in the Department of the Prime Minister and Cabinet, and includes a dispersed and thin regional network (Perche 2018). State agencies and policy units are much smaller. There are generally a small number of statutory bodies within jurisdictions'

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<sup>91</sup> Overt racism directed at minorities who are not part of the mainstream is likely to emerge in circumstances where particular interest groups or sections of society feel threatened either by exogenous change (such as globalisation and large-scale refugee flows) or endogenous change such as systemic reforms directed to levelling 'the playing field'. It follows that inherently exclusionary institutions can be seen as being latently racist even when they do not appear to be directed at specific minorities.

Indigenous affairs portfolios. Each State and Territory also administers a suite of Indigenous-specific legislation, unique to each jurisdiction and generally covering land and heritage issues, advisory mechanisms, and in some cases particular funding arrangements. Formalised mechanisms for policy consultation and engagement with representative Indigenous interests are thin and pro forma in nature, although in recent years a number of states have legislated to facilitate negotiations with land-owning groups in relation to native title settlements. The Australian Government relies on an administratively established Indigenous Advisory Council appointed by the Prime Minister which largely operates behind a veil of bureaucratic secrecy.

While these institutional arrangements are enormously diverse and complex – there are more than 40 separate Indigenous land-related statutes across Australia (Wensing 2016), and the recent Joint Select Committee on Constitutional Recognition considered 12 different advisory structures (Dodson & Leeser 2018:2.142–2.145) – the Indigenous-specific institutions are merely the visible and comparatively small tip of a much larger mainstream iceberg.

One way to assess the impact of mainstream institutions on Indigenous interests is to consider the Productivity Commission's annual compilation of Indigenous expenditure. The 2017 report identifies some \$30 billion in Indigenous expenditure by governments, but only \$6 billion of this is Indigenous-specific. The Australian Government spends around half of the \$30 billion, with the balance spent by States and Territories. While commentators often argue that \$30 billion is allocated to 'Closing the Gap', it includes both positive and negative expenditures, citizenship entitlements such as welfare and pension payments, and excludes substantial tax expenditures that overwhelmingly benefit high-income earners (Treasury 2018). Our assessment is that nowhere near \$30 billion is allocated to addressing Indigenous disadvantage, nor is structural reform a priority.

At a deeper level, analyses such as that undertaken by the Productivity Commission ignore the ways in which profits and economic rents are allocated within Australia. These are the product of an array of historic factors combined with the entrepreneurial capabilities of current and antecedent generations. What is clear, however, is that Indigenous citizens are over-represented among the poorest Australians, and have historically been disadvantaged by policies that denied them access to capital accumulation and commercial activity. The fact that some Indigenous entrepreneurs are now taking advantage of the institutional changes of the past 50 years to engage successfully in business does not negate the significant and continuing disadvantage suffered by the majority of Indigenous citizens, which can be traced to coercive dispossession, and limited access to education, to employment, to capital and to opportunity.<sup>92</sup>

While policymakers have sought to reverse the exclusionary impact of the institutional framework on Indigenous people, their focus has been shallow, largely directed to Indigenous-specific issues, and has entirely ignored the need to address the very real impact of generations of systemic exclusion on Indigenous people. This conceptual gap or backlog can be likened to a marathon where some runners are hobbled for the first 15 kilometres, and then newly 'enlightened' organisers identify the issue and remove the hobbles, but allow the race to continue without adjusting the respective positions of all runners. Moreover, the increasing evidence that intergenerational trauma is a real factor in Indigenous lives means that, to return to our previous metaphor, even those runners whose hobbles have been physically removed may not have the resilience to continue to race competitively.

Australia's history is replete with institutions created explicitly to exclude Indigenous people. These included electoral systems that denied Indigenous Australians the vote, statistical systems that explicitly ignored Indigenous peoples, and social security systems designed in ways that denied Indigenous people access to entitlements (Gunstone 2010). Various administrative arrangements across both public and private sectors

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<sup>92</sup> As Young (2001:15) points out, nor does it mean that those individuals who overcome the obstacles created by structural disadvantage can be 'judged as equal to those before whom few obstacles have loomed'.

created barriers to Indigenous citizens enlisting in the armed forces, obtaining passports and bank accounts, accessing towns after dusk, and seeking substantive justice in the legal system.<sup>93</sup>

In recent years, these overtly exclusionary arrangements have largely given way to less obvious frameworks that have an indirect adverse impact. Examples include income management of welfare payments in the Northern Territory, and the Community Development Program in remote Australia, both of which are technically directed at all low-income earners within the programs' geographical footprint, but primarily impact Indigenous people. Moreover, there is a further institutional dynamic even more adverse to Indigenous citizens, namely, where institutional frameworks that apply in the mainstream are either not made available to Indigenous people or operate in a way that assume Indigenous citizens' needs and aspirations will be automatically met by mainstream processes. This issue recently emerged in the Royal Commission into the banking and financial services industry. The Royal Commission highlighted significant gaps in Indigenous citizens' access to financial services and superannuation when compared to the wider community (Hayne 2018).

A further example is the operation of Rent Assistance in remote Australia. Rent Assistance is the largest housing program for low-income earners in the nation, totalling \$4.4 billion per annum (see AIHW 2018).<sup>94</sup> It provides supplementary rent assistance to low income tenants (most on welfare given the income thresholds) in private sector tenancies.<sup>95</sup> For a range of historical reasons, remote communities have virtually no private rental accommodation. Remote Indigenous residents are almost entirely reliant on social housing, which is extremely underfunded, overcrowded, and often of poor quality. The absence of a private rental market means the Rent Assistance footprint is almost non-existent in remote Australia.<sup>96</sup> Consequently, one-fifth of the Indigenous population is systemically excluded from the nation's largest housing assistance program.

While institutional biases exist across the nation, and impact on Indigenous citizens in urban and regional settings, it is in remote settings where the impact is most obvious.

In 2007, we co-authored a book titled *Beyond Humbug* on Indigenous public policy in Australia (Dillon & Westbury 2007). Our focus was primarily on remote Australia. We argued there was a national interest in governments engaging with remote Australia, and that demographic change would impact hard on remote Indigenous communities, creating substantial new pressures linked to a more youthful population. We pointed to the emerging and widespread dysfunction in many communities largely resulting from an absence of government institutions on the ground. Access to a wide range of services expected and assumed by non-remote citizens is simply not available. We compared this absence to the level and quality of government engagement in a failed state.<sup>97</sup> The book identified a range of structural policy issues that required attention if the problems we saw emerging were not to get worse and create a lost generation of remote Indigenous citizens.<sup>98</sup>

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<sup>93</sup> For a more eloquent exposition of these points and more, see the introductory paragraphs of historian Peter Read's essay 'Whose citizens? Whose country' in Peterson & Sanders (1998:169). Peterson's chapter 'Welfare colonialism and citizenship' in the same volume references legislation in Western Australia and the Northern Territory from the 1940s and 1950s respectively which sets out the conditions which an Aboriginal person must meet to successfully apply for the revocation of status as a ward of the state. As Peterson (1998:112) notes, it essentially amounted to a requirement that an individual demonstrate 'an economic responsibility to a nuclear family built around individualistic striving, capital accumulation and a generalised moral commitment to an impersonal collectivity ruled on the basis of a democratic electoral process'. Those who could not meet these criteria were denied the full rights of citizenship.

<sup>94</sup> Commonwealth support for social housing is around \$1.5 billion. Of course, these expenditures ignore the much larger tax expenditure support to homeowners that is estimated at \$74 billion (Treasury 2018:19). To the extent that Indigenous citizens are under-represented among homeowners, they are structurally disadvantaged in relation to non-Indigenous citizens.

<sup>95</sup> Of course, Rent Assistance might also be seen as a form of subsidy to private sector landlords. Indeed, the program's origins are much more likely to have been derived from landlord interest group pressure than the advocacy of low-income tenancy interests.

<sup>96</sup> The reasons for this are complex, and relate inter alia to land tenure, transaction costs in arranging leases, shortages of surveyed and serviced lots in most communities, poor access to capital and bank finance, and low levels of entrepreneurial experience within communities.

<sup>97</sup> Some critics misinterpreted this analogy as being a criticism of Indigenous people and their governance processes.

<sup>98</sup> One of the issues we did not address in *Beyond Humbug* was the impact on remote service delivery flowing from the abolition of ATSIC. In retrospect, it is clear that ATSIC was, among other things, an institutional mechanism for attending to the physical infrastructure needs of

We were not alone in identifying these issues. In 2012, Desert Knowledge Australia published a landmark report that highlighted many of the same issues and challenges. *Fixing the Hole in Australia's Heartland: How Government Needs to Work in Remote Australia* identified mainstream governance arrangements as the primary cause of policy failure in relation to remote Australia. The report explicitly noted 'The governance of remote Australia should not be cast as an "Aboriginal issue" – it is about ineffective government arrangements, disengagement, and national indifference.' Walker et al. (2012:10).

In the 12 years since we wrote *Beyond Humbug*, it is fair to say that governments have made some efforts to address remote needs, including through a number of Rudd Government National Partnerships, and the increased funds flowing on from the Northern Territory intervention. However, governments have not been prepared to address the structural issues we identified, and the extra investments provided (welcome as they were) have not been adequate to meet outstanding and projected future needs in virtually every area of service provision. Indeed, the current Government has reduced funding for Indigenous programs particularly in remote Australia.

In a 2018 'op-ed' in the *Australian Financial Review*, Danny Gilbert, arguing in favour of constitutional change, succinctly summarised the current state of play in remote Indigenous communities:

The position in remote Australia is tragic. Here there are intractable problems of appalling poverty, drug and alcohol abuse, violence, child abuse and neglect, suicide, poor health, poor education, high levels of incarceration, large-scale unemployment and under-employment (Gilbert 2018).

Our aim is to highlight not just the current dire circumstances, but also the lack of substantive structural changes to the institutional frameworks that drive continuing disadvantage in remote Australia. The increased but arguably inadequate investments of the Rudd/Gillard Government made barely a dent in the frameworks that underpin continuing disadvantage. Over the past five years the changes then put in place – a Remote Service Delivery framework, a remote employment and income-support program focused on community development, and a National Partnership to improve remote Indigenous housing – have been dismantled or restructured by the Abbott/Turnbull/Morrison Governments, largely to provide cover for the withdrawal of funding.<sup>99</sup>

While Indigenous exclusion is particularly visible in remote regions, it is not limited to remote Indigenous residents. High levels of intersectional Indigenous disadvantage persist in urban and regional Australia, and spill over into poor physical and mental health, high levels of drug and alcohol abuse, high levels of incarceration, poor education outcomes, and so on. Continuing Indigenous exclusion is a national issue, which manifests with different emphases across the country and different levels of intensity; it leaves a wake of damaged lives and reduced life opportunities, and a stain on our nation's reputation. Though these outcomes are not the subject of ongoing and widespread popular political debate and contention, political elites are highly conscious of their negative impact on the body politic.

## **The underlying political consensus that reinforces continued exclusion**

An across-the-board elite consciousness of the problem does not extend to a consensus on what is required to address it. The left–right ideological divide and the political narratives associated with each side play out in the public debate and parliamentary arenas, and are primarily focused on persuading the broader (and largely uninterested) electorate that governments and oppositions are acting, or have a plan that will address

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discrete Indigenous communities which are either outside local government areas, or are regarded as private properties (albeit communally owned) within them. Since ATSIC was abolished, no other national institution has systematically attended to this issue. We are grateful to Will Sanders for bringing this point to our attention.

<sup>99</sup>In chapters one and two, we discuss the propensity of the beneficiaries of the extant political settlement (the dominant coalition) to seek to wind back reform and return to the status quo ante.

Indigenous disadvantage, close the gap, create jobs, fix the 'Indigenous problem'. The ideological underpinnings of left and right political elites are distinct, but in many respects overlap and differ only in emphases. Conservative elites invoke the role of individual responsibility and effort, economic development and employment in driving improved Indigenous outcomes. On the left, elites emphasise collective rights, identity, land rights, the pre-eminent place of culture and cultural understanding, substantive consultation, human rights and Indigenous self-determination.

These ideological focus points are both substantive and also operate to signal where advocates stand. They are tempered by broader ideological preoccupations on both the left and the right: scepticism of government action on the right, a belief in government intervention on the left. Nor are these ideological underpinnings set in stone; they can change over time. Perceptions of the issue of land rights have changed over time. The left has come to terms with the reality that granting land rights has not been the panacea that those advocating for it 50 years ago believed it would be; the right has come to terms with the fact that granting land rights and recognising native title have not been the political and economic disasters they feared.

Yet notwithstanding the lack of a consensus among policy and political elites, a more profound link exists, emanating from their shared membership of the dominant coalition and a desire not to upset the extant political settlement. Political elites on both sides are deeply reluctant to address the structural and institutional arrangements underpinning Indigenous exclusion. There is a shared preference to limit policy and political debate to issues that avoid fundamental change, and instead give the appearance of action and change without placing the political settlement at risk. One can almost discern an unspoken agreement, or dare we say 'bipartisanship', across the elite ideological divide not to drive fundamental reform. This reluctance is not necessarily 'conscious', as it is facilitated by the complexity of our political system and the ideological and partisan divides that serve to facilitate self-serving rationalisations. The specialisation of policy and political roles makes ultimate accountability for political and policy direction opaque.

Of course, this deeply pessimistic conclusion is not necessarily the full story. Structural analysis needs to acknowledge the potential impact of individual agency (Young 2001:15). Thus, our provisional conclusion ignores the possibility of individual action to drive fundamental change from within a government (at either ministerial or bureaucratic levels). Importantly, it ignores the possibility of Indigenous actors finding ways to exploit opportunities (both formal and informal) thrown up within the interstices of complex institutional arrangements.<sup>100</sup> More often than not, however, reforms based on the vision and energy of a single influential individual are reversed or weakened once that individual moves on and loses influence or power. The abolition of ATSIC described in chapter two is an example; the recent disembowelling of the National Partnership on Remote Indigenous Housing is another. Finally, exogenous impacts, a war, a pandemic, or the impact of globalisation, may fracture the existing political settlement, establish a new structural equilibrium among elite interests, and thus open opportunities (and risks) for Indigenous interests. Yet such ad hoc possibilities are unlikely to counter or compensate for the inertia that characterises the overwhelmingly exclusionary impact of the extant political settlement.

To sum up so far, the primary driver of longstanding political and policy failure in Indigenous affairs is the continued stasis and inertia in the institutional settings affecting Indigenous Australia. This policy stasis is the result of the enormous challenges facing historically excluded Indigenous interests in driving policy change in a complex and highly politicised system. Mainstream institutions have collateral impacts on Indigenous interests

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<sup>100</sup> In the case of the ATSIC reforms, the role of Minister Gerry Hand was crucial. In turn, he was able to exert policy influence within the Government due to his factional powerbase within the ALP. In the case of the Indigenous Voice proposals, the charismatic intellectual leadership of Noel Pearson and Megan Davis has been crucial in taking the proposal from a 'good idea' to a nationally acclaimed policy opportunity.

that are not amenable to Indigenous political leverage because they are barely visible and changing them would upset existing equilibriums among the powerful and dominant interests already benefiting.

In the light of this analysis, it is worth considering two specific examples that provide tangible support for our conclusions. The first focuses on remote Australia, and the second relates to New South Wales (though it resonates nationally) whose Indigenous citizens reside largely in urban and regional locations. Separately and together, they demonstrate that exclusionary institutions exist across the breadth of Indigenous Australia.

## **Funding remote services**

The institutional arrangements underpinning remote communities differ considerably from those applying in regional and urban Australia. The reasons are complex, and include the nature of settler engagement with remote regions and resultant Indigenous responses, the design of land rights laws, the nature of native title rights, the demographics of remote regions, the histories and political dynamics of State and federal jurisdictions, and the nature of economic activity undertaken in remote regions. For better or worse, the current institutional frameworks that govern and shape resource allocation by the public sector, and investment by the private sector, operate to constrain investment in core essential services in most remote locations. As the Remote Focus report (Walker et al. 2012) points out, there is a complex interplay of four levels of governance: federal, State or Territory, local government and community-level organisations, all engaged or potentially engaged in allocating resources. Conflicts over responsibilities, priority setting, implementation and ongoing management of funded projects are endemic. Each jurisdiction has its own idiosyncratic history, approaches, and culture of engagement. There is considerable scope for individual agency to create opportunities outside structural constraints. Nevertheless, for all this complexity and flexibility, at a structural level, the institutional arrangements in place operate to limit the quantum of funding available.

## **Perverse outcomes of horizontal fiscal equalisation**

The structural elements operating in this way include the allocation of public resources by State and Territory governments. These decisions are largely informed by electoral considerations, biasing public spending towards urban over remote investments. A subset of this issue relates to the allocation of goods and services tax (GST) revenues based on a process of horizontal fiscal equalisation overseen by the Commonwealth Grants Commission, that identifies and assesses the particular needs in jurisdictions including those needs arising from the special circumstances of each jurisdiction's Indigenous population. Under this system, once the relative needs of each jurisdiction have been calculated, the Commonwealth allocates the designated share to each jurisdiction without any requirement that it be spent in addressing the assessed needs. The so-called 'indigeneity factor' has long been contentious in the Northern Territory where Indigenous interests have argued that successive Territory Governments have prioritised spending in the urban centres (and their more populous electorates) over the bush.<sup>101</sup>

While this is an issue, at a deeper structural level the process of horizontal fiscal equalisation is directed at equalising the recurrent requirements of jurisdictions, and not their need for capital investment. Remote Australia suffers a combination of later settlement, low population density and remoteness, which means there is a capital infrastructure shortfall. This flows into reduced assessed needs for recurrent government expenditures to maintain the existing infrastructure base.

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<sup>101</sup> The submission of the Yothu Yindi Foundation to the recent Productivity Commission inquiry into horizontal fiscal equalisation lays out these arguments in a cogent and summary form. The submission is available at [www.pc.gov.au/inquiries/completed/horizontal-fiscal-equalisation/submissions](http://www.pc.gov.au/inquiries/completed/horizontal-fiscal-equalisation/submissions)

The recent Productivity Commission inquiry into horizontal fiscal equalisation largely bypassed the issues raised for Indigenous interests in remote Australia. The commission pointed to blurred lines of responsibility between the federal government and State and Territory jurisdictions, and to the inconsistent treatment of Commonwealth funding to the States and Territories, where some programs are explicitly excluded from the fiscal equalisation process, to avoid addressing the sorts of issues raised above. The result is complexity and confused accountability. Instead of recommending specific structural reforms such as we proposed in our 2007 book *Beyond Humbug* (Dillon & Westbury 2007),<sup>102</sup> the Productivity Commission argued that ‘improvements to the HFE [horizontal fiscal equalisation] system can only go so far’. It went on to propose that the Australian Government and the States should ‘work towards meaningful reform to federal financial relations’: in the first instance, assess how the various types of grants interact with one another and, second, ‘develop a better delineated division of responsibilities between the states and the Commonwealth, and establish clear lines and forms of accountability. Policies to address Indigenous disadvantage should be a priority’ (Productivity Commission 2018a:284). While the diagnosis is largely correct, the proposed treatment essentially amounts to kicking the policy can down the road, again.

For Indigenous interests, this result is disappointing. It reinforces the institutional bias towards the majority of citizens in non-remote jurisdictions to the detriment of citizens living in remote Australia.

## Exclusion from infrastructure spending

From an Indigenous perspective the structural flaw embedded in the current processes of horizontal fiscal equalisation means that residents in jurisdictions with extensive remote regions including high proportions of Indigenous long-term residents are particularly disadvantaged. No account is taken of the fact that these regions settled late by Europeans have virtually no essential infrastructure. The relative need for new capital investment is not assessed by the Grants Commission process. Yet it is the very absence of this infrastructure (which includes housing, roads, essential services, surveyed lots, and educational and health facilities) that constrains and limits remote Indigenous residents’ access to economic opportunities.

To take a practical example, this issue was recently highlighted in relation to the roll out of the National Disability Insurance Scheme (NDIS) in remote Indigenous communities, where the prevalence of disability is at least twice the rate for other Australians. Recent research highlights that in a number of cases support packages under the NDIS are not being expended, as the necessary infrastructure and disability services simply do not exist and are therefore not available for purchase in these communities (Avery 2018).

The constraints on the fiscal equalisation methodology mean that there is no automatic process for funding infrastructure development and maintenance across remote Australia, with the consequence that virtually all investment in these facilities is sourced from discretionary specific-purpose funding.

The institutional arrangements that underpin local government funding have similar design features, building in a bias to local governments in more populous jurisdictions. Remote local governments are doubly disadvantaged: their rate revenues are extremely small, and the available Commonwealth funding is allocated among the States in two distinct categories. The first category is on a population basis, with a requirement that once allocated, funds will be distributed to local governments through an equalisation process; the second, related to roads, is allocated based on fixed percentages that have an historical basis. Taken together, these arrangements ensure the system fails to equalise allocations fully against need.<sup>103</sup> The Northern Territory is the

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<sup>102</sup> See also Dillon (2018a). Both of these documents include an argument for an innovative approach to fiscal equalisation across remote Australia that essentially amounts to the creation of a virtual jurisdiction for the purpose of horizontal fiscal equalisation that would be assessed against all other jurisdictions.

<sup>103</sup> Refer to Productivity Commission (2018a:87) for a more detailed discussion of local government funding arrangements including the rather opaque road funding arrangements.

major loser from this arrangement, as its whole population is similar in size to Geelong. Consequently, in relation to the first category, one-sixth of the Australian landmass is allocated only the same amount of funding for local government services as is the city of Geelong. Not only is the backlog in essential services infrastructure not included in the calculations of need, but funding for local government services is skewed towards the most populous States.

There is a deeply embedded mindset within governments at all levels that the infrastructure needs of smaller remote communities do not count. For example, and merely as an indicator of this mindset, the activities of Infrastructure Australia,<sup>104</sup> which is heavily reliant of proposals being developed and advocated by State and Territory governments, invariably pass over the needs of remote communities, usually on the basis that they are too small to worry about. Yet if one were to aggregate the needs of the 1200 plus remote settlements, the 'need' would be assessed as costing billions of dollars. A recent Infrastructure Australia audit aimed at informing the development of the Government's overarching strategy towards northern Australia for the next 15 years dismissed the infrastructure needs of Indigenous communities in a single paragraph:

The audit focuses primarily on infrastructure connecting to larger northern population centres (3,000 persons or more), as well as to areas of significant existing or prospective economic activity. In consequence, the essential infrastructure needs of the many smaller remote Indigenous communities fall outside the scope of the audit.<sup>105</sup>

While Infrastructure Australia's work does not determine funding levels, it is highly influential in shaping the options that governments consider for funding. The outcome is that funding for remote essential services and infrastructure defaults to ad hoc decisions of governments at both State and federal levels.

These systemic biases appear to have been replicated in the Australian Government's North Australia Infrastructure Facility (NAIF). This is a lending mechanism established by legislation with its own board and staff and with access to a \$5 billion allocation from the budget for concessional loans to economic infrastructure projects across northern Australia. The NAIF operates within an investment mandate determined by the Minister for Northern Australia, and its funding decisions are subject to ministerial override. Its strategic objectives include 'supporting the construction of economic infrastructure that provides the basis for the longer term expansion of industry and population in northern Australia'.<sup>106</sup> Yet while Indigenous citizens represent a substantial proportion of the long-term residents in northern Australia, and Indigenous people are the major landowners, the NAIF board includes only one very recently appointed Indigenous member.<sup>107</sup> While its funding criteria require proponents to address an 'Indigenous engagement strategy', the NAIF facility structure appears primarily designed to subsidise commercially viable private-sector projects with concessional public finance. While Indigenous-owned projects are formally eligible, without a focus on public-sector-sponsored projects<sup>108</sup> that inevitably have substantial economic impacts, it is highly unlikely that a significant proportion of the available finance will underwrite Indigenous-owned investments.

It is clear that, for reasons that no longer make any sense (if they ever did), Indigenous communities and interests across remote Australia face an institutional framework that either ignores them or is severely tilted

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<sup>104</sup> Infrastructure Australia is a Commonwealth statutory authority with a remit to assess and provide advice to governments on infrastructure priorities and need.

<sup>105</sup> The paragraph went on to state that these issues were being dealt with by various processes being led by the Northern Territory Government, notwithstanding that northern Australia's needs extend beyond the Territory to Western Australia and Queensland; see Infrastructure Australia (2015) 'Northern Australia audit: infrastructure for a developing north', January 2015:12.

<sup>106</sup> This quote is from the NAIF website: [www.naif.gov.au/about-us/](http://www.naif.gov.au/about-us/); accessed 27 September 2018.

<sup>107</sup> Ms Kate George was appointment to NAIF announced by Minister Canavan on 4 April 2019.

<sup>108</sup> The NAIF is designed to provide concessional finance primarily to commercial/private sector projects.

against them. These are institutions that primarily deliver mainstream services to Australian citizens, but do not operate to address the needs of remote Indigenous citizens.

## Out-of-home care for children in New South Wales

Institutional disadvantage is not just an issue for remote Indigenous citizens. Structural disadvantage is endemic in regional and urban Australia, although it is often more difficult to pinpoint because it is overlain by ostensibly 'race neutral' laws and addressed by mainstream services and service providers endemically blind to the particular needs of Indigenous clients. New South Wales, where one-third of the nation's 630 000 Indigenous citizens reside, provides a recent useful example.

In 2011 and 2014, the state Ombudsman issued reports pointing to the chronic underfunding of the child protection system in New South Wales. His reports did not focus on Indigenous families or children. Out-of-home care is just one element in the broader child protection system that operates in every jurisdiction.

In 2016, the New South Wales Government received a report (the Tune report) it had commissioned on out-of-home care for children and young people (Tune 2016). For reasons we can only guess at, the Government decided not to release the report, claiming that it was cabinet-in-confidence. In June 2018, the report was publicly released following a threat from the Legislative Council to expel a senior member of the Government unless this report (and two others) was made public.

The removal of children into out-of-home care is a major issue for the Indigenous community nationally, and an issue of major policy and political concern for governments. Nationally, there are 31 000 children in out-of-home care, of whom 11 900 or 38% are Indigenous. In New South Wales, of the 11 600 children in out-of-home care, 4600 or 39% are Indigenous.<sup>109</sup> These statistics disclose a major and ongoing crisis within a significant proportion of Indigenous families. Given that the 'drivers of demand'<sup>110</sup> for out-of-home care include drug and alcohol abuse, domestic violence and mental health issues, the levels of child out-of-home care reflect a much larger swathe of pain, stress and trauma that inevitably reaches well beyond the families involved.

The salience of the Tune report for our argument is not merely the fact that Indigenous children and young people are significantly over-represented within the child protection system in New South Wales (and nationally), serious as that is. Nor are we concerned just with the underlying drivers of that outcome. Rather it is the conceptually separate conclusion that the bureaucratic system government uses for managing vulnerable children is fundamentally broken and not fit for purpose. As David Tune stated in his covering letter to the then Premier:

The review concluded that, overall, the current NSW system is ineffective and unsustainable. The system is not client centred, expenditure is in crisis and not aligned to an evidence base and the Department of Family and Community Services has minimal influence over drivers of demand and levers for change. Moreover the system is failing to improve long-term outcomes for children and families with complex needs, and to arrest devastating cycles of intergenerational abuse and neglect.

The report goes on to identify a series of deeply embedded and interconnected systemic problems that, if they are to be addressed effectively, will require a 'fundamental level of change'. The report recommends a series of reforms that flow logically from the need to address the systemic problems identified. They include the introduction of personalised and targeted support packages; an 'investment approach' based on prioritising

<sup>109</sup> These statistics are sourced from the *Review of Government Services 2018*, Productivity Commission (2018b). Refer to figure 16A.17 in the chapter on child protection services.

<sup>110</sup> The Tune report uses this term.

resource allocation to those cohorts of clients with greatest needs; and the establishment of a Family Investment Commission to oversee implementation and take responsibility for coordination. The report also recommended the establishment of local cross-agency boards to build greater local input into the delivery of services. Overall, the report is clear, focused, concise and logical. It makes an extremely persuasive case, including in noting that a failure to address the current shortcomings will lead both to greater family suffering and to increased long-term costs to government.<sup>111</sup>

The Tune report provides persuasive evidence that the system for managing at risk and vulnerable children in New South Wales is fundamentally broken. The report recommendations are high level, sensible and well thought out, and if implemented would undoubtedly lead to substantial improvements. As the report notes, 'significant disruption of the system is needed to achieve the fundamental level of change required' (Tune 2016:4).

The State Government's response has been to propose a series of technical and process reforms, along with the allocation of some \$90 million over four years directed to early intervention programs (Allam & Evershed 2018). But they have not been prepared (so far) to adopt the recommended investment approach, nor the personalised and targeted support packages, nor the Family Investment Commission. Of course, these decisions were facilitated by the secrecy imposed on the Tune report. In a discussion paper released in October 2017 and purporting to respond to the Tune report, the Minister's foreword stated:

In 2016, the NSW Government announced record funding for Their Futures Matter in response to the findings of the independent review of OOHHC [out-of-home care] in NSW led by David Tune AO PSM.

Their Futures Matter takes a whole-of-government approach to ensure that effort and funding across government is focused on interventions that will improve the long-term outcomes for children and families at the earliest opportunity (Department of Family and Community Services 2017).

The discussion paper made no mention of the key reforms proposed by the Tune report, instead focusing on a myriad of technical legislative and administrative processes. While the Government claims to be implementing the Tune report, 'either as framed or by other means', the opacity and lack of transparency around the report, its recommendations, and consequential implementation makes such a conclusion difficult to sustain. Of course, from the Government's perspective, proactively addressing the management of vulnerable at risk children is both politically risky and potentially highly expensive. There is no interest group with widespread political influence pushing for reform, and multiple uses exist for the resources required for proactive reform in this area.

Notwithstanding the radical incisiveness of the Tune report, it is not without a significant flaw. The report's underlying assumption is that, because this is a mainstream program dealing with vulnerable children from all backgrounds, addressing the program's shortcomings can similarly be undertaken entirely through a mainstream lens. The Tune report acknowledges the over-representation of Aboriginal children in the system, focusing on the fact that 7% of Aboriginal children are in the out-of-home care system (compared to 1% of the mainstream children's population). However, nowhere does the report acknowledge that more than one-third of all children in out-of-home care in New South Wales are Indigenous.

While the out-of-home care system is a mainstream program, in a very real sense it is also Indigenous. Once this reality is acknowledged, the case for building in systemic elements that have the capacity to engage with Indigenous clients becomes overwhelming. Moreover, the Government's substantive (non-)response to the Tune report is similarly blind to this systemic reality. The exclusionary impact of the out-of-home care system for

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<sup>111</sup> These findings and recommendations resonate strongly with those handed down by the recent Royal Commission into Youth Detention and Child Protection in the Northern Territory established by the Australian and Territory Governments (Commonwealth of Australia 2017).

vulnerable children (of all backgrounds) in the mainstream is real and long lasting. As the report notes, 'the current system is not effective in improving the life chances for vulnerable children and families'. Given that the State's Indigenous population represents only 2.9% of the total mainstream population (Angus 2018), and Indigenous children comprise 39% of the children in out-of-home care, 13 times their expected pro-rata level of involvement, we can safely assert that the system's exclusionary impact affects Indigenous children and families to an extraordinary degree.

In response to the release of the Tune report, Indigenous interests, notably AbSec, the peak body for Aboriginal child protection and family support organisations in New South Wales, called for the establishment of an Aboriginal Child and Family Commissioner to oversight Aboriginal child protection matters. The Government has rejected that option stating:

We're not creating a separate system for Aboriginal children. This is core business for us...This is Australia and we are all in this together. This is core for all of us. It needs to remain in the mainstream, as part of mainstream responsibility (Allam 2018a).

The bottom line is that two years on from the receipt of the Tune report, the New South Wales Government has not been prepared to drive substantive structural reform of the out-of-home care system that disproportionately affects Indigenous children and families. In addition, the Government is not prepared to acknowledge that this reality deserves nuanced and culturally appropriate policy design.

This reluctance to pursue systemic reform will be tested in the near future as a report of an Independent Review of Aboriginal Children and Young People in Out of Home Care is being undertaken by Professor Megan Davis.<sup>112</sup> The review was commissioned in September 2016 and is expected to report by end July 2019.

This overview demonstrates that institutionalised exclusion of Indigenous interests is not limited to remote Australia. It is perhaps less overt, and more difficult to discern as it is embedded in a mainstream policy frame, but it is nevertheless real. It raises the question: what other policy issues are camouflaging Indigenous exclusion in non-remote Australia?

## Conclusion

To sum up, while we haven't undertaken a comprehensive assessment, the statistics on Indigenous incarceration, Indigenous health outcomes including mental health and disability, and Indigenous education, to name just a few policy areas, suggest that deep-seated disadvantage flowing from institutionalised exclusion is both ubiquitous and intergenerational across both remote and non-remote parts of the nation. The Morrison Government's current moves to 'refresh' the Closing the Gap targets appear designed to disguise these deep-seated issues (Dillon 2018c).

Notwithstanding the macro-policy debates and developments of the last five decades, it is clear that Indigenous interests have yet to make substantive gains in reversing systemic Indigenous exclusion. A key challenge for Indigenous interests is to develop and sustain effective political support and influence at the national level while maintaining robust regional and local legitimacy.

In our concluding chapter, we assess the various macro-policy options available or currently under consideration. We also outline our vision for future policy directions in relation to Australia's engagement with its First Peoples.

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<sup>112</sup> The terms of reference for the review are available at [www.familyisculture.nsw.gov.au](http://www.familyisculture.nsw.gov.au)



## 4. Future Directions in Indigenous Policy

*The trouble with our times is that the future is not what it used to be.* Paul Valery (1937)<sup>113</sup>

Our aim in this chapter is to address the macro-level issues that in large measure shape the overall policy approach of governments. Our focus looks beyond the immediate and the short term, seeks to consider the implications of the nation's Indigenous affairs policy settings over the last five decades, and looks to the medium-term future.

### Addressing Australia's discriminatory future

Australia's social, economic and political institutions are the accumulated result of the exercise of political influence and power by the coalitions of interests that have dominated our political systems over the past century (or more). Coalitions of dominant interests strongly influence political parties and the governments that parties form. They are the primary drivers in the establishment of institutions to direct economic resources and benefit to those included within the coalition.<sup>114</sup> These institutions include laws that design and regulate the operation of markets, that establish regulatory bodies, that shape the tax system, that oversee industrial relations and its components, that regulate social and political activities by citizens, and so on. At the apex of our institutional system is our federal system, and the parliaments and public sectors that manage and implement the processes involved in changing our institutions.

For present purposes, there are two key points to make about our institutions. First, they invariably have a much longer lifespan and influence than the interests that created them. Institutions are invariably part of a complex web of arrangements that makes reform or change difficult to achieve. Our system of representative democracy privileges legislative compromise and encourages institutional incrementalism; it therefore involves a deeply ingrained preferential bias for the status quo over change. While this is widely recognised at the level of constitutional change, it is even more widespread at legislative and even informal levels. The ubiquity of change and innovation in society drives necessary consequential institutional adjustment, but also tends to obscure institutional stasis. It follows that, even were there to be changes to the equilibrium within the dominant coalition (say in relation to the recognition of Indigenous interests), the outcomes delivered by our institutional framework would continue to reflect the status quo ante, until the institutions underpinning the new equilibrium change, which may take decades.

Second, our institutional framework is designed to work in favour of the dominant coalition of interests, and thus by definition to direct resources away from those groups or interests not part of the dominant coalition.<sup>115</sup> Levels of exclusion are diffuse depending on the level of engagement (or more saliently non-engagement) with particular institutions and thus differ both between different groups in society and within them. So even assuming that our political elites are gradually overcoming their longstanding bias against Indigenous interests, Indigenous people are still impacted by two less obvious factors. First, institutional inertia means that discriminatory and other adverse frameworks continue despite elite rhetoric about Indigenous acceptance. Second, the growing Indigenous engagement with mainstream institutions is exclusionary in its effects. One example that incorporates elements of both factors is access to welfare: Indigenous citizens are over-

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<sup>113</sup> Valery (1937). This quote is a loose translation of the original: 'L'avenir est comme le reste: il n'est plus ce qu'il était.' This translates to 'The future is like everything: it is not what it was'.

<sup>114</sup> This line of argument draws on the literature on political settlements. Refer to the discussion in chapter one.

<sup>115</sup> See Abbink & Dogan (2018) for recent research in experimental psychology supporting the proposition that group behaviour that excludes members to maximise benefits to a dominant cohort is a naturally occurring social dynamic. As the authors state in their conclusion: 'Our results show that spontaneous formation of mobs is easy, and surprisingly many subjects are inclined to be a part of it, showing little concern for the consequences for the victim. Nominations of victims are frequent even if the gains from it are minimal, and individuals do not hesitate to pick a fellow group member who is already poorer than themselves. In this case, the victim's relative poverty only serves as a focal point and a coordination device.'

represented among the long-term unemployed, yet there has been virtually no real increase in the value of unemployment benefits since 1994 (Whiteford 2016).

We can draw at least two conclusions from this high-level analysis. First, notwithstanding ongoing shifts towards greater *de jure* inclusion for all citizens, and the associated rhetoric of increasing societal inclusion, without structural policy change to adjust institutions, Indigenous people will continue to have to navigate, and overcome the disadvantages thrown up by the institutional frameworks created in earlier times when Indigenous people were deliberately and explicitly excluded. Second, mainstream exclusionary institutions are significant potential inhibitors of greater Indigenous inclusion. For example, institutional frameworks in the criminal justice system that rarely prosecute let alone imprison corporate malfeasants,<sup>116</sup> while imprisoning fine defaulters, will inevitably reinforce high Indigenous incarceration rates. Taken together, we can confidently predict that, without structural policy change, existing exclusionary barriers and their concomitant exclusionary outcomes will continue into the indefinite future.

There are many normative arguments for addressing Indigenous exclusion; however, to date they have failed to gain traction. In our view, this is largely because the beneficiaries of the current political settlement underpinned by the dominant coalition of interests in Australian society are not prepared to place their relative positions at risk by opening up a significant reconfiguration of that political settlement.

Incremental change is possible; however, this is as likely to be negative as positive. Moreover, even where change is positive, it is easily reversed. More significant change is possible when an overwhelming national community consensus emerges, as occurred with the long land rights debate from the late 1970s through to the 1990s when the High Court handed down the *Mabo* native title decision.<sup>117</sup> And of course exogenous shocks and change will always create the possibility of significant reconfiguration of the extant political settlement, albeit not necessarily in alignment with Indigenous aspirations or interests. Periods of disruption within the national political settlement open up both opportunities and risks for excluded groups.

This analysis goes a long way to explaining why progress in addressing Indigenous disadvantage has been so difficult. It suggests that policymakers are themselves fundamentally constrained by what is consistent with the extant political settlement, as any attempt to break out of those (admittedly blurred) parameters will lead to political conflict with consequences that a government cannot ignore.

The analysis also explains why the two major parties (notwithstanding their significant ideological and other differences) are fundamentally 'at one' since they too are major participants and beneficiaries in the extant political settlement. Political parties generally emerge to represent and advocate for key interest groups, and thus are usually conceptualised as conduits for underlying interests. However, as political parties have become more professionalised and embedded in public life, they absorb and reflect broad ideological perspectives linked to their constituent interests and, at least to an extent, take on the character of independent interests themselves. While they differ at the margin, and both parties include individuals keen to drive positive change, the parties have a common interest in supporting and maintaining the underlying status quo. In these circumstances, the tactical attraction of 'bipartisanship' on Indigenous affairs to policymakers is obvious, allowing policymakers to focus on rhetorical aspiration more than substantive and fundamental reform that would threaten the stability of the extant political settlement. Indeed, it is difficult to think of the last time that the

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<sup>116</sup> The Hayne (2019) Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry provides the most recent evidence for this proposition.

<sup>117</sup> As we have previously noted, this only occurred because the High Court stepped in to overcome the political gridlock that had taken hold. See Dillon & Westbury (2007:ch.4); Dillon (2018b:5). Moreover, consistent with our argument, the initial reforms embedded in the NTA (which were themselves compromises) were progressively wound back, most notably by the so-called Wik amendments. This process of winding back is arguably still occurring; e.g., in the way the Land Fund established by the NTA has been progressively brought under the control of the Department of Finance and made part of the Commonwealth's financial accounts system.

national government initiated a truly fundamental structural reform agenda in Indigenous affairs. Megan Davis (2018a:23–24) has expressed similar views, which are worth quoting at length:

Counter-intuitively, bipartisanship also worked against Indigenous peoples. While it is a legitimate point that bipartisanship is a necessary ingredient to achieve reform, it does not always need to be the starting point. Western liberal democracies thrive on political tension; parliaments are designed to mediate tension. Without tension, government ideas cannot be tested. Post-ATSIC, bipartisanship has locked Aboriginal voices out of decision-making and the government and opposition have become accustomed to not consulting us...

Perhaps a different way of characterising this issue is to distinguish between positive and negative bipartisanship: positive bipartisanship relates to a common view regarding an actual reform or policy; negative bipartisanship relates to a common view not to address or advance a reform or policy initiative. While positive bipartisanship is generally desirable, negative bipartisanship is rarely in the public interest, yet it is endemic in the Indigenous affairs domain at both federal and state levels.

Of course, it does not follow that the political settlement supported and maintained by the current dominant coalition of interests will necessarily be in the national interest.<sup>118</sup> Dominant coalitions clearly have an interest in robbing their self-interest in the language and form of the national interest. Moreover, in developed liberal democracies, the shape and form of the extant political settlement is likely to be more inclusive than many developing states, as democratic pressures over time force the dominant coalition to accept new entrants. However, countervailing pressures exist to maximise benefits to coalition members and therefore minimise the potential beneficiaries. These structural incentives may lead to the continued exclusion of less powerful interests, and over time may lead to significant disenchantment and ultimately political and social conflict.

The dominant coalition thus has an incentive to temper short-term advantage in the interest of maintaining the longer-term viability of the nation's existing political settlement. Concessions can be made to broaden the set of beneficiaries, but, for less powerful interests, it is more likely to involve the adoption of rhetorical and symbolic policies designed to assuage concerns while minimising substantive change to the distribution of benefits.<sup>119</sup> We see elements of these dynamics playing out in the nation's approach to Indigenous affairs.

For example, over recent decades political and corporate elites (who are members of the dominant coalition) have signed on to a suite of token or non-substantive policies that do not threaten underlying economic power. These policies include the pursuit of the reconciliation agenda and 'constitutional recognition' of Indigenous interests conceptualised in symbolic rather than substantive terms, and the policy of 'Closing the Gap' without a realistic and resourced strategy to achieve it. Federal and State policies amount to 'benign neglect' rather than proactive support of Indigenous aspirations and inclusion within the national political settlement.

The results of these policies have been overwhelmingly negative. Australia's reputation on treatment of its First Peoples in international forums is tarnished.<sup>120</sup> Indigenous incarceration rates are stratospheric. Indigenous health, education and employment indicators are chronically low and well below comparable non-Indigenous indicators.

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<sup>118</sup> Of course, the concept of the national interest is inherently problematic, and one of the tactics of the dominant coalition is to define their own interests as the national interest.

<sup>119</sup> McConnell (2010) refers to these as 'placebo policies'.

<sup>120</sup> Arguably Australia under-appreciates how it is viewed in the rest of the world on these issues.

The place of Indigenous people within the nation is highly significant in both symbolic and substantive terms since it is a yardstick by which our success as a modern liberal democracy is measured by international observers and Australian citizens. Yet as a nation, we confront a paradox.

While rhetorical support for Closing the Gap and addressing Indigenous disadvantage is virtually ubiquitous, change will derive only from structural reform that reshapes the nation's institutional framework to remove its exclusionary bias against Indigenous interests (and necessarily other less powerful mainstream groups). Yet the dynamics of the dominant coalition engender powerful disincentives to opening up the current political settlement to change and, concomitantly, powerful incentives to water down any substantive reforms that do emerge. We are locked in a dynamic where, all things remaining equal, continuing *de facto* Indigenous exclusion is the inevitable outcome.

The lack of progress does not accord with the archetypical Australian ethos of the 'fair go', but it is the reality the nation must face. It bewilders the electorate which does not understand the failure to make progress, and is inclined to 'blame the victims' for this failure. Indigenous people's expectations and faith in governments and their policy rhetoric are similarly weakened, if not obliterated. Prime Minister Morrison's recent statement to Parliament on release of the latest *Closing the Gap Report* amounts to an admission of defeat. While stating the current situation is 'unforgivable' and conceding that 'it's not true' Aboriginal and Torres Strait Islander children 'can access the same opportunities as any other children growing up in Australia today', he added 'and I don't know when it will be true' (Morrison 2019). This is also an admission of fundamental policy failure.

Not only are the *de facto* discriminatory institutional frameworks of the past locked in place, but a social and political dynamic has been established which will unwind in the future to undermine social stability and amplify racial cleavages. This outcome is not in our long-term national interest. Moreover, while the exclusionary political settlement normally operates without explicit reference to race or Indigenous peoples, the potential for overt racial discrimination at a structural level is progressively increasing.

## The continued legalisation of racial discrimination

It is worth examining in some detail the history of recent efforts to outlaw overt racial discrimination by government. The enactment of the *Racial Discrimination Act 1975* (RDA) by the Australian Parliament was accepted by the dominant coalition as it related primarily to the appropriate treatment of individuals; it was not perceived as a threat to the political settlement.<sup>121</sup> After all, it accorded with the more progressive societal attitudes that had emerged in the 1960s and 1970s. The RDA also reflected in large measure the success of multiculturalism in post-war Australia. However, a major shortcoming of the legislation was that it did not constrain discriminatory legislation by the Commonwealth. In particular, the Commonwealth retains the power to legislate inconsistently with the RDA. This is not a mere debating point, as the Commonwealth has done exactly this on a number of occasions.<sup>122</sup> We examine just two of these instances: the so-called Wik amendments to the NTA in 1998 and the legislation to implement the Northern Territory intervention in 2007.

The Wik amendments were driven by the 1996 High Court decision in *Wik Peoples v the State of Queensland* which held that the grant of a pastoral lease by the Crown did not have the effect of entirely extinguishing native title, and that native title rights not inconsistent with the pastoral lease could coexist with that lease. This was a major change to the Australian Government's prior understanding of the potential reach of native title, and expanded considerably the likely footprint of native title across the continent. The amendments also provided an opportunity for various adjustments to the legislation to improve its workability. We do not attempt a full analysis

<sup>121</sup> There was no appreciation at the time of the way in which the High Court might use this legislation to underpin their decision on the existence of common law native title in *Mabo*; see Dillon (2017).

<sup>122</sup> For this reason, we would argue that assertions that constitutional reform is pointless and merely symbolic are incorrect. For an example, see Macdonald (2018).

of the amendments here,<sup>123</sup> but focus on the validation provisions; these, *inter alia*, essentially allowed State and Territory governments to validate the extinguishment of native title since the commencement of the NTA through to the date of the Wik High Court decision. These provisions involved the setting aside of the RDA which would otherwise have invalidated the extinguishing acts. The formal policy rationale was that the Wik decision was unexpected and governments may have taken actions that affected or extinguished native title in ignorance; however, the terms of the amendment were broad enough to cover extinguishing acts deliberately taken by State and Territory governments in full knowledge of their discriminatory effect. While the provisions require 'just terms' compensation to be paid to native title holders for any extinguishment of their title, the actions validated were by definition racially discriminatory acts of State and Territory governments. They are a continuation of the process of Indigenous dispossession that began in 1788, more than 200 years ago.

The second case involved the 2007 Northern Territory Emergency Response colloquially known as the Northern Territory intervention. This involved a complex array of initiatives and legislation, including the compulsory acquisition of five-year leases over 64 communities, initially without compensation; the power to take control of town camps around major towns; the suspension of the future act provisions of the NTA in relation to the community leases and town camps; bans on access to alcohol and pornographic material in prescribed areas of the Northern Territory; and the introduction of income management of welfare payments in these areas. The associated legislation received bipartisan support when enacted.

The United Nations (UN) Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples, James Anaya, issued a report in February 2010 that analysed the implications of the intervention. In particular, the report examined concerns that the measures targeted Indigenous people and involved racial discrimination, and assessed the Government's claims (incorporated in the relevant legislation) that the measures involved were 'special measures' that, while discriminatory, were intended to benefit Indigenous peoples and were thus allowed under both international law and the RDA. While these provisions had the effect domestically of overriding the RDA, Anaya (2010) found that the measures were substantively discriminatory, and that they did not meet international norms for special measures. The Rudd Labor Government subsequently decided to pay compensation for the five-year leases, and legislated amendments to remove the RDA override provisions in the relevant legislation.

We have mentioned these examples to emphasise a couple of points. Australian governments have a long history of enacting racially discriminatory laws and measures when circumstances give them an incentive to do so. In terms of our analytic framework, when the interests of key beneficiaries of the current political settlement are at risk from a potential extension of Indigenous peoples' rights, discriminatory measures are perceived to be a feasible policy response.<sup>124</sup> Second, our national experience of this type of response not only existed in previous generations; it has continued into recent times. Notwithstanding our self-image as a nation that abhors racial discrimination, governments and oppositions have been prepared to adopt it where convenient, albeit framed in ways that downplay the overtly discriminatory impact of the measures.

In the context of the recent national dialogue on constitutional recognition, it is clear that one of the key drivers for Indigenous citizens is the stark realisation that at present they have absolutely no guarantee that a current or future government will not adopt similarly discriminatory policies and legislation. Many non-Indigenous

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<sup>123</sup> For example, they included provisions that removed the right to negotiate for non-exclusive native title on pastoral leases, and provided for a new mechanism, Indigenous Land Use Agreements, to facilitate access to native title land (or land under claim) by third parties.

<sup>124</sup> In the case of the Northern Territory intervention, the motivation was linked more directly to the strategy of the then Government in the lead up to an election, rather than to the interests of the dominant coalition of interests that establish the political settlement. However, the then Opposition supported the intervention, clearly fearing electoral damage if they opposed it. This case demonstrates the role of ideas and ideology in shaping the position of political parties vis-à-vis dominant interests and the extant political settlement.

Australians would also be concerned if governments were once again to adopt racially discriminatory policy measures.

## The push for constitutional recognition

In what seems like an ancient earlier epoch in the constitutional recognition trek, the Expert Panel established by the Gillard Government recommended, inter alia, a new provision in the Constitution to prohibit racial discrimination (Dodson & Liebler 2012). The proposed section 116A would provide:

The Commonwealth, a state or a territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

Because the RDA is already legislated, the practical impact of the constitutional amendment would primarily be to constrain the Australian Parliament and the national government.

This provision appears to have been the major sticking point for conservatives; they foreshadowed a campaign against any proposal to entrench a prohibition on racial discrimination on the basis that 'unelected judges' could overturn legislation enacted by Parliament. To call it for what it is, conservative opponents of the proposal (with varying degrees of sophistry) wished to retain the Parliament's capacity to enact racially discriminatory legislation.

The threat of a conservative 'no' campaign, potentially supported by conservative State governments, was enough to dissuade both Labor under Prime Ministers Gillard and Rudd, and the LNP under Prime Ministers Abbott, Turnbull and Morrison, from calling the conservatives' bluff, and putting the Expert Panel's recommendations to a referendum. This is an example of negative bipartisanship. Pragmatists expressed concern that a lost referendum would put the Indigenous recognition agenda back for a generation. But 11 years on from Prime Minister John Howard's 2007 pre-election promise to conduct a referendum on constitutional recognition, it seems legitimate to wonder whether it might not have been better to have tried and failed rather than to do nothing. A failure would at least have had the benefit of holding a mirror up to Australian society, and allowed the majority of disengaged Australians to reflect much more deeply on what it means to be a citizen of a nation prepared to discriminate against its own citizens on the basis of race.

What is patently clear is that neither major political party has been prepared to proactively invest in leading a national debate to both recognise Indigenous Australians and in particular to rule out into the future the power of the Parliament to enact racially discriminatory legislation. Indigenous Australians and the many non-Indigenous citizens who are concerned about social justice issues can only conclude that this has been an ongoing failure of national leadership. Thus in July 2008, Prime Minister Rudd told a gathering of Aboriginal people at Yirrkala that he intended to honour an election promise to recognise the rights of Aboriginal people in the Constitution. According to the *Sydney Morning Herald*, he said it was time to 'give attention to detailed, sensitive consultation with Indigenous communities about the most appropriate form and timing of constitutional recognition' (Murdoch 2008).

In 2010 the Gillard Government reinvigorated the constitutional recognition process through the establishment of an Expert Panel to develop proposals for constitutional recognition of Indigenous people (Dodson & Liebler 2012). But once it had reported, the Government could not see its way clear to propose the referendum

the panel had recommended. Instead, the Government funded a public campaign known as 'Recognise', ostensibly directed to raising awareness and public support for a future referendum.<sup>125</sup> During the Abbott Government, notwithstanding some high-flown rhetoric from the Prime Minister, the substantive policy was similar to that of the previous Government; namely more process, but no decisions. There followed a review by former National Party leader John Anderson (Anderson: 2014), and a Select Committee chaired by Ken Wyatt MP and Senator Nova Peris (Wyatt 2015). Neither produced results acceptable to government.<sup>126</sup>

It is also clear that Indigenous interests are increasingly focused on the reality that Indigenous exclusion is real, ongoing, and structural in nature, and that comparative power relations sit at the core of the nation's ongoing exclusionary institutions and policies towards Indigenous citizens. Ultimately, in July 2015 a group of Indigenous leaders met with Prime Minister Turnbull and Opposition Leader Bill Shorten at Kirribilli House to map out a process for taking the issue of constitutional recognition forward. Megan Davis (2016) recounts how this meeting presaged the Government's refusal to countenance the implementation of the Expert Panel recommendations, in particular the prohibition of racial discrimination. This in turn led the Indigenous leadership to begin a dialogue with key conservatives on alternative approaches to Indigenous recognition. From these discussions emerged the proposal for an Indigenous Voice to Parliament – a proposal which fed into the wider discussions among the national Indigenous leadership.

The Kirribilli meeting led in December 2015 to the establishment of the Referendum Council by the Turnbull Government with a remit to develop a viable proposal to advance constitutional recognition. The council was co-chaired by Pat Anderson and Mark Liebler and its members included prominent Indigenous and non-Indigenous Australians.<sup>127</sup>

## Re-establishing an Indigenous voice

The Referendum Council undertook a range of regional consultations that culminated in a major meeting in May 2017 of around 250 Indigenous leaders at Uluru and the promulgation of the Uluru Statement from the Heart that called for 'the establishment of a First Nations Voice enshrined in the Constitution' to advise on legislation before the Parliament.

The statement also proposed a legislated 'Makarrata Commission' to facilitate a process of truth telling about Australia's Indigenous history and potentially to oversight a process of agreement making between governments and the nation's Aboriginal and Torres Strait Islander peoples. The Royal Commission into Institutional Responses to Child Sexual Abuse has opened a window into the extent and severity of trauma arising from past institutionalised injustice to mainstream Australians,<sup>128</sup> and thus raised implicit questions on the need for parallel action in relation to intergenerational trauma among Indigenous Australians arising from the impact of dispossession and colonialism. Notwithstanding a number of previous reports, it is clear that the case for a Makarrata Commission to assist in addressing the complex intergenerational reverberations of colonisation and dispossession is extremely strong.<sup>129</sup>

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<sup>125</sup> The involvement of Liberal Party pollster Mark Textor as a consultant to the Expert Panel, and of former ALP National Secretary Tim Gartrell as a director of the Recognise campaign team is emblematic of the efforts of pro-recognition advocates to find the middle ground. The failure of both the Expert Panel and Recognise processes to gain political traction points to the intensity of the opposition to Indigenous recognition at the political extremes, particularly at the conservative end of the spectrum.

<sup>126</sup> Davis (2018a) provides more detail on these processes.

<sup>127</sup> The council membership is listed on the Referendum Council website: [www.referendumcouncil.org.au](http://www.referendumcouncil.org.au)

<sup>128</sup> The Royal Commission reported that 14% of the 6875 survivors of abuse who gave evidence were Indigenous, which suggests that Indigenous children were over-represented in the cohort of children who were sexually abused.

<sup>129</sup> These reports include the 1997 *Bringing Them Home* report on the Stolen Generations (Human Rights and Equal Opportunity Commission 1997), the 1991 Royal Commission into Aboriginal Deaths in Custody (Johnston 1991), and the more recent 2017 Royal Commission into Youth Detention in the Northern Territory (Commonwealth of Australia 2017).

The Uluru Statement refers to the need for ‘substantive constitutional change and structural reform’, and goes on to include the following text:

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is *the torment of our powerlessness*.

In its final report (Anderson & Liebler 2017), the Referendum Council made two recommendations:

1. That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51 (xxvi) and section 122. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.
2. That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians.

On 26 October 2017, the Turnbull Government announced that it did not accept the proposal for a constitutionally entrenched Indigenous Voice to Parliament, citing its likely loss at a referendum (presumably based on indications from conservatives that they would mount a campaign against it). Various government ministers also claimed that the proposed Voice was not desirable as it would be a ‘representative assembly’ and amount to a third chamber of Parliament and thus infringe on the Parliament’s ability to represent all Australians equally. The media release stated:

The Government does not believe such an addition to our national representative institutions is either desirable or capable of winning acceptance in a referendum.

Our democracy is built on the foundation of all Australian citizens having equal civic rights – all being able to vote for, stand for and serve in either of the two chambers of our national parliament – the House of Representatives and the Senate.

A constitutionally enshrined additional representative assembly for which only Indigenous Australians could vote for or serve in is inconsistent with this fundamental principle (Turnbull et al. 2017).

A third element in the Government narrative related to the alleged lack of detail in relation to the design and structure of the proposed Indigenous Voice. Indigenous advocates countered by arguing that there had indeed been some preliminary work undertaken and made available to the Prime Minister. However, as the proposal was for the Indigenous Voice to be legislated by the Parliament, it was neither necessary, nor perhaps even appropriate, to map out the proposal in detail prior to a referendum. For Indigenous interests and leaders, the Government’s rejection of the Uluru Statement provoked widespread outrage, with Noel Pearson penning a white hot missive in *The Monthly* accusing Prime Minister Turnbull of bad faith and lies over the issue (Pearson 2017). The Labor Opposition joined the majority of Indigenous leaders in excoriating the then Prime Minister for what was seen as an act of bad faith, given the expectations that had been raised in establishing the Referendum Council and giving it a remit to develop detailed proposals. Nevertheless, the lack of conservative support meant that a successful recommendation leading to constitutional change would be highly unlikely. In February 2018, as part of its response to the Prime Minister’s Closing the Gap Statement, the Labor Opposition

announced that, if returned to Government at the next election, Labor would legislate such a Voice, presumably so as to leave the door open to subsequent moves towards constitutional change (Burney 2018).

Following Prime Minister Turnbull's removal from office, Prime Minister Morrison reaffirmed the Government's position in September 2018 and re-asserted that the Indigenous Voice represented a 'third chamber' of Parliament which would not be 'a workable proposal' (Karp 2018).

In the wake of its decision to reject a referendum on the Indigenous Voice, the Government announced its intention to respond positively to calls from Bill Shorten to establish yet another Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islanders. The final report of the Joint Select Committee, jointly chaired by Julian Leeser MP and Senator Patrick Dodson, was tabled in November 2018 (Dodson & Leeser 2018). The committee made only four recommendations. The first recommendation states:

In order to achieve a design for The Voice that best suits the needs and aspirations of Aboriginal and Torres Strait Islander peoples, the Committee recommends that the Australian Government initiate a process of co-design with Aboriginal and Torres Strait Islander peoples...

The recommendation goes on to list six issues the co-design process should consider or address, including consultation processes, the importance of addressing regional and local elements, and a timeframe that would involve a report during the term of the 46th parliament (that is, during the next parliamentary term).

The second recommendation states:

...that following a process of co-design, the Australian Government consider, in a deliberate and timely manner, legislative, executive and constitutional options to establish The Voice.

Recommendations three and four deal with 'truth-telling' and a possible 'national resting place' for Indigenous remains.

Notwithstanding the valuable recording of multiple Indigenous and academic views on constitutional recognition issues, the Joint Select Committee avoided taking a position on the hard choices, and thus failed to advance substantively the constitutional reform agenda. It left open the issue of the institutional basis of the Indigenous Voice (executive fiat, legislation, or constitutional amendment) and avoided any substantive recommendations on the design of the Voice, emphasising instead the desirability of a co-design process. While there is undoubted merit in a process of Indigenous co-design, the net effect of the Joint Select Committee's work has been to broaden significantly the set of potential options and pathways to an outcome. In contrast, serious policymaking is invariably characterised by a process that narrows down the options and key decisions to be taken, based on rigorous and intellectually defensible assessment.

The result has been that, while ostensibly outlining an ideal process to be followed to establish an Indigenous Voice, the Joint Select Committee has created the preconditions for yet more delay and prevarication.

Following the release of the Joint Select Committee's final report, Indigenous responses have been relatively muted. Focus has presumably shifted to the likely approach of a Labor Government that appears to have a reasonable chance of attaining office at the forthcoming federal election in May 2019. Voices as disparate as Labor MP Linda Burney, and *The Australian's* editor-at-large Paul Kelly pointed out in late 2018 that the bipartisan consensus on the approach to Indigenous recognition had collapsed.<sup>130</sup> Further, in media interviews, and his 2018 Lowitja Oration (Pearson 2018), Noel Pearson refreshed his push for a bipartisan approach to

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<sup>130</sup> Burney was quoted as saying that the failure to take the proposal to a referendum '...is threatening the bipartisan [nature] of Indigenous affairs that has been established over two decades' (Kelly 2018; Thorpe 2018; a). See also Burney (2018).

recognition. He called for a reconceptualised Indigenous Voice, built on local and regional foundations rather than a top-down model, along with the promulgation of a Declaration articulating key national values and celebrating the three sources of Australian identity: Indigenous foundations, British settlement, and Australian society's more recent multi-cultural texture.

On the other hand, as Megan Davis (2018a: 23–4) has identified, bipartisanship is not an end in itself. While it is essential to the stability of a reform, it can operate to stifle reform initiatives and drive a stultifying consensus in favour of the status quo.

By early 2019, with an election looming, both parties had modified their policy positions. Labor committed to holding a referendum on an Indigenous Voice within its first term if elected. The LNP Coalition has, with little fanfare, committed to fund a co-design process to develop options for an Indigenous Voice to Parliament.

For Labor, in developing its overarching policy plan should it win government, difficult choices will need to be made. Devising the timing and terms of a referendum will be both risky and contentious. The task of devising legislation for an Indigenous Voice (whether before or after a referendum), and a legislative framework for a new Makarrata Commission will loom large. Potential complexities and complications abound, the issue of ensuring such a voice is 'representative' will emerge, including how best to incorporate local and regional community voices. A plethora of other issues will inevitably arise including how to mesh Indigenous aspirations for constitutional change with policy commitments to move towards a referendum on a possible republic.<sup>131</sup> Moreover, in the event Labor wins the election, the task of designing and delivering good programs and policies will continue in parallel with development of the Indigenous Voice, so it will be desirable that Labor not allow itself to walk into an all-encompassing policy and legislative swamp that consumes vast amounts of time, energy and political capital. Whether a Labor Government decides to legislate an Indigenous Voice first, or move straight to a proposal for constitutional recognition including an Indigenous Voice, it is clear that they would need to spell out the shape and extent of their proposals if they are to attract the necessary support in both the Parliament and the wider community. In addition, they would need to work up a detailed implementation plan or strategy.

In the event that the LNP Coalition Government is returned at the next election, their policy approach is to support the recommendations of the Joint Select Committee. This involves undertaking further consultation on 'the co-design of options for a Voice to Parliament' (Treasury 2019:154). As noted above, this is a recipe for prevarication and delay. Such a process might easily require three or four years to conclude (or indeed, might not reach a conclusion). This scenario would delay the need to implement the Indigenous Voice within the next term of government. Given their previously announced views, the portents for substantive Indigenous constitutional reform appear to be poor, notwithstanding the allocation of \$7.3 million in the 2019 Budget for the co-design of options for a Voice to Parliament (Treasury 2019:154).<sup>132</sup> Moreover, the fact that funding is appropriated does not mean that it will be expended. For example, the Coalition allocated \$190 million in 2016 to fund a referendum on constitutional recognition, yet this remains unexpended, and virtually no progress has been made since it was appropriated (Houghton 2019).

After more than a decade of public debate since 2007, numerous prime ministerial announcements, and the appointment of a monotonous procession of expert bodies and parliamentary committees,<sup>133</sup> it seems fair to say that substantive progress on Indigenous constitutional recognition has stalled. If elected, a new Labor

<sup>131</sup> In a media release dated 29 November 2018, Labor MPs Linda Burney, Patrick Dodson, Malarndirri McCarthy and Warren Snowdon stated 'If elected in 2019, a Shorten Labor Government will move quickly to agree a process together with First Nations people to make the Voice a reality – including a pathway to a referendum. Labor supports a Voice. We support enshrining it in the Constitution. This is our first priority for constitutional change' (Burney et al. 2018).

<sup>132</sup> See Houghton (2019) for a more detailed discussion of the apparent policy turnaround, which arrives at a similar conclusion.

<sup>133</sup> Davis (2018a) has provided an excellent and detailed account of this meandering journey.

Government may bring new energy and focus to the task of advancing this agenda, but any new government will face formidable political and policy challenges. The most substantial challenge is the absence of bipartisan support for reform. The temptation to defer, delay and prevaricate when faced with concerted opposition, extremely high expectations, and limited political capital and support in mainstream Australia for what is an ambitious and potentially inchoate agenda, may well be irresistible. Alternatively, a Labor Government may decide to bow to the pressure to proceed to a referendum merely in order to resolve the issue one way or the other. Such an approach would be extremely high risk for Indigenous interests; in the event of a failed referendum it would leave nothing to show for 12 years of hard work.

### **Necessary long-term reform or a costly distraction?**

So how should we assess the efforts of the last decade towards constitutional recognition for Indigenous Australians? On one view, the decision by the national Indigenous leadership to focus on constitutional recognition appears to have been a massive waste of time and effort, and arguably a strategic mistake. The inability to make progress on constitutional reform over the last decade has meant lost opportunities. It has also bestowed greater flexibility upon governments to shape policy issues at the meso level, as available oxygen among Indigenous interests and their non-Indigenous supporters was diverted to the superficially more attractive, and at one level less complex, macro issues. Arguably, the result has been significant lost opportunities for Indigenous interests on the ground as major national Indigenous-specific programs have come under sustained criticism, but not at a breadth and intensity that would force substantive reform. So, for example, the Indigenous Advancement Strategy, under the sole control of the Minister for Indigenous Affairs and lacking substantive transparency, was severely criticised by the Australian National Audit Office (ANAO) (Auditor-General 2017).<sup>134</sup> The Community Development Program, in place only in remote Australia, has been operating under a more rigorous set of rules than the Job Network, and has led to an extraordinary number of punitive penalties for Indigenous 'jobseekers' who fail to meet program requirements (Conifer et al. 2018). And the National Partnership on Remote Indigenous Housing has been essentially dismembered and ongoing funding virtually halved, despite remote housing recording the highest overcrowding rates in the nation. Moreover, mainstream policies continue to have disproportionately adverse impacts in areas such as child protection and Indigenous incarceration.

Of course, the counter argument is that, just as the 1967 Referendum required a decades-long struggle to achieve change, so too will constitutional recognition. Moreover, without institutional entrenchment such as is provided by constitutional recognition, any gains Indigenous interests make are, as was the case with ATSIC, subject to reversal and dilution.<sup>135</sup> The bottom line is that there is a trade-off between driving for reform at the macro and meso levels. Any strategic decision by Indigenous leaders to focus on one level and not the other has potential opportunity costs across the entire policy realm. Given the significant opportunity costs involved, this suggests that maintaining a focus on macro-policy reform will need to result in substantive and not merely symbolic change, if it is to be justified.

### **Progress at State and Territory levels**

While the macro-policy debate in Indigenous affairs at the national level over recent years is best characterised as a tin can being kicked down a very long road, at State and Territory levels there has been significant, albeit incremental, progress over the past decade. In particular, there has been a resurgence in focus on the regional settlement of native title claims. Negotiated settlements create significant potential and possibilities for positive

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<sup>134</sup> See also Auditor-General (2018:para. 4.20) for confirmation of the Minister's reluctance to delegate decision-making. The contrast with the situation that applied under ATSIC is stark; under ATSIC, Indigenous interests decided on the allocation of funding resources.

<sup>135</sup> Constitutional entrenchment of an Indigenous Voice will still require legislation to implement, and there will therefore remain a risk that its design could be compromised or limited in various ways, either deliberately or due to unintended consequences. See the discussion of implementation risks later in this chapter.

structural changes across the breadth of the Indigenous policy domain. Examples include the 2006 Parks Deal in the Northern Territory, the finalising of a number of agreements under the *Traditional Owner Settlement Act 2010* in Victoria, with others in train, and the Noongar claim-settlement process in the southwest of Western Australia that is progressing towards finalisation.<sup>136</sup> The proposed Noongar settlement emerged from a native title claim, but is arguably more than an agreement over land titles; it comprises a complex set of agreements between a sovereign state government and a set of Indigenous polities defined by their laws and customs. These settlements are hugely significant in their own right, and in each region open up significant opportunities for greater inclusion over and above the transfer of property rights involved.

This focus on native title has expanded in recent years into a broader focus on the potential for negotiation of treaties. South Australia led the way, establishing a Treaty Commissioner and a process of consultation, recently halted with the election of a conservative State government. This was followed by a legislated negotiation framework in Victoria. More recently in the Northern Territory a Memorandum of Understanding between the Territory Government and the Aboriginal land councils was negotiated, followed by the appointment of Mick Dodson as Treaty Commissioner. Even in Western Australia, long one of the most conservative jurisdictions on Indigenous policy issues, there is currently a proposal for the establishment of an office for advocacy and accountability in Aboriginal affairs. The proposal is for a new statutory office 'to strengthen the government's accountability to Aboriginal Western Australians and to advocate for Aboriginal people's interests in government policy and performance' (Department of the Premier and Cabinet 2018:1).

While each of these initiatives has had a long gestation, and a number have hit hurdles as they move forward, it seems clear that there is a trend at State and Territory levels towards recognising the legitimacy of Indigenous interests as parties in a necessary renegotiation of the current frameworks that govern the relations between the Indigenous and non-Indigenous domains. What is also obvious is that the Abbott, Turnbull and Morrison Governments have persisted in placing their heads in the sand on these issues.

A number of fundamental issues present themselves. Where does the nation head from here on Indigenous policy? What challenges will confront Indigenous interests and their leadership? What responses are likely from non-Indigenous interests, and how might they manifest? What strategies offer the best hope of substantive progress for Indigenous interests? Where should governments allocate and focus their finite policy resources to advance and protect the national interest?

## **The proposal for an Indigenous Voice**

Indigenous interests built a broad coalition to support the consultative processes leading up to the Uluru Statement. Those processes ultimately led to a tactical decision to set aside, at least for a period, the aspiration of a constitutional prohibition on racial discrimination.

The pragmatic rationale for this decision was that the Indigenous leadership's discussions with influential conservatives had convinced them that any proposal to entrench a prohibition on racial discrimination would be vehemently opposed. In a recent essay in *Griffith Review* Megan Davis (2018a) has laid out the genesis of the proposal for an Indigenous Voice to the Parliament. A key driver was the realisation by the Indigenous leadership, and in particular Noel Pearson, that a compromise position acceptable to conservatives was the only way a referendum would pass, as any organised campaign against reform would likely lead to an unsuccessful result.

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<sup>136</sup> See Dillon (2017) for a more extensive discussion of these issues, and links to relevant references. See also Dodson & Leeser (2018: 5.22–5.75).

This was reinforced by the refusal of the Abbott and Turnbull Governments to countenance such a change, and also Labor's lukewarm support for the idea. Instead, it was decided to pursue the proposal for an Indigenous Voice to Parliament, complemented by a Makarrata process outside the Constitution. As mentioned earlier, both those proposals are currently in a state of flux.

Based on the analysis set out earlier, it is our view that over the medium term, the entrenchment of a constitutional prohibition on racial discrimination by government is crucial in successfully overcoming systemic Indigenous exclusion. The current capacity of the Commonwealth to legislate in a discriminatory way is widely acknowledged to be morally indefensible, and its continued existence (particularly if discriminatory legislation or policies are pursued) will undermine any pretence that the nation has 'recognised' Indigenous people in our Constitution.<sup>137</sup> It is also likely to be a sticking point in any future moves towards a republic.

Notwithstanding this assessment, we see the proposal for a constitutionally entrenched Indigenous Voice as an extremely positive development that deserves widespread support. We are also encouraged by the progress made at State levels towards agreements, native title settlements, and/or treaties, whether State-wide or for sub-regions. However, each of these developments is potentially problematic and indeed risky for Indigenous interests, and thus for the nation itself.<sup>138</sup> Considerable energy is being and will be devoted to these policy approaches; they each face potential political opposition; and they each involve considerable complexity, potentially engendering a focus on rhetoric rather than reality, or on the headlines rather than the fine print. Below, we examine the key issues that will need to be addressed as the nation and Indigenous interests progress both these policy aims.

Noel Pearson had been in dialogue with a number of progressive conservatives such as Damien Freeman and Julian Leeser who seek to both 'uphold the Constitution' and accept that 'Indigenous Australians ought to be fairly recognised on their terms'.<sup>139</sup> Freeman is the founder of the Uphold and Recognise, a not-for-profit company with a board led by Sean Gordon that includes a number of prominent Indigenous leaders; it supports the Uluru Statement and the recommendations of the Referendum Council. The Uphold and Recognise website indicates it has established a policy unit to develop practical options for implementing both. The website says the unit 'will take strategic direction from thought leaders in this area' including Noel Pearson and Megan Davis.

Uphold and Recognise recently published a series of discussion papers presenting various options for implementation of the Uluru Statement (Freeman 2018).<sup>140</sup> The discussion papers include draft amendments to the constitutional and associated legislation for two potential options for structuring an Indigenous Voice to Parliament. The papers also dealt with a proposed Declaration of Recognition that would not have constitutional status, and with the Makarrata proposal.

Uphold and Recognise has performed a valuable service in developing these papers and the draft Bills, since they lay out potential ways forward; they explore some of the operational detail involved in implementing the Uluru Statement and demonstrate that this would not present insurmountable problems. However, they also demonstrate that the detailed design parameters of the proposals are crucial and will determine the extent to which the reforms are effective, and thus successful.

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<sup>137</sup> The current Social Justice Commissioner, June Oscar, and four of her predecessors, Bill Jonas, Tom Calma, Mick Dodson and Mick Gooda, recently called for the removal of the Commonwealth's power to legislate in racially discriminatory ways. Their call was included in a recent submission to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples 2018 (Australian Human Rights Commission 2018:para. 63). See also Allam (2018c).

<sup>138</sup> Davis (2018b) outlines similar concerns. The key structural risk is that a treaty or agreement negotiated between fundamentally unequal partners would not effect a lasting resolution of the issues in contention.

<sup>139</sup> These quotes are taken from the Uphold and Recognise website: [www.upholdandrecognise.com/about/](http://www.upholdandrecognise.com/about/)

<sup>140</sup> This document includes three ancillary papers: 'Hearing Indigenous Voices'; 'A fuller declaration of Australia's nationhood'; and 'Makarrata'.

Given that Freeman and his erstwhile collaborator Julian Leaser have been influential in persuading Pearson and Davis to the less radical Voice proposal, and the continuing involvement of Pearson and Davis in providing 'strategic guidance' to Uphold and Recognise,<sup>141</sup> the discussion papers can safely be considered along with the final report of Joint Select Committee as a benchmark for further analysis.

In the paper 'Hearing Indigenous Voices', Uphold and Recognise explores two options, each with its own draft constitutional amendment and draft Bill. The options are termed the 'speaking for country option' and the 'advisory council option'. Both options involve both centralised and local elements, but differ in their construction. The speaking for country option involves the establishment of what are termed 'local entities' and allows them to affiliate voluntarily at regional and then national levels to facilitate the provision of advice and views to Parliament. The advisory council option creates the national 'advisory' entity, and provides for local Indigenous entities to send delegates to a conference to select members of the national body.

This approach is more nuanced than merely proposing top-down or bottom-up options, since both involve an aspiration for both local legitimacy and national effectiveness. However, each is substantially flawed insofar as they involve high degrees of voluntary (or not mandated) negotiation and coalition building within and across Indigenous groups, premised on an assumption that these negotiations will proceed smoothly, and will produce clear-cut and broadly-accepted resolutions. In our view, this is a recipe for disaster since it substantially overestimates the likelihood that hundreds of Indigenous groups and organisations across the nation can come together seamlessly and without time-consuming negotiation and dissension.

If native title has taught us anything, it is that the social dynamics of Indigenous societies are fluid and capable of engendering and sustaining intense social and cultural conflicts. One of the reasons the land councils in the Northern Territory have been largely successful for over 40 years is that the legislation establishing them channelled the inevitable conflicts between groups into internal battles under the 'carapace' of the legislated land council structure, and thus managed potential existential threats to the land councils.<sup>142</sup> The risk in designing structures that aspire to Indigenous agency but fail to set robust parameters is that Indigenous energy will be directed to internal battles and not to influencing national policy.

We can conceptualise the status quo as one where neither local voices nor a national voice are mandated. The options proposed for discussion by Uphold and Recognise are on one hand to mandate a structure of local voices, and allow a national voice to emerge organically; and on the other hand, to mandate a national voice based on the voluntary emergence of inchoate local entities.

In our view, what is required is the legislative mandating of both a national structure or voice, and the legislative mandating of local or regional entities.<sup>143</sup> Indigenous agency will flourish within the mandated structures, just as it has continued and proved effective within the land councils established in the Northern Territory. Uncertainty and intra-Indigenous conflict will be minimised and channelled in constructive ways where clear decision-making structures are established. The most effective way to achieve this is to mandate them by legislation. Such an approach will ensure that Indigenous interests have the best chance to be effective in influencing macro-level and meso-level policy outcomes into the indefinite future.

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<sup>141</sup> We note, however, that Uphold and Recognise and Pearson and Davis made separate and different submissions to the Joint Select Committee.

<sup>142</sup> The legislation also provided the land councils with an explicit function of dispute resolution in relation to traditional ownership issues. There have been times when conflicts have extended beyond the land councils themselves, leading to the creation of new land councils on Tiwi and Groote, or at other times to external interests picking sides to drive anti-land rights agendas. However, these are the exceptions that prove the rule.

<sup>143</sup> The mandating by legislation does not preclude Indigenous co-design of the legislation. Our aim in suggesting this is to meld 'top-down' and 'bottom-up' processes within an institutional structure that is robust and not subject to abolition at the whim of a minister.

Whichever option is ultimately chosen, it will inevitably involve a large number of moving parts. It follows that there is likely to be a need for fine-tuning the design of the Indigenous Voice into the future. Accordingly, the terms of any constitutional amendment should be broad enough to allow significant refinements to be made over time, while also protecting the Indigenous Voice from being hollowed out from within. For example, there may need to be a provision for a larger majority vote on any Bills to amend the Indigenous Voice legislation to ensure substantive bipartisanship is required for significant design changes. Such a provision would only be truly effective if it were entrenched in the Constitution.

The two options outlined in the ‘Hearing Indigenous Voices’ discussion paper differ on the issues that might be subject to advice. The ‘speaking for country’ option involves a much narrower remit than the ‘advisory council’ option. This is to some extent a product of the need for government to consult myriad local groups; as drafted, it is limited to proposed laws relating to Aboriginal and Torres Strait Islander affairs. In contrast, the advisory council option is drafted to allow the Indigenous Voice to advise on ‘matters relating to Aboriginal and Torres Strait Islander Affairs’, or as the draft explanatory memorandum puts it: ‘This includes providing advice on the development of public policy in relation to Indigenous affairs.’ (Freeman 2018:35, ‘Hearing Indigenous Voices’). This option also has a subset of ‘designated Acts’ which may then be the subject of advice that is tabled in Parliament and that the Parliament is obliged to consider. This latter option is more attuned to the realities of public policy development as it is intended that the Indigenous Voice has the opportunity to influence policy development informally in advance of legislation being drafted and introduced.

In our view, the broader approach outlined in the advisory council option is likely to be much more effective than the more limited and cumbersome approach outlined in the speaking for country option. Again, however, we consider that there is a third option that must be considered. Given the overwhelming weight of mainstream policy and programs on Indigenous citizens’ lives, any approach that ignores this reality and limits itself to Indigenous-specific policy and law would seem to be fundamentally short-sighted. Accordingly, we suggest that the remit of the proposed Indigenous Voice (whatever the structure that underpins it) should be to provide advice on the development of public policy that significantly affects Indigenous citizens.<sup>144</sup> While this appears to be a minor, almost semantic, change to the proposed remit, the potential consequences are huge. For example, why should the Indigenous Voice be precluded from providing advice in relation to mainstream social security legislation (including, but not only, in relation to the Community Development Program which applies in remote Australia but is technically not Indigenous-specific), or legislation which through omission inappropriately ignores or excludes key Indigenous concerns? Similarly, there are strong arguments in favour of the Indigenous Voice having the ability to provide advice to COAG, and to State and Territory levels of government. This may require explicit provision in legislation and/or the Constitution.<sup>145</sup>

## Practical implementation issues

An issue that follows from the remit of the Indigenous Voice, and which takes on greater salience as the remit becomes broader, is the practical issue of policy support and research for the members of the Indigenous Voice. Legislation and the policy dynamics that underpin and flow from legislation are increasingly complex. Major interest groups (that by definition are members of the dominant coalition) such as the National Farmers Federation or the Business Council of Australia invariably have access to a cadre of technical policy researchers and consultants to both monitor the policy landscape and horizon, and to analyse and develop policy approaches consistent with the interests and aspirations of their respective constituencies. Moreover, the public and private debates among the major interests in Australian public life are also facilitated by the work of

<sup>144</sup> We note that a number of submissions to the Joint Select Committee made a similar point. See e.g. the discussion of the submissions of Stubbs and Rundle at paras 2.114–2.115.

<sup>145</sup> Similar views were expressed in a number of submissions to the Joint Select Committee, including in submissions from Rundle, Davis, Hobbs and the Centre for Comparative Constitutional Studies; see paras 2.136–2.141.

'think tanks' such as the Institute of Public Affairs, the Centre for Independent Studies, the Grattan Institute and the Australia Institute. These organisations play crucial roles in building and sustaining policy narratives that underpin and sustain the momentum required to influence policy outcomes. A number of peak bodies of varying size and sophistication represent Indigenous interests, while the think tank space is quite thin and is largely filled by semi-academic bodies such as the Lowitja Institute.<sup>146</sup>

In our view, the efficacy and effectiveness of the Indigenous Voice will be determined in large measure by the quality of its policy-research engine room. One of the risks in the approach adopted by the Indigenous leadership at Uluru is that, while the details of the design for the Indigenous Voice will be determined by the Parliament, so too will the funds available to resource it. So far, there appears to have been little considered thought given to how such a body might be resourced; in particular, how its funding might be guaranteed in terms of both adequacy and sustained longevity.

There are a number of potential mechanisms available to seek to address this issue. They include tying the level of resourcing to some benchmark, hypothecating a revenue flow from a government revenue source (such as a percentage of GST revenues), or legislating a permanent appropriation (which could be changed by the Parliament subject to any entrenchment provisions such as the requirement for a super majority to amend the legislation as suggested above). Our own preference, however, would be for the Parliament to create a perpetual fund along the lines of the current Aboriginal and Torres Strait Islander Land Account which was built with 10 years of legislated appropriations, now sits at \$2 billion and provides a guaranteed revenue stream of just over \$50 million per annum to the Indigenous Land Corporation each year.<sup>147</sup> There would be a need for appropriated funding over the interim period while the fund built to an adequate level. The advantage of such a system is that it would provide Indigenous interests with a secure, guaranteed and perpetual source of funding for the Indigenous Voice insulated from government interference. The rationale for providing the initial contributions ultimately rests on acknowledging that this is part of the cost of appropriately compensating Indigenous interests for their dispossession<sup>148</sup> and ongoing institutional exclusion.

## Mitigating the risks

As noted above, we recognise and strongly support the innovative potential of the Indigenous Voice proposal, and see substantial merit in seeking to establish it via an amendment to the Constitution. There are, however, multiple risks involved that need to be considered and taken into account in its implementation.

The most obvious risk is that a referendum may fail, particularly if a conservative-led campaign were to emerge. Accordingly, one key issue is whether to take the proposal to a referendum accompanied by a settled proposal or whether to leave key elements to be decided by the Parliament following the referendum. The Joint Select Committee explored this issue in depth (Dodson & Leeson 2018: paras 3.78–3.152). There are arguments and risks on both sides of this question. A joint submission to the Joint Select Committee by Uphold and Recognise and the PM Glynn Institute argued forcefully in favour of a 'legislation first' approach, citing the likelihood of a vigorous 'no' campaign around the lack of detail. A number of prominent Indigenous leaders including Mick Gooda, June Oscar and Jackie Huggins adopted a similar position in evidence to the Joint Select Committee. In contrast, submissions from the Cape York Institute and another from Pat Anderson, Megan Davis and Noel

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<sup>146</sup> Australia appears to lag some 50 years behind the US where the National Congress of American Indians has been operating since 1944, and provides Indian tribes with a sophisticated and proactive advocacy organisation with deep roots into the US legislative and policymaking systems (see [www.ncai.org](http://www.ncai.org) for more information).

<sup>147</sup> Refer to the Annual Reports of the Department of the Prime Minister and Cabinet and the Indigenous Land Corporation for details regarding this account. Its name will change to the Aboriginal and Torres Strait Islander Land and Sea Future Fund from July 2019.

<sup>148</sup> Noting that dispossession of Indigenous lands is not a process that occurred in 1788, but one that continued progressively through to recent times. For example, the 1998 Wik amendments to the NTA validated actions of State governments that invalidly extinguished native title between 1993 and 1998.

Pearson and a number of academics argued firmly in favour of a referendum first approach.<sup>149</sup> For its part, the committee declined to express a view on this crucial issue, opting instead to fall back on the desirability of initiating a process of co-design before making a decision on the implementation approach.

It is clear that there is no risk-free implementation path to establishing the Indigenous Voice, and valid concerns on both sides of the issue. The recent experience in the United Kingdom where the Brexit referendum passed without a detailed implementation plan graphically demonstrates the sorts of issues that might arise in pursuing a referendum without some level of detail on the table. On the other hand, pursuing the development of a perfect model before legislating or moving to a referendum runs a real risk of losing either an enabling authorising environment or constituency support and thus of losing the requisite momentum to see it successfully established. In our view, the most effective way forward would be to establish an interim or provisional Indigenous Voice by administrative fiat, using it as a key advisory and co-design input into a subsequent Bill and legislation and a referendum. This would both meet the widely shared concern for a co-design process, and ensure that momentum is not lost. To overcome the risk that a legislated voice might never be put to a referendum, any legislation establishing the Indigenous Voice might contain a requirement for it to be put to a referendum within say five years.

A second risk is that the implementation phase (whether for legislation, a referendum or co-design) will bog down in confusion, complexity and conflict. Much of the discussion reflected in the Joint Select Committee report is understandably framed in terms of ideal practice, and first best principles. The reality is that any complex policy development involves time-consuming processes (much of it invisible to parties outside of government), including complex legal issues to be resolved, time-consuming Cabinet processes, and sequential review processes by parliamentary committees that slow down or even reverse progress.<sup>150</sup> Add in numerous regional consultations, and two or more years will be required. At each decision point, there is a risk of delay or worse. In such a scenario, the incentives for opponents of the proposal to seek to delay, defer or halt the implementation process is significant. In our view, the preferred alternative approach is to start immediately with the administrative establishment of an interim Indigenous Voice, on the explicit understanding that the processes of co-design, legislative development and progress to a referendum will follow.

A third significant risk is that the Indigenous Voice may not work as intended. The design challenges are daunting and the evidence provided to the Joint Select Committee pointed to a multiplicity of potential criteria that might be incorporated within the design. Issues raised included regional and local input; gender equality; reflection of traditional ownership responsibilities; reflection of those dispossessed from their country; language representation; reflection of differences in governance and cultural authority; and representation of young and emerging leaders (Dodson & Leeser 2018:ch. 2, especially paras 2.19–2.82). One eminent lawyer advocated explicit consideration of a ‘polyphony of voices’,<sup>151</sup> while another counselled that a proliferation of voices may serve to weaken the capacity to influence lawmakers.<sup>152</sup> Our point is not to argue for or against these criteria, but to point out the real risk that, in seeking to design the perfect institution, the risks of unintended consequences multiply. The solution is to acknowledge explicitly the desirability of incremental development of the Indigenous Voice.

A fourth risk is that the Indigenous Voice may be vulnerable to intentional dilution. Without constitutional entrenchment, it would be vulnerable to abolition by a future government just as occurred with ATSIC. Even with entrenchment, the fact that the operational mechanisms of the Indigenous Voice are legislated means it is at

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<sup>149</sup> See Appleby (2019) for a succinct summary of the referendum first argument. Appleby was one of the academics who contributed to the Anderson et al. submission to the Joint Select Committee report.

<sup>150</sup> As a point of comparison, the ATSIC legislation had an 18-month gestation period, but involved less consultation than is currently envisaged for any Indigenous Voice proposal, and involved very limited co-design.

<sup>151</sup> Professor Anne Twomey; see paragraphs 2.47–2.50 of the Joint Select Committee report.

<sup>152</sup> Professor Rosalind Dixon; see paragraphs 2.51–2.52 of the Joint Select Committee report.

risk of legislative ‘hollowing out’ by a future government. While we have argued above for a degree of legislated entrenchment to prevent this, there is a simultaneous need for institutional checks and balances that can, if necessary, recommend adjustments. The experience of ATSIC tells us that it is unlikely that the Parliament and Indigenous co-designers will hit upon an optimal design at its first attempt, and there will be a need for continuing review and oversight. We suggest that there be consideration given to establishing an Indigenous Voice Oversight Committee comprised of eminent individuals with the background, standing and authority to persuade both the Indigenous Voice membership and the Parliament when structural changes are required, and with a remit limited to overseeing the structural effectiveness of the operations of the Indigenous Voice. In our view such a body should comprise a majority of Indigenous members. However, there may be a case for non-Indigenous members as well, given that the Indigenous Voice is designed to be heard by mainstream Australia represented by the Parliament, and any proposals for change will need to persuade Parliament as a whole.

A fifth risk, of more general significance, is that institutional inertia will prove too strong and the Indigenous Voice will be unable to drive systemic and structural reform. Even when it is working effectively, the Indigenous Voice is at its core an entity designed to persuade and influence. We entirely accept that its absence is a major gap in our nation’s institutional architecture. However, establishing the Indigenous Voice will not, of itself, ensure or guarantee that Indigenous institutional exclusion and powerlessness ends or is even reduced either in the short or the medium term. We should not underestimate the resilience and robustness of the institutions that underpin the extant political settlement in Australia, nor the time needed for fundamental structural reforms (if implemented) to gain traction. Nor should we underestimate the propensity of established interests to push back in order to protect the status quo.

Reinforcing this scepticism is the fact that the proposed Indigenous Voice is focused on the Parliament whereas it is well established that the Parliament is in most respects a creature of and is dominated by the executive arm of government (Galligan 1995:141; Chalmers & Davis 2000; Breukel et al. 2017). This dynamic points to the importance of building and sustaining strong Indigenous advocacy organisations outside the Parliament to complement the Indigenous Voice. It also suggests that there may well be a case for the establishment (or retention) of separate Indigenous advisory mechanisms to the executive arm of government. More contentiously, it also raises the potential importance of a remit for the Indigenous Voice that ultimately goes beyond legislation and policy and extends to a role in parliamentary oversight of the Executive through the Parliament’s committee system.<sup>153</sup>

The consequences if any of these risks emerge and gain traction will not just adversely affect Indigenous interests. Implicit in our argument is that the nation as a whole will benefit from Indigenous recognition and the full inclusion of Indigenous people within our nation’s institutions. The Australian nation has been the victim of the intergenerational transmission of discriminatory and non-inclusive institutions which insidiously, and mainly out of sight of most Australians, limit the potential and life opportunities of Indigenous citizens. The budget costs of ongoing policy failure in increased health services, increased welfare, increased incarceration, and so on will continue to be significant. However, there is an even larger opportunity cost related to the potential but unrealised economic, social and cultural contributions of Indigenous citizens. These costs arise because potential Indigenous contributions are circumscribed, limited or not made and shared with the nation as a whole as a direct result of exclusion and constrained life opportunities.

It is in the public and national interest that Indigenous exclusion is laid to rest, and that proposals such as the Indigenous Voice are implemented successfully and effectively. But it is also important to understand that a

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<sup>153</sup> The thought here is not to create a separate oversight mechanism, but to strengthen the inclusiveness of the existing oversight mechanisms.

single institutional reform, even one as necessary and as significant as this, will not automatically or rapidly reverse the deeply systemic dynamics of structural Indigenous exclusion in Australia.

## The increasing momentum for agreements

The Indigenous leaders who met at Uluru, and in particular leaders such as Pearson and Davis, understand that the Indigenous Voice proposal requires buttressing to mitigate the potential risks. Thus they have also supported the idea of a national Declaration and most significantly a Makarrata; the latter characterised as an institutional mechanism for truth telling about Indigenous histories, involving elements of conflict resolution, agreement making and ultimately grievance resolution on the basis of a new 'settlement'. It conjures up the notion of treaty by another name.

As part of their series of discussion papers titled 'Journey from the Heart', Uphold and Recognise has developed a discussion paper on Makarrata, a Yolngu concept that refers to the process of resolving conflicts, disputes, and righting of past wrongs. The concept of Makarrata was adopted by the Senate Standing Committee on Constitutional and Legal Affairs in their report into the feasibility of a compact or 'Makarrata' between the Commonwealth and Aboriginal people in 1983 titled '*Two Hundred Years Later...*'. It has progressively gained broader acceptance as an alternative term for treaty.

The Uphold and Recognise approach is premised on five aspects of Makarrata: recording the history of Indigenous peoples; preserving the cultures of Indigenous peoples; empowering Indigenous peoples to take responsibilities for their communities; creating commercial opportunities for Indigenous people; and, fifth, concluding agreements between governments and Indigenous peoples that address the four 'criteria' above. While these are important for resolving fundamental grievances between Indigenous and non-Indigenous Australia, it is not self-evident that they are the only or even the most important principles to be addressed in this respect. Moreover, these are all matters that might be included in agreements with State and Territory governments, leading to the question, is it desirable for the Commonwealth (or a State or Territory) to proceed alone? Nevertheless, the discussion paper proceeds to identify three options for progressing a Makarrata focused on achieving these principles. First, a direct local Makarrata between local or regional entities and the Commonwealth.<sup>154</sup> Second, a Makarrata tribunal (similar to the New Zealand Waitangi Tribunal) that would inquire into the history of local groups, recommend terms for an agreement, facilitate the negotiation of an agreement and oversee implementation of agreements once concluded. Third, royal commissions of makarrata that would inquire into the identity of groups, failures by the Crown to comply with the founding documents of the relevant jurisdiction in relation to each group, and possible terms upon which subsequent agreements might be negotiated to deal with the issues identified.

These are all useful ideas, and no doubt will be the subject of much further discussion. The Joint Select Committee on Constitutional Recognition includes some brief discussion of a Makarrata, but fails to progress the issue. Instead, it recommended a less formal and more inchoate process of local and regional truth telling. Important as these processes are for addressing the adverse consequences of intergenerational trauma, to the extent that they fail to actively engage mainstream Australia, they are unlikely to have a direct impact on mitigating ongoing structural exclusion.

To sum up, implicit in much of the discussion regarding an Indigenous Voice, a possible Makarrata, truth telling and the like is the sense that there can be a single and final resolution of the deep-seated schism between

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<sup>154</sup> The role of the Commonwealth versus the States in these agreements is an issue that will eventually rise in importance. To date, the States have led the way, although their commitment may wane as governments change. Indigenous interests may be tempted to 'forum shop', but the inevitable outcome will be a complex mosaic and substantial opportunities for governments at all levels to shift responsibility. Indigenous interests would be wise to encourage the Commonwealth to establish a legislated Makarrata framework which involved both levels of government (and even local government), and which required those governments to negotiate in good faith.

Indigenous and non-Indigenous Australians. This is in our view an idealised notion and misunderstands both the deep-seated nature of the schism and its intergenerational impacts, and the nature of the relationship between First and later Australians. As in all marriages or committed relationships, new issues will periodically arise, and require resolution; the aspirations and needs of each partner require ongoing attention, and the process of communication and engagement is as important as any agreement within the relationship.

Or, to lean on insights drawn from a landmark inquiry more than 40 years ago into future choices for the Canadian Arctic (Berger 1977), Commissioner Justice Thomas Berger in his cover letter to the Canadian minister, said:

The settlement of native claims is not a mere transaction. Intrinsic to settlement is the establishment of new institutions and programs that will form the basis for native self-determination. It would be wrong, therefore, to think that signing a piece of paper would put the whole question behind us, as if all that were involved was the removal of a legal impediment to industrial development. The native people insist that the settlement of native claims should be a beginning rather than an end of the recognition of native rights and native aspirations.

Let us be clear. There is nothing wrong with local and regional agreements, and nor are the options for a Makarrata Tribunal or regional royal commissions inherently without merit. However, an agreement is not necessarily a treaty. Resolving some or many tensions or conflicts is not a final resolution. We need a degree of conceptual clarity around these issues to ensure that, as a nation attempting to address issues central to our national identity, we do not work at cross purposes. We need to ensure that expectations on either side are not raised and then dashed, and that Indigenous peoples are not subjected to a 'beads and mirrors' ploy (albeit more sophisticated and complex), reminiscent of John Batman's 'acquisition' of Melbourne (Boyce: 2011).

## The concept of shared sovereignty

In a compelling recent essay in *The Monthly*, 'Step by Step: The Road to a Settlement' (Davis 2018b),<sup>155</sup> Megan Davis lays out succinctly the key elements in the pathway forward from the perspective of the Indigenous leadership, as well as a persuasive critique of the degradation over recent decades of the concept of self-determination. She also offers a trenchant, if somewhat coded, critique of the Government's moves to 'refresh' the Closing the Gap strategy off the back of its own misguided rejection of deficit narratives. As Davis (2018b) notes:

All the positivity in the world will not change the statistics in child removals and youth detention... Highlighting structural problems is not about highlighting deficits. Talking about powerlessness and voicelessness is not to strip people of agency.

However, her primary focus is on the way forward, the 'road to a settlement'. Davis notes that the Uluru leaders, in articulating the demand for an Indigenous Voice, were not jettisoning the need for a more fundamental treaty or settlement. Rather, they were advocating for a 'sequenced reform in which an Indigenous Voice to Parliament is the first step, and treaty making follows'. She canvasses the risks of uncoordinated and poorly-considered agreements disguised as treaties. She also points to the risks of mismanaged treaty processes, and acknowledges the complex and opaque policy space within which treaties will be made. Davis concludes with two separate but related ideas that deserve further consideration:

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<sup>155</sup> It should be noted that Davis's use of the term 'settlement' is not the same as our use of the term 'political settlement'. Her use refers to a resolution, compact, or conciliation between Indigenous and mainstream interests and citizens, albeit one which has the capacity to evolve over time.

Inevitably, we, as Aboriginal and Torres Strait Islander peoples, have to manage the titanic expectations of community that come with utopian ideals of treaty. After all, much of what would be done via treaty has already been done through land rights and other statutory regimes. Treaty is not an end, it is the beginning of the state acknowledging our grievances...

...Our sovereignty has never been ceded – not in 1788, not in 1967, not with the Native Title Act, not with the Uluru Statement from the Heart. It coexists with the sovereignty of the Crown and should never be extinguished (Davis 2018b).

These are important and highly salient insights that repay careful consideration and reflection. We overwhelmingly agree with Davis, but add a commentary on a number of her points. In particular, we would assert that there is also a responsibility on the Commonwealth and the States and Territories to ensure they do not make unwarranted claims regarding treaties that raise expectations among either the electorate at large or Indigenous people.<sup>156</sup> Not all agreements are treaties, and misrepresenting the nature of agreements around policy or service delivery will not advance Indigenous recognition. We would be inclined to emphasise the potential of treaties to establish, in Davis's own definition of treaties, 'binding frameworks of future engagement and dispute resolution'.

Davis's second point represents the core of the whole debate over constitutional recognition and the pathway to a settlement. The first sentence is a statement of fact: sovereignty was never ceded by Australia's Indigenous peoples. The second sentence, and in particular the notion of shared or coexisting sovereignty is deeply contested. The notion is undeniably a core aspiration of most Indigenous people, but also not automatically accepted or understood by most Australians.<sup>157</sup>

The concept of lost, or unrecognised, sovereignty is at the core of the macro-policy debate over Indigenous issues in Australia. Davis appears to be doing two things here. First, sending a signal to the Indigenous constituency, or at least their thought leaders, that a new conception of sovereignty is central to their macro-level policy aspirations. Second, she is presenting to mainstream Australians a conceptual approach to sovereignty that moves beyond the traditional definition of sovereignty as supreme and absolute authority within the nation's territorial borders (Philpott 2016).<sup>158</sup> Of course, it is the widespread adherence to this traditional notion of the meaning of Crown sovereignty, and the fear that any infringement of its absolute and universal application would be fatal to its continued existence, which drives much political opposition to any moves to recognise the existence of Indigenous sovereignty.<sup>159</sup>

Yet, nation states share sovereignty with a range of international and non-state actors. The sovereignty of virtually all nation states is voluntarily circumscribed by various formal and informal international norms, treaties, covenants and laws, while the sovereignty of many nation states is involuntarily circumscribed by political insurrection, terrorism and war. Nation states increasingly accept the authority and legitimacy of international courts, tribunals and institutions that issue decisions that can range from binding to merely persuasive. Legal theorist Paul Schiff Berman cites evidence suggesting that around 125 international institutions issue decisions that can affect state legal authority. Moreover, numerous non-state actors, from global corporations such as Google and Facebook, to global NGOs operate not merely across borders, but in ways that transcend

<sup>156</sup> This resonates with the Canadian legal principle of the 'Honour of the Crown'. See Hoehn and Stevens (2018).

<sup>157</sup> For an example of the arguments underpinning non-acceptance, see Stoker (2019). Liberal Senator Amanda Stoker's paper makes an extended philosophical argument in favour of universalism and against identity politics. She equates calls by the mineral industry for an Indigenous Voice with 'jumping on an identity politics bandwagon' (2019:12). In terms of our analytical framework, this is an instance of entrenched ideological views within a political party lagging a shift in the views of a key interest group within the dominant coalition. Clearly, the major mining corporations have assessed that an Indigenous Voice to Parliament is not a significant threat to their interests. Other commercial interests may not share that view.

<sup>158</sup> See the discussion in Senate Standing Committee on Constitutional and Legal Affairs (1983:34–48) for a more traditional analysis.

<sup>159</sup> Of course, consistent with our overall analysis, there is a sense in which arguments against greater inclusion of Indigenous interests will often be disguised opposition to sharing economic and political power.

geography, thus creating significant challenges for the legal systems of territorially-based states and their legal systems.

Increasingly, international non-state actors are creating and reinforcing international and transnational norms that over time take on legal significance – what a number of legal scholars have described as ‘jurisgenerative processes’ (Berman 2009:231; see also Berman 2007). The widespread acceptance of human rights spelt out in a range of international conventions, backed up by political and military intervention in the most extreme cases of non-compliance, is beginning to impinge on the absolute nature of state sovereignty (Philpott 2016). We no longer live in a nation state where the Crown holds absolute sovereignty<sup>160</sup> or where all the norms that determine or influence citizens’ daily lives are developed and determined within our borders. The Crown’s sovereignty has since Federation been shared between the Commonwealth and the States, and is already shared transnationally. Moreover, a wide range of informal norms and values are broadly accepted as part of the Australian ethos, often without the sanction or explicit encouragement of Australian law (e.g., freedom of religious belief, or the freedom of diggers to play two-up on ANZAC Day).

In circumstances where sovereignty is already shared in a range of external, internal, formal and informal contexts, it is no longer tenable to ignore the reality that Indigenous interests have their own cultural modes of operating, their own social and cultural norms, and their own laws. Nor is it tenable to argue that Indigenous people’s aspiration for sovereignty (over their lives, their matters and their modes of existence) cannot be recognised, particularly if the argument is based on a flawed assumption that the Crown’s sovereignty is absolute and indivisible. It patently is not.<sup>161</sup>

Arguably the last 50 years have seen the gradual development of both Indigenous and non-Indigenous institutions that while designed to implement meso-policy (e.g., to outlaw racial discrimination, or to grant and regulate Indigenous property rights) have also accrued informal macro-policy significance. The Racial Discrimination Act played a crucial and determinative role in shaping the High Court decision in *Mabo*, and in shaping the design of the NTA. The ALRA in the Northern Territory created the powerful land councils that have been described as ‘para-governments’; they play a highly influential role in shaping the meta-politics of the Northern Territory.<sup>162</sup> In other words, ‘shared sovereignty’ is already a reality in Australia, albeit limited and informal.<sup>163</sup> It is most influential in setting limits or vetoing particular courses of institutional reform, and much less influential in proactively exercising influence over the design and timing of macro-policy directions.

The challenge for the Australian nation is to formally accept and recognise the value of shared Indigenous sovereignty and then most importantly to work over time on the development of institutions that develop and delineate the terms of that shared sovereignty. This will require institutions which give Indigenous people a voice, and which include them on par with other citizens<sup>164</sup> in key decisions about the management of the nation and its future (and not merely the policies and decisions that relate to Indigenous people). Of course, there will be times when Indigenous and non-Indigenous sovereignty overlap, or conflict, and a resolution will need to be found. Such circumstances should be seen as an opportunity for constructive engagement, for dialogue and for

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<sup>160</sup> Coombs (1994:207) makes precisely this point.

<sup>161</sup> Moreover, these characteristics are reinforced by a profusion of Indigenous organisations, many in the public sector. Sanders (2002) has argued that they constitute an ‘Indigenous order of government’ in Australia that deserves explicit recognition.

<sup>162</sup> Altman & Dillon (1988) described the Northern Territory land councils as ‘para-governments’. See Parish (2018) for a more recent commentary on the influence of the land councils in shaping Northern Territory constitutional opportunities. The New South Wales Aboriginal Land Council may similarly exercise institutional influence beyond its formal statutory remit, albeit in a much more populous State which tends to overwhelm its relative significance; see Norman (2015).

<sup>163</sup> It might be argued that the *Mabo* case, which recognised *de jure* property rights that have been given legislative basis in the NTA, has also established and recognised in public discourse the fact of prior Indigenous sovereignty (even where native title rights have in *de jure* terms been extinguished such as in the Yorta Yorta case). This suggests that the reality of shared sovereignty while informal, is also based on *de jure* principles that are only going to deepen in significance over time.

<sup>164</sup> To be clear here, we are arguing that where Indigenous citizens are excluded in relation to mainstream policies, they should be included. We are not arguing that Indigenous citizens should have special rights in relation to mainstream policies and programs that other citizens do not have.

seeking and reaching mutual understanding. The nation will be richer for considering and, where possible, incorporating Indigenous perspectives in its public life. When Megan Davis asserts that Indigenous sovereignty coexists with the sovereignty of the Crown, she is both making a statement of fact (albeit one that is contested and not universally accepted), and articulating an aspiration that is widely shared among Indigenous citizens. It is an aspiration whose time has come.<sup>165</sup>

There are clearly strong linkages between greater inclusion, particularly political inclusion, and notions of shared sovereignty. Economic and political exclusion goes hand in hand with weak or absent sovereignty. The importance of shared sovereignty is that it gives substance to the forms of inclusion by acknowledging the legitimacy and importance of Indigenous forms of sociality and political organisation. It also helps to explain why the negotiation of greater inclusivity for Indigenous interests has been so difficult for the membership of Australia's extant political settlement: the adoption of 'colour blind' notions of individualism creates a barrier to Indigenous inclusion.

A number of policy implications flow from the increasing acknowledgment of shared forms of sovereignty. In particular, in our view, the development of treaties should be distinguished from mere agreements about meso-policy issues (such as service delivery), which will nevertheless often be highly significant to relevant Indigenous groups and to the governments involved. Treaties should be about establishing new frameworks for engagement and dispute resolution which also give tangible recognition to the notion of shared sovereignty, and thus should focus on institutional change or reform (although the distinctions between institutional reform and meso-policy may not always be entirely clear). Just as mainstream institutions develop and change over time, so too should the institutional reforms embedded in treaties, albeit any variations will require Indigenous consent. The notion that treaties can dispense some sort of final resolution to all of the issues that exist or may arise between Indigenous and non-Indigenous interests is in our view entirely misguided. In particular, the fundamental role of the relative power of interest groups in our politics, and the deep disequilibrium in the power of Indigenous interests compared to other interests, means that it may be virtually impossible for treaties to be negotiated and agreed that are structurally fair and just. For all these reasons, any treaty agreements will require careful development and design from both sides, and will need to be actively managed going forward. While we believe that there is a need for treaty agreements focused on developing institutions able to make shared sovereignty a reality, they should not be entered into lightly by either party<sup>166</sup> as the real work begins once the treaty is made.

## Conclusion

So what will be the shape of Indigenous policy into the future? In our view, at the macro level, it will be about the gradual acceptance and working out of how to give effect to overcoming the structural impediments of systemic social, economic and political exclusion and simultaneously acknowledging the ongoing reality of shared sovereignty between Indigenous people and institutions and mainstream Australia and its institutions.

This will likely be a challenging journey for the nation, and for its Indigenous peoples. We face a situation of ongoing endemic policy failure by governments; this has multiple symptoms all of which require policy attention.

At its core, policy failure can be traced back to the fact that the informal coalition of groups that share power in Australia includes virtually no Indigenous interests. In other words, notwithstanding significant Indigenous

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<sup>165</sup> In making this assertion, we are cognisant that Indigenous forms of sovereignty are not necessarily mere replicas of non-Indigenous state-based forms of sovereignty, and that scope exists for Indigenous peoples to shape the design and the form of Indigenous sovereign institutions in non-statist ways which may better reflect the political structures of Indigenous societies. See Nadasdy (2017) for a discussion of these issues, and in particular, for his description of such non-state based sovereign systems as 'anti-sovereignty'.

<sup>166</sup> While we implicitly assume that treaties will be between governments and Indigenous interests, there is no absolute necessity for the treaty agreement to be limited to these two parties.

gains over the past half-century, the Australian political settlement, reflected in a complex web of institutions built over two centuries that deliver benefits to coalition members, continues to substantively exclude most Indigenous interests.

This ongoing exclusion is a function of the widespread overt racism of the past, combined with a structural blindness. Virtually all key elite interest coalition members are focused on maintaining or expanding their relative influence within the informal coalition. This is generally a zero sum game, and the existence of multiple actual and potential competitors for influence within the dominant coalition means that its members individually and collectively have no incentive to surrender power or influence in ways which would benefit Indigenous interests.

The leaders of the dominant coalition of interests are nevertheless increasingly cognisant of the deep-seated injustice that sits at the core of Australian society, and are open to rhetorical moves towards Indigenous inclusion and recognition, both individually and as a group. However, they are far less open to substantive concessions to shift the institutional framework to remove the inhibitors and constraints to Indigenous inclusion.<sup>167</sup> This is a description of deep-seated systemic or structural exclusion and powerlessness hidden behind a rhetorical fig leaf of benign intentions.

If this analysis is accepted, what does it tell us about the prospects for greater substantive inclusion of Indigenous interests within the nation's political settlement? We can draw a number of conclusions.

First, the path forward for Indigenous interests must focus on structural or systemic reform. In essence, Indigenous interests must seek to force their way into the dominant coalition that shares power in Australian society. There is a role here for persuading key members of the dominant coalition to facilitate this, but it will take time and persistence. The proposed Indigenous Voice – if it is effective – will go some way towards doing this. Even if it operates effectively, the road ahead will be long and hard. And any forward movement is likely to engender a sustained counter-reaction from at least some quarters.

Second, the dynamic nature of the extant political settlement means that gaining access is merely the first step; real influence requires ongoing engagement with other key actors, both to minimise the risk of loss of influence and to maximise the scope of influence. This requires sustained and effective organisation across a range of social, economic and political domains. This must be a key area of focus for the Indigenous leadership into the future. Indigenous interests need a strong web of advocacy groups, peak bodies and research institutes. While a number of highly effective Indigenous peak bodies exist, there are areas of national policy significance not supported by effective advocacy organisations. A key element of effective organisation is to sustain a unified position on the important high-level issues, noting that the heterogeneous nature of Indigenous interests makes this challenging in the best of times.

Third, there is a need for a comprehensive strategy by Indigenous interests aimed at identifying key institutional barriers to Indigenous inclusion, and key institutional locations of Indigenous exclusion, and implementing sustained long-term policy and political campaigns to have those institutions adjusted, reformed or abolished.

Fourth, if Indigenous interests are to be successful in influencing and shifting the established order, it will be imperative to develop and sustain alliances with key mainstream interests to increase the likelihood of success in whichever political strategies they choose.

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<sup>167</sup> The recent announcement by BHP and Rio Tinto (2019) in support of the establishing a constitutionally entrenched Indigenous Voice appears to be an exception to this statement. It can be explained by the fact that the major miners have already 'settled' the terms of their engagement with Indigenous interests through the allocation to native title holders of implicit property rights in relation to mineral resources under the NTA which have facilitated the negotiation of commercially-oriented mining agreements between the parties.

Fifth, the major political parties, while having radically different worldviews, are effectively part of the dominant coalition since their primary constituencies (business and the unions) are key members of that coalition. Accordingly, their policies in large measure reflect, or operate within parameters that reflect, the extant political settlement. Because the major political parties operate at the interface between the wider electorate and the dominant coalition, they have a unique status and open up opportunities for leverage and policy innovation. In particular, they are a portal into the dominant coalition and can play an influential role in shaping the terms of the ongoing bargaining that takes place within the dominant coalition. However, it would be a mistake to assume that the government of the day determines on its own the shape of institutional reform agendas. Governments will rarely act in ways that overtly and fundamentally challenge the power of the dominant coalition, and when they do, their reforms are vulnerable to being wound back over time.

Sixth, one potential role governments can play is to make the case to or within the dominant coalition for the national interest. There is a cogent argument to be made along the lines that ongoing policy failure in Indigenous affairs, ongoing exclusion of Indigenous people, and the ongoing inability to recognise the legitimacy of Indigenous voices has damaged, and will continue to damage, the national interest. In these circumstances, the opportunity exists for visionary leadership within governments to address policy failure and grasp the opportunity of recognising shared sovereignty.

Our assessment is that the road ahead for the nation in relation to Indigenous affairs will inevitably throw up numerous challenges and take decades. The ultimate destination is not yet in sight. The road ahead will be 'very hard'. There will be opposition, pushback, and 'plenty humbug'.

The journey the nation is embarked on will define who we are and shape the future we bequeath to our children and their children. The place of Indigenous peoples within the Australian nation is an issue that will not disappear. At a purely practical level, a failure to address this challenge will maintain egregious levels of poverty, disadvantage and inequality. It will create an obstacle to wider constitutional reform into the future. At a more symbolic level, failure to address Indigenous recognition will signal far and wide a desiccation at the core of our national being. On the other hand, embarking in good faith on a national process of Indigenous recognition will bring tangible benefits to the nation's citizens, Indigenous and non-Indigenous, and finally remove the stain of the White Australia Policy which has permeated the nation's institutional underpinnings since Federation.

Notwithstanding the inevitable challenges the nation faces, the arc of the moral universe<sup>168</sup> bends towards much greater inclusion of First Nation interests and the formal recognition of shared sovereignty between Indigenous and non-Indigenous Australians. Whether the arc of the 'political universe' bends in the same direction is less clear. The fundamental prerequisite for sustained progress is to disrupt the current political settlement in Australia, circumvent the dominant coalition of self-serving interest groups, and directly convince a substantial majority of Australians that Indigenous recognition is not a threat, but an opportunity. An opportunity for a fairer nation, a more prosperous nation, a better governed nation and an opportunity for a more honest nation that accepts its history and is prepared to shape its future in the interests of all its citizens.

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<sup>168</sup> We have borrowed this term from Martin Luther King.

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