# Deliberating Native Title

## Deliberative democracy and native title

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I declare this thesis to be my own original work and all sources relied upon have been acknowledged.

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**Abstract**

This thesis discusses Indigenous people, native title and deliberative and participatory democracy. In this thesis, I argue an important, yet largely unknown system has emerged as a result of Australia's recognition of the pre-colonial property rights ('native title') of Aboriginal and Torres Strait Islander people. I will demonstrate how an Indigenous property right has become an important means for various forms of deliberative and participatory democracy by Aboriginal people.

Since the 1970s, Aboriginal people in Australia have called upon Australian governments to recognise our right to self-determination. We have called on the Australian state to recognise Aboriginal sovereignty, to negotiate a treaty or treaties, and to make space for Indigenous self-government. These calls have been mostly rejected and ignored by the Australian state.

Following the recognition of native title in 1992 by the High Court of Australia in the landmark *Mabo v Queensland (No 2)* Aboriginal people have use their native title rights in innovative ways to engage in engage in forms of deliberative and participatory democracy in environmental public policy, negotiating 'treaty like' agreements, and Indigenous nation building.

Native title is based on the recognition of Indigenous traditional law and custom, prompting legal scholars to argue the recognition of native title is inherently the recognition of Indigenous polities, their sovereignty and capacity for self-government. Consequently, many Aboriginal groups are increasingly *thinking, planning, and acting sovereign* in order to challenge the presumed authority of the Australian state to make and pass laws and policies without the consent of Aboriginal people.

Despite well-documented limitations in what the recognition of native title entails and the arduous process to secure a successful native title determination, thirty years after *Mabo,* many hundreds of Aboriginal groups now hold native title rights recognised by Australian law. The native title system consists of the many government, statutory, Indigenous and civil society groups and institutions that engage with native title as a legal, political, social, and economic matter. This makes the native title system a unique space for understanding Aboriginal modes of deliberative and participatory democracy. Advocates of deliberative and participatory democracy emphasise the 'emancipatory' potential of enhanced democratic engagement for overcoming deep political disagreement. Yet, what I call 'participatory deliberative democracy

under conditions of settler colonialism' is a largely under theorised and under studied area by deliberative and participatory democracy scholars.

This thesis further our knowledge about deliberative and participatory democracy by analysing how Aboriginal people have turned recognition of pre-colonial property right into an innovative means for deepening democratic engagement within Australian democracy. This thesis makes a contribution to our understanding of settler colonialism and deliberative and participatory democracy.

# Contents

# Abbreviations and acronyms

| | |
|---|---|
| ACF | Australian Conservation Foundation |
| AEC | Australian Electoral Commission |
| AIATSIS | Australian Institute of Aboriginal and Torres Strait Islander Studies |
| ALP | Australian Labor Party |
| ALRC | Australian Law Reform Commission |
| ANU | Australian National University |
| ATSIC | Aboriginal and Torres Strait Islander Commission |
| BHA | Bush Heritage Australia |
| CAEPR | Centre for Aboriginal Economic Policy Research (ANU) |
| CANZUS | Canada, Australia, New Zealand, and the United States |
| CSIRO | Commonwealth Scientific and Industrial Research Organisation |
| CATSI Act | Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) |
| CEO | Chief Executive Officer |
| CERD | United Nations Committee on the Elimination of Racial Discrimination |
| CSIRO | Commonwealth Scientific and Industrial Research Organisation |
| FPIC | free, prior, and informed consent |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ILUA | Indigenous land use agreements |
| KLC | Kimberley Land Council |
| KNY | *Kungun Ngarrindjeri Yunnan – 'Listen to what Ngarrindjeri have to say'* |
| MDB | Murray Darling Basin |
| NAC | National Aboriginal Conference |

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|---|---|
| NGO | non-government organisation |
| NLC | Northern Land Council |
| NNI | Native Nations Institute (University of Arizona) |
| NNTT | National Native Title Tribunal |
| NRM | natural resource management |
| PBC | prescribed body corporate |
| RDA | *Racial Discrimination Act 1975* |
| RNTBC | Registered Native Title Body Corporate |
| SRA | Shared Responsibility Agreement |
| SWALSC | South West Aboriginal Land and Sea Council |
| TONT | Traditional Owner Negotiation Team |
| UK | United Kingdom |
| UN | United Nations |
| UNDRIP | United Nations Declaration on the Rights of Indigenous Peoples |
| UNPFII | United Nations Permanent Forum on Indigenous Issues |

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# 1 Introduction

> In fact, the Euro-centric world view may have much to learn from Aboriginal Australia. Through our extended deliberative processes, which rely more on consensus than dictatorship of the bare majority, with our diffused structures of power through clans, 'skin' groups and gendered spheres of knowledge and via their decentralised systems of more than 500 sovereign nations, Indigenous Australians had a much more inclusive and participatory model of democracy than the British did at the time. Indeed, the argument could be made that Indigenous Australians have much more to contribute to the debate about the future of democracy than is generally conceded.[1]

> Each of the constitutional dialogues was run in precisely the same way and took place over a three-day weekend to accommodate participants' employment. The method was a structured, deliberative decision-making process that engaged participants in a dialogue. The decision to have a 'dialogue' was deliberate. We were conducting our work in communities exhausted by the superficial consultation practices of the bureaucracy, particularly the Commonwealth bureaucracy. The tolerance for any process that looked 'top down' or 'tick a box' was very low. We took very seriously the importance of the process being bottom up and driven by the people themselves.[2]

The quotes to begin this thesis are from two distinguished Indigenous legal and political scholars in Australia. These passages illustrate that deliberative and participatory democratic practices are a familiar feature of both past and contemporary Aboriginal political culture in Australia.

Though theories of democracy tend to attribute the polis of ancient Greece as the birthplace of democratic governance, several notable political scholars including Dahl[3] and Fukuyama[4] acknowledged that older forms of democracy were undoubtedly practiced by Indigenous cultures well before Athenian democracy.

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[1] Larissa Behrendt, 'Aboriginal Australia and Democracy: Old Traditions, New Challenges', in Benjamin Isakhan and Stephen Stockwell (eds), *The Secret History of Democracy* (Palgrave Macmillan, 2011) 148.

[2] Megan Davis, 'The Long Road to Uluru' [2018] (60) *Griffith Review*.

[3] Robert A Dahl, *On Democracy* (Yale University Press, 2nd ed., 2015).

[4] See Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (Farrar, Straus and Giroux, 2011).

> Like fire, or painting or writing, democracy seems to have been invented more than once, and in more than one place. After all, if the conditions were favourable for the invention of democracy at one time and place (in Athens, say, about 500 B.C.E.), might not similar favourable conditions have existed elsewhere?... For example, because of favourable conditions some form of democracy probably existed for tribal governments long before recorded history.[5]

Indigenous people's contribution to democracy is often overlooked. The same may be said of Indigenous people and deliberative democracy.

The world's Indigenous people constitute some 6 per cent of the global population (approx. 476 million people) in over 90 countries representing 5,000 different cultures and 7,000 languages.[6] From local communities to international institutions such as United Nations Permanent Forum on Indigenous Issues (UNPFII)[7], Indigenous people are involved in many forms of deliberative and participatory democracy. Yet, despite the extensive academic interest in deliberative and participatory democracy over the past 40 years, both fields say little in relation to Indigenous peoples.

This situation is somewhat surprising. Firstly, because the challenges Indigenous peoples face in settler-colonial democratic societies would seem to align with the so-called *emancipatory* potential of deliberative and participatory democracy.[8]

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[5] Dahl (n 3) 9.

[6] The World Bank, Everyone Equal: The Resilience of Indigenous Peoples Across the Globe, (Webpage), https://www.worldbank.org/en/news/feature/2020/08/07/everyone-equal-the-resilience-of-indigenous-peoples-across-the-globe

[7] The United Nations Permanent Forum on Indigenous Issues (UNPFII) is a high- level advisory body to the Economic and Social Council established in July 2000. Its mandate is to advocate on indigenous issues related to economic and social development, culture, the environment, education, health and human rights. UNPFII provides expert advice and recommendations on Indigenous issues to the UN Economic and Social Council, as well as to programmes, funds and agencies of the United Nations to raises awareness and promote the integration and coordination of activities related to Indigenous issues within the UN system. United Nations Permanent Forum on Indigenous Issues (UNPFII) (Webpage), https://social.desa.un.org/issues/indigenous-peoples/unpfii

[8] As Knops explains, 'It is clear, therefore, that the emancipatory promise of an equal voice in a process of free reasoning is central to any theory of deliberative democracy. This is a twofold promise; first, it gives disadvantaged groups the opportunity to voice their opinions; second, it guarantees that, to the extent that they advance good reasons, the views of disadvantaged groups should influence decisions. See, Andrew Knops, 'Delivering Deliberation's Emancipatory Potential' (2006) 34(5) *Political Theory* 594, 596.

The emancipatory and transformative potential of deliberative democracy resides in the securing of 'equal participation of otherwise excluded social groups in public deliberation that can transform pre-existing assumptions held by the broader society about the legitimacy of the demands of socially excluded groups'.[9]

As Bashir explains, the emancipatory potential of deliberative democracy in societies shaped by colonisation and historical injustice is that it is a better method for resolving conflict, accommodating difference, and addressing socio-economic inequalities and asymmetries of power in political relations than voting.

> It is through voicing their views and participating in the formation of public opinion, while using reasonable arguments in power- and manipulation-free public deliberation rather than through outvoting the majority, that excluded groups will influence decision and policy making'.[10]

Yet very little in the existing literature speaks of where, how and why, Indigenous people may engage with deliberative democracy beyond an acknowledgment that advocates of deliberative and participatory democracy possibly should be interested in understanding Indigenous people's 'spheres of deliberation'.[11]

Secondly, Indigenous people hold several principles regarding democratic engagement that strongly align with the values of deliberative and participatory democracy including the right of self-government, direct involvement in decision making processes, and the principle of free, prior, and informed consent (FPIC).[12]

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[9] Bashir Bashir, 'Reconciling Historical Injustices: Deliberative Democracy and the Politics of Reconciliation' (2012) 18(2) *Res Publica* 127, 136.

[10] Ibid.

[11] As Hébert explains, Indigenous people must be able to able to deliberate at multiple scales, from intra and inter family level to global level. Indigenous people must be able to engage with the broader non-Indigenous political sphere as well. 'Discussing Indigenous forms of deliberation requires acknowledging these (Indigenous) spheres are complex' as Indigenous people must 'constantly decode the implicit rules of colonial, state and global governance to find strategic opportunities to be heard' and to 'engage in their own forms of deliberation'. See Martin Hébert 'Indigenous Spheres of Deliberation', in Andre Bächtiger et al (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press UK, 2018) 100-109.

[12] For example, Article 18 of the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP) states 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and

My thesis is concerned with questions of where, how, and why Aboriginal people deliberate. The 'where' is what I believe is a unique 'deliberative space', the native title system in Australia. The 'how' is through three practices that are commonplace within the native title system: public policy making, agreement making, and the rebuilding of Indigenous governance. The 'why' is to realise the goals of sovereignty and self-government.

At this point, it is necessary to elaborate a little on my theoretical lens for this study; deliberative and participatory democracy. In Chapter 3, I provide greater detail on both theories, but for now I will provide a short overview.

Participatory democracy grew from student activism in the 1960s as a challenge to traditional democracy. As leading proponent of participatory democracy Carole Pateman explains, adherent of participatory democracy believed citizens ought to be able to participate more directly in democratic processes.[13] However, to do so, societies needed to address structural and socioeconomic barriers so ordinary citizens had more scope for greater political participation.[14] The main claim of participatory democracy is that increased participation by citizen's in decision-making processes of government strengthens the quality of democracy and public policies.

Participatory democracy makes space for citizens to more directly decide on issues affecting their lives. Advocates of participatory democrats believe democracy is enhanced when more people can participate in decision making, which is a better means for securing the ideal of government by the people.[15]

For participatory democracy advocates, the aim is to increase the participation of ordinary citizens in public decision-making. By contrast, deliberative democrats emphasise the discursive quality of public deliberation as the means to more legitimate decision making. In simple terms, one believes democracy is enhanced when more people are included in decision making; while the other holds that democracy is best enhanced by improving the quality of discussion.

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develop their own indigenous decision-making institutions'. See United Nations, 'United Nations Declaration on the Rights of Indigenous Peoples'.

[13] Stephen Elstub, Deliberation and Participatory Democracy, in Bächtiger et al (n 11) 188.

[14] Ibid.

[15] Lyn Carson and Stephen Elstub, *Comparing Participatory and Deliberative Democracy* (Research & Development, newDemocracy, 2019) 2.

Scholarly interest in deliberative democracy grew in the 1980s, building on the theoretical foundations of participatory democracy.[16] The literature on deliberative democracy has now surpassed participatory democracy so much so, its advocates claim it now dominates the field of democracy studies.[17] The essence of deliberative democracy is that it is a talk-centric approach to resolving political disagreement as opposed to voting, which is the more traditional method of resolving political disagreement.

Because it involves deliberation between parties with differing ideas on what may constitute the right thing to do, deliberative democracy entails a process of reason giving and listening to the arguments of others. Advocates of deliberative democracy assert that key to a deliberative conceptualisation of democracy is the considered exchange of reasons with one another.[18]

As Cini and Felicetti explain, deliberative and participatory democracy both seek to deepen democracy by placing citizens at the centre of political decision making processes. Some scholars such as Fung and Wright consider these to be radical forms of democracy that are alternatives to the more traditional electoral democracy. However, despite both theories aspiring to involve more citizens in decision-making, they come from very different traditions.[19]

Deliberative democrats favour an idea of democracy in which people address collective problems by deliberating together about how best to solve them.[20] Despite criticism from advocates on the drawbacks on the respective theories, both approaches attempt to articulate a vision of democracy beyond the representative model. That is to say, they both envisage a robust concept of democracy based on participatory and deliberative norms.[21]

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[16] ' As Floridia explains, the history of deliberative democracy is far from linear but grew from a complex process in which different conceptual elements were gradually elaborated, changed and reworked. The notion of 'deliberation' is expressed in the thinking of Aristotle and democratic thinkers such as John Stuart Mill and John Dewey. The early eighties can be categorised as a transitional phase as democracy theorists took the antecedents of participatory democracy into a new direction. Deliberative democracy is somewhat of a theoretical and practical evolution of the ideals of participatory democracy of the sixties and seventies. See, Antonio Floridia 'The Origins of the Deliberative Turn' in Bächtiger et al (n 11) 35-36.

[17] Selen A Ercan and John S Dryzek, 'The Reach of Deliberative Democracy' (2015) 36(3) *Policy Studies* 241.

[18] Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, First Edition, 2004) 3.

[19] Lorenzo Cini and Andrea Felicetti, 'Participatory Deliberative Democracy: Toward a New Standard for Assessing Democracy? Some Insights into the Italian Case' (2018) 10(2) *Contemporary Italian Politics* 151, 152.

[20] Ibid.

[21] Ibid.

In Australia, deliberative and participatory processes and forums for Aboriginal and Torres Strait Islander people to be more strongly involved in decision-making processes are largely absent. Although we can publicly advocate for policies we wish to see enacted, our participation in political decision-making processes is limited to voting as with other citizens. Yet since the 1970s, Aboriginal and Torres Strait Islander people have persistently called for structural changes to enable greater participation and deliberation on the laws and policies that affect us.

A key argument in this thesis is that the recognition of native title has provided a platform for greater participation and deliberation for and by Aboriginal people in decision-making processes. Also, for Aboriginal people, to realise the ideals of sovereignty and self-government, requires both deliberation and participation in decision-making. As I will argue in this thesis, the ideal of Indigenous self-government aligns strongly with what some scholars defined as *participatory deliberative democracy*.

As such, my thesis is not concerned with a detailed procedural analysis of deliberative and participatory democracy in structured and designed forums such as mini-publics, but rather with highlighting a mostly hidden public space in which Aboriginal people engage in deliberative and participatory democracy as a means of exercising self-government.

In Chapter 5 I discuss *Mabo* and native title in greater detail but for the purposes of this Introduction, 'native title' is the result of the historic *Mabo v Queensland (No 2)*[22] decision of the High Court of Australia in 1992 which recognised the pre-colonial land rights of Aboriginal and Torres Strait Islander people. Before *Mabo*, within Australian law Aboriginal and Torres Strait Islander people were deemed to possess no recognisable legal rights to our traditional lands. Prior to this, and since British colonisation and assertion of sovereignty over Australia[23], the legal doctrine of *terra nullius* had held as 'good law' in Australia for two centuries.[24]

[22] *Mabo v State of Queensland (No 2) HCA 23 (1992) 175 CLR 1*.

[23] At the time of colonisation, the territory now known as 'Australia' obviously did not exist. What did, and continues to exist, are hundreds of individual Indigenous nations with differing names, language and cultural traditions. Over history, the landmass of Australia has been variously known as *Terra Australis*, New Holland, and certain parts as Queens Land, Van Diemen's Land etc. Throughout this thesis for the sake of simplicity, I use the term 'Australia' to mean the landmass prior to British colonisation and as the modern nation state today. I do however refer to specific Aboriginal nations and cultural groups when discussing a particular Indigenous group in both pre-colonisation and modern contexts.

[24] The denial of Indigenous people rights to land in Australia for more than 200 years was attributed to a classical Roman law doctrine of terra nullius. The term means 'empty land' or 'land without people'. European nations used

The *Mabo* claim concerned the Meriam people of the island of Mer (the Murray Islands) situated in the Torres Strait between the northern tip of Cape York Peninsula and Papua New Guinea.

> In Mabo the Meriam people sought, in part, a declaration that, notwithstanding the annexation of the islands by Queensland in 1879 and governmental actions over the preceding years, the Meriam people retained native title to the islands entitling the Meriam people to possession, occupation, use and enjoyment of the islander. They were successful in this application.[25]

In their joint decision, Chief Justice Mason and Justice McHugh summarised the decision

> In the result, six members of the Court (Dawson J. dissenting) are in agreement that the common law of this country recognizes a form of native title which, in cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland.[26]

In *Mabo,* the High Court repudiated the notion Australia was *terra nullius* or 'desert and uninhabited' at the time of British colonisation.[27] It also rejected the notion that Aboriginal and Torres Strait Islander people were 'barbarous' and 'without settled law'.[28] In recognising that the pre-colonial rights in land ('native title') of Aboriginal and Torres Strait Islander people had

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this legal concept to claim new territories they deemed to be unoccupied. See, David Ritter, 'The Rejection of Terra Nullius in Mabo: A Critical Analysis' (1996) 18(1) *Sydney Law Review*.

[25] Michael Kirby, 'In Defence of Mabo' (1993) 65(4) *The Australian Quarterly* 66, 53.

[26] *Mabo v State of Queensland (No 2) HCA 23 (1992) 175 CLR 1* (n 22) per Mason CJ & McHugh J.

[27] As legal historian PG McHugh explains, when the British colonised a new territory, under its own laws the property rights of tribal people was to be 'recognized as surviving as a legal "burden" on Crown ownership that could only be extinguished by the Crown'. 'Aboriginal title (other jurisdiction such as Canada use the term, "Aboriginal title") allowed the tribal owners to have their communal land rights recognised by the introduced common law legal system as a burden on the Crown's radical title'. See PG McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011) 3.

[28] Australian Law Reform Commission (ALRC), *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report* (Australian Law Reform Commission, 2015) 67-68.

survived British acquisition in 1788, the High Court declared *terra nullius* and the denial of Indigenous people's rights to their traditional lands as factually wrong and morally unjust.[29]

> The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices.[30]

To reach its decision the High Court relied on common law recognition of native title in other former British colonies such as the United States, Canada, and Aotearoa New Zealand. It also integrated contemporary claims of justice, human rights, international law, and Australian common law in its decision.[31]

*Mabo* overturned the 'lie of *terra nullius*' and by doing so, forced a wholesale reconsideration of established assumptions about land ownership and the settlement of Australia. Thirty years on from the *Mabo* decision, native title is now embedded within Australia's legal and political system and considered 'settled law' in Australia.[32]

In addition to recognising Aboriginal and Torres Strait Islander people's rights to their traditional lands, *Mabo* and native title also raised public understanding about the effects of

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[29] As Haughton explains, recognition of Indigenous people as possessing rights to their traditional lands was a principle of international law from the 1500s. Spanish jurist Francisco de Vitoria argued in 1532 that 'ethnic, cultural and religious differences of American Indians from Europeans were not such as to deprive the Indians of the rights they enjoyed as men by virtue of their common humanity'. Early international law sought to acknowledge that a 'change of sovereignty did not affect private property rights' – including Indigenous and tribal peoples. Yet in the 18th Century, British common law was influenced by the writing of social theorist John Locke who argued that in situations of 'hunter-gatherer societies' that did not mix their labour with the land, these territories could be deemed as 'desert and uncultivated' and therefore, terra nullius. As Haughton explains, though Indigenous peoples in the United States and New Zealand also did not cultivate the land, the British nonetheless negotiated treaties, 'a practice which, implicitly or explicitly, recognised the prior legal ownership of the land by the Indigenous peoples in question'. This, however, did not occur in the colony of New South Wales. See James Haughton, 'An Unsettling Decision: A Legal and Social History of Native Title and the Mabo Decision', Parliamentary Library Research Paper Series 2022-23' 2.

[30] *Mabo v State of Queensland (No 2) HCA 23 (1992) 175 CLR 1* (n 22) per Deane and Gaudron JJ.

[31] Gerry Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *Melbourne University Law Review* 16.

[32] The term 'settled law' is used to denote judicial precedent – a series of consistent judicial decisions – that now form a substantive part of legal doctrine on an issue. In practical terms, it signifies that the contours of the law on an issue are well established and there is little deviation from the accepted understanding of the law.

dispossession for Aboriginal and Torres Strait Islander people. It also opened up discussion of other legal and political rights of Aboriginal and Torres Strait Islander people.

> *Mabo* set a new agenda. It broke barriers and created a raft of opportunities that would not have been possible without it. Native title has paved the way for a new relationship between Indigenous and non-Indigenous Australians. It has opened the door on a range of possibilities that were in the past, just dreams.[33]

For many Aboriginal people and Indigenous rights advocates, *Mabo* and the recognition of native title was thought to be the start of further legal and political reforms. Structural and institutional changes to Australian democracy including recognition of Indigenous sovereignty and the right to self-government would emerge over time as a natural maturation in discussions emanating from the recognition of native title. However, as of 2023, the anticipated structural reform remains mostly unfulfilled.[34]

Yet the issues of sovereignty, treaty and self-government remain important to Aboriginal people. How to resolve these issues is amongst the most vexed political and legal issues Australia faces.[35] These issues are collectively understood and expressed as the right of Indigenous people to *self-determination*[36] and articulated in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[37] to which Australia is a signatory.

A fundamental claim of deliberative democracy is that people should be included in processes to decide the laws and policies most likely to affect them. As notable deliberative democracy

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[33] Glen Kelly and Stuart Bradfield, 'Winning Native Title, Or Winning Out of Native Title?: The Noongar Native Title Settlement' (2012) 8(2) *Indigenous Law Bulletin* 14.

[34] As Hobbs explains, re-establishing Australia's 'politico-legal foundation' as a consequence of the recognition of native title was to be realised through a promised but never delivered 'social justice package' of compensation and structural reforms. Though the 'social justice package' was never delivered, it could still be the legacy of recognition of native title. See, Harry Hobbs, 'Locating the Logic of Transitional Justice in Liberal Democracies: Native Title in Australia' (2016) 39(2) *University of New South Wales Law Journal* 551.

[35] Duncan Ivison, *Can Liberal States Accommodate Indigenous Peoples?* (Polity Press, 2020).

[36] The terms 'self-determination', 'self-government', and 'sovereignty' are used interchangeably by Indigenous people as demands against the settler-colonial state. The terms can be highly contextualised in their use, rhetoric and in law but are generally used to demand settler-colonial states recognise the political autonomy of Indigenous people, the desire for Indigenous groups to exercise a degree of self-government over political and policy matters that affect us, and that states must accommodate Indigenous sovereignty within the territorial boundaries of the nation state.

[37] United Nations (n 12). Adopted by the United Nations General Assembly on 13 September 2007, UNDRIP is considered the most comprehensive articulation of Indigenous peoples claim to a right to self-determination.

scholar Jane Mansbridge argues, 'citizens should not be thought of as merely passive subjects of legislation or policies passed by politicians in legislatures, but as active citizens in their own self-governance'.[38]

In Australia, native title is recognised as a *sui generis* domestic property right providing Aboriginal people with a legally recognisable interest in land.[39] Yet for Aboriginal people, native title has broader political implications and is seen as an important basis for self-determination. It implies recognition of the unceded sovereignty of Aboriginal people and is a basis for Indigenous self-government.

In this thesis, I discuss how Aboriginal people use a recognised property right (native title) as a means to engage in deliberative and participatory democracy within the native title system. Further, I explore how the native title system functions as an unintended 'deliberative space' for Aboriginal people to negotiate with Australian governments on the laws and public policies that affect our lives.

Having provided some background on the focus of my thesis, I now discuss my research question.

## 1.1 Research Question

This thesis employs deliberative and participatory democracy as a theoretical lens to discuss how Aboriginal people use their native title rights and the native title system.

The question this thesis seeks to answer is:

[38] Jane Mansbridge et al, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy' (2010) 18(1) *Journal of Political Philosophy* 64.

[39] *Sui generis* is a Latin phrase used to refer to something that possesses unique characteristics that are not easily categorised. In the *Mabo* decision, Deane and Gaudron JJ argued the term *sui generis* in relation to native title in Australia was most appropriate, citing its use in the Canadian case *Guerin v The Queen* and the Privy Council decision in *Amodu Tijani v Secretary*. 'On the other hand, the rights under common law native title can, as the Privy Council has pointed out, approach the rights flowing from full ownership at common law. The preferable approach is that adopted in *Amodu Tijani* and by Dickson J in the Supreme Court of Canada in *Guerin v The Queen*, namely, to recognize the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as *sui generis* or unique'. *Mabo v State of Queensland (No 2) HCA 23 (1992) 175 CLR 1* (n 22) per Deane & Gaudron JJ.

Has the native title system become a deliberative and participatory democratic space for self-determination by Aboriginal people?

Additional questions include:

- How does native title facilitate public deliberation and political claim making for Aboriginal people?
- What are the main deliberative and participatory democratic practices of Aboriginal people within the native title system?

My research questions come from my involvement working with many Aboriginal groups between 2005 and 2017. During this time, I worked with several non-government organisations (NGOs) including two national environmental NGOs: the Australian Conservation Foundation (ACF), which had a focus on environmental policy and advocacy; and Bush Heritage Australia (BHA), which had a focus on practical land management. My role with both organisations involved the negotiation of partnership agreements with Aboriginal communities engaged in Caring for Country[40] projects (environmental land management projects led by Indigenous people using Indigenous cultural and ecological knowledge) on their traditional lands and waters. Most of this work was in northern Australia – the vast region from Cape York Peninsula in Queensland, the Gulf of Carpentaria and Arnhem Land in the Northern Territory, and the far northern Kimberley region of Western Australia.

In my work to support Aboriginal Caring for Country efforts, I was often involved in meetings between various Aboriginal groups (land councils, Aboriginal community organisations, Indigenous ranger groups) and government agencies. The agencies and their representatives would often be from a range of different departments – environment, parks and wildlife, Attorney-General's department, Indigenous affairs. Meetings were generally organised around negotiating government support for the communities' Caring for Country work. Discussions would initially focus on land management issues – removal of weeds and feral animals, biodiversity surveys, or plans to mitigate and manage dry season wildfires. Discussions might

[40] Caring for Country is the term Aboriginal and Torres Strait Islander people use to describe the Indigenous community-based natural resource management for the protection of traditional lands, sea, waterways, and cultural heritage on Indigenous people's ancestral territories that provides conservation benefit and economic development opportunities. See JC Altman and PJ Whitehead, 'Caring for Country and Sustainable Indigenous Development: Opportunities, Constraints and Innovation' (20) *CAEPR Working Paper No. 20* 14 (Centre for Aboriginal Policy Research, ANU, 2003).

also include what resources were necessary for establishing a Caring for Country program such as funding for a coordinator, mapping work, office space, equipment, vehicles etc.
However, members of the Aboriginal group would inevitably raise other 'non-native title' issues that were of concern to their community. Issues raised often included the need for new housing in the community, more Aboriginal teachers in the local school, more health services, or support for community-development initiatives, and policing and justice issues within the community. At this point in the conversation, many of the government representatives would look confused because the discussion had strayed onto what they perceive to be 'non-native title' issues. 'Sorry, but we are here to discuss native title' they would say. To which members of the Aboriginal group would exclaim, 'We are talking about native title!'

What I took from these exchanges was that Aboriginal people had a more *expansive and holistic* understanding of native title. It included the right of Aboriginal people to be involved in discussions and decision-making regarding a range of public policy matters, including housing, health, community development, and education. For Aboriginal people I was working with, native title created a 'deliberative space' for them to negotiate policy matters that affected both the land *and* the people living on that land.

In order to bring my personal observations of Aboriginal and government engagement concerning native title, I will employ both socio-legal and interpretative research approaches to my questions, which I discuss in detail in Chapter 2.

## 1.2 Focus: The Native Title System in Australia

In this section, I briefly discuss the focus of my research, the native title system.[41]

As explained, the recognition of native title in Australian law was ultimately the result of the decision of the High Court of Australia in *Mabo (No. 2).*[42] Though it was the first time an

[41] Formally, the native title system are those institutions that have a formal role in determining native title such as the Federal Court or those institutions that have a statutory role under the *Native Title Act 1993* such as the Federal Parliament and government agencies such as the Attorney-General's department. Less formally, the native title system also consists of a wide array of government, corporate, and civil society groups that have reason or need to engage with native title. For an overview of the native title system see David Ritter, *Contesting Native Title* (Allen & Unwin, 2009); Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* (Australian Government, 2013).

[42] *Mabo v State of Queensland (No 2) HCA 23 (1992) 175 CLR 1* (n 22).

Australian court had recognised the existence of native title, or 'Aboriginal title' as it is alternatively known, native title was already recognised in several other former British common law countries, including the United States since 1823.[43] Rather than being a radical decision, *Mabo* and the recognition of native title merely brought Australia into line with other common law jurisdictions.[44]

Understanding the profound impact *Mabo* would have on the established system of property rights in Australia, and that would it almost certainly result in other Aboriginal and Torres Strait Islander people seeking similar declarations, the Keating government embarked on creating the legislative and administrative means for responding to the anticipated surge in new native title claims. A 'native title system' was established to manage the inevitable conflict created by the recognition of native title.[45]

Formally, the native title system refers to the various institutions – the Federal and High Courts, federal government departments such as the Attorney-General's department, state and territory governments, a range of statutory organisations such as the National Native Title Tribunal (NNTT), and Indigenous native title representative organisations such as land councils. Less formally, it refers to various 'native title communities'[46] (government, legal, research, business) with an interest in native title matters as well as Indigenous community organisations, and a large number of NGOs, civil society groups, and private interest groups whose business may require them to work with or negotiate with native title holding groups.

It is a large array of state, Indigenous, civil society, and private groups with competing interests that coalesce around native title, prompting some to liken the native title system to a market place for the buying of access to Indigenous land held under native title.[47]

There are two parts to the native title process. The first is the 'claims' phase and the second, the 'post-determination' phase.

[43] McHugh (n 27) 1.

[44] Richard Bartlett, 'Mabo: Another Triumph for the Common Law' (1993) 15(2) *Sydney Law Review* 178.

[45] Tim Rowse, 'How We Got a Native Title Act' (1993) 65(4) *The Australian Quarterly* 110.

[46] Aboriginal and Torres Strait Islander Justice Commissioner, *Native Title Report 2007* (Australian Human Rights Commission, 2007) 9-10.

[47] David Ritter, *The Native Title Market* (University of Western Australia Press, 2009).

The claims phase begins when an application for a determination is placed with the Federal Court of Australia by a person or persons (the applicant) authorised by all members who, according to their traditional laws and customs, may hold the common or group rights and interests to the land under claim (the native title claimant group). Authorised applications are then assessed via a 'registration test' by NNTT. If passed, the application is registered with the Native Title Registrar, made available on their webpage, and publicly advertised so that people and groups that may hold an interest in the area under claim can apply to become a party to the application. A native title determination is achieved either through a trial in which a declaration is made by the Federal Court (or the High Court if the case is appealed) or the parties (which may include state and territory governments as respondents to native title applications) may prefer to negotiate and reach what is called a consent determination.[48]

In the 'post-determination' phase of native title, groups holding native title rights seek to use and enjoy their rights. This may include activities such as environmental and culture heritage management, community development, health, and housing and supporting community businesses. Indigenous community organisations may also seek to carry out additional activities such as 'town planning, social harmony projects, cultural protocols, Welcome-to-Country ceremonies, interpretive and cultural signage, job creation, training and economic development'.[49]

Former president of the NNTT Raylene Webb calls the post determination phase of native title, the 'management problem'.

> Once a native title determination has been achieved the challenge to leveraging native title to reach its full potential presents a completely different problem. *This is the management problem* [emphasis added]. This problem involves an unstructured but complex network of Anglo-Australian rules and regulations, Indigenous perspectives and internal and external stakeholder expectations.[50]

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[48] For an overview of the native title claims process see Chapter 14 'Making a Claim Under the *Native Title Act 1993* (Cth)', see Richard Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 4th ed. 2020) 229-273. See also National Native Title Tribunal, (Webpage), http://www.nntt.gov.au/Pages/Home-Page.aspx

[49] Belinda Burbidge et al, *Report on the 2019 Survey of Prescribed Bodies Corporate (PBCs)* (National Native Title Council, AIATSIS, CSIRO, 2021).

[50] Raelene Webb, 'The 2016 Sir Frank Kitto Lecture: Whither Native Title?' (2016) 19(2) *Australian Indigenous Law Review* 17, 124.

This thesis is concerned with the *post determination* phase of native title, as this is the most active for Aboriginal people engaging in decision-making processes. It is also where Aboriginal people assert their sovereignty and the right to self-government.

David Ritter, a former native title lawyer with the Yamatji Marlpa Land Council, says there are in fact two competing conceptualisations of native title, one held by non-Indigenous government and legal officials, and another held by Aboriginal people. He describes the non-Indigenous conceptualisation as *jural native title* and the other held by Aboriginal people as *social native title*. As Ritter explains, social native title is a 'non-legal idea' about the aspirations of Indigenous groups that extends 'beyond what the law of native title can recognise'.

> In essence, what is argued is that, additional to the formal 'doctrine of native title' as recognised by the Native Title Act 1993 and the judiciary (henceforth called herein 'jural native title'), there is the matter of 'social native title'. Social native title can be understood as a concept that embraces the human and citizenship rights and *political aspirations* [emphasis added] of Indigenous people in relation to country that are outside of conventional jural native title, but emerge as expressions of Indigenous law and custom.[51]

Because Aboriginal people believe native title to contain implicit *political rights,* the native title system becomes a critical space of political contestation and encounter between Indigenous and settler law and political authority. What I argue in this thesis is that native title system has become an important space for deliberation and democratic innovation.[52]

This is especially so since the Aboriginal and Torres Strait Islander Commission (ATSIC) was abolished in 2004.[53] The native title system is one of the few spaces in which Aboriginal people

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[51] David Ritter, 'Hypothesising Social Native Title', in Lisa Strelein (ed.), *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 118.

[52] Democratic innovations are 'processes or institutions that are new to a policy issue, policy role, or level of governance, and developed to reimagine and deepen the role of citizens in governance processes by increasing opportunities for participation, deliberation, and influence'. See Stephen Elstub and Oliver Escobar (eds), *Handbook of Democratic Innovation and Governance* (Edward Elgar Publishing, 2019) 14.

[53] ATSIC began operating in 1989 before being abolished by then Prime Minister John Howard in 2005. There is a wealth of analysis and discussion on the demise of ATSIC and the administration of Indigenous public policy in Australia. See Scott Bennett and Angela Pratt, *The End of ATSIC and the Future Administration of Indigenous Affairs* (Current Issues Brief No.4, Department of Parliamentary Services, 2005) 34; Patrick Sullivan, *Belonging Together: Dealing with the Politics of Disenchantment in Australian Indigenous Affairs Policy* (Aboriginal Studies Press, 2011);

can engage in direct negotiation with governments on laws and policy matters. It is a kind of unintended *deliberative democratic space* with Aboriginal people increasingly acting as *Indigenous polities* demanding government-to-government relations with the Australian state.[54]

As of August 2023, there have been exactly 600 native title determinations[55] managed by some 250 prescribed body corporates (PBCs)[56] representing the native title interests of Aboriginal and Torres Strait Islander peoples.[57] When governments or any other party wish to undertake an activity on Aboriginal lands held under native title, they must engage with the appropriate PBC, land council and any other Indigenous organisations representing the native title holding group. These many hundreds of Indigenous groups with recognised native title rights constitute hundreds of 'deliberative sites' of engagement between Aboriginal groups, governments and other actors.

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Patrick Sullivan, 'Disenchantment, Normalisation and Public Value: Taking the Long View in Australian Indigenous Affairs' (2013) 14(4) *The Asia Pacific Journal of Anthropology* 353; Will Sanders, Australian National University, and Centre for Aboriginal Economic Policy Research, *Towards an Indigenous Order of Australian Government: Rethinking Self-Determination as Indigenous Affairs Policy* (Discussion Paper No. 230/2002, Centre for Aboriginal Economic Policy & Research (CAEPR), 2002).

[54] Scholars of settler colonialism and Indigenous rights often speak of the desire of Indigenous people to have 'space' within the settler state to exercise Indigenous political autonomy and agency. That is, the creation of Indigenous 'sovereign spaces' for 'Indigenous governance.' See Sana Nakata and Sarah Maddison, 'New Collaborations in Old Institutional Spaces: Setting a New Research Agenda to Transform Indigenous-Settler Relations' (2019) 54(3) *Australian Journal of Political Science* 407; Lisa Strelein and Tran Tran, 'Building Indigenous Governance from Native Title: Moving Away from "fitting in" to Creating a Decolonized Space' (2013) 18(1) *Review of Constitutional Studies* 19+; Irene Watson, 'Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal Peoples' (2009) 108(1) *South Atlantic Quarterly* 27.

[55] See, National Native Title Tribunal, (Webpage), accsssed 25/08/2023, http://www.nntt.gov.au/Pages/Statistics.aspx

[56] Under the *Native Title Act 1993*, all native title claimants' groups that receive a successful native title determination are legally required to form what is called a Registered Native Title Body Corporate (RNTBC), more commonly referred to as a 'prescribed body corporate' (PBC). PBCs are incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act) and established in accordance with the *Native Title Act 1993* to represent the common law holders and manage their native title rights and interests. As Burbidge et al explain, 'PBCs are crucial managers of Indigenous rights and interests in country, key foci for Indigenous social and economic development aspirations and important organisations for external parties seeking contact with Traditional Owners'. See Burbidge et al (n 35).

[57] PBC (Webpage). As of December 2022, see https://nativetitle.org.au/learn/role-and-function-pbc/pbc-national-snapshot

I want to finish this discussion of native title and the native title system by acknowledging that not all Aboriginal people hold positive views about native title. For some, native title is merely a continuation of colonisation and assimilation.

Trawlwoolway and Pinterrairerin man and lawyer Michael Mansell, from *lutruwita* (Tasmania), writing shortly after the *Mabo* decision, stated:

> The court did not overturn anything of substance, but merely propounded white domination and superiority over Aborigines by recognising such a meagre Aboriginal form of rights over land. If *Mabo* represents the best that the legal system has to offer, then Aborigines will be put off by the effort and costs involved in litigating for such a puny reward. *Mabo* offers something for those who are grateful for small blessings, but nothing in the way of justice.[58]

Goenpul woman and Aboriginal scholar Distinguished Professor Aileen Moreton-Robinson views the native title determination process as a perpetuation of colonialism because it relies on Aboriginal people receiving the coloniser's approval in order to be recognised as the lawful owners of our traditional lands. For Moreton-Robinson, native title treats Aboriginal and Torres Strait Islander people as 'trespassers on our own lands until we can prove native title'.[59]

Professor Irene Watson, a member of the Tanganekald, Meintangk Boandik First Nations Peoples and professor of law at the University of South Australia, views native title as an assimilationist project of the state. She argues the so-called rejection of *terra nullius* has become *mythologised* by the Australian settler state.

Watson argues in *Mabo* and the *Native Title Act 1993* Australia has absolved itself of its colonial past, limiting its adverse behaviour and delivering a restrained legal remedy. To Watson, native title and the system established to administer it has become yet another manifestation of assimilation – a state managed apparatus to envelope Indigenous aspirations for political and cultural autonomy to ensure the dominance of the state remains in place.[60]

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[58] Michael Mansell, 'Mabo Perspectives: The Aboriginal Provisional Government – The Court Gives an Inch but Takes Another Mile' (1992) 2(57) *Aboriginal Law Bulletin*.

[59] Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015) 69.

[60] As Watson argues, the recognition of native title was simply a ruse for the state to 'assimilate' native title applicants into the Australian property law system. As she explains, 'Our capacity to care for country remains a struggle. Native

Rather than viewing it as an 'Indigenous sovereign space', Watson says native title gives the 'illusion of an Aboriginal space' recognised under Australian law. The 'settled native' is absorbed by the settler-colonial system as a 'British subject' through the process of assimilation. Watson asks, can native title law provide a real home for the sovereign Aboriginal subject? Who is the native subject, and what is its status, outside of native title recognition? What of 'the *untitled native*? [emphasis added]'.[61]

Yet many Aboriginal and non-Indigenous supporters of Indigenous rights still believe in the 'promise of native title' as a mechanism for greater economic and political empowerment for Aboriginal and Torres Strait Islander people although recognising it has not met the expectations of Aboriginal and Torres Strait Islander people.[62]

Despite legitimate criticism by some Aboriginal scholars, it is my argument in this thesis that native title nonetheless facilitates greater deliberative and participatory engagement between Aboriginal people, government, and other actors within the native title system. And that within the native title system, Aboriginal people are able to practice forms of deliberative and participatory democracy that are not possible elsewhere.

This is important because Aboriginal people have consistently called for greater inclusion in decision-making processes within Australian democracy. Deliberative and participatory democracy are normative theories that assert that people affected by political decisions ought

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title does little to alter that struggle; it only enables some of us to participate in the un-law-full activity of wheeling and dealing and selling the land or to assimilate into the colonial game of recognition.' See, Irene Watson, 'Aboriginal Laws and Colonial Foundation' (2017) 26(4) *Griffith Law Review* 469.

[61] Many Aboriginal people argue sovereign rights to land exists with or without the recognition of native title. As Watson explains, Mabo provided the legislative framework for 'native title' laws, which allow for traditional owners or native title holders (as determined by the courts) to enter into negotiations relating to their *ruwi*. At the same time, existing 'native title' laws that have been 'recognised' by the state are vulnerable to extinguishment. In recognising Aboriginal title in Mabo, the High Court of Australia managed to assimilate Aboriginal laws and cultures into Australian property law but in doing so created a title that is more vulnerable than any other title to the power of the state to extinguish without compensation. Watson, 'Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal Peoples' (n 54).

[62] In recent times in Australia, various sub-national state and territory governments have initiated treaty negotiations with Indigenous people. The most notable is the state of Victoria, which is working with the First Peoples' Assembly of Victoria and has established the Yoo-rrook Justice Commission – to facilitate a truth-telling and justice process into past and ongoing injustices committed against Aboriginal Victorians since colonisation. See First Peoples–State Relations, Victorian Government, (Webpage), https://www.firstpeoplesrelations.vic.gov.au/

to have a right to participate in the making of those decisions. Yet beyond the processes of electoral representative politics, Aboriginal people have few options for deliberative democratic engagement. Native title thus provides opportunities and space for Aboriginal people to engage deliberation, negotiation, and participation in law and policy-making processes of government and to realise some degree of self-government.[63]

The opportunity to engage in deliberation for Aboriginal people is useful because it allows us to put forward our points of view on law and policy issues. Because of Australia's colonial foundations, historically governments have paid little attention to the concerns and voices of Aboriginal people. Since the recognition of native title, ignoring the viewpoints of Aboriginal people is more difficult. Governments and other actors must now engage with Aboriginal people and at least make some effort to reach common ground.

Having provided background on the native title system, I now turn to discuss the political struggles of Aboriginal and Torres Strait Islander people as a matter of public discourse in Australia.

## 1.3 Aboriginal and Torres Strait Islander Political Struggle as Public Discourse

In this section, I discuss Aboriginal and Torres Strait Islander people's struggles for self-determination as constituting a distinct subject of public discourse in Australia since the 1960s.[64]

A key strategy in the political struggle of Aboriginal people is to make our political claims publicly knowable. Aboriginal people must often rely on the media to communicate our political claims to governments and the broader Australian public. By articulating publicly what we

[63] The term 'self-determination' is the most used term to describe the aspirations of Indigenous people globally, to make their own choices to secure their social, cultural and economic needs. I prefer the term 'self-government as I believe what Aboriginal people want is the ability to make practical, day-to-day decisions not only about land or native title matters, but also a range of social policy issues including housing, health, education, and community development.

[64] Aboriginal-led activism on the rights of Indigenous people has arguably a much longer trajectory. For example, two Aboriginal men – John Noble and Jimmy Clements – protested on the steps of the new Commonwealth Parliament building at the royal opening in Canberra in May 1927. See Paul Daley, 'Enduring Traditions of Aboriginal Protest: Truth-Telling amid the Dark Shadows of History' [2018] (60) *Griffith Review* 67. Also, the first Day of Mourning organised by the Aborigines League (est. 1932) and the Aborigines Progressive Association (est. 1937) was held in 1938. However, for this thesis I limit my discussion to the 1960s onward.

perceive as problems with government approaches to policy issues, we are seeking to make our concerns a matter of public discourse.[65]

As Australian media scholars Kerry McCallum and Lisa Waller explain, the public discussion of Indigenous issues through the news media plays an important role in the identification of policy problems and the development of policy solutions. That is to say, the discussion of, and policy responses to, Indigenous issues, are often played out in the public domain.[66]

> Political and media elites construct some issues as problems needing urgent or dramatic solutions, while those interested in developing or influencing policy outcomes play out their battles discursively by trying to influence the ways in which the news media frame the issue.[67]

The 1967 referendum is widely regarded as a seminal, pre-*Mabo* moment in Australian democracy for changing the relationship between Aboriginal and Torres Strait Islander people and the Australian state. Unlike the popular myth that the referendum gave Indigenous people the right to vote, the referendum actually amended two racially discriminatory sections of the Australian Constitution.[68]

Before the referendum, Section 51 (xxvi) of the Australian Constitution gave the Commonwealth powers to make laws with respect to 'people of any race, *other than the Aboriginal race* [emphasis added] in any state, for whom it was deemed necessary to make special laws'. Section 127 read that 'in reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, *aboriginal natives shall not be counted'* [emphasis added]. The question put to the Australian public was:

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[65] The terms 'public discourse', 'public deliberation', and 'public reason' encompass a broad range of communicative activities that take place in the public sphere. James Bohman uses the term 'public deliberation' to describe the making of political issues publicly knowable in the public domain. As Bohman explains, discussing political and policy matters publicly is a means for producing a shared agreement about the public good. It is a 'process of public discussion and debate in which citizens and their representatives reflect on the general interest or on their common good. See, James Bohman, *Public Deliberation* (MIT Press, 1996) 4.

[66] Kerry McCallum and Lisa Waller, *The Dynamics of News and Indigenous Policy in Australia* (University of Chicago Press, 1st edition, 2017) 14.

[67] Ibid.

[68] Bain Attwood, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007); John Gardiner-Garden, *The Origin of Commonwealth Involvement in Indigenous Affairs and the 1967 Referendum* (Background Paper No 11, Parliamentary Library, Parliament House, 1997).

> Do you approve the proposed law for the alteration of the Constitution entitled 'An Act to alter the Constitution so as to omit certain words relating to the people of the Aboriginal race in any state and so that Aboriginals are to be counted in reckoning the population'?

The 'success' of the referendum was ensured by the question receiving a 'yes' vote of 90.77% and majority support in all states and territories.[69]

In addition to the referendum, beginning in the early 1960s to the present day, there have been a significant number of notable events that have generated public deliberation on Indigenous issues, as set out chronologically in Table 1.1. The 1967 referendum was one part of a series of public initiatives and events to raise awareness about issues affecting Aboriginal and Torres Strait Islander people such as land justice, Indigenous rights, treaty, and reconciliation.

**Timeline of public events ordered chronologically affecting Aboriginal and Torres Strait Islander people between 1962–2022**

| | |
|---|---|
| • 1962 *Commonwealth Electoral Act* granted all Aboriginal and Torres Strait Islander people the option to enrol and vote in federal elections (enrolment was not compulsory)<br>• 1963 Yolngu Bark Petition<br>• 1965 'Freedom rides' in regional New South Wales led by Charles Perkins<br>• 1966 Wave Hill walk off by the Gurindji people demanding land rights and equal wages<br>• 1967 Referendum<br>• 1968 ABC Boyer lectures ('The Great Australian Silence') by anthropologist WEH Stanner<br>• 1971 *Milirrpum v Nabalco* the first ever land rights case of (linked to the 1963 Yolngu bark petition)<br>• 1972 Aboriginal Tent Embassy is established on the lawns in front of Old Parliament House | • 1988 Indigenous protests during Australia's Bicentenary celebrations (Aboriginal Sovereign Treaty '88 Campaign)<br>• 1991 Royal Commission into Aboriginal Deaths in Custody<br>• 1991 Decade of Reconciliation<br>• 1992 *Mabo* decision<br>• 1992 Prime Minister Paul Keating's 'Redfern Speech' to launch the United Nations International Year of Indigenous People<br>• 1994 *Native Title Act 1993* (Cth)<br>• 1996 *Wik* High Court decision<br>• 1997 Final Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families ('Stolen Generations Report') |

[69] Under Section 128 of the Australian Constitution, a proposal to alter the Constitution must first be passed by an absolute majority in both Houses of the Commonwealth Parliament. It must then be presented to the Australian people as a referendum which must be approved by a 'double majority' – support by a majority of national electors (>50%) comprising every state and territory; and by a majority of electors in a majority of the states (in at least four out of six states). See Gardiner-Garden, 'The Origin of Commonwealth Involvement in Indigenous Affairs and the 1967 Referendum' (n 68).

| | |
|---|---|
| which sparked land rights movement of the 1970s<br>• 1972 the Gough Whitlam Labor government adopts Indigenous self-determination as official policy<br>• 1976 *Aboriginal Land Rights (Northern Territory) Act* (Cth) for Northern Territory<br>• 1983 The Baraunga Statement | • 1998 Native Title Amendment Act ('Howard's Ten Point Plan')<br>• 2000 Reconciliation Walk over the Sydney Harbour Bridge<br>• 2004 ATSIC abolished<br>• 2007 Northern Territory emergency response ('NT Intervention')<br>• 2008 Apology to the Stolen Generation<br>• 2017 Uluru Statement from the Heart<br>• 2022 Newly elected ALP Government led by Anthony Albanese commits to holding referendum on Voice to Parliament |

Indigenous issues, it could be said, are rarely off the political agenda in Australia. Collectively, these events are publicly deliberated upon, performing a kind of *civic education* for non-Indigenous Australians about Aboriginal and Torres Strait Islander people.[70]

The most recent catalyst for public deliberation on Indigenous issues is the proposed First Nations Voice to Parliament.

In June 2017, Aboriginal and Torres Strait Islander delegates at the National Constitutional Convention at Uluru issued the Uluru Statement from the Heart calling for a constitutionally enshrined First Nations Voice to Parliament. The Voice is a proposal to enshrine a new deliberative institution in Australian democracy providing Aboriginal and Torres Strait Islander people the ability to speak to the Australian parliament on law and policy matters.[71]

[70] Davis argues participation in Australian democracy is a key consideration in civic education including an understanding of Australia's history of democratic exclusion of Indigenous people. Additionally, Davis argues, civic education should also examine and critique the minimalist nature of an individual's participation in Australian democracy through voting. The 'majoritarian' nature of Australian democracy that relies on voting as the primary democratic act isolates many groups such as Indigenous people in Australian society. Examining the strength of this ideology is a key to understanding and respecting the importance of avenues that go beyond mere 'ballot box accountability' of periodic elections. See Megan Davis, 'Civics Education and Human Rights' (2003) 9(1) *Australian Journal of Human Rights* 236.

[71] The Uluru Statement is the most recent catalyst for public deliberation regarding Indigenous rights and for the proposed referendum to establish a First Nations Voice to Parliament. See Gabrielle Appleby and Megan Davis, 'The Uluru Statement and the Promises of Truth' (2018) 49(4) *Australian Historical Studies* 501; Davis, 'The Long Road to Uluru' (n 2).

The Uluru Statement from the Heart was the culmination of a series of First Nations Regional Dialogues between December 2016 and May 2017. As Professor Megan Davis, a Cobble Cobble woman and Aboriginal professor of public law explains, the regional dialogues and the national convention were 'a deliberative decision-making process that followed an identical structured agenda across all the regions'.[72] Davis calls the Uluru Statement an Indigenous *democratic innovation*.[73]

Yet the Uluru Statement was quickly dismissed by then Prime Minister Malcolm Turnbull on the claim that an Indigenous Voice would act as a 'third chamber of parliament'.[74] In response to the government's dismissal, Davis said they were dismissing the deliberative effort of 250 Indigenous delegates. 'If the Uluru Statement from the Heart was an example of the transformative potential of liberal democratic governance through civic engagement beyond the ballot box, the aftermath of Uluru revealed the limitations of Australian retail politics'.[75]

However, on 21 May 2022, the Australian Labor Party (ALP) led by Anthony Albanese won government and confirmed its commitment to holding a referendum to establish a First Nations Voice to Parliament.[76] If the referendum is successful, the Voice has the potential to transform Indigenous people's participation in democratic governance. Since ATSIC was abolished in 2005, Aboriginal and Torres Strait Islander people have lacked an effective voice in national politics and in law and public policy making. A fundamental finding of my doctoral research is that the native title system became an unintended 'deliberative space' to fill this vacuum. My research show Aboriginal people have used the processes of native title to negotiate agreements

[72] The Uluru Statement calls for establishing two new institutions. A Makarrata Commission for truth telling and agreement making; and a First Nations Voice to Parliament. See *Final Report of the Referendum Council ('Uluru Statement from the Heart')* (Commonwealth of Australia, 18 September 2017) 10.

[73] Davis, 'The Long Road to Uluru' (n 2).

[74] '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'. The Hon. Malcolm Turnbull MP, Prime Minister, Senator the Hon. George Brandis QC Attorney-General, Senator the Hon. Nigel Scullion Minister for Indigenous Affairs, 26 October 2017, Joint Media Release, Response to Referendum Council's Report on Constitutional Recognition.

[75] Davis, 'The Long Road to Uluru' (n 2).

[76] Dana Morse, 'Albanese Promised Action on the Uluru Statement. What Does That Mean?', *ABC News* (online, 23 May 2022) <https://www.abc.net.au/news/2022-05-24/federal-election-anthony-albanese-indigenous-uluru-statement/101092816>.

and policy matters with government and make the native title system a 'deliberative democratic space'.[77]

The importance of a deliberative democratic space is that since the 1970s, Aboriginal and Torres Strait Islander peoples have demanded the right to self-determination and greater participation in the processes of government. As the Uluru Statement makes clear, the call for a constitutionally enshrined Voice to Parliament seeks to empower Aboriginal and Torres Strait Islander people so that we can participate in deciding on the law and public policies that affect us. Because we constitute an extreme political minority in Australia, electoral politics does provide us with a strong voice in political decision-making.[78] We seek to be active agents in decision-making processes not passive recipients of government solutions.

The Uluru Statement calls for a new political institution that provide Aboriginal people with a voice in government decision making. In the absence of an institutional voice to parliament, the native title system functions as a critical forum for deliberation and participation in at least some forms of government decision making.

Having discussed Indigenous political issues as a matter of public discourse, I now turn to a discussion of some key concepts and terms used throughout this thesis.

## 1.4 Key Terms and Concepts

In this section, I explain my use of a range of key terms and concepts.

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[77] With no national institution or representative body since the demise of ATSIC in 2005 to advocate on behalf of Aboriginal people, it has been native title groups such as land councils who have often had to become the national 'voice' for Aboriginal and Torres Strait Islander people in public political discourse. Between 2011 and 2019, the National Congress of Australia's First Peoples (National Congress) sought to fill the void of ATSIC as the national political voice for Aboriginal and Torres Strait islander people. However, under the Tony Abbott, led Coalition government funding ceased in 2013 and National Congress struggled for resources before eventually folding in 2019. In its absence, native title groups as well as peak national bodies such as the National Native Title Council have often acted as the collective voice of Aboriginal and Torres Strait Islander people on important political and legal matters such as the need to protect Aboriginal cultural heritage.

[78] Aboriginal and Torres Strait Islander people constitute just over 3 per cent of the Australian population. As such, normal democratic processes such as voting are often ineffective for us. As Davis explains, 'We are saying that the ballot box is not enough for us. We cannot influence the ballot box.' See, Megan Davis, 'Indigenous Constitutional Recognition from the Point of View of Self-Determination and Its Exercise through Democratic Participation' (2015) Vol 8(No.19) *Indigenous Law Bulletin* 5, 11.

Firstly, I recognise the historical and present-day use of terms 'Indigenous' and 'First Nations', 'tribal' etc can be problematic. As Peters and Mika explain, terms such as Aborigine, Indian, Indigenous, or First Nations are often offensive when used in a totalising and universal way to define radically different groups. They have a homogenising effect similar to that of early imperial anthropology that created 'others' as 'indigenous' in differentiation and opposition to colonial settlers.[79]

However, these terms are largely unavoidable when engaging with material that deals with Indigenous peoples and Indigenous issues. My own preference is to use the term 'Aboriginal and Torres Strait Islander people'. Also, because I worked only with Aboriginal people within the native title system, I offer opinions and insights from the perspective of Aboriginal people only and not Torres Strait Islander people. Wherever possible, I refer to the specific cultural and language groups, for example Ngarrindjeri, Goenpul, or Wunambal Gaambera.

Another problem all Indigenous scholars face is the use of Western liberal political and legal concepts and terms in relation to the struggles of Indigenous people. As Smith explains, Western research of Indigenous worlds ensures theories – including political theories – are 'thoroughly Western'. Theories have constructed all the rules by which the Indigenous world has been theorised and in which indigenous voices have been overwhelmingly silenced.[80]
Writing about complex legal and socio-political issues concerning Indigenous people in a settler-colonial context involves an unavoidable need to employ Eurocentric concepts, which have been complicit in the subjugation of Indigenous people. As Persram et al explain, 'political modernity' consisting of the modern institutions of the state, its bureaucracy, and modern capitalism make it impossible to conceptualise it without resorting to categories, concepts, and genealogies that occur in the intellectual and theological traditions of Europe.

> Concepts such as citizenship, the state, civil society, public sphere, human rights, equality before the law, the individual, distinctions between public and private, the idea of the subject, democracy, popular sovereignty, social justice, scientific rationality, and so on all bear the burden of European thought and history. One simply cannot think of

[79] Michael A Peters and Carl T Mika, 'Aborigine, Indian, Indigenous or First Nations?' (2017) 49(13) *Educational Philosophy and Theory*.

[80] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (University of Otago Press, 1999) 29.

> political modernity without these and other related concepts that found a climactic form in the course of the European Enlightenment and the nineteenth century.[81]

I recognise that use of such concepts such as 'sovereignty', 'self-determination', and 'democracy' are problematic with Indigenous scholars[82] who debate the appropriateness of these terms in relation to the struggles of Indigenous people.
In Australia, Moreton-Robinson says a new research agenda on Indigenous sovereignty is necessary as the existing body of knowledge on sovereignty is constructed upon a racially biased, non-Indigenous (whiteness) logic and not Indigenous knowledge.

> In this body of scholarship, rights are perceived as being productive, enabling, and constraining, and the analysis of Indigenous rights is located within a judicio-political framework of law, right, sovereignty. The limitation of this literature lies in the reliance on 'rights' as the cipher for analysing Indigenous sovereignty. It does not reorientate our conceptualisation of power outside of a law, right, sovereignty paradigm to think about indigenous sovereignty and power in different ways'.[83]

Nonetheless, the concept of self-determination is held to be an important political goal for many Aboriginal people. Self-determination is a fundamental human right in the United Nations Charter, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 1 of both covenants state: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

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[81] Nalini Persram et al, *Postcolonialism and Political Theory* (Lexington Books, 2007) 14.

[82] Taiaiake Alfred, a Kahnawà:ke Mohawk philosopher and First Nations political theorist from the Quebec region of Canada, argues that contemporary understandings of sovereignty in settler-colonial contexts are deeply implicated in colonisation. As he explains, state sovereignty has assumed mythic status that serves the colonial project, not justice. 'Until "sovereignty" as a concept shifts from the dominant "state sovereignty" construct and comes to reflect more of the sense embodied in Western notions such as personal sovereignty or popular sovereignty, it will remain problematic if integrated within indigenous political struggles. Sovereignty implies a set of values and objectives that put it in direct opposition to the values and objectives found in most traditional indigenous philosophies.' See Taiaiake Alfred, Sovereignty, in Philip J Deloria and Neal Salisbury, *A Companion to American Indian History* (John Wiley & Sons, Incorporated, 2004) 461.

[83] Moreton-Robinson argues Australia has a form of 'white, patriarchal sovereignty' that constrains some citizens (Indigenous people) while enabling other citizens (non-Indigenous). This form of sovereignty is legitimated through a discourse of 'equal opportunity' for all citizens but 'not all citizens have the resources, capacities, and opportunities to exercise them equally'. Moreton-Robinson (n 59) 127.

The right of *Indigenous people to self-determination* is articulated in the UNDRIP.[84] Specifically, Articles 3 and 4 state:

> **Article 3**
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> **Article 4**
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Within the context of Australia, the Australian Human Rights Commission defines the right to self-determination as an 'on going process of choice' to ensure that Indigenous communities are able to meet their social, cultural and economic needs.[85] It is not about creating a separate Indigenous 'state' but acknowledging that Aboriginal and Torres Strait Islander peoples are Australia's first people, as was recognised by law in the historic *Mabo* judgement.

The position of the Aboriginal and Torres Strait Islander Social Justice Commissioner was created by the federal parliament in December 1992 as a response to the findings of the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence. It was also a response to the extreme social and economic disadvantage faced by Indigenous Australians.

The role of the Commissioner is to keep Indigenous issues before the federal Government and the Australian community to promote understanding and respect for the rights of Indigenous Australians. In 2003, the Social Justice Commissioner explained, 'Without self-determination it is not possible for Indigenous Australians to fully overcome the legacy of colonisation and dispossession.'[86]

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[84] United Nations (n 12).

[85] Australian Human Rights Commission, (Webpage), https://humanrights.gov.au/our-work/rights-and-freedoms/right-self-determination

[86] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2003* (Australian Human Rights Commission, 2003).

My own preference for the purposes of this thesis is to use the terms 'sovereignty' and 'self-government'. I view these terms and their meaning as being most useful in terms of describing the desire for Aboriginal people to be *active* in deliberation and decision-making processes.

The claim that Indigenous sovereignty continues to exist irrespective of any formal recognition or acknowledgement from the Australian state is an uncontroversial one from the perspective of Aboriginal people. As Michael Mansell argues, Indigenous sovereignty was never extinguished and thus it remains intact:

> Aboriginal sovereignty does exist. Before whites invaded Australia, Aborigines were the sole and undisputed sovereign authority. The invasion prevented the continuing exercise of sovereign authority by Aborigines. The invasion and subsequent occupation has not destroyed the existence of Aboriginal sovereignty.[87]

Arguably less controversial is the ideal of Indigenous self-government. Though speaking about First Nations people in Canada, Macklem provides a useful description of self-government by Indigenous people.

> A workable definition of self-government that avoids the emptiness of generality without descending into the politics of specifics, however, is that native self-government at least refers to the need for a territorial base on native land, some forms of administrative and political structures and institutions for the airing of native voices and political decision-making, the transfer of jurisdictional responsibilities from Parliament to native people, the ability of native people to organize their societies and pass laws governing their lives free from federal or provincial interference, and access to sufficient fiscal resources to meet these responsibilities.[88]

Within Australia, Indigenous self-government has been described by Vivian et al as entailing 'governing structures and mechanisms, which Indigenous peoples rely on to organise

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[87] Michael Mansell, Aboriginal Provisional Government (2002) 'Finding the Foundation for a Treaty With the Indigenous Peoples of Australia', cited in Sean Brennan, Brenda Gunn and George Williams, '"Sovereignty" and Its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' *Sydney Law Review* (2004) 26(3) 46.

[88] Patrick Macklem, 'First Nations Self-Government and the Borders of the Canadian Legal Imagination' (1991) 36 *McGill Law Journal* 389.

themselves and to interact with other polities';[89] and by O'Faircheallaigh as the 'creation of a governance sphere, within the Australian polity, in which Aboriginal people and institutions are empowered to govern their communities, to make authoritative decisions, and have access to the resources required to give effect to these decisions'.[90]

For the purposes of this thesis, I prefer to use the terms 'sovereignty' and 'self-government' as these represent a more practical rather than theoretical description of the aspirations of Aboriginal people. For example, Aboriginal people often say they are *exercising sovereignty and self-government* rather than claiming a right to self-determination through native title. Although my preference is for sovereignty and self-government, it is unavoidable at times not to refer to the term 'self-determination' given its usage in international discourse on Indigenous people.

Democracy is another Western liberal political concept that is also deeply implicated in the colonisation of Indigenous peoples and the immense harm caused to Indigenous people. However, as discussed earlier in the Introduction, scholars such as Dahl argue that democracy seems to have been invented and practiced by tribal peoples long before recorded history.[91]

Democracy is a value and a practice that Behrendt believes to be an inherent feature of Indigenous political culture.[92] Aboriginal author Melissa Lucashenko provocatively claims that Aboriginal people invented democracy.[93] She draws from Bruce Pascoe's book *Dark Emu* in which he describes the many millennia of relatively peaceful co-existence the hundreds of Aboriginal nations enjoyed before the arrival of the British in the 18th Century. Lukashenko, like Behrendt, believes Aboriginal people have long practiced deliberative and participatory forms of democracy.

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[89] Alison Vivian et al, 'Indigenous Self -Government in the Australian Federation' (2017) 20 *Australian Indigenous Law Review* 28.

[90] Ciaran O'Faircheallaigh 'Native Title, Aboriginal Self-Government and Economic Participation' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 159.

[91] Dahl goes on to explain, that tribal groups were ideal for democratic governance to evolve because most were so tightly bound together. Also, if they were free of control or coercion by outside groups and left to more or less govern their own affairs and had a group of elders that saw themselves as equal in terms of governing the group – that is to say free of any hierarchy or contest for sole leadership – then 'democratic tendencies are likely to arise'. Dahl (n 3).

[92] Larissa Behrendt, 'Aboriginal Australia and Democracy: Old Traditions, New Challenges', in Isakhan and Stockwell (n 1) 148.

[93] Melissa Lucashenko, 'The First Australian Democracy' (27 September 2015) *Meanjin*.

The rules-based nature of Aboriginal governance was captured in the first land rights case, *Milirrpum v Nabalco.* In the words of Justice Blackburn of the Northern Territory Supreme Court after considering the evidence of the Yolngu claimants,

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.[94]

Several Aboriginal groups have their own terms that express what I perceive to be Aboriginal democratic values and what it means to act democratically. For example, the Yawuru Traditional Owners whose land encompasses the township of Broome in Western Australia adhere to their philosophical concept of *Mabu Liyan*, which translates as 'good wellbeing'. The term is part of Yawuru philosophy that weaves people, culture, and Country (land) together. The concept of *mabu* (good) *liyan* (wellbeing) is at the heart of the modern Yawuru economic development and social agenda that is inclusive, supportive, and committed to the principles of sustainability and community cohesion.[95]

Lastly, at the heart of the political and legal struggles of Aboriginal and Torres Strait Islander people is our vexed and complicated relationship with the 'Australian state'. As with other concepts, there is no room here for an extended discussion of the concept of 'the State', but in international law 'states' are bodies of governing institutions that have legal authority over a defined territory and population. They are the main 'political and legal unit' that became a global reality during the Age of Discovery as European nations such as Portugal, Spain and France began circumnavigating the world.

> In the 18th and 19th centuries, European colonial expansion brought the notion of the state, and of state law, to existing civilisations elsewhere. Indigenous people were invaded and conquered, or entered into power sharing arrangements with colonisers, and new states were formed. By the 20th century, the nation-state was unrivalled as the

[94] *Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141* (Supreme Court of the Northern Territory, 27 April 1971).

[95] See Edmund Rice Centre for Justice and Education, (Webpage), Mabu Liyan: The Basis of Yawuru Resilience, https://www.erc.org.au/mabu_liyan_the_basis_of_yawuru_resilience; see also 'The Good Fight: Roebuck Plains Station and its return to Indigenous owners', *The Guardian*, (Webpage), https://www.theguardian.com/australia-news/2022/feb/05/the-good-fight-roebuck-plains-station-and-its-return-to-indigenous-owners-photo-essay

> level of political association at which communities organise themselves. All people in the world are now under the influence of the law of states as a result of their membership of a state, their residence in a state, or the control of state law over the territories in which they reside.[96]

The Australian state, as I discuss throughout this thesis, is the various institutions – courts, legislatures, statutory bodies, government agencies, administrative bureaucracies, processes, public policies, laws, regulations, guidelines etc – that represent the interests of the Australian state and carry out the various functions of the state. It is the cumulative influence of government, public institutions, laws, policy development, and various forms of power (economic, coercive, and cultural) that enable the state to exercise control over a territory and people.

I now turn to the structure of my thesis.

## 1.5 Thesis Structure

Following this Introductory chapter, this thesis is structured as follows.

In Chapter 2, I discuss my methodological approach beginning with my positionality as an Indigenous research scholar, and my interdisciplinary approach combining socio-legal and interpretive methods to support my argument that native title and the native title system create an unintended deliberative, democratic space for Aboriginal people. I justify such an approach on the basis that the democratic features of native title are largely unrecognised and these methodological approaches complement my efforts to make a mostly hidden feature of native title (its democratic effects) knowable, as both methods are concerned with making the invisible phenomena, visible.

In Chapter 3, I discuss the normative characteristics of deliberative and participatory democracy theories and why they are a useful lens for understanding how the native title system has become a unique democratic space for Aboriginal people. I analyse both theories in relation to the struggles of Indigenous people. I conclude by arguing why I believe a 'participatory deliberative approach to native title' better aligns with the ideal of Indigenous

[96] Gabrielle Appleby, Alexander Reilly and Laura Grenfell, *Australian Public Law* (Oxford University Press, 2014) 4.

self-government, which often demands both greater deliberation and participation of Aboriginal people in decision making which affects us.

In Chapter 4, I discuss the historical role of law in the dispossession and colonisation of Aboriginal people, as any account of contemporary Indigenous–settler-colonial political relations in Australia must discuss the role of law. This chapter highlights the significance of the doctrine of discovery and *terra nullius* in 'lawfully' dispossessing Aboriginal people from their lands and the role of colonial law in cementing *terra nullius* in Australian jurisprudence for more than 200 years. I then discuss the *Mabo* decision and native title as raising issues for relations between Aboriginal and Torres Strait Islander people and the state that go beyond 'questions of real estate' and concern issues such as sovereignty and Indigenous self-government. I conclude this section with a discussion of 'deliberative and participatory democracy under conditions of settler colonialism' and argue that settler colonialism is a field that is under theorised and under studied by deliberative and participatory democracy scholars.

In Chapter 5, I discuss the significance of the *Mabo* decision and recognition of native title as representing a 'constitutional moment' in Australian history by overturning *terra nullius* and for resetting Indigenous–settler relations in Australia. I discuss the importance of native title using the ideal of *democratic inclusion* of Aboriginal and Torres Strait Islander people in political decision-making. I draw on the work of Indigenous and legal scholars who argue native title remains an important means for reforming political relations between Aboriginal and Torres Strait Islander people and the Australian state, while noting that greater democratic inclusion in national level decision-making processes has not yet been realised.

In Chapter 6, I discuss the ideal of deliberative inclusion. After *Mabo*, calls by Aboriginal people for structural reforms increased. Aboriginal people sought reforms that would expand our participation in negotiation and decision making process of government.

In Chapter 7 I analyse events that occurred shortly after the recognition of native title, when Australia – under the leadership of Prime Minister John Howard. Rather than lead to greater deliberative inclusion, Howard reverted to a paternalistic style of government toward Aboriginal and Torres Strait Islander people. Howard rejected the 'constitutional moment' presented by *Mabo* and instead overturned many of the gains Aboriginal and Torres Strait Islander people made under the period of self-determination, including by abolishing ATSIC. I discuss the actions of Howard and his government from the perspective of *institutional*

*listening*[97] and the challenge for Aboriginal people when empowered spaces, governments, and political leaders refuse to listen.

This analysis sets the context for my argument in Chapter 8 that the native title system has emerged as an alternative, contestatory mechanism and forum for negotiating greater Indigenous involvement in decision-making that affects our lives and for exercising sovereignty and self-government.

In Chapters 9, 10, and 11 I analyse what I argue are three forms of deliberative and participatory democratic practices under taken by Aboriginal people within the native title system including environmental public policy known as Caring for Country (Chapter 9), agreement making and the deliberative negotiation of comprehensive settlements (Chapter 10), and Indigenous nation building (Chapter 11).

Chapter 11 is my conclusion and my thoughts on future research.

[97] Mary F Scudder, Selen A Ercan and Kerry McCallum, 'Institutional Listening in Deliberative Democracy: Towards a Deliberative Logic of Transmission' (2023) 43(1) *Politics* 38.

# 2 Methodology & Approach to Thesis

In this chapter, I describe my methodological approach to answer my primary research question: *How has the native title system become a deliberative and participatory democratic space for Aboriginal people?*

My thesis aims to make a particular space – the native title system – visible as space of deliberative and participatory democracy for and by Aboriginal people. To do this I engage two methodological approaches that both seek to make 'visible' previously hidden legal and social phenomena: socio-legal and interpretative research.

To begin, I discuss Indigenous standpoint theory and the importance of bringing Indigenous perspectives into academic research. I then explain my use of socio-legal and interpretative research methodologies as part of an interdisciplinary approach to my research question.
I finish with a discussion of where my research fits within the academic fields that my research engages with – the fields of deliberative and participatory democracy and native title.
When I began my thesis, my intention was to conduct qualitative interviews and case studies with several Indigenous groups and communities. However, the onset of COVID-19 and lockdowns over 2020–2021 made this impossible. I then considered conducting 'elite interviews'[98] with leading scholars and experts in native title but found that many had published extensively on native title and broader issues of sovereignty, treaty, and self-government. I believed there to be enough published material, coupled with my own insights from working in the native title area between 2005 and 2018, to support my argument that the native system has become an unintended deliberative space for Aboriginal people.

I do hope my work will be relevant and useful to Aboriginal communities seeking to strengthen their own sovereignty and ability to be self-governing.

I now turn to discuss the importance of bringing Indigenous perspectives to academic research.

[98] Elite interviewing is a method of qualitative interviewing with individuals in senior level roles or those possessing extensive knowledge about an institution or policy issue. Elites are considered to be 'a member of a group of persons exercising a major share of authority or influence within a larger group or organisation. Elite interviewing has almost exclusively been applied at top levels within coherent occupational or professional groupings, e.g. US politicians and healthcare executives'. See Gabriel Scally et al, 'The Application of "Elite Interviewing" Methodology in Transdisciplinary Research: A Record of Process and Lessons Learned during a 3-Year Pilot in Urban Planetary Health Research' (2021) 98(3) *Journal of Urban Health* 404.

## 2.1 Indigenous Standpoint Theory

My decision to undertake a thesis was inspired from my many years working with Aboriginal groups using their native title rights and interests. I saw first-hand the many challenges and difficulties Aboriginal people faced trying to make the best of their hard-won native title rights. Almost all the groups I worked with began with very few resources or support but were determined to make native title work for them and their communities. It was inspiring to observe their innovative approach to native title.[99]

Indigenous standpoint theory seeks to provide Indigenous perspectives in research and challenge the historical trend of *research about us*[100] to research that is undertaken by Indigenous people, expresses an Indigenous perspective, is grounded upon Indigenous experience, and provides an Indigenous voice to the issues under discussion. It is a response to what many have described as the 'over study' of Indigenous people globally by non-Indigenous researchers and institutions. Lester-Irabinna Rigney describes the phenomenon in this way:

> The research enterprise as a vehicle for investigation has poked, prodded, measured, tested, and compared data toward understanding Indigenous cultures and human nature. Explorers, medical practitioners, intellectuals, travellers, and voyeurs who observed from a distance have all played a role in the scientific scrutiny of Indigenous peoples. Indeed, it is the research by such people and their institutions that have been responsible for the extraction, storage, and control over Indigenous knowledges. Moreover, 'it is the acquisition of Indigenous knowledges and the ensuing ownership of that knowledge which are the foundations upon which many academic qualifications and careers' have been achieved'.[101]

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[99] In this thesis, I write and speak often in first person as part of an Indigenous standpoint perspective on native title and deliberative and participatory democracy. This thesis is of course based on my own views and opinions of native title so I do not claim to present the perspective of the various Indigenous groups, scholars and authors I cite in this thesis.

[100] Martin argues that research conducted on or about Aboriginal people generates what she calls 'terra nullius research'. 'In this research, we are present only as objects of curiosity and subjects of research, to be seen but not asked, heard or respected. See Karen Martin and Booran Mirraboopa, 'Ways of Knowing, Being and Doing: A Theoretical Framework and Methods for Indigenous and Indigenist Re-search' (2003) 27(76) *Journal of Australian Studies*, 203.

[101] Lester-Irabinna Rigney, 'Internationalization of an Indigenous Anticolonial Cultural Critique of Research Methodologies: A Guide to Indigenist Research Methodology and Its Principles' (1999) 14(2) *Wicazo Sa Review*, 109.

As Rigney states, Indigenous research, its design, implementation and publication, is a critical element of self-determination. Indigenous people conducting research on Indigenous issues, from an Indigenous perspective is an effort to define, control, and own 'epistemologies and ontologies that value and legitimate the Indigenous experience. Indigenous perspectives must infiltrate the structures and methods of the entire research academy.'[102] As Torres Strait Islander scholar Professor Martin Nakata explains, Indigenous scholarship within traditional disciplines is required in order to demonstrate how this knowledge is limited in its ability to understand us.[103]

Consequently, wherever possible I have referenced Indigenous scholars, writers, advocates, and organisations to support my arguments. This is an important aspect for myself personally and I would suggest a responsibility that is understood by Indigenous scholars – to include Indigenous perspectives in their scholarship. I found this to be particularly true with the field of deliberative and participatory democracy, which is overwhelmingly dominated by non-Indigenous perspectives. Also, much of the research tends to focus on non-Indigenous institutions and forums, which raise problems for Indigenous people's participation, such as mini-publics, citizen's assembly, and legislatures.[104]

As Māori scholar, Linda Smith explains, a key task for Indigenous scholars is challenging prevailing theoretical and methodological norms in academia.

> Another problem is that academic writing is a form of selecting, arranging and presenting knowledge. It privileges sets of texts, views about the history of an idea, what issues count as significant; and, by engaging in the same process uncritically, we too can

[102] Ibid. 114.

[103] Martin Nakata, 'Australian Indigenous Studies: A Question of Discipline' (2006) 17(3) *The Australian Journal of Anthropology* 265, 272 ('Australian Indigenous Studies').

[104] A mini-public is a widely used institutional form that creates space for a diverse body of citizens who would otherwise not interact are selected randomly to reason together about an issue of public concern. The core design feature of a mini-public is that participants composed of a representative subset of the wider population to ensure that a range of voices are considered in deliberation. That is to say, its members are composed of a sample of the wider public. Unlike participatory budgeting or town hall meetings, where participants are self-selected, mini-publics are designed to actively recruit participants to ensure some form of statistical representativeness of the population affected by the issue. See, Nicole Curato et al, *Deliberative Mini-Publics: Core Design Features* (Bristol University Press, 1st ed., 2021) 3.

render indigenous writers invisible or unimportant while reinforcing the validity of other writers.[105]

I am hopeful my perspectives on deliberative and participatory democracy as practiced by Aboriginal people will resonate with scholars in these fields.

## 2.2 An Interdisciplinary Study of Deliberation, Participation, and Native Title

As an interdisciplinary research project, this thesis engages with both socio-legal and interpretive research methodologies. Both methodologies are concerned with making human experiences and certain legal and social phenomena that may be invisible, visible – and therefore knowable – as their goal. I elaborate further on each methodological approach below.

### 2.2.1 Socio-Legal Approach to Native Title

Socio-legal research is concerned with *law and society,* and the relationship between the two.

The study of law and society as an interdisciplinary approach to law has been used in relation to history, geography, anthropology, economics, international development, policing, judicial decision-making, race, gender, identity, intersectionality, environmental crime, and political violence. Socio-legal scholars have a commitment to empiricism and the development of knowledge based on observation and the testing of phenomena in the real world.[106]

As Creutzfeldt et al explains, 'socio-legal studies grew out of a shared desire to explore larger questions of law, to expand doctrinal enquiry into an empirical, evidence-based understanding of legal phenomena'. Socio-legal research crosses disciplinary boundaries, combining methods and theories to provide multiple lenses through which law and legal phenomena can be considered.[107]

[105] Smith (n 80) 36.

[106] Stephen Bottomley and Simon Bronitt, *Law in Context* (The Federation Press, 2012) 2.

[107] Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge, 1st ed. 2019) 4.

Socio-legal scholars have a strong history of engaging with political activism and social and political change. Socio-legal orientated research seeks to contribute to progressive social change and new understandings of the ways in which law interacts and engages with its social environment, law's limitations, and an emphasis on empirical as opposed to doctrinal legal research.[108]

Law can be abstract and knowable only to those with expert knowledge. Yet law is also a lived experience for many people. Sociologist Susan Silbey speaks of a chasm in legal scholarship between the study of legal doctrine, located in the law schools and some parts of political science, and the study of legal behaviour and practices, located primarily in the social sciences.[109]

In Silbey's opinion, law is too often studied as a phenomenon separate from the society in which it resides. In a sociological analysis of legal phenomena, 'law is recursively implicated in the construction of diverse and distant social worlds: social networks and organizations, dinner tables, hospitals, movie theaters, novels, and social movements'. A socio-legal study of law then 'focuses on the ways in which legality (as a structural component of society) is constituted through *everyday negotiated transactions*' [emphasis added]. In this conception, legality is not inserted into social situations; rather, through repeated invocations of the legal concepts and terminology, as well as through imaginative and unusual associations between legality and other social structures, the rule of law is made and recreated daily.[110]

Silbey's description of law being negotiated through everyday transactions is how I came to understand native title. By working with various Aboriginal groups, I came to understand that native title had much more meaning for people beyond its legal definition as a property right. Many were using native title to exercise sovereignty and self-government. That is to say, to have greater involvement in decision making that affected their lives.[111]

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[108] Ibid. 3.

[109] Susan S Silbey, 'Everyday Life and the Constitution of Legality' in *The Blackwell Companion to the Sociology of Culture* (John Wiley & Sons, Ltd, 2005) 332.

[110] Ibid. 332.

[111] For example, many of the Aboriginal groups I worked with were interested in Caring for Country and environmental management projects. In planning processes with government staff, they would often insist on having equal decision-making powers regarding the management of Country. Members of the Aboriginal group would insist governments empower them with financial resources and technical support to enable them as Traditional Owners to assume land management responsibilities. They wanted government officials to recognise their authority as Traditional Owners of Country. They were in effect seeking recognition of their legal and political authority that challenged the presumed authority of the state to manage their Country.

Aboriginal people understood native title to be more than a recognised property right, to be also the right to self-government; in many of the meetings I observed between Aboriginal groups and government officials, I saw how these competing conceptualisations of native title were debated through deliberation.

As First Nations legal scholar, John Burrows, an Anishinaabe man of the Nawash First Nation in Canada explains, engagement between Indigenous people and governments can change how certain legal issues are understood and provide scope for Indigenous customary law.

> Communities, politicians, bureaucrats, and developers, through their interaction with each other, draw, erase, and redraw legal borders to include and/or exclude certain peoples, institutions, and ideas. These dialogical engagements create and interpret law and produce a legal geography that remains largely uncharted. A de-centred map of law, with attention other than on the courts, re-focuses scrutiny on how these informal, customary practices of law continue to operate simultaneously with the often more visible and formal institutions of law.[112]

In this way, through repeated interaction and deliberation, Indigenous customary law can become more visible to both non-Indigenous actors and their institutions.

As I discuss in later chapters, Caring for Country is one avenue for Aboriginal people make native title more meaningful to people's everyday lives as well as making Aboriginal law and political authority more visible within Australian democracy.

I now turn to discuss the concept of interpretative research.

### 2.2.2 An Interpretative Approach to Deliberative Democracy

Similar to the socio-legal approach to the study of law and legal phenomena, an interpretive approach to deliberative democracy seeks to understand how people experience certain phenomena by understanding how people take or give meaning to situations or issues.

[112] John Borrows, 'Living between Water and Rocks: First Nations, Environmental Planning and Democracy' (1997) 47(4) *University of Toronto Law Journal* 417.

As Hendriks explains,

> Interpretative policy research in an approach to studying the political world that focuses on meaning. It explores what policy events, actions, texts, stories and objects 'mean' in their human and historical context. [113]

As Ercan, Hendriks and Boswell explain, 'Interpretive research studies the social world by seeking to understand meaning underlying an intention, action, object or phenomenon'.

> For an interpretive researcher, any understanding of social and political phenomena is shaped by the experiences and perspectives of those involved, and also those observing. Epistemologically interpretive researchers are committed to two underlying philosophical traditions: i) that there is meaning in the underlying frames and assumptions through which people live their experiences (phenomenology) and ii) that there is meaning embedded in actions, text or artefacts (hermeneutics). [114]

Unique to interpretative research is recognition of the role of the researcher in making sense of what he/or she is observing and discussing. The researcher is immersed in the research as a 'participant-observer' and so co-constructs or co-generates their evidence. Methods for generating data are threefold: observing, interviewing, and reading. 'Interpretative research typically draws on one or more of these three.'[115]

Observation and even participation in the setting, acts, and events being observed are central to participant-observer research. The objective of an interpretative approach to research is to understand the acts and actor as much as possible from their own frame of reference, their own sense making of the situation. What is important is that the researcher seeks to 'understand the everyday, common sense, largely unarticulated, yet tacitly known "rules" that members of the situation have mastered to enable them to navigate the interactions and settings that comprise

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[113] Carolyn M Hendriks, 'Praxis Stories: Experiencing Interpretive Policy Research' (2007) 1(3) *Critical Policy Studies* 278, 279.

[114] Selen A Ercan, Carolyn M Hendriks and John Boswell, 'Studying Public Deliberation after the Systemic Turn: The Crucial Role for Interpretive Research' (2017) 45(2) *Policy & Politics* 195, 198.

[115] Dvora Yanow, 'Qualitative-Interpretive Methods in Policy Research', in Frank Fischer, Gerald Miller and Mara S Sidney (eds), *Handbook of Public Policy Analysis: Theory, Politics, and Methods* (CRC/Taylor & Francis, 2007) 409; Peregrine Schwartz-Shea and Dvora Yanow, *Interpretive Research Design: Concepts and Processes* (Taylor & Francis Group, 2011) 5.

their daily lives'.[116] An additional strength of adopting an interpretive approach is its strong association with Indigenous standpoint theory, as discussed in the previous section.

As Yanow explains, a hallmark of interpretive research is the heightened degrees of reflexivity on the part of the researcher: explicit attention to the ways in which family background, personality, education, training, and other experience might well shape who and what the researcher is able to access, as well as the ways in which he makes sense of the generated data. This enactment of the phenomenological arguments that selves are shaped by prior experiences, which in turn shape perception and understanding. It is an argument that has also been advanced in feminist and race-ethnic studies concerning *'standpoint' perspectives* [italics added].[117]
An interpretive approach is concerned with context, discourse and meaning-making expressed through language, action and artefacts and does not seek to 'settle' debate on a policy situation, but, rather, to 'stimulate' debate about the contested understandings of politics. Interpretative approaches are concerned with bringing 'excluded or marginalised "voices" into research'.[118]

An interpretive approach emphasises contextuality and seeks to understand, or make sense of, a phenomenon, in its local, historical and social context to form 'constitutive causality' that explores how humans conceive of their worlds, the language they use to describe them, and other elements constituting that social world, which make possible or impossible the interactions they pursue.[119]

Deliberative democracy scholars argue an interpretive approach can help uncover deliberation as a 'communicative activity occurring in a diversity of spaces' and amongst a multiplicity of actors, sites and activities, and forms of communication between different sites. 'Some occur within the state, others outside. Some sites are ongoing and form part of established political institutions; others are one-off innovations or public protests.'[120]

This explanation of interpretative research as a useful methodological approach for making visible, diverse deliberative spaces with multiple actors engaged in ongoing forms of deliberation, aligns with my discussion of the native title system. That is to say, that deliberation

[116] Dvora Yanow, Qualitative-Interpretive Methods in Policy Research, in Fischer, Miller and Sidney (n 115) 409.

[117] Dvora Yanow, Qualitative-Interpretive Methods in Policy Research, in ibid. 408.

[118] Ercan, Hendriks and Boswell (n 114).

[119] Ibid.

[120] Ibid. 196.

within the native title system between Aboriginal people and government is not confined to one institution or site but occurs at multiple sites, amongst a wide range of actors, across the native title system.

I now turn to discuss where my research sits within the two main areas of my research, deliberative and participatory democracy and native title.

## 2.3 Situating My Research

My research is primarily an empirical study of the deliberative and participatory democratic practices of Aboriginal people within the native title system.

This thesis seeks to contribute to the understanding of deliberative and participatory democracy by Indigenous people in a settler-colonial context. It does so by taking the focus of research away from traditional institutions such as parliaments or mini-publics, to spaces where Aboriginal people are more likely to engage in deliberative and participatory democracy through processes such as environmental public policy making, negotiating agreements, and rebuilding Indigenous governance institutions.

As stated, only a few scholars have discussed the political struggles of Aboriginal people using deliberative democracy theory. These include Duncan Ivison and his analysis of reconciliation in Australia[121] and more recently, Ron Levy, Gabrielle Appleby, and Helen Whalan and their discussion of the deliberative democratic potential of the Voice to Parliament proposal to resolve Australia's 'constitutional legitimacy crisis'.[122]

International scholars Jorge Valadez[123], Bashir Bashir[124] and Bobby Banerjee[125] all discuss deliberative democracy in relation to Indigenous people to critique some of the normative

[121] Duncan Ivison, 'Deliberative Democracy and the Politics of Reconciliation', in David Kahane et al (eds), *Deliberative Democracy in Practice* (University of British Columbia Press, New Edition, 2010) 115–137.

[122] Gabrielle J Appleby, Ron Levy and Helen Whalan, 'Voice versus Rights: The First Nations Voice and the Australian Constitutional Legitimacy Crisis' (2023) 46(3) *University of New South Wales Law Journal*.

[123] Jorge M Valadez, *Deliberative Democracy, Political Legitimacy, and Self Determination in Multicultural Societies* (Westview Press, 2001); Jorge M Valadez, 'Deliberation, Cultural Difference, and Indigenous Self-Governance' (2010) 19(2) *The Good Society* 60.

[124] Bashir (n 9).

[125] Subhabrata Bobby Banerjee, 'Decolonizing Deliberative Democracy: Perspectives from Below' [2021] *Journal of Business Ethics*.

claims of deliberative democracy in settler-colonial contexts. For example, Bashir argues many prominent advocates of deliberative democracy fail to 'fully capture the significance' of the claims of colonised people which gives rise to cases of 'historical injustices'.

> The historical dimension of long-standing injustices gives rise to a set of distinctive demands, such as remembrance, acknowledgement, responsibility, and apology and reparations. Indeed, these demands go beyond the type of democratic inclusion that is often offered by deliberative democracy and require a special form of politics; namely, a politics of reconciliation.[126]

As Banerjee argues, ideal conditions for deliberation and rational consensus may be possible amongst wealthy, educated, and urban based groups in metropolitan centres but 'it is difficult to imagine how Indigenous communities in the Brazilian Amazon can engage in deliberative discourse as equal citizens with powerful market and state actors intent on expanding mining and logging on Indigenous lands'.[127]

My thesis is a contribution to this limited field of scholars concerned with deliberative democracy theory and its relationship with Indigenous peoples and our political struggles in settler colonial contexts.

Also, because the focus of my research is the traditional lands of Aboriginal people held under native title, my work sits with scholars whose work studies citizen-led deliberative and participatory innovations in non-institutional settings such as Fung and Wright[128], Hendriks, Ercan and Boswell[129], and Dzur.[130] My thesis also engages with the work of deliberative and

[126] Bashir (n 9) 128.

[127] Banerjee (n 125) 285.

[128] Archon Fung and Erik Olin Wright, *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (Verso, 2003).

[129] Carolyn M Hendriks, Selen A Ercan and John Boswell, *Mending Democracy: Democratic Repair in Disconnected Times* (Oxford University Press USA – OSO, 2020).

[130] Albert W Dzur, *Democracy Inside: Participatory Innovation in Unlikely Places* (Oxford University Press, 2018).

participatory democracy scholars whose work engages with the processes of public policy making such as Frank Fisher[131], Douglas Torgerson and Hendrik Wagenaar.[132]

For example, in this thesis I present an example of what Torgerson calls democratisation through policy discourse[133] in the form of a unique Indigenous approach to environmental management in Australia, 'Caring for Country'. Caring for Country is also the focus of considerable academic research from scholars interested in native title, environmental management and planning and public policy scholars including Altman[134], Hill[135], Jackson et al[136], Lane [137] and myself.[138]

In the area of native title, my research has been influenced by Indigenous scholars including Mick Dodson[139], Irene Watson[140], and Aileen Moreton-Robinson[141], and non-Indigenous scholars including Lisa Strelein, Duncan Ivison, Sean Brennan, Raelene Webb, and David Ritter. Also influential is the work of non-Indigenous scholars who engage with Indigenous public policy

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[131] Frank Fischer, *Reframing Public Policy: Discursive Politics and Deliberative Practices* (Oxford University Press, Incorporated, 2003); Frank Fischer, *Participatory Governance* (No Working Paper No.24, August 2010); Frank Fischer and John Forester (eds), *The Argumentative Turn in Policy Analysis and Planning* (Duke University Press, 1993).

[132] Maarten A Hajer and Hendrik Wagenaar, *Deliberative Policy Analysis: Understanding Governance in the Network Society* (Cambridge University Press, 2003); Hendrik Wagenaar, 'Governance, Complexity, and Democratic Participation: How Citizens and Public Officials Harness the Complexities of Neighborhood Decline' (2007) 37(1) *The American Review of Public Administration* 17.

[133] Douglas Torgerson, Democracy Through Policy Discourse, in Hajer and Wagenaar (n 132) 113-138.

[134] Jon Altman and Sean Kerins (eds), *People on Country: Vital Landscapes, Indigenous Futures* (The Federation Press, 2012); Altman and Whitehead (n 26).

[135] Rosemary Hill and Liana Williams, Indigenous natural resource management: overcoming marginalisation produced in Australia's current NRM model, in Bruce Taylor, Cathy Robinson and Marcus B Lane, *Contested Country: Local and Regional Natural Resources Management in Australia* (CSIRO Publishing, 2010).

[136] Sue Jackson, Libby Porter and Louise C Johnson, *Planning in Indigenous Australia: From Imperial Foundations to Postcolonial Futures* (Taylor & Francis Group, 2017).

[137] Marcus B Lane, 'Participation, Decentralization, and Civil Society: Indigenous Rights and Democracy in Environmental Planning' (2003) 22(4) *Journal of Planning Education and Research* 360 ('Participation, Decentralization, and Civil Society').

[138] Justin McCaul 'Caring for Country as Deliberative Policymaking', in Nikki Moodie and Sarah Maddison (eds), *Public Policy and Indigenous Futures* (Springer, 2023) 51-69.

[139] Mick Dodson and Lisa Strelein, 'Australia's Nation-Building: Renegotiating the Relationship between Indigenous Peoples and the State' (2001) 24(3) *UNSW Law Journal*.

[140] Watson, 'Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal Peoples' (n 54).

[141] Moreton-Robinson (n 59).

including Michael Dillon[142], Elizabeth Strakosch[143], Sarah Maddison[144], Patrick O'Sullivan[145], and Will Sanders.[146] Also helpful to my thinking and writing have been North American Indigenous and non-Indigenous legal scholars such as John Borrows[147], Glen Sean Coulthard[148], Leanne Betasamosake Simpson[149], James Tully[150], Kent McNeil[151] and Jeremy Webber.[152]

In addition to drawing on this extensive range of academic scholarship, I also draw on a wide variety of published materials. These include public speeches, reports, submissions, and policy papers from Indigenous leaders and institutions including the Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) and Australian Law Reform Commission (ALRC). I also draw from my experiences from attending Indigenous public policy events such as the National Native Title Summit, an influential national platform for public deliberation on native title and public policy matters which attracts native title groups, politicians, legal scholars, and government staff.[153]

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[142] Michael Dillon, 'Emerging Strategic Issues in Native Title: Future Political and Policy Challenges', *CAEPR Discussion Paper No. 292* 24C (Centre for Aboriginal Policy Research, ANU, 2017).

[143] Elizabeth Strakosch, 'Beyond Colonial Completion: Arendt, Settler Colonialism and the End of Politics', in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation* (Springer Singapore, 2016) 15.

[144] Sarah Maddison, Tom Clark and Ravi de Costa, *The Limits of Settler Colonial Reconciliation: Non-Indigenous People and the Responsibility to Engage* (Springer, 2016); Nakata and Maddison (n 54).

[145] Sullivan, *Belonging Together: Dealing with the Politics of Disenchantment in Australian Indigenous Affairs Policy* (n 53).

[146] Will Sanders, 'Towards an Indigenous Order of Australian Government' (n 39).

[147] Borrows (n 112); Michael Asch, John Borrows and James Tully, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (University of Toronto Press, 2018).

[148] Glen S Coulthard, 'Subjects of Empire: Indigenous Peoples and the "Politics of Recognition" in Canada' (2007) 6(4) *Contemporary Political Theory* 437; Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 1st ed., 2014).

[149] Leanne Betasamosake Simpson, 'Indigenous Resurgence and Co-Resistance' (2016) 2(2) *Critical Ethnic Studies* 19.

[150] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995).

[151] Kent McNeil, 'Envisaging Constitutional Space for Aboriginal Governments' (1993) 19(1) *Queen's Law Journal* 95.

[152] Jeremy Webber, 'Native Title as Self-Government' (1999) 22(2) *UNSW Law Journal*; Jeremy Webber, 'Forms of Transitional Justice' (2012) 51 *NOMOS: American Society for Political and Legal Philosophy* 98.

[153] The National Native Title Summit is an annual public policy forum organised by the Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS), a statutory body with a legislative responsibility for educating Australia about Aboriginal and Torres Strait Islander people and culture. The Summit is the leading Indigenous research and public policy event on native title in Australia and a flagship initiative of AIATSIS. Each year, the summit is held in different region of Australia with the regional native title representative body hosting the event in consultation with the Traditional Owners of the town or city in which the conference is held. For example, I attended the 2018 summit held on Yawuru Country in Broome in Western Australia and organised by the Kimberley

Most tellingly in terms of situating my research, in the course of researching this thesis, I found much of the existing scholarship on deliberative and participatory democracy did not speak to my specific research focus. The deliberative and participatory democratic practices of Indigenous people in Indigenous and non-Indigenous spaces. There appears to be very little empirical research on Indigenous people and our engagement with deliberative and participatory democracy theory.

As stated, advocates of deliberative and participatory democracy like to emphasise the *emancipatory potential* of deliberative and participatory democracy. In particular, they argue greater deliberation and participation for marginalised and minority groups in decision-making processes is a positive thing.[154] Yet there does not appear to be many actual examples of where and how this is happening, particularly in relation to Indigenous peoples.[155] I believe Indigenous people's political struggles in settler-colonial contexts offers a potentially rich area of future research on deliberative and participatory democracy in Indigenous spaces.

## 2.4 Conclusion

This thesis is an interdisciplinary, empirical study of how Aboriginal people contest the law of native title. It uses examples such as public policy making, agreement making, and Indigenous nation building to illustrate how Aboriginal people engage in deliberative and participatory

Land Council (KLC) and in 2022 on Kabi Kabi Country, on the Sunshine Coast in Queensland organised by the Queensland South Native Title Services (QSNTS) and Kabi Kabi people. In its 2021 annual report, under the section 'Forums for Dialogue', the AIATSIS Summit is a key goal of the AIATSIS strategic plan to deliver on their vision and mission statements. The AIATSIS vision statement is: A world in which Aboriginal and Torres Strait Islander peoples' knowledge and cultures are recognised, respected, celebrated and valued. Its mission to: tell the story of Aboriginal and Torres Strait Islander Australia, create opportunities for people to encounter, engage with and be transformed by that story, support and facilitate Aboriginal and Torres Strait Islander cultural resurgence, and shape our national narrative. *AIATSIS Annual Report 2020-21* (Australian Institute of Aboriginal & Torres Strait Islander Studies, 2021) 218.

[154] 'Deliberative theory of democratic legitimacy has at its core the idea that collective decisions are determined through reasoned debate between all concerned. Such discussion should be unfettered by all but the power of the better argument. To this extent, deliberative democracy harbours an 'emancipatory potential'. See Knops (n 8).

[155] This situation may be changing. In May 2022, I participated in a presentation series on 'Decolonising Democratic Innovations' organised by the School of Global Governance and Deliberative Democracy at the University of Canberra. I followed this opportunity by also presenting on my PhD research at the European Political Research Consortium General Conference in Innsbruck, Austria in September 2022 on the same theme. This thesis therefore fits with an emergent interest within the research field towards deliberative democracy, Indigenous people, and decolonisation. This work may generate more interest among scholars to engage with Indigenous modes of deliberative and participatory democracy.

democracy. This thesis seeks to contribute to understanding deliberative and participatory democracy as practiced by Indigenous people within a settler-colonial context by making a hidden and under-researched deliberative, democratic space ('native title system'), visible.

# 3 Deliberative and Participatory Democracy

In this chapter, I provide an overview of both deliberative and participatory democracy theories. Many political theorists regard deliberative and participatory democracy as closely related yet conceptually distinct[156] with different origins[157], and that they cannot be equated.

> It is on this point that substantial differences in theoretical perspectives emerge, in relation to the notion of 'deliberative democracy'. These two terms cannot be equated: 'participatory democracy' is founded on the direct action of citizens who exercise some power and decide issues affecting their lives; 'deliberative democracy', instead, is founded on argumentative exchanges, reciprocal reason-giving, and on the public debate which precedes decisions.[158]

That is to say, they seek to enhance democracy by different means: one by the inclusion of more people in decision-making (participatory) and the other by improving quality of discussion (deliberative).[159] One concerns *who* makes decisions and the other *how* decisions should be made. Both, however, are responses to the malaise of representative democracy and institutions and negative assessments about the capacity of citizens to engage in self-government.[160]

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[156] See Antonio Floridia, 'The Origins of the Deliberative Turn' and Stephen Elstub, 'Deliberative and Participatory Democracy' in Bächtiger et al (n 6); Lorenzo Cini and Andrea Felicetti, 'Participatory Deliberative Democracy: Toward a New Standard for Assessing Democracy? Some Insights into the Italian Case' (2018) 10(2) *Contemporary Italian Politics* 151; Antonio Floridia, *From Participation to Deliberation: A Critical Genealogy of Deliberative Democracy* (ECPR Press, 1st edition, 2017).

[157] 'Theories of participatory and deliberative democracy are closely related to each other, although not necessarily linked in every strand of theory building. While participatory democracy has its roots in the Greek polis its modern interpretation starts in the 1960's, deliberative democracy is a quite recent but very prominent theory in the family of normative democratic theories'. See Henrike Knappe, 'Participatory and Deliberative Democracy: From Equality Norms to Argumentative Rationalities' in *Doing Democracy Differently* (Verlag Barbara Budrich, 1st ed., 2017) 45.

[158] Floridia (n 156) 6.

[159] Lyn Carson and Stephen Elstub, 'Comparing Participatory and Deliberative Democracy' [2019] *New Democracy Research and Development Note*.

[160] Stephen Elstub, 'Deliberative and Participatory Democracy' in Bächtiger et al (n 6) 187.

Yet as I will argue, for Aboriginal people, securing the ideals of sovereignty and self-government, requires both *deliberation and participation* in decision-making. What some scholars have defined as 'participatory deliberative democracy'.[161]

> A participatory deliberative conception encourages the realisation of a stronger vision of political autonomy by enabling people to debate laws and policies that representatives and governors enforce for them. Taking part in a variety of collective arenas, citizens learn to advance and defend their own solutions to common problems and to argue in such situations on the basis of different yet relevant reasons. This more radical vision of democracy therefore introduces an innovative conception of democratic quality grounded on the idea of participatory deliberative arenas.[162]

'Participatory deliberative democracy' is therefore a better reflection of the ideals of Indigenous autonomy and self-government. This is because self-government for Indigenous people incorporates deliberation and participation as equally important or at least, highly complementary.

I now turn to provide a review of deliberative democracy theory.

## 3.1 Overview of Deliberative Democracy Theory

> Deliberative democracy is grounded in an ideal in which people come together, on the basis of equal status and mutual respect, to discuss the political issues they face and, on the basis of those discussions, decide on the policies that will then affect their lives.[163]

[161] Cristina Lafont, *Democracy Without Shortcuts: A Participatory Conception of Deliberative Democracy* (Oxford University Press, Incorporated, 2020); Cini and Felicetti (n 156).

[162] Cini and Felicetti (n 156) 13.

[163] Bächtiger et al (n 6) 2.

The literature on deliberative democracy is extensive[164] and now dominates the field of democracy studies.[165] It is the major area of research within the fields of political theory and political philosophy.[166] The purpose of this section is not to offer a full discussion of its various theoretical strands and subfields but to emphasise its claim as being a more legitimate process for reaching decisions, and why a talk-centric approach to resolving political disagreement appeals to marginalised groups such as Indigenous people in settler-colonial contexts.

As Knappe explains, deliberative democracy makes two distinct claims. First, through the process of deliberation, that is, the process of reason giving and listening to the arguments of others, a political decision can be more rational and enlightened. Second, deliberation has a developmental participatory effect. That is to say, by deliberating, citizens develop more sophisticated political views and make decisions that are more informed by having to consider the perspectives of others.[167] Dryzek argues deliberative democracy is a normative theory about how politics *ought* to be conducted rather than an explanatory theory about existing politics.[168]

At the heart of the theory is the assertion that democracy is enhanced when people and engage in the considered exchange of reasons – what theorists term the 'reason giving' characteristic of deliberative democracy.[169]

> Whatever its precise formulation, such a conception of democracy presupposes an account of how the process of public deliberation makes the reasons for decision more rational and its outcomes more fair. The reasons given must primarily meet the conditions of publicity; that is, they must be convincing to everyone. Because of this

[164] To review the evolution of the field of deliberative democratic theory see Bächtiger et al (n 6); Stephen Elstub, 'The Third Generation of Deliberative Democracy' (2010) 8(3) *Political Studies Review* 291; Stephen Elstub, Selen Ercan and Ricardo Fabrino Mendonça, 'Editorial Introduction: The Fourth Generation of Deliberative Democracy' (2016) 10(2) *Critical Policy Studies* 139; Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (The Belknap Press of Harvard University Press, 1996); Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, First Edition, 2004); James S Fishkin and Peter Laslett (eds), *Debating Deliberative Democracy* (Blackwell Publishing, 2003); Stephen Elstub and Peter McLaverty (eds), *Deliberative Democracy: Issues and Cases* (Edinburgh University Press, 2014); Kahane et al (n 101); Carolyn M Hendriks, *The Field and Study of Deliberative Democracy in Australia* (2021); Hendriks, Ercan and Boswell (n 109).

[165] Ercan and Dryzek (n 17).

[166] Kahane et al (n 101) 1.

[167] Knappe (n 157) 58.

[168] Ercan and Dryzek (n 17) 243.

[169] Gutmann and Thompson (n 18) 3.

> emphasis on reasons, the quality of deliberation is crucial to determining the reasonableness of an outcome or a decision. It is not surprising then that some theorists called their accounts of deliberation 'epistemic' or 'rational' in a broad sense: deliberation improves outcomes in so far as it helps citizens construct an interpretation of the decision and its consequence in light of what all those affected think about the matter at hand.[170]

As Antonio Floridia explains, it was Jane Mansbridge who problematised how competing interests in a democracy should be addressed. Should it be done through the counting of votes (aggregation) or through discussion in order to reach a 'consensus'?[171]

Iris Marion Young argues deliberative democracy is a 'form of practical reason'. 'Participants in the democratic process offer proposals for how best to solve problems or meet legitimate needs, and so on, and they present arguments through which they aim to persuade others to accept their proposals. Democratic process is primarily a discussion of problems, conflicts, and claims of need or interest. Through dialogue others test and challenge these proposals and arguments'.[172]

Simone Chambers states that deliberative democracy is a way in which citizens can enhance democracy and criticise institutions that do not live up to normative standards.[173] Furthermore, it replaces a vote-centric theory of democracy with a talk-centric theory. A vote-centric view sees democracy as the arena in which 'fixed preferences and interests compete via fair mechanisms of aggregation. In contrast, deliberative democracy focuses on the communicative processes of opinion and will-formation that precede voting. Accountability replaces consent as the conceptual core of legitimacy.'[174]

The virtues of a talk-centric approach to resolving political disagreement is shared by Elstub and McLaverty who state, 'the normative claim which unites this body of thought (deliberative democracy) is that political decisions should be talk-centric rather than vote-centric. Rather

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[170] Bohman (n 65) 6.

[171] Antonio Floridia, Origins of the Deliberative Turn, in Bächtiger et al (n 11) 37.

[172] Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2nd ed, 2000) 22.

[173] Simone Chambers, 'Deliberative Democratic Theory' (2003) 6(1) *Annual Review of Political Science* 307, 308.

[174] Ibid.

than merely constituting the aggregation of individual preferences, collective decisions should emerge from public reasons discussion and debates'.[175]

For Amy Gutmann and Dennis Thompson, deliberative democracy is a form of government in which free and equal citizens and their representatives, justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible. With the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.[176]

For James Bohman, deliberative democracy entails public deliberation so citizens can provide their consent to laws rather than having laws imposed upon them. Public deliberation is a means for producing a shared vision and for transforming citizens' limited and self-interested perspectives.

> According to most proponents of deliberative democracy, political decision making is legitimate in so far as its policies are produced in a process of public discussion and debate in which citizens and their representatives, going beyond mere self-interest and limited points of view, reflect on the general interest or on their common good.[177]

For Bohman, public deliberation is, *and ought to be,* a key feature of democracy that centres on the idea that inclusive processes of rational argumentation and exchanges of perspectives serve legitimising functions in a society and political system. The normative theory of deliberative democracy is thus broadly understood as all citizens are included on equal terms in the discursive processes through which decisions, practices, and ideas are debated and justified. To what extent they actually do include all citizens on equal terms is one important measure of democracy in a society.[178]

Deliberation is therefore a specific way of interaction in order for people and societies to resolve conflict or disagreement. As Dieter Ruct describes,

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[175] Elstub and McLaverty (n 164).

[176] Gutmann and Thompson (n 18) 5-6.

[177] Bohman (n 65) 4.

[178] As Holdo explains discussions about how societies can become more democratic and egalitarian, and how public policy and implementation processes can gain deeper legitimacy and effectiveness centres on concern of inclusion and uptake of a plurality of perspectives and types of knowledge. Markus Holdo, 'A Relational Perspective on Deliberative Systems: Combining Interpretive and Structural Analysis' (2020) 14(1) *Critical Policy Studies* 21.

> This interaction is characterised by a respectful articulation of claims, viewpoints, arguments and experiences among the participants who ultimately seek a grounded judgement on the validity and legitimacy of their positions. All concepts of deliberative democracy oppose the use of power based on coercion, hierarchy, threat, manipulation and the like.[179]

Advocates of deliberative democracy believe it can lessen the ability of powerful interests to dominate decision making processes by requiring parties not engage in bargaining from fixed positions but rather remain open minded to the possibility of being convinced by 'unforced force of the better argument'.[180]

As Chambers explains, the appeal of deliberative democracy is its claim to be a more just and indeed democratic way of dealing with pluralism than aggregative models of democracy.[181] It asks that people account for one another through dialogue.

> Thus, accountability is primarily understood in terms of "giving an account" of something, that is, publicly articulating, explaining, and most importantly justifying public policy. Consent (and, of course, voting) does not disappear. Rather, it is given a more complex and richer interpretation in the deliberative model than in the aggregative model.[182]

In principle, deliberative democracy suggests that as citizens, we should strive to create political interactions that are 'egalitarian, un-coerced, competent, and free from delusion, deception,

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[179] Dieter Ruct, 'Deliberation as an ideal and practice in progressive social movements' in Kenneth Newton and Brigitte Geissel, *Evaluating Democratic Innovations: Curing the Democratic Malaise?* (Taylor & Francis Group, 2012) 113.

[180] Jürg Steiner, *The Foundations of Deliberative Democracy: Empirical Research and Normative Implications* (Cambridge University Press, 2012) 4 quoting Habermas. 'Thus, *all* arguments, be they related to questions of law or morality or to scientific hypotheses or to works of art, require the *same* basic form of organization, which subordinates the eristic means to the end of developing intersubjective conviction by the force of the better argument'. For original see, Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society, Volume 1* (Polity Press, 1991) 56.

[181] Chambers (n 173) 308.

[182] Ibid.

power, and strategy'.[183] These are ideals, but the crucial point is that democratic societies should strive to create these conditions.

Advocates of deliberative democracy emphasise that they do not reject the common understanding of democracy as involving electoral competition between political parties and the competitive struggle for the people's votes.[184] However, voting and the aggregation of individual voter preferences are not viewed as the only or indeed ideal mechanism for legitimating decisions.

It is on this issue of voting (or aggregative democracy) that Aboriginal and Torres Strait Islander people face a significant challenge. Australia's democracy is a majoritarian, representative model in which Indigenous people constitute an 'extreme minority'. Noel Pearson, a Guugu Yimithirr man and lawyer and a leading Indigenous intellectual, argues our extreme minority status (what he calls the democratic problem of the 'elephant and the mouse') raises concerns regarding the principle of democratic equality.[185]

Pearson argues representative democracy produces parliaments and executive governments that respond to the majority of the citizenry and therefore 'simply do not work for Aboriginal and Torres Strait Islander people'.

> While Australians complain about politicians, governments and bureaucracies, our democratic institutions, systems and processes generally work for the majority. The electoral system ultimately drives responsive government. Not so for extreme minorities whose presence in that electoral system is negligible'.[186]

Similarly, Davis argues Australia's democratic culture, distinguished by an extreme form of parliamentary sovereignty, poses a problem for Indigenous peoples who constitute approximately 2 per cent of 22 million people. 'We are saying that the ballot box is not enough for us. We cannot influence the ballot box.'[187]

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[183] John S Dryzek, *Discursive Democracy* (Cambridge University Press, 1st ed., 1990) 202.

[184] Young, *Inclusion and Democracy* (n 172) 16-51.

[185] Noel Pearson, 'A Rightful Place' (2014) (55) *Quarterly Essay* 40.

[186] Ibid.

[187] Davis, 'Indigenous Constitutional Recognition from the Point of View of Self-Determination and Its Exercise through Democratic Participation' (n 78) 11.

Our extreme minority status and lower voter registration[188] make representative democracy problematic for Aboriginal people.[189] These insights raise questions to whether majoritarian, representative democracy and its inherent bias toward majoritarianism is capable of treating Aboriginal concerns equally and fairly – or whether it is a structural impediment to Indigenous people attaining democratic equality.[190]

This perhaps is why some deliberative democracy advocates such as Fung argue 'deliberative democracy to be a revolutionary political ideal' because deliberative democracy is motivated by 'political equality, justice and self-government'.[191] Likewise, Gutmann and Thompson argue deliberation is a 'weapon of the weak'.[192] Others such as Ercan and Dryzek argue that deliberative democracy is a 'transformative project with its roots in critical theory that in essence, seeks a thorough transformation of the social order'.[193] Deliberative democracy is therefore a reform movement as well as an academic activity. 'Some engage with the theory to better understand and interpret the world, others to change it.'[194]

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[188] Compounding our demographic status as an extreme minority, the Australian Electoral Commission (AEC) estimates there to be an almost 20% gap between Indigenous and non-Indigenous enrolment rates. As of July 2021, nationally there are over 16 million registered voters representing 96.2% of all eligible voters in Australia. However, the estimated number of registered Indigenous voters is approx. 530,000 – representing an enrolment rate of 78%. See, Australian Electoral Commission (AEC), (Webpage), Indigenous enrolment estimates as at 31 December 2022, https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/performance/indigenous-enrolment-rate.htm

[189] Gutmann and Thompson argue that aggregative methods such as voting favour majoritarianism. 'The electoral process is modelled on the analogy of the market. Like producers, politicians and parties formulate their positions and devise their strategies in response to the demands of voters who, like consumers, express their preferences by choosing among competing products (the candidates and their parties). Whatever debate takes place in the campaign serves a function more like that of advertising (informing voters of the comparative advantages the candidates) than like that of argument (seeking to change minds by giving reasons). Aggregative theorists thus believe that the collective outcomes produced by voting require no further justification. See Gutmann and Thompson (n 18) pp 13-21.

[190] See Edana Beauvais, Deliberation and Equality, in Bächtiger et al (n 11). Political systems are democratic to the extent that people are empowered to participate in political practices – such as voting, representing, deliberating, and resisting – that contribute to self- and collective-rule.

[191] Archon Fung, 'Deliberation before the Revolution: Toward an Ethics of Deliberative Democracy in an Unjust World' (2005) 33(3) *Political Theory* 397.

[192] For example, Gutmann and Thompson refer to moral appeals as the 'weapon of the weak', which can give disadvantaged, groups an argumentative advantage over the powerful. See Gutmann and Thompson (n 164) 133.

[193] Selen A Ercan and John S Dryzek, 'Conclusion: The Reach of Deliberative Democracy' (2015) 36(3) *Policy Studies* 359.

[194] Ercan and Dryzek (n 17).

These various descriptions of deliberative democracy theory as transformative, equality and lessening the use of coercive power is why I argue its appeal to Aboriginal people. The insistence on dialogue and reason-giving in decision-making processes aligns with the ideal of FPIC: that any decision reached must involve the freely attained and informed consent of Aboriginal people regarding any proposed laws and policies likely to affect us.

To conclude this discussion of deliberative democracy theory, I will briefly summarise the four distinct 'turns', or iterations, in the evolution of the theory. [195]

## 3.2 Four Turns in Deliberative Democracy Theory

The contemporary field of deliberative democracy theory has been greatly influenced by the thinking of German political philosopher, Jürgen Habermas, and American political and legal philosopher, John Rawls.

Habermas believed a critical component of democratic politics was an informed and knowledgeable 'public sphere'. For Habermas, the public sphere is the space of human association between private life and the state. Habermas developed the notion of democracy as a 'two-track model' in which public opinion forms through the social interactions between ordinary citizens in their homes, workplaces, cafes, clubs etc (public sphere). These opinions are then filtered through to formal institutions such as courts and legislatures.[196]

Another contribution of Habermas was his concept of the 'ideal deliberative procedure' as part of his ethics of communication theory to explain how people reach collective decisions through discourse and a shared understanding and acceptance of what he called 'validity claims'.[197]
A validity claim is any utterance with propositional content that calls on someone to provide reasons for the acceptability (justification) of the utterance. To understand properly a proposition and what it implies, the listener must be knowledgeable enough to understand and

[195] Elstub, Ercan and Mendonça (n 164); Elstub (n 164); Bächtiger et al (n 11).

[196] Jürgen Habermas, 'The Public Sphere: An Encyclopaedia Article', in Meenakshi Gigi Durham and Douglas M Kellner (eds), *Media & Cultural Studies: Key Works* (Blackwell Publishing, 2006) 73-78.

[197] For Habermas, 'the public sphere' is a realm of social life in which something approaching public opinion can be formed. Access is guaranteed to all citizens. A portion of the public sphere comes into being in every conversation in which private individuals assemble to form a public body. Citizens behave as a public body when they confer in an unrestricted fashion – that is, with the guarantee of freedom of assembly and association and the freedom to express and publish their opinions – about matters of general interest. See, Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society* (Polity, 1st edition, 1992).

accept reasons that could be offered in support of it. 'Thus speech acts are intelligible only to hearers who understand what validity claim is being raised, and how it could be redeemed in argumentation.'[198]

The other influential early figure, John Rawls, is most famous for his 'Theory of Justice' regarding the manner in which people within a democracy, holding equal rights, should relate to one another. Rawls held justice to be the first virtue fundamental to the major political and social institutions of a liberal society such as the political system, economy, and the family.[199]

For Rawls, a well-ordered society should be able to regulate effectively a public conception of justice. That is to say, in a given society, people accept and acknowledge – and that others accept and acknowledge – the same principles of justice and the basic structure of society. This means that the social and political institutions of a society work to uphold and satisfy the principle of justice, especially in the event of disagreement or competing interests.

> Among individuals with disparate aims and purposes a shared conception of justice establishes the bonds of civic friendship; the general desire for justice limits the pursuit of other ends. One may think of a public conception of justice as constituting the fundamental charter of a well-ordered human association.[200]

For Rawls, the primary objective of the structure of society is the way the major social institutions distribute fundamental rights and duties and determine the distribution of opportunities from social cooperation. That is to say, how do the major institutions of a society – the marketplace, private property, the family – define rights and duties and influence the life prospects of all its citizens.[201]

To unpack this proposition, Rawls' devised his 'original position' hypothesis. In *A Theory of Justice* he argues that if people hold no knowledge or understanding of their place in a society – that is their class position or social status, their good fortune, abilities, strengths etc – they are more likely to adhere to principles of justice from behind a 'veil of ignorance'. From this 'original position', people are more likely to ensure their choices in regard to the principle of

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[198] Joseph Heath, 'What Is a Validity Claim?' (1998) 24(4) *Philosophy & Social Criticism* 23.

[199] John Rawls, *A Theory of Justice* (Belknap Press, 2nd Edition, 1999).

[200] Ibid 4.

[201] Ibid 6.

justice as fairness, are governed by the outcome of natural chance, and not influenced by their position or material advantage.[202]

This can be understood as the equality of opportunity principle inherent in deliberative democratic theory. Rawls 'original position' is an exercise in abstraction designed to encourage people to engage with issues of justice in an unbiased manner. The flaw in Rawl's concept is that people rarely approach an issue of moral disagreement without personal interests in their thoughts.

Other notable first-generation deliberative democrats include Joshua Cohen and his concern with democratic legitimacy[203] and John Dryzek and his interest in discursive democracy.[204] The concern of first-generation theorists was to develop normative theories about deliberative democracy.[205]

However, these early normative descriptions of deliberative democracy were criticised for not adequately considering the complexity of contemporary societies.

> First-generation deliberative democrats, like Jürgen Habermas and John Rawls, debated the normative justifications of deliberative democracy, interpretations and necessary components of the theory, but failed to take account of the sheer complexity of contemporary societies. First-generation deliberative democrats thought reason exchange to be the only applicable form of communication, which would result in uniform preference change, ending in consensus.[206]

Critics of first-generation theorists argued too much emphasis had been placed on 'rational argumentation' which lent legitimacy to particular forms of knowledge (academic), and modes of communication (technical) usually held by only certain groups of people (wealthy, male) in society.[207] The scope of what constituted 'ideal deliberation' was far too narrow for liberal, pluralistic societies.

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[202] Ibid 11.

[203] Joshua Cohen, Deliberation and Democratic Legitimacy, in Derek Matravers and Jonathan Pike, *Debates in Contemporary Political Philosophy: An Anthology* (Routledge in association with The Open University, 2003) 342–360.

[204] Dryzek, *Discursive Democracy* (n 183).

[205] Elstub, Ercan and Mendonça (n 164).

[206] Elstub (n 164) 291.

[207] Bächtiger et al (n 11) 6.

As Bächtiger et al explain, political theorists and philosophers began advocating for consideration of other forms of human communication such as testimony, greetings, rhetoric, and storytelling in order to better accommodate people's personal experiences rather than abstract knowledge and argumentation.[208]

Second-generation deliberative democrats included Iris Marion Young,[209] and Amy Gutmann and Dennis Thompson[210] who understood contemporary societies to be complex and pluralistic. They incorporated pluralism and cultural diversity into the theory to make it more relevant to multicultural modern societies. As summarised by Elstub et al:

> They problematized the consensus and rational argument requirements of deliberation and brought deliberative democratic theory in close connection with several other fields including feminism, multiculturalism, and environmental politics. Young (1996) offered a powerful criticism of the speech styles advocated by first-generation deliberative scholars, arguing that besides rational argumentation, deliberation should allow storytelling, rhetoric, and greetings as legitimate forms of communication to enable greater inclusivity.[211]

Yet, as Elstub et al explains, while second-generation theorists can be praised for reforming the theory to be more cognisant of societal pluralism and complexity, they offered little in terms of defining what *institutions* are best able to ensure the ideals of deliberative democracy could be realised in complex societies.[212]

Third-generation deliberative theorists therefore duly focused on institutional aspects of deliberative democracy, leading to an increase in empirical studies of courts[213] and

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[208] Ibid 7.

[209] Young, *Inclusion and Democracy* (n 172).

[210] Gutmann and Thompson (n 18).

[211] Elstub, Ercan and Mendonça (n 146) 142.

[212] Ibid.

[213] Conrado Hübner Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford University Press, 2013); Rachel A Cichowski, 'Courts, Rights, and Democratic Participation' (2006) 39(1) *Comparative Political Studies* 50.

legislatures.[214] In more recent years, the most popular institutional setting for the study of deliberative democracy has been 'mini-publics'.[215]

As Nicole Curato explains, scholars became interested mini-publics for their role in fostering more deliberative politics. Forums such as citizens' juries, consensus conferences, and 21st Century town hall meetings have been attributed with helping people to develop civic virtues, promote social learning, transform preferences, and produce demonstrably better outcomes. As Curato states, the pervasiveness of mini-public studies has been so dominant that, 'one could get the impression that mini-publics *were* deliberative democracy'.[216]

The fourth and recent iteration has been towards systemic analyses of deliberation. While third-generation scholars focused on institutions, they tended to focus on established institutions of democracy – courts and parliaments – to analyse their deliberativeness. As John Parkinson and Jane Mansbridge explain, a deliberative systems approach seeks to consider a range of sites of democratic engagement facilitating a network of discourses that can deepen and broaden democratic governance.

> We recognize that most democracies are complex entities in which a wide variety of institutions, associations, and sites of contestation accomplish political work – including informal networks, the media, organized advocacy groups, schools, foundations, private and non-profit institutions, legislatures, executive agencies, and the courts. We thus advocate what may be called a systemic approach to deliberative democracy.[217]

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[214] John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998); André Bächtiger et al, 'The Deliberative Dimensions of Legislatures' (2005) 40(2) *Acta Politica* 225.

[215] 'Many deliberative democrats enthusiastically endorse the proliferation of mini-publics as a way to lead current democratic societies closer to the ideal of deliberative democracy'. A key reason for their popularity, Lafont explains, is they 'reflect the deliberative transformation of raw, uninformed public opinion into considered public opinion'. See Lafont (n 161); Nicole Curato and Marit Böker, 'Linking Mini-Publics to the Deliberative System: A Research Agenda' (2016) 49(2) *Policy Sciences* 173; Kimmo Grölund, André Bächtiger and Maija Setälä, *Deliberative Mini-Publics: Involving Citizens in the Democratic Process* (ECPS Press, 2014).

[216] Curato and Böker (n 215) 174.

[217] John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012) 2.

A deliberative system is defined as 'a set of distinguishable, differentiated, yet interdependent parts with distributed functions and a division of labour connected to form a complex whole'.[218] In classic accounts of democratic systems, legislatures and courts are considered important institutions for deliberation because they make binding decisions. However, as Parkinson and Mansbridge explain, a deliberative system seeks to include deliberation and decisions made outside of these formal institutions.[219]

In conclusion, deliberative democracy is clearly, *idealistic.* However, as Ercan and Dryzek insist it should not be dismissed as overly naïve, rather it should be thought of as a set of standards 'upon which the actually existing democracies and democratic practices can be analysed, criticized and further improved'.[220]

I now turn to discuss participatory democracy.

## 3.3 Overview of Participatory Democracy Theory

Elstub explains that participatory democracy emerged from student activism in the 1960s and the belief that citizens, in the right circumstances, should, could, and would participate effectively in democratic processes.[221] Advocates of participatory democracy argue greater involvement of citizens in decision-making processes is not due to a lack of interest or capabilities, but rather structural and socioeconomic inequalities, which determined what options citizens had for greater political participation.[222]

A leading scholar of participatory democracy theory is Carole Pateman. As she explains, participatory democracy (which she refers to as 'participatory governance' or 'co-governance') grew during the 1980s as 'participation' began to become part of mainstream development practice promoted by NGOs and international agencies, including the World Bank. Pateman says participatory democracy requires deliberative democracy. 'Deliberation, discussion, and debate are central to any form of democracy, including participatory democracy, but if deliberation is necessary for democracy, it is not sufficient.'[223]

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[218] Ibid 4.

[219] Ibid 4.

[220] Ercan and Dryzek (n 147) 243.

[221] Stephen Elstub, Deliberation and Participatory Democracy, in Bächtiger et al (n 11) 188.

[222] Ibid.

[223] Carole Pateman, 'Participatory Democracy Revisited' (2012) 10(1) *Perspectives on Politics* 7.

I would agree. For Aboriginal people, the ideal of self-government cannot be fully realised through deliberation only. As I will argue at the end of this chapter, for Aboriginal people, the ideal of self-government must be both *deliberative and participatory*. This understanding that for certain groups such as Indigenous people, deliberation and participation are held as equally important for realising self-government, appears under theorised within the fields of deliberative and participatory democracy.

The most oft cited example of successful citizen centred, participatory democracy is the much discussed 'participatory budgeting' in the town of Porto Alegre in Brazil.[224] As Fung and Wright explain, participatory budgeting enables citizens to propose what the priorities should be in terms of advancing common interests of citizens e.g. building a school or delivering social services under severe resource constraints. Efforts such as participatory budgeting are termed Empowered Participatory Governance because they are attempts to deepen democratic engagement for ordinary citizens to participate in and influence policies that directly affect their lives.[225]

Historically though, deliberative and participatory democracy have been understood as conceptually distinct though closely aligned alternative theories of democracy. As Floridia explains, 'It is on this point that substantial differences in theoretical perspectives emerge, in relation to the notion of 'deliberative democracy'. Participatory democracy is founded on the direct action of citizens who exercise some power and decide issues affecting their lives. Deliberative democracy is founded on argumentative exchanges, reciprocal reason giving, and on the public debate that precedes decisions.[226]

Carson and Elstub also argue the two are different. Discussing the benefits and differences between deliberative and participatory democracy, they explain that 'participatory democrats want more participation, in all aspects of politics (and sometimes in spaces beyond the political sphere, such as workplaces and universities), from all citizens who choose to be involved. They believe this is the essence of democracy – the only way to ensure that the 'people rule' is for them to be involved in making the decisions that affect them'.[227]

[224] Fung and Wright (n 128) 10-12.

[225] Ibid 17.

[226] See Antonio Floridia 'The Origins of the Deliberative Turn' and Stephen Elstub 'Deliberative and Participatory Democracy' in Bächtiger et al (n 11); Cini and Felicetti (n 156); Floridia (n 156).

[227] Carson and Elstub (n 15) 2.

In contrast, deliberative democrats have a specific view of political participation: deliberation. Deliberation requires that participants be well informed about the topic, consider different perspectives in order to arrive at a public judgement (not just an opinion) about 'what can we strongly agree on?' Deliberation is considered a superior form of political participation as it leads to more informed and rounded public opinion, and, arguably, better decisions. [228]

One of the key criticisms of participatory democracy, Elstub explains, is the belief that most citizens have little motivation to participate in policy discussions and making decisions. For example, Warren (1996) questions the extent to which people want more opportunities for participation, dismissing it as 'romantic dogma'. 'Individuals are likely to find decision-making so burdensome and inefficient that most will withdraw into cynical apathy. This will leave most decisions to an activist few who will, ironically, make decisions based on the authority they derive from a participatory process'.[229]

Nonetheless, as Elstub argues, participatory democracy is closer to the maxim, 'rule by the people'.[230]

As Fischer explains, participatory democracy creates new spaces that in turn nurture a 'different breed of civil society actor'. In both developed and developing countries, these have involved a number of important shifts in problem-solving, and service delivery, including more equitable forms of support for economic and social development. It has often meant a transition from a professionally dominated (politicians and bureaucrats) to a more citizen- or client-based role in problem solving activities, frequently taking place within the new civic society organisations.[231] As Fischer states, participatory governance seeks to shift the role of citizens beyond merely voting to 'include direct deliberative engagement with pressing issues'.[232]

> Participatory governance emphasises democratic engagement through deliberative practices as a response to a 'democratic deficit' found in many contemporary political systems.[233]

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[228] Ibid.

[229] Bächtiger et al (n 11) 195.; Mark E Warren, 'What Should We Expect from More Democracy?: Radically Democratic Responses to Politics' (1996) 24(2) *Political Theory* 241, 243. ('What Should We Expect from More Democracy?').

[230] Stephen Elstub, Deliberative and Participatory Democracy, in Bächtiger et al (n 11).

[231] Fischer, 'Participatory Governance' (n 131).

[232] Ibid.

[233] Ibid.

These descriptions of new spaces and new civil society actors aligns with my own assertion that the native title system creates opportunities for greater Aboriginal participation in public policy and self-governance. Aboriginal people must engage in both deliberative and participatory forms of democratic practice, engaging in reasoned public arguments with the state and others *and* the exercise of self-government through decision making on policies likely to affect our lives.

> The underlying participatory idea is that citizens in a democracy are to engage with the substance of law and policy, and not simply delegate responsibility for such substantive engagement to representatives (Cohen, 2009).[234]

In this light, I agree with Cini and Felicetti, who argue that deliberation and participation are 'interwoven normative projects' making public decision-making in liberal democracies both more participatory and deliberative.[235] As I will elaborate below, for Aboriginal people, the ideal of self-government can only be realised when we can engage in both deliberation and participation concerning laws and policies that affect our lives.

## 3.4 Indigenous Self-Government as Participatory Deliberative Democracy

Having discussed the normative features of deliberative and participatory democracy and views that the two theories should be considered separate or complimentary approaches to deepening democracy, I conclude this section by explaining why the ideal of Indigenous self-government entails a participatory deliberative approach to democracy.

Various scholars have articulated what Indigenous self-government entails and means in the context of Australia. O'Faircheallaigh made the following useful contribution:

> Aboriginal self-government is defined here as the creation of a governance sphere, within the Australian polity, in which Aboriginal people and institutions are empowered to govern their communities, to make authoritative decisions, and have access to the resources required to give effect to these decisions. The term does not imply the

[234] Stephen Elstub, Deliberative and Participatory Democracy, in Bächtiger et al (n 11).

[235] Cini and Felicetti (n 156) 7.

> creation of an Aboriginal state that is either sovereign or separate from the rest of Australia. Rather it refers to the establishment of an Aboriginal 'sphere of government' whose political and administrative reach, and whose relationship with other 'spheres of government' (Federal and State), has been agreed through a negotiation based on recognition by the Australian State of the inherent right of Aboriginal people to be self-governing.[236]

For Vivian et al,

> Indigenous self-government refers to overtly political institutions that represent Indigenous constituencies…that respond to a scope of activity set by the (Indigenous) nation/governing body/citizens rather than by external parties; that are accountable to the nation/society/people/community' rather than external actors. These Indigenous institutions 'seek to engage with non-Indigenous governments on a *government-to-government* [emphasis added] basis rather than as stakeholders participating in a consultation'.[237]

The notion of self-government is enveloped in the concept of self-determination.

For example, Articles 18 and 19 of UNDRIP make clear that the FPIC principle means Indigenous people – as either a group, community or through our representative organisations – must have a direct role in both discussing and deciding upon laws and policies that will affect our lives.

> **Article 18**
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

> **Article 19**
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and

[236] Brennan et al (n 90) 159.

[237] Vivian et al (n 89) 225.

informed consent before adopting and implementing legislative or administrative measures that may affect them.[238]

There is no separation or indeed incompatibility between the ideals of deliberation and participation in Indigenous self-determination.

For Aboriginal people, realisation of ideals such as sovereignty, self-government, and self-determination, must include both deliberative *and* participatory roles in decision-making. For Aboriginal people, equating deliberative and participatory approaches to democratic decision-making is generally not problematic. Like scholars such as Cini, Felliciti, and Lafont, we conceive self-government as a 'participatory deliberative approach' to democracy that combines the two approaches.

The tendency of some theorists to not equate deliberation and participation as complimentary parts of a decision-making process is, I believe, illustrative of a general lack of engagement from the fields of deliberative and participatory democracy with the realities of Indigenous people. For Aboriginal people, deliberation on its own and without participation in decision-making is not enough. This position aligns with Pateman's assertion that deliberation alone is 'insufficient'[239]

In many cases, the ideal of self-government for Aboriginal people extends to service delivery and implementation of outcomes. The ideal of self-government for Aboriginal people entails a direct role in developing policies, making decisions and delivering programs and services that would normally be done by government agencies.[240]

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[238] United Nations (n 12).

[239] As Pateman explains, 'Deliberation, discussion, and debate are central to any form of democracy, including participatory democracy, but if deliberation is necessary for democracy it is not sufficient'. See, Pateman (n 223) 8.

[240] A strong example of this conceptualisation of Indigenous self-government is in the area of Aboriginal health and the national network of Indigenous community-controlled health organisations. These health services are community owned and controlled organisations that provide a range of health care services alongside state and private health services to Aboriginal communities in urban, regional, and remote communities. They are active in developing policy and the provision of culturally safe health care to Aboriginal and Torres Strait Islander people. Indigenous health services are seen as fundamental to the principle of self-determination. See, National Aboriginal Community Controlled Health Organisation (NACCHO) (webpage), https://www.naccho.org.au/

In Australia, for Aboriginal people the ideal of self-government as constituting deliberation and participation in policy making was available at the national level through ATSIC.[241] As Behrendt explains, ATSIC was able to develop policy proposals, deliver its own programs, coordinate with other government agencies, and advise the minister for Indigenous affairs. The role of ATSIC was to maximise 'participation' of Aboriginal people in 'the development of self-sufficiency and self-management'.

> That is, ATSIC was tasked to maximise the participation of Aboriginal and Torres Strait Islander peoples in the formulation and implementation of programmes and to provide an effective voice within government.[242]

For Aboriginal people 'participatory deliberative democracy' also entails the notion of 'shared jurisdiction' with the Australian state. As Lane and Hibbard explain, through environmental planning Aboriginal people are often seeking to reconfigure the terms of Indigenous–settler state relations by negotiating the means for 'shared jurisdiction'.

> Shared jurisdiction is enabled by providing for relations between 'equal, self-governing, and co-existing entities, and set up negotiation procedures to work out consensual and mutually binding relations of autonomy and interdependence'. In other words, this (environmental planning) is a project of decolonizing relations with the settler state, enabling self-government, and providing the means for controlling custodial lands and protecting cultural heritage.[243]

In later chapters, I discuss three examples of Aboriginal deliberative and participatory democratic practice within the native title system, which are demonstrative of what I call a 'participatory deliberative approach to native title', including environmental planning (Caring for Country). By insisting we must be able to deliberate and participate in decision-making processes, Indigenous people are engaging in deliberative and participatory democracy 'from below'.[244]

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[241] For a general discussion of ATSIC and the role it performed on behalf of Aboriginal and Torres Strait Islander people in the development of public policy, see Bennett and Pratt (n 53).

[242] Larissa Behrendt, *The Abolition of ATSIC – Implications for Democracy* (Australian National University, November 2005).

[243] Marcus B Lane and Michael Hibbard, 'Doing It for Themselves: Transformative Planning by Indigenous Peoples' (2005) 25(2) *Journal of Planning Education and Research* 172, 174.

[244] Donatella Della Porta and Nicole Doerr 'Protest and Social Movements' in Bächtiger et al (n 6) 403.

As Elstub explains, 'Participatory democracy tells us that citizens should govern, and deliberative democracy tells us decisions should be made through deliberation. Their combination, "participatory deliberative democracy" says that citizens should govern through deliberation'.[245]

> The case is made that in these conceptions the normative and explanatory potential of each approach is diminished without the presence of the other, so it is desirable and coherent to pursue a 'participatory deliberative democracy' in which citizens make collective decisions through deliberation. Participatory democracy can enhance and facilitate the inclusion of all relevant reasons and assent from all affected, as a deliberative interpretation of legitimacy requires. In turn a specific focus on 'deliberative' participation makes participatory democracy less vague, can contribute towards delivering the educative effects that political participation is considered to cultivate in citizens, and help reduce inequalities by promoting public reasoning.[246]

As I have argued, the recognition of native title has enabled more opportunities for deliberation and participation for Aboriginal people in decision-making processes. This in turn has been a catalyst for calls for the Australian state to recognise our right to self-government.[247]

We are not content, as Mansbridge explains, to be passive subjects of legislation or policies passed by politicians in legislatures, but are determined to be active citizens in our own self-governance.[248] Active citizenship entails, as Rubenstein explains, lessening the gap between 'the

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[245] Stephen Elstub 'Deliberation and Participatory Democracy' in ibid 198.

[246] Ibid 188.

[247] As Fischer explains, democratic participation is considered a political virtue unto itself but participatory governance claims to offer even more. Democratic participation can contribute to the development of communicative skills, citizen empowerment, and community capacity building. 'With regard to citizen competence and empowerment, the practices of participatory governance are seen as a specific case of the broader view that participation contributes to human development generally, both intellectual and emotional'. See Fischer, 'Participatory Governance' (n 131).

[248] 'The moral basis for this reason giving process is common to many conceptions of democracy. Persons should be treated not merely as objects of legislation, as passive subjects to be ruled, but as autonomous agents who take part in the governance of their own society, directly or through their representatives. Participants should have equal opportunity to influence the process, have equal resources, and be protected by basic rights. See Mansbridge et al (n 38).

governors and the governed'.[249] This lessening and the sharing of jurisdiction are what constitute Indigenous self-government.

## 3.5 Conclusion

In this section, I examined the key features of both deliberative and participatory democracy. I argued that the ideal of Indigenous self-government is best realised through a 'participatory deliberative approach to native title' which includes both deliberative *and* participatory approaches to deepening democratic engagement.

Because native title enables deliberation and participation, I consider the native title system to be unintended *deliberative democratic space* for Aboriginal people. That is to say, native title has created previously unavailable opportunities for Aboriginal to engage in direct negotiation with governments and others on law and public policy matters.

As should be clear from my discussion, I am engaging with deliberative and participatory democracy theories at a broad scale. I am not concerned with a micro level analysis of a decision-making procedure in a well-designed venue or forum such as a mini-public. Rather, I seek to illustrate how the recognition of native title has created many opportunities for Aboriginal people to engage in the exchange of reasoned arguments and participate in various decision-making processes within the native title system.

The ideal of Indigenous self-government is therefore a much fuller and richer conceptualisation of the ideal of citizen self-government than that understood by deliberative and participatory democrats. However, as I will discuss in the next chapter, the ideals of deliberative and participatory democracy face a particular challenge *under conditions of settler colonialism*.

[249] Kim Rubenstein, 'Power, Control and Citizenship: The Uluru Statement from the Heart as Active Citizenship' (2018) 30(1) *Bond Law Review* 14, 26.

# 4 Participatory Deliberative Democracy Under Conditions of Settler Colonialism

> Australia's founding ideology, one that is unique even among the community of former British colonies, lies in the assumption of the inherent superiority of the colonising culture, and their systems of government and civil society. History paints Indigenous peoples in a savage light, often portrayed as having no concept of civilised customs, societies or governments. This ideology has become familiarly known, since *Mabo v Queensland [No 2]* as the myth of terra nullius – the idea that the land was empty of law, government, property rights and civilised society or culture.[250]

In the previous chapter, I discussed some of the normative features of both deliberative and participatory democracy. I sought to challenge the assertion of some scholars who argue that deliberative and participatory democracy are too separate and should not be equated. I argue that a 'deliberative participatory approach to native title' that includes both deliberation and participation, is much closer to the ideal of Indigenous self-government. That is to say, self-government for Aboriginal people entails both deliberation and participation in decision-making processes.

In this chapter, I provide additional contextual background to my critical analysis of deliberative and participatory democracy within the native title system. In particular, I discuss the effects of settler colonialism on Aboriginal people. As Davidson and Elstub explain, empirical studies of deliberative and participatory democracy should be 'reflexive' and 'context-specific'. All countries, they argue, have 'distinct political cultures and system, which may generate both opportunities and barriers to the institutionalisation of deliberative and participatory processes'.[251]

The purpose of this chapter therefore is to discuss the colonial history of Australia and its effects on Aboriginal people and our place within contemporary Australian democracy.

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[250] Dodson and Strelein (n 139) 827.

[251] The authors provide an overview of the development of deliberative and participatory democracy in the United Kingdom (UK) as a means for conducting a comparative analysis of deliberative and participatory democracy between the UK and other polities. See Stewart Davidson and Stephen Elstub, 'Deliberative and Participatory Democracy in the UK' (2014) 16(3) *The British Journal of Politics and International Relations* 367.

Australia, Canada, New Zealand, and the United States (CANZUS states[252]) are all former British colonies in which Indigenous people were violently disposed of their lands. These are often referred to as 'settler-colonial states'.

Whereas colonialism entails a colonising power occupying Indigenous lands to extract natural resources and exploiting Indigenous labour to do so, and eventually the colonising power exits and leaves, with settler colonialism the colonising power may engage in the extraction of resources and exploitation of Indigenous labour – but rather than leave, it seeks to displace Indigenous people from their own lands. The colonising power remains to institute a new society in place of the pre-existing, Indigenous society. In the words of Tuck and Yang,

> In order for the settlers to make a place their home, they must destroy and disappear the Indigenous peoples that live there.[253]

In a settler-colonial state such as Australia, the effects of colonisation never cease but remain *in situ* in the form of laws, policies, and institutions of the state that continue to dominate and absorb Indigenous people and culture.[254] Political conflict between coloniser and colonised remains an ongoing and permanent feature of Indigenous settler-colonial relations.[255] Political relations between Aboriginal people and the Australian settler state are characterised by the ongoing contestation regarding the legitimacy of Australia's assumed sovereignty.[256]

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[252] The acronym 'CANZUS' refers to the settler-colonial states of Canada, Australia, New Zealand, and the United States. These states all have Indigenous populations highly engaged in domestic and international politics. They demand the settler state to recognise their inherent right to self-determination, sovereignty, and self-government. See Kirsty Gover, 'Settler–State Political Theory, "CANZUS" and the UN Declaration on the Rights of Indigenous Peoples' (2015) 26(2) *European Journal of International Law* 345.

[253] Eve Tuck and K Wayne Yang, 'Decolonization Is Not a Metaphor' (2012) 1(1) *Decolonization: Indigeneity, Education and Society* 1, 6.

[254] Patrick Wolfe, *Settler Colonialism* (A&C Black, 1999); Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387.

[255] Elizabeth Strakosch 'Indigenous–Settler Relationships: Policy, Rights, Reconciliation, and Sovereignty' in Jenny M Lewis and Anne Tiernan, *The Oxford Handbook of Australian Politics* (Oxford University Press, 2021) 336-355.

[256] As Appleby et al explain, settler states view the state's sovereignty as ultimate and exclusive. Indigenous people's claims to sovereignty challenge this position. 'Apparently incompatible sovereignty claims form the core of the constitutional legitimacy crisis. Distinct legal and political systems struggle for political pre-eminence, casting doubt about the legitimacy of each.' See Appleby, Levy and Whalan (n 122).

Demands for treaty or treaties, formal apologies, compensation, and greater political empowerment and other contested matters feature prominently and consistently in political deliberation between Aboriginal people and the Australian state.

According to Jorge Valadez democratic societies founded upon settler colonialism and the displacement of Indigenous peoples, deep disagreement manifests in conflicts over political representation, land and natural resources, education and social policies, and the demand from Indigenous people for self-determination. [257]

The objective of this chapter addresses a concern raised by both Fung and Bashir – that advocates of deliberative and participatory democracy tend to assume deliberation and participation under 'highly favourable conditions', rather than 'sub-optimal circumstances'[258] and do not fully appreciate the effects of settler colonialism.[259]

I begin this chapter with a discussion of international laws that enabled Britain to claim sovereignty over Australia based on 'discovery' (doctrine of discovery) and then settlement (doctrine of *terra nullius*).[260] These 'acts of state' under international law of the time allowed for the 'lawful' dispossession of Aboriginal people from their lands. I then discuss the ambiguous citizenship status of Aboriginal people in the first fifty years of colonisation, in which the legal status of Aboriginal people was often indeterminate. That is to say, Aboriginal people were considered neither sovereign people nor British subjects amenable to British law. I then discuss the effects of settler colonialism on Aboriginal people up to time of the *Mabo* decision.

I conclude the chapter by arguing that rather than being a relic of the past, the legacy of colonisation continues to exclude Aboriginal people within Australian democracy.

I now turn to discuss the laws of colonialism.

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[257] Valadez, *Deliberative Democracy, Political Legitimacy, and Self Determination in Multicultural Societies* (n 123) 1.

[258] Fung (n 191) 398.

[259] Bashir (n 9).

[260] For the sake of simplicity, I use the term Australia in both pre and post colonisation contexts in reference to the territory now known as Australia, rather than its various designations pre-British colonisation including *Terra Australis*, New Holland, and the colony of New South Wales.

## 4.1 Law of Colonialism

In this section, I discuss the 'law of colonialism'. As Miller explains, the principle in international law that Indigenous Peoples and Nations did not and do not own the full title to their lands is still the law in most countries today.[261]

Law has and continues to cause immense harm to Indigenous people in other settler-colonial states such as Australia. Therefore, any discussion of the contemporary political status of Aboriginal people in Australia must acknowledge the 'colonising power of settler law'. [262]

The role of early international law and theories of settler colonialism are a major field of scholarship in probing our understanding of the contemporary political and legal claims of Indigenous people in states such as Australia, New Zealand, Canada, and the United States that were colonised by Britain.[263]

Much of the information in this chapter may be familiar to those with knowledge of settler colonialism. However, for scholars of deliberative and participatory democracy, an understanding of how Aboriginal people came to hold no rights whatsoever to their traditional lands despite never ceding sovereignty to British and later colonial and Australian authorities, may help to explain why the ideals of deliberative democracy are difficult to realise for Aboriginal people.

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[261] Robert J Miller, 'The Doctrine of Discovery: The International Law of Colonialism' (2019) 5(1) *The Indigenous Peoples' Journal of Law, Culture & Resistance* 39.

[262] Although concerning colonisation of the Americas, Robertson explains the role of law in dispossessing Indigenous people of their lands, which is applicable to the Australian context. 'The discovery of the Americas forced Europeans to adapt their traditional worldview to the Columbian (Christopher Columbus) landfall. For political and cultural reasons, the intellectual structure they ultimately applied to define the terms of their relationship to this "new world" was legal. Over a succession of generations, Europeans devised rules intended to justify the dispossession and subjugation of the native peoples of the Western Hemisphere. Of these rules the most fundamental were those governing the ownership of land'. See Lindsay G Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford University Press, Incorporated, 2005) ix.

[263] Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 254); Nakata and Maddison (n 54); Jeff Corntassel, 'Life Beyond the State: Regenerating Indigenous International Relations and Everyday Challenges to Settler Colonialism' (2021) 2021(1) *Anarchist Developments in Cultural Studies* 71.

Law is often thought of as virtuous given it seeks to address fundamental questions of natural justice and provide a framework for harmonious social relations between people. However, as Anghie explains, there is a symbiotic relationship between law and colonialism.

> My broad argument is that colonialism was central to the constitution of international law in that many of the basic doctrines of international law including, most importantly, sovereignty doctrine, were forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation.[264]

Law, firstly international, then British, and later, colonial, enabled the 'legal' acquisition of Aboriginal lands. As legal scholar PG McHugh explains, legalism shaped Britain's engagement with non-Christian societies and how it came to exercise *imperium through its own laws* over Indigenous people's territories and, over time, to pacify and govern Indigenous peoples.[265]

Law, from the perspective of Aboriginal people, has been a tool to legitimate past and present-day acts of discrimination and injustice. The two colonial legal doctrines that loom large, historically and in present-day relations between Aboriginal people and the Australian state, are the doctrines of *discovery* and *terra nullius*.[266]

In the *Mabo* decision, Justices Deane and Gaudron acknowledged legalism's role in the dispossession of Aboriginal people from their lands:

> Inevitably, one is compelled to acknowledge the role played, in the dispossession and oppression of the Aborigines, by the two propositions that the territory of New South Wales was, in 1788, terra nullius in the sense of unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants. Those propositions provided a legal basis for and justification of the dispossession. They constituted the legal context of the acts done to enforce it and, while accepted,

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[264] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004) 3.

[265] McHugh (n 27) 2-3.

[266] *Mabo v State of Queensland (No 2) HCA 23 (1992) 175 CLR 1* (n 22) per Deane and Gaudron JJ.

rendered unlawful acts done by the Aboriginal inhabitants to protect traditional occupation or use.[267]

## 4.2 Doctrine of Discovery

The doctrine of discovery was used by European nations to colonise the so-called 'New World' between the 15th and 19th Centuries, although its roots stretch back to 1096.[268] The doctrine is considered one of the earliest forms of international law giving European explorers the right to claim territories they 'discovered'.[269] While it provided legal guidance on the discovery and acquisition of new lands, the doctrine also helped the colonising European nations to have their claims recognised by international law and respected by other countries. That is, the doctrine helped to regulate competition between European nations to avoid any potential conflict.[270]

The origins of the doctrine lay with the Catholic Church and its belief Christians had a divine duty to convert heathens to Christianity. It was believed that the Pope exercised universal jurisdiction by virtue of his divine mission to spread Christianity. This included appropriating their lands if necessary.[271] Consequently, the rulers of Europe relied upon the Pope's authority to legitimise their invasions of 'heathen territories' to expand the Christian world by conquest.

Inherent to the doctrine of discovery was a belief that Christians and Europeans possessed religious, cultural, and racial superiority over non-Christians ('infidels') who lacked lawful *dominium*, sovereignty, and property rights'.[272] Papal bulls – the written declarations issued by the Church or Pope of the day – provided guidance to European nations as to where they could lawfully discover new territories. For example, Pope Alexander VI issues three Papal Bull dividing the world into Spanish and Portuguese spheres.[273] The issuing of revised papal bulls could expand the scope of the doctrine at a given point in time making it a somewhat arbitrary legal instrument.[274]

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[267] Ibid.

[268] Miller (n 261).

[269] Robert J Miller, Jacinta Ruru, Larissa Behrendt and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010) 9.

[270] Ibid 9.

[271] S James Anaya, *Indigenous People in International Law* (Oxford University Press, 3rd ed., 2004) 16.

[272] Miller et al (n 269) 9.

[273] Miller (n 261) 37.

[274] Miller et al (n 269) 11.

However, concern about the use of the doctrine compelled Spanish religious and legal figures to confront questions about the moral and legal legitimacy of papal authority.[275]

As Miller et al explain, Spanish theologians, Franciscus de Vitoria and Bartolomé de la Casas, were highly influential figures in the development of 'divine law' that blended law and theology, which in turn provided the legal criteria for the acquisition of native lands.[276] However, de Vitoria was of the view that Indigenous people held title to their lands because they were '…free men and the true owners of the lands they possessed under their natural law rights'. As such, he did not believe the Catholic Church held temporal jurisdiction over the whole world as sovereignty and dominium over land were based on natural or human law.[277]

For de Vitoria, native people such as those in the Americas – despite being non-Christians – nonetheless possessed the right to property regardless of their lack of faith. The 'right of discovery' was therefore not applicable in areas of the Americas that were already legitimately occupied, and thus possessed by native people.[278] Like de Vitoria, de la Casas argued that by recognising Indigenous people's essential humanity, European nations were bound to respect native people's autonomy and entitlement to land.[279]

As Anaya explains, a century later, Dutch jurist Hugo Grotius would express a similar view. Like de la Casas and de Vitoria, Grotius believed native peoples possessed an essential humanity that they shared with Europeans, and as such were entitled to the same rights as Europeans. Additionally, Grotius placed greater emphasis on occupancy rather than discovery as the basis for any discussion on the issue of sovereignty and property rights.[280]

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[275] Ibid 13.

[276] Anaya (n 271) 16.

[277] Cited in Miller et al (n 269) 14. However, de Vitoria also believed that conquering native peoples was justified if they violated principles of European natural law. His theories stated that if infidels were to prevent the Spanish from exercising natural law rights, then Spain was obliged to protect its own rights and 'defend the faith'. So, at a cursory level, it appears de Vitoria's theories protected the rights of Indigenous people, but his theories also strengthened European claims to Indigenous territories by providing a legal rationale – not an arbitrary religious prerogative – for claiming Indigenous lands. De Vitoria's theories provided only limited recognition of Indigenous people rights and enabled – lawfully – Spain's natural law rights to supersede native peoples' rights if need be.

[278] Giovanni Lista, '"No More Occasion for Puffendorf nor Hugo Grotius": The Spanish Rights of Possession in America and the Darien Venture (1698–1701)' (2021) 47(4) *History of European Ideas* 543.

[279] Anaya (n 271) 16.

[280] As Anaya explains, Grotius in his book, *On the Law of War and Peace* (1625), rejected the premise that title to land could be acquired upon discovery even when those land were already occupied by humans. Treaties, Grotius

Nonetheless, as European states undertook journeys to the New World, the doctrine of discovery and its inherent bias toward ideas of European religious, cultural, and racial superiority and pre-eminence, provided the legal means for these states to acquire lands and property and exercise governmental rights over Indigenous peoples.[281]

Under international law during the 18th Century at the time Australia was 'discovered', the doctrine of discovery defined three ways European states could lawfully claim new territories: conquest, cession (treaty), or occupation.[282] Under the first two methods (conquest, cession), the existing laws of the people in question remained in force until modified by colonial prerogative. The third method, occupation, was deemed lawful due to the land being uninhabited and upon acquisition, and so British law came into effect.

In his lead judgment in *Mabo*, Justice Brennan detailed the principles of international law the British applied in claiming a territory already occupied by inhabitants deemed to have no recognisable political organisation and therefore, sovereignty:

> The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited. As among themselves, the European nations parcelled out the territories newly discovered to the sovereigns of the respective discoverers, provided the discovery was confirmed by occupation and provided the indigenous inhabitants were not organized in a society that was united permanently for political action.[283]

Some scholars argued that Australia could be classified as having been acquired by *conquest* due to the widespread use of violence by British colonisers because of the strong and persistent resistance from Aboriginal people to dispossession. As Cassidy explains, despite the negative connotations of the term 'conquest', it has positive ramifications for Aboriginal peoples, at least in international law.

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explained, are a natural law right to all people – including non-Christians or as he described them, '…strangers to the true religion'. Ibid 19.

[281] Miller et al (n 269) 2.

[282] Bain Attwood, *Possession: Batman's Treaty and the Matter of History* (The Miegunyah Press, 2009) 75.; Bain Attwood, 'Law, History and Power: The British Treatment of Aboriginal Rights in Land in New South Wales' (2014) 42(1) *The Journal of Imperial and Commonwealth History* 171, 173.

[283] *Mabo and Others v Queensland* (No. 2) [1992] HCA 23; 175 CLR 1, 33.

> The classification of the acquisition of the Australian Continent continues to be a matter of great importance to the Aboriginal peoples of Australia. It continues to determine their rights to land, their personal status as 'British subjects' or aliens, and whether they can be considered sovereign nations either domestically or internationally. Ironically, had the acquisition of Australia been classified as a 'conquest' and the Aboriginal peoples of Australia regarded as 'conquered' then, despite the negative connotations seeming to flow from these terms, they might historically have been considerably better served.[284]

Cassidy argues that under international law at the time, 'conquest' did not necessarily mean the extinguishment of pre-existing customary law, nor Aboriginal customary rights. Thus, conquest would have provided an alternative ground for recognising Aboriginal rights and the recognition of Aboriginal people as sovereign *politiques* under international law.[285]

The 2015 Inquiry into the *Native Title Act 1993* by the ALRC also highlighted the importance in distinction between 'conquered' and 'settled' for the recognition of Indigenous customary law. In their report, the ALRC explain that in territories acquired by conquest, local laws remained intact, unless found to be repugnant to the common law (*malum in se*). At the time of the acquisition of New South Wales, the rule for conquered colonies was that local laws remained in place until modified. This rule included the presumption that pre-existing property rights were to be respected by the conquering sovereign (doctrine of continuity).

> Had Australia been treated as a 'conquered' colony, Aboriginal customary laws, to the extent that they had not been expressly abrogated, would presumably have been recognised, at least in their application to Aborigines. The recognition of Aboriginal customary laws now, it has therefore been argued, depends at least in part on a reassessment of the initial classification of Australia for the purposes of the application of law. The Commission has received several submissions arguing that the 'settled' colony notion should be rejected in the strongest terms as an initial step in its inquiry.[286]

As Irene Watson explains, colonisation was not happenstance, but a 'global colonial project' that devastated First Nations people and their territories in different parts of the world. Colonisation

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[284] Julie Cassidy, 'The Impact of the Conquered/Settled Distinction Regarding the Acquisition of Sovereignty in Australia' (2004) 8 *Southern Cross University Law Review* 50, 3.

[285] Cassidy (n 284).

[286] Australian Law Reform Commission (ALRC) (n 28) 63.

was the 'deliberate' taking of Indigenous people's territories – by force and gradual encroachment – to secure land and resources and the exercise of power. Laws, legal structures, and actual physical violence were necessary to subjugate Indigenous people. Colonising states such as Britain deployed the same techniques repeatedly to appropriate Indigenous lands. Central to this project was the application of the doctrines of *discovery* and *terra nullius* to justify dispossession and genocide of First Nations people.[287]

Though these doctrines have their roots in centuries past, their effects remain relevant to the present-day political struggles of Indigenous people, globally.

In May 2012, the 11th session of the United Nations Permanent Forum on Indigenous Issues (UNPFII) called on governments to re-examine their constitutional arrangements and restore the 'First Nation' status to their Indigenous peoples.[288] It also called on the Catholic Church to denounce the doctrine of discovery as the 'shameful' root of the humiliation and marginalisation of Indigenous people, which continues today.[289]

In November 2016, a ritual burning of the Doctrine of Discovery took place at the Oceti Sakowin Camp in North Dakota as part of the Standing Rock Sioux Tribe protest against the construction of an oil pipeline they claim would contaminate drinking water on their reservation and pollute downstream waterways.[290] And in July 2022, during a visit to Canada to formally apologise for the role of the Catholic Church in the abuse of children in residential schools, Pope Francis faced protests and demands from First Nations people for the Church to also rescind the doctrine of discovery.[291]

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[287] Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 5.

[288] 'Forum Speakers Say "Doctrine of Discovery" Shameful Root of Today's Indigenous Oppression, Remnants Still Evident in Many Constitutions Must Be Removed' <https://www.un.org/press/en/2012/hr5089.doc.htm>.

[289] Ibid.

[290] Baron Pineda, 'Indigenous Pan-Americanism: Contesting Settler Colonialism and the Doctrine of Discovery at the UN Permanent Forum on Indigenous Issues' (2017) 69(4) *American Quarterly* 823, 823.

[291] In July 2022 during a visit to Canada, Pope Francis was met by First Nations groups protesting at a church in Quebec in which they held a banner with the words' Rescind the Doctrine'. News reports claim the Vatican and Canadian Catholic bishops had begun work on a statement to formally reject the doctrine's tradition of legal reasoning. Canadian Broadcasting Corporation, 'Pope Faces Calls to Renounce the Doctrine of Discovery at the Heart of Colonialism | CBC Radio' (online, 26 July 2022) <https://www.cbc.ca/radio/asithappens/as-it-happens-the-tuesday-edition-1.6532503/pope-faces-calls-to-renounce-the-doctrine-of-discovery-at-the-heart-of-colonialism-1.6532787>.

What is important about the doctrine of discovery to present-day relations between Aboriginal people and the state of Australia, is that at the time Britain gave no thought to the possibility that Aboriginal people held some form of existing sovereignty over their lands under the notion of *natural law*. And while the majority of the High Court in the *Mabo* decision acknowledged *terra nullius* was clearly wrong – legally and morally – as the basis for the dispossession of Aboriginal people, the original 'acquisition of sovereignty' by the British however, was deemed an 'act of state' and therefore 'non-justiciable' within an Australian court. The decision was made that the effects of British colonisation cannot, therefore, be undone by an Australian court.

As historian Henry Reynolds explains, the non-justiciable nature of a sovereign state annexing a territory is considered to be beyond the reach of a municipal court. The prerogative powers of the sovereign have been established in British constitutional theory and affirmed in Australia case law in *Coe v Commonwealth*[292] and again in the *Mabo* decision. As Reynolds states, '[s]uch a doctrine may well make life easier for the judiciary. It makes it very hard however, for anyone questioning the legality of the British annexation of Australia.'[293]

Because recognition of sovereignty remains an important legal and political claim for Aboriginal people, the resolution of this matter must be conducted through political negotiation. As Kilduff and Wood explain, as a consequence of *Mabo,* 'surely legal notions such as the assertions of sovereignty which presumed the validity of the doctrine (of discovery) must also come into question'. The notion of sovereignty is, they argue, 'primed for re-examination in the domestic plane' because domestic courts do not have jurisdiction over matters of state.[294]

With the High Court and Parliament's acceptance of *terra nullius* as legal fiction, Australia has a 'gap in the common law as to how the territory was first lawfully acquired by the British and thus the legality of its (and its successors') claims of sovereignty'.[295]

> As a question of fact, the Australian continent was clearly occupied when the British first arrived, and this appears to have been evident to everyone except for Anglo-Australian law. As a question of law, however, the unresolved Anglo-Australian claims over land

[292] *Coe v Commonwealth [1979] HCA 68* (High Court of Australia, 5 April 1979).

[293] Henry Reynolds, *Aboriginal Sovereignty: Reflections on Race, State, and Nation* (Allen & Unwin, 1996) 4.

[294] Peter Kilduff and Asmi Wood, 'Determining Sovereignty: Through Law? Or a Political Option?' (2021) 50(3) *Australian Bar Review* 23, 486.

[295] Ibid.

> and waters still remain an outstanding matter for resolution between the parties, through negotiation, inter alia the outcomes of which, can be formalised in a treaty.[296]

Likewise, Simpson accuses the High Court in the *Mabo* decision of 'doctrinal inconsistency'.

> However, while the twin pressures of accepted social history and international law obliged the Court to dispose of terra nullius (thereby rejecting strong judicial precedent), political exigencies forced it to break the logic of the legal argument following from this at a critical point. This occurred when the Court refused to abide by the implications of its own arguments, and find that Australia was conquered territory. The result was doctrinal inconsistency. More specifically, the High Court appears to have developed a theory of acquisition at international law that is politically expedient but ultimately indefensible.[297]

Clearly then, the matter of sovereignty must be resolved through negotiation of a treaty, something Australia at least at the national level of politics, has thus far avoided. It is also one of the most difficult forms of negotiation for Indigenous peoples in settler-colonial settings.

I now turn to discuss the doctrine of *terra nullius.*

## 4.3 Doctrine of terra nullius

> From the earliest years of settlement the colonists faced the inescapable fact that the Aborigines were in possession of the land. They quickly came to appreciate that the various tribal groupings lived in clearly defined territories and that they had a firm sense of possession. 'Strange as it may appear', David Collins noted in 1791, 'they also have their real estates'.[298]

While Britain and other European nations used the doctrine of discovery to claim various parts of the New World, the doctrine of *terra nullius* has arguably had a unique role in the colonisation of Australia.

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[296] Ibid 487.

[297] Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (n 31) 197.

[298] Reynolds, 'The *Mabo* Judgement in the Light of Imperial Land Policy' (n 324) 29.

The term *terra nullius* is a Latin phrase meaning a land that is vacant or empty. As Miller et al explain,

> Under this element, if lands were not occupied by any person or nation they were available for Euro-American claims. If lands or islands are truly empty this argument makes some sense. But Euro-Americans applied this element to lands that were actually occupied by Indigenous societies and governments if they were not being used in a manner that Euro-American legal systems approved. In that case, the lands were considered legally 'empty' and available to claim.[299]

The doctrine of *terra nullius* is what allowed British settlers to dispossess Aboriginal from their lands, in the words of Justice Brennan, 'parcel by parcel'.[300] In designating Australia as *terra nullius*, the British erased any property rights Aboriginal people had to their traditional lands.[301] As discussed, under international and British Imperial law of the 18th Century, in a conquered or ceded territory already populated by people, the local laws and any system of property rights were to remain intact unless they were found to be 'repugnant' to the common law. The presumption was that pre-existing property rights and local laws of the people were to be respected by the conquering sovereign until such time that the laws could be modified by colonial prerogative.[302]

However, by being deemed *terra nullius*, from the first stages of the assertion of sovereignty over Australia, the British made it clear that British laws operated over its newly acquired territory. It gave no recognition to the laws of Aboriginal people or recognition of their interests and rights to their land. The concept of *terra nullius* was employed in practice many years

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[299] Miller et al (n 269) 10.

[300] *Mabo v State of Queensland (No 2) HCA 23 (1992) 175 CLR 1* (n 22) per Brennan J.

[301] As Ritter explains, 'The expression "terra nullius" derives from classical Roman law, under which the doctrine of "Occupatio acted to confer title upon the discoverer of an object that was "res nullius", that is, "belonged to nobody". At international law in post-Renaissance Europe, this doctrine was conveniently and analogously applied to the acquisition of territory by states. Territory that was "res nullius" could be lawfully acquired by a state through simple occupations and was described to that effect as "terra nullius". Ritter argues terra nullius was doctrinally irrelevant to colonisation and only became relevant as a convenient legal explanation for why Indigenous interests in land were not recognised after Milirrpum v Nabalco case demonstrated Aboriginal people did in fact possess a system of law in relation to land. Nonetheless, terra nullius has been a powerful mnemonic device – in rhetoric and legalism – in the story of Australia to explain the dispossession of Aboriginal people. See, Ritter, 'The Rejection of Terra Nullius in Mabo: A Critical Analysis' (n 24).

[302] Australian Law Reform Commission (ALRC) (n 28) 62-63.

before it formally became part of the Australian legal system. Aboriginal people had no legal standing to contest it.

While the term *terra nullius* has become synonymous with *Mabo* and native title, Ritter argues it was the British common law doctrine of 'desert and uncultivated' (similar to the international law doctrine of *terra nullius)* – that was relied upon by the British and later colonists to completely ignore the rights of Aboriginal people to their traditional lands.

> The extension of that analogy ('desert and uncultivated') is that the category of land that can be lawfully acquired by 'settlement' under the common law, is the common law equivalent of terra nullius. According to the classic exposition by Blackstone, the only type of land that could be acquired by settlement was land that was found to be 'desert and uncultivated'. Crucially however, just as the expanded doctrine of terra nullius under international law embraced certain inhabited land, so 'desert and uncultivated' land under the common law included land that was inhabited, and on the basis of similar criteria. This judicial categorisation of inhabited land as 'desert and uncultivated' was applied to the Australian colonies.[303]

Attwood argues that suggestions that *terra nullius* (or the common law equivalent) was applied at the very moment of British arrival at Botany Bay, are misguided as the legal doctrine of *terra nullius* was not formulated until the later years of the 19th Century.[304] Kilduff and Wood express a similar view,

> Arguably, an enduring myth is that the British arrived and immediately laid claim to sovereignty from when they first landed at Botany Bay. The emerging truth is that the British did not feel secure (in the new territory) for about half a century, and they asserted exclusive claims only after their military superiority was largely achieved.[305]

Reynolds argues there are two meanings to the term *terra nullius* that complicates its understanding and application. One describes a territory that is devoid of a sovereign that is recognisable to Europeans, such as the presence of a King or Queen or perhaps a group of

[303] Ritter, 'The Rejection of Terra Nullius in Mabo: A Critical Analysis' (n 24) 8.

[304] Attwood, *Possession: Batman's Treaty and the Matter of History* (n 282) 72.

[305] Kilduff and Wood (n 294) 486.

eminent leaders holding decision-making powers. The other is a territory in which people do not own land or that has no land tenure system to regulate ownership.[306]

Additionally, there were two distinct lines of thought regarding the idea of a native people being in 'possession' of land and therefore holding rights to property. One was based on occupation, which meant people were deemed to be in possession by simply being present on the land. Under this category, native people wandering or moving across the land and not having a permanent residence could still be considered as being in 'possession' of their land. The other was the 'cultivation' theory of John Locke that stipulated possession of rights in land could only be recognised where there was clear productive use of the land to support livestock or agriculture.[307]

The effect of *terra nullius* (whether meaning 'desert and uncultivated' 'without sovereign' or 'recognisable system of law') in relation to Australia was to render Aboriginal people with no rights to their traditional lands under the newly established colonial system of law.[308] This seemingly arbitrary decision is perhaps the most consequential result of the 'law of colonisation'. As Hal Wootton who asks, 'How could it be said that people occupying the land in 1788 had no rights?'[309]

This act of designating Australia as *terra nullius* remains a highly contested and unresolved issue in the political struggles between Aboriginal people and the Australian state more than 230 years since colonisation.

It is estimated that at the time Britain annexed Australia, there were some 500 Aboriginal groups or nations.[310] These nations lost all rights in land at the moment of the planting of the British flag and the reading of the declaration asserting British sovereignty. Captain James Cook and later Governor Phillip had instructions to seek the 'consent of the natives', yet neither did so. The rationale for not negotiating a treaty or treaties can be attributed to the discriminatory racial and scientific thinking of Social Darwinism that proclaimed Aboriginal peoples as

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[306] Henry Reynolds, *The Law of the Land* (Penguin Books, 3rd ed. 2003) 15.

[307] Raelene Webb, 'The Birthplace of Native Title - from "Mabo to Akiba"' (2017) 23 *James Cook University Law Review* 31, 32-33.

[308] Miller et al (n 269) 21.

[309] Hal Wootten, 'Mabo and The Lawyers' (1995) 6(3) *The Australian Journal of Anthropology* 116, 122.

[310] See Larissa Behrendt, Aboriginal Australia and Democracy: Old Traditions, New Challenges, in Isakhan and Stockwell (n 1) 148.

'backward people', 'uncivilised' and 'living in a primitive state'. They were deemed as not being in legal possession of the lands they inhabited.[311]

Attwood contends that the legal beginnings of Australia are 'murky'. It was not thoughtful legal and intellectual discourse that informed the British consideration of the legal status of Aboriginal people. Rather it was day to day, on-the-ground encounters with Aboriginal people whom they perceived as being grossly inferior – and therefore not worthy or capable of entering formal agreements, and so 'a treaty was never seriously considered'.[312]

*Terra nullius* was not applied in North America in the period before the British asserted sovereignty over Australia. As Banner explains, Britain had been in North America for two centuries before they reached Australia. By the middle of the 18th Century, imperial policy in North America had turned away from *terra nullius*.[313]

When the British colonised Aotearoa New Zealand a few decades after Australia, they did not treat Aotearoa New Zealand as *terra nullius*. Instead, they signed a treaty (Waitangi) in 1840 explicitly recognising the Māori as owners of the land. British land policy in Australia was different from otherwise similar colonies. The existence of *terra nullius* in Australia is thus something of a puzzle.[314]

Banner argues that at the time Captain James Cook voyaged to Australia in 1770 it was established British policy that land was to be acquired by 'fair purchase only'.

> The Royal Society and the government anticipated that if there really was an inhabited continent in the south Pacific, and if it turned out to be suitable for colonizing, Britain would buy it from the natives, just like it was buying North America. Terra nullius was not a standard feature of colonial land policy.[315]

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311 Miller et al (n 269) 172.

312 Attwood, *Possession: Batman's Treaty and the Matter of History* (n 282) 72.

313 'To be sure, there were advocates of terra nullius in Britain and North America, and settlers trespassed in large numbers on the Indians land. But in the eighteenth century, as a matter of official policy the British acknowledged North American Indians as possessors of property rights in their land'. See Stuart Banner, 'Why Terra Nullius? Anthropology and Property Law in Early Australia' (2005) 23(1) *Law and History Review* 95, 96.

314 Ibid.

315 Ibid 98.

What Banner and others surmise from the records of Cook and botanist Joseph Banks, is that Australia appeared to be 'sparsely populated', and the Aboriginal people encountered 'largely unthreatening', and the territory in question an 'immense tract of land…considerably larger than all of Europe'. As Banner explains, the legal scholar Emmerich de Vattel had reasoned that it was problematic if small societies held claim to large tracts of land – more than 'they would have occasion for' and that they would therefore have 'no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands'. On the descriptions of Cook and Banks, British authorities were given the impression Australia was not simply a large tract of uninhabited land, but an empty continent.[316]

As Simpson explains, the legal effect of not recognising the rights of Aboriginal people to their land became a feature of Australian jurisprudence. In the case of *Cooper v Stuart*[317], the Privy Council reinterpreted Sir William Blackstone's definition of a 'desert and uncultivated' territory by stating that the land could be *practically unoccupied* for the purposes of *terra nullius*.

The case is notable for the phrase, 'without settled inhabitants or settled law' to justify an 'enlarged' meaning of the 'desert and uncultivated' doctrine to deny Aboriginal people as holding rights to their traditional lands despite their physical presence.[318]

> In this way, the people that did inhabit the land were redefined as *physically present but legally irrelevant* [emphasis added] and their history was obliterated. Thus began the series of elisions and slippages that came to characterize Australian judicial pronouncements on acquisition, and to provide the tools for a series of artificial and purely formal reconciliations of law, politics and history.[319]

Reynolds states that either way, under English and international law, Aboriginal people were undoubtedly in possession of their lands. Furthermore, there was no compulsion upon Aboriginal people to 'cultivate their lands' in order to demonstrate possession.

> Clearly a strong case can be argued for the fact that the Aborigines were in possession of their land as that term was understood in both international in English law at the

[316] Ibid 100.

[317] *Cooper v Stuart (1889) 14 App Cas 286.*

[318] Ritter, 'The Rejection of Terra Nullius in Mabo: A Critical Analysis' (n 24).

[319] Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (n 31) 200.

> end of the eighteenth century and the early years of the nineteenth century. To prove possession it was not necessary to enclose and farm the land in the way of Europeans, nor was it necessary to live permanently in one place. The fundamental requirements were to be present on the land and to manifest a will to ownership. Over much of the continent the Aborigines clearly had possession of a character of which the land was capable.[320]

As to why international and English land laws were not applied to Aboriginal people, Reynolds says simply that the laws only applied to the settlers and protecting their right to property from the Crown. 'None of this applied to the Aborigines because they lost all rights to property at the beginning of settlement. In their case, the property law of centuries was suspended while they were dispossessed.'[321]

The absence of agriculture, roads, housing, and towns with trade and commerce, were critical symbols of what the British expected of 'advanced societies' with sophisticated social organisation such as government and institutions. These beliefs arguably doomed Aboriginal societies. By the 1840s, the need for land grew and colonists began to expand their search for land and water for agriculture westward of Port Jackson (Sydney)[322] – and the effects of *terra nullius* would be catastrophic for Aboriginal people.

The granting of land to white settlers without the consent of Aboriginal people set the stage for conflict and frontier violence as settlers encountered more and more Aboriginal groups as they explored beyond Sydney. Settlers proceeded to take the lands of Aboriginal people, viewing them as lacking laws, forms of government, and a recognisable system of land ownership. [323]

Legal scholar Bruce Kercher says many settlers knew that Aboriginal people populated the land around Sydney and there were clear, observable boundaries between individual Aboriginal groups and that certain 'fixed rights' were associated to these land boundaries. Aboriginal

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[320] Reynolds, *The Law of the Land* (n 306) 27.

[321] Ibid.

[322] Drawing on historical record of NSW, Reynolds writes that Governor Phillip estimated there were some 1500 Aboriginal people within a 16 kilometre radius of Port Jackson settlement – more than the number of Europeans on the First Fleet. HRNSW vol. 1, part 2, p.664 cited in ibid 68.

[323] Henry Reynolds, 'Action and Anxiety: The Long History of Settler Protest about the Nature of Australian Colonization' (2014) 4(4) *Settler Colonial Studies* 334, 335.

groups also fought to protect their lands, leading some of the early governors to recognise the moral claims of Aboriginal people to their land.[324]

As Attwood explains, in the first 50 years of colonisation, questions regarding the legal foundations of British claims to possession and the dispossession of Aboriginal people from their lands were unsatisfactory for some settlers.[325] In a series of criminal cases between 1829 and 1841, legal opinion was far from settled as to whether Aboriginal people were British subjects and therefore protected by British and colonial law or, in the absence of a treaty, whether the sovereign rights of Aboriginal should be respected. While the courts had already decided in 1827 that it held jurisdiction in criminal cases involving Aboriginal people and settlers[326], what the cases of *Ballard, Murrell*, and *Bonjon* illustrate is that the legal status of Aboriginal people was far from settled. As Kercher explains in *Bonjon*, Justice Willis expressed a clearly enlightened opinion regarding the rights of Aboriginal people of the time.

> In this instance however the colonists and not the aborigines are the foreigners; the former are exotics, the latter indigenous, the latter the native sovereigns of the soil, the former uninvited intruders...I repeat I am not aware of any express enactment or treaty subjecting the Aborigines of this colony to the English colonial law, and I have shown that the Aborigines cannot be considered as Foreigners in a Kingdom which is their own. From these premises rapidly indeed collected, I am at present strongly led to infer that the Aborigines must be considered and dealt with, until some further provision be made, as distinct, though dependent tribes governed among themselves by their own rude laws and customs.[327]

The period after the 1840s to the beginning of the 20th Century would be characterised by colonial violence toward Aboriginal people as more and more settlers move outward from Sydney in search of land. As McCrae et al explain, the period between 1830 and 1910 came to be known as 'The Killing Times' – an unofficial war between settlers seeking to take possession of Aboriginal lands and Aboriginal people seeking to defend their territories.

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[324] Bruce Kercher, 'Native Title in the Shadows: The Origins of the Myth of Terra Nullius in Early New South Wales Courts', in Gregory Blue, Martin Bunton and Ralph C Croizier (eds), *Colonialism and the Modern World: Selected Studies* (Routledge, 2015) 102.

[325] Bain Attwood, 'Denial in a Settler Society: The Australian Case' (2017) 84 *History Workshop Journal* 24, 25.

[326] R v Lowe [1827] NSWKR 4; [1827] NSWSupC 32.

[327] Bruce Kercher, 'R v Ballard, R v Murrell and R v Bonjon' (1998) 3(3) *Australian Indigenous Law Reporter* 425.

> After the invasion of the coastal areas, the British gradually ventured inland in search of new country for grazing and agriculture. Over the decades from 1830 to 1910, a large proportion of Aboriginal land was taken over, crippling local hunter gather economies. At least 20,000 Aborigines were killed in frontier warfare.[328]

Despite the questionable nature of settlement, British colonisation attained a measure of acceptability through the mere passage of time.[329] In *Attorney-General v Brown*[330] and *Cooper v Stuart*[331] courts confirmed Australia was a *settled colony* and not a ceded or conquered territory. The legal effect of this designation that upon settlement the Crown acquired complete legal title to all lands in the colony on the basis that all lands were relevantly unoccupied the time of its establishment.[332] Dispossession denied Aboriginal groups the ability to live on our lands and sustain ourselves.

> The loss of traditional land was crippling to Aboriginal communities. Only ancestral land was of value to Aboriginal people. One clan's land did not have spiritual and cultural significance to another Aboriginal community. In this way, Aboriginal attachment to land was non-transferable. Not only were Aboriginal communities less capable of surviving in unfamiliar territory, but religious life was seriously impaired or lost.[333]

As Moreton-Robinson states, *terra nullius* is infamous as the original act of theft of Indigenous lands. It provided colonists with a sense of belonging and ownership of land derived from the dispossession of Aboriginal people.[334] The fiction of *terra nullius* would endure as the legal basis for the founding of the Australian state until proven untrue by 1992 *Mabo* decision.[335]

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[328] Grimshaw, Lake, McGrath, and Quartly, *Creating a Nation* (1994), cited in Garth Nettheim and Heather McCrae et al, *Indigenous Legal Issues: Commentary & Materials, 4th Edition* (Thompson Rueters, 2009) 21.

[329] Reynolds, *The Law of the Land* (n 306) 46.

[330] *Attorney-General v Brown [1847] 1 Legge 312.*

[331] *Cooper v Stuart (1889) 14 App Cas 286.*

[332] Anthony Mason, 'The Rights of Indigenous Peoples in Lands Once Part of the Old Dominions of the Crown' (1997) 46(4) *International and Comparative Law Quarterly* 812, 816.

[333] Larissa Behrendt, 'White Picket Fences: Recognizing Aboriginal Property Rights in Australia's Psychological Terra Nullius' (1998) 10(2) *Constitutional Forum* 50, 52.

[334] Moreton-Robinson (n 59) 5.

[335] The assertion that the Mabo decision overturned terra nullius is somewhat contentious. Ritter argues the British never formally invoked it and so its significance in the Mabo judgment is moot. There is no scope for a full discussion, however, what is certainly true is that in public discourse, terra nullius was an established trope often used to both justify and explain how the British came to 'legally' acquire a vast and already occupied territory on the other side of the world. Whether it is legally relevant or not, the perception that Mabo 'overturned' terra nullius has been a catalyst

*Mabo* may have repudiated the use of *terra nullius* in the settlement of Australia, but native title does not recognise other important matters for Aboriginal such as sovereignty and the right to self-government. These elements are absent in the jurisprudence of native title in Australia. As I will discuss in later chapters, these unresolved matters permeate deliberation between Aboriginal people and governments regarding native title.

I now turn to discuss the status of Aboriginal people in post Federation Australia.

## 4.4 Aboriginal People in Post Federation Australian Democracy

With such disregard for the legal rights of Aboriginal people by colonial authorities, it is perhaps no surprise that at the end of the 19th Century when the colonies contemplated federation and the formation of a new nation state – the Commonwealth of Australia – it was not considered necessary to include Aboriginal people in the drafting of the new constitution. As Davis and Brennan explain, 'The creation of a nation in 1901 did not cause Australians to revisit their relationship to the peoples whose lands they had occupied'.[336]

As Sarah Pritchard explains, no Indigenous people appear to have been included in the various constitutional conventions held between 1897 and 1898 leading up to the drafting of *Australia Constitution Act 1900* that eventually led to the formation of the Commonwealth of Australia in 1901. At the conventions 'no delegate appears to have suggested 'even in passing that there might be some national obligation to Australia's earliest inhabitants' and '(t)here was no discussion of their exclusion from the scope of the power, and no acknowledgment of any place for them in the nation created by the Constitution. There appears to be no evidence that Aboriginal or Torres Strait Islander persons participated in the Conventions or played any role in the drafting of the Constitution.'[337]

In the newly formed Commonwealth of Australia, the Constitution left legislative power concerning Aboriginal people with the states – seemingly against the findings of the British

for greater discussion of the need to recognise Indigenous sovereignty, and the rights to self-determination and self-government. See, Ritter, 'The Rejection of Terra Nullius in Mabo: A Critical Analysis' (n 24).

[336] Sean Brennan & Megan Davis, 'First Peoples' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press UK, 1st ed, 2018) 29.

[337] Sarah Pritchard, 'The "Race" Power in Section 51(Xxvi) of the Constitution' (2011) 15(2) *Australian Indigenous Law Review* 14; Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2(1) *Federal Law Review* 17.

House of Commons Select Committee.[338] Section 51(xxvi) of the Constitution, as it stood at Federation, conferred upon the new Commonwealth the power to make laws with respect to 'the people of any race, *other than the aboriginal race* (emphasis added) in any State, for whom it is deemed necessary to make special laws'.[339]

Following Federation, there were several harmful eras of public policy over the lives of Indigenous people: dispossession, protection, and assimilation.[340] Although Aboriginal people were theoretically British subjects after settlement and therefore entitled to the protection of British laws, during the eras of dispossession and protection Aboriginal people were subjected to violence, including slavery and murder, as settlers sought out more land to farm and develop. This violence, known to colonial authorities and the public, went mostly unpunished.

> Depredations and punitive expeditions continued well into this century, especially in northern regions. Aboriginal responses varied with time, place and circumstance, and included reprisals which sometimes led to trials and convictions for acts which Aborigines themselves regarded as fully justified. But trials were rare, compared with the large number of incidents on both sides.[341]

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[338] In 1835, the British House of Commons established a Select Committee on the Aboriginal Tribes (British Settlements) to investigate the mistreatment of Aboriginal people in Australia. In its final report in July 1837, the Committee confirmed that Aboriginal peoples everywhere were being degraded and destroyed by settler violence, alcohol and introduced diseases, and suggested that colonisation could be conducted with less bloodshed and loss of livelihood if the British imperial government took a stronger role in managing things. Only the Crown, it argued, should have the power to purchase or acquire Aboriginal peoples' land and provide protection and religious instruction to Aboriginal people. 'Colonial legislatures should not be trusted with Aboriginal policy matters'. The Report commented, 'Whatever may be the legislative system of any Colony, we therefore advise that, as far as possible, the Aborigines be withdrawn from its control'. See Ann Courthoys and Jessie Mitchell, 'Colonial Self Government', in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 108-131.

[339] In the new Australian Constitution, only two mentions – both discriminatory – are made with regard to Indigenous people. In the first, s51 stated 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to…(xxvi) the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. The second, s127, which stated 'In reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'.

[340] John Gardiner-Garden and Coral Dow, *Overview of Indigenous Affairs: Part 1: 1901 to 1991* (2011) 30; John Gardiner-Garden and Coral Dow, *Overview of Indigenous Affairs: Part 2: 1992 to 2010* (Department of Parliamentary Services, 2011) 28.

[341] Slowly, public and official concerns saw attitudes towards the mistreatment of Aboriginal people change in policy terms to an era of 'protection' from the 1830s. A British parliamentary inquiry around this time recommended

The protection era gave way to an era of 'assimilation' in the early 20th Century, which was characterised by a whole-of-government (national and sub-national governments) collaborating to devise policies to better 'assimilate and absorb' Indigenous people into the general Australian populace as citizens. This period is perhaps most notorious for also including the government program of child removal, placing Indigenous children with non-Indigenous families or institutions in the hope of 'civilising' them.

> The first century and a half of European-Aboriginal relations in Australia can be characterised as a period of dispossession, physical ill-treatment, social disruption, population decline, economic exploitation, codified discrimination, and cultural devastation. The notional citizenship ascribed to the Aboriginal people at the beginning of this period was all but gone by the end of it, and as if to illustrate this point, in every State the law specifically sanctioned the removal of Aboriginal children from their parents.[342]

The children and families subjected to this practice would come to be known as the Stolen Generations and the focus of a national apology in 2008.[343]

During the period of 1901 and 1966, state governments exercised paternalistic control over Aboriginal people's lives.

> Although the legislation in this 'period of assimilation' varied between states, in every jurisdiction it tended to touch on similar areas (where an Aboriginal person could live, their access to alcohol, their wage rate, their access to their own wages, and whom they could marry) and laws intended for the 'protection' or 'welfare' of Aboriginals became laws which oppressed and alienated indigenous people.[344]

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missionaries for Aboriginal people be established and protectors appointed to protect Aboriginal people from abuse and to manage many aspects of their lives. Australian Law Reform Commission (ALRC), *Recognition of Aboriginal Customary Laws* (No 31, Australian Law Reform Commission, 1986).

[342] John Gardiner-Garden, *From Dispossession to Reconciliation* (Department of Parliamentary Library, 1999) 68, 2.

[343] The National Inquiry into the Stolen Generations (and the *Bringing Them Home* report, 1997) was a result of the Royal Commission into Aboriginal Deaths in Custody (1991), which found that a high proportion of Indigenous people who died in custody had been removed as children. See Larissa Behrendt et al, *Aboriginal and Torres Strait Islander Legal Relations* (Oxford University Press, 2nd edition, 2018) 592-604.

[344] Gardiner-Garden, 'From Dispossession to Reconciliation' (n 342) 2.

Throughout the period of assimilation, Commonwealth legislation supported discrimination against Aboriginal people in such areas as voting rights, wage entitlements and social security eligibility. However, public concern about the harm assimilation policy was causing and the denial of civil rights reflected poorly on Australia's international image.[345]

This combination of domestic and international criticism compelled the Australian government to reform matters. In the early 1960s, it lifted restrictions on eligibility for benefits, extending the federal franchise, and removing various legal disabilities. The states found themselves under pressure to follow suit and most discriminatory state legislation was soon repealed.[346] It would also be influential in calls for constitutional change.[347]

Then followed the 1967 referendum which resulted in alterations to sections 51[xxvi] and 127 of the Constitution, Aboriginal people were formally counted in the census and the federal government now had powers to make laws in relation to Aboriginal people.[348] Support for the proposed amendments received a 'yes' vote of 90.77% by a majority of voters in all states and territories was seen as a turning point in relations between Indigenous and non-Indigenous people in Australia.[349]

However, the sense of change did not last. Faith Bandler, a civil rights activist of South Sea Islander heritage who played a leadership role in the referendum, wrote in 1989 that despite

[345] The 1930s saw the emergence of an Aboriginal activist movement and a series of initiatives to bring public and political attention to the situation of Aboriginal people including the first National Day of Mourning in 1938. A leading figure at this time was Yorta Yorta man William Cooper, notable for establishing the Australian Aborigines' League and petitioning King George V to intervene in the affairs of the Australian government to 'prevent the extinction of the Aboriginal race, provide for better conditions, and enable Aboriginal people to be become members of parliament'. See Bain Attwood, *William Cooper: An Aboriginal Life Story* (University Publishing, 1st ed., 2021) ('*William Cooper*'); Russell McGregor, 'Protest and Progress: Aboriginal Activism in the 1930s' (1993) 25(101) *Australian Historical Studies* 555.

[346] Gardiner-Garden, 'From Dispossession to Reconciliation' (n 342) 3-4.

[347] Attwood, *The 1967 Referendum: Race, Power and the Australian Constitution* (n 68) 49.

[348] Attwood, *The 1967 Referendum: Race, Power and the Australian Constitution* (n 68); Gardiner-Garden, 'The Origin of Commonwealth Involvement in Indigenous Affairs and the 1967 Referendum' (n 68).

[349] Gardiner-Garden, 'The Origin of Commonwealth Involvement in Indigenous Affairs and the 1967 Referendum' (n 68).

the momentous feeling after the referendum, in the years that followed, Aboriginal people had cause to ask if anything meaningful had been achieved at all.[350]

Between 1972 and 1996, at the national level, there was a commitment to supporting Indigenous self-determination. However, after the 1996 election of the conservative John Howard led Liberal–National Party coalition government, self-determination was replaced by 'practical reconciliation' as the overarching policy agenda.[351]

Much of this chapter has been one of looking back at Australian legal and political history. However, the legacy of this past remains highly relevant to my discussion of native title and deliberative and participatory democracy. The arbitrary use of law and legal processes by colonial and Australian governments has created a deep distrust amongst Aboriginal people towards the Australian state and whether it will act in our interests and protect us – legally and physically – from governmental action.

What I intend to illustrate is that the history of violence, harmful policies, government neglect and legal and political exclusion in Australia since 1788 provides for a very distinct and highly challenging set of political circumstances. The situation is described as a 'uniquely tangled politics' which creates what I term 'deliberative and participatory democracy under conditions of settler colonialism', which I now turn to discuss.

## 4.5 Participatory Deliberative Democracy Under Conditions of Settler Colonialism

In the previous chapter in which I examined the theories of deliberative and participatory democracy, I disagreed with the contention of some scholars that deliberative and participatory democracy should be treated as two distinct models of democracy that are not to be equated.

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[350] Attwood, *The 1967 Referendum: Race, Power and the Australian Constitution* (n 54) 101; Faith Bandler, *Turning the Tide: A Personal History of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders* (Aboriginal Studies Press, 1989).

[351] In March 1996, John Howard led the Liberal–National Party coalition to defeat Paul Keating and the Australian Labor Party, to become Prime Minister. His new coalition government immediately set about unwinding many of the progressive steps achieved during the Hawke/Keating era. The biggest was a shift to 'practical reconciliation' with a focus on education and economic issues rather than what Howard saw as the symbolism of a 'rights based' approach to reconciliation. Self-determination and strengthening native title rights was now off the agenda and momentum on these issues faltered. See, Gardiner-Garden and Dow (n 340).

I argued that this separation of deliberation and participation is incompatible with the ideal of Indigenous self-government and the principle of FPIC[352], which is inherently *deliberative and participatory*.

I then offered my own conceptualisation of Indigenous self-government as being closer to what some theorists describe as 'participatory deliberative democracy'.

I want to conclude this chapter with a discussion of another characteristic unique to Australia that I believe greatly affects the realisation of deliberative and participatory democracy for Aboriginal people: settler colonialism. This is because settler colonialism produces a set of political issues that are much more complex than normal public policy disputes – although disagreement over public policy is a key feature of political disagreement between Aboriginal people and the Australian state.

However, the issues that are reflective of settler colonialism are complex *constitutional* matters that are entwined with acts of historical injustice, colonisation, dispossession, assimilation,

[352] 'Firstly, "free" should imply no coercion, intimidation or manipulation. Secondly, "prior" should imply that consent must be sought sufficiently in advance of any authorisation or commencement of activities, and that the relevant agents should guarantee enough time for the indigenous consultation/consensus processes to take place. Thirdly, "informed" implies that indigenous peoples should receive satisfactory information in relation to certain key areas, including the nature, size, pace, reversibility and scope of the proposed project, the reasons for launching it, its duration, and a preliminary assessment of its economic, social, cultural and environmental impact'. Mauro Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16(1) *The International Journal of Human Rights* 1; United Nations (n 12).

massacres[353], the forced removal of children (The Stolen Generations)[354], wage theft[355], enslavement and indentured labour[356] and destruction of cultural heritage.[357]

Yet calls by Aboriginal and Torres Strait Islander people for Australia to properly address historical injustice matters can often prompt negative responses from sections of non-Indigenous Australia including suggestions that Aboriginal people should 'get over it'[358] and move on. Also, that legal or political remedies to address for past injustices are a form of 'special treatment' that is unnecessary given that all Australians – including Indigenous Australians – are now treated 'equally'. [359]

> Aboriginals should be treated as equals, same laws, same economics, the same everything. This emphasis on 'equity' can be interpreted within the context of the

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[353] See University of Newcastle, Colonial Frontier Massacres in Australia 1788-1930 (Webpage), https://c21ch.newcastle.edu.au/colonialmassacres/. Also Lorena Allam and Nick Evershed, The Killing Times: The massacres of Aboriginal people Australia must confront (Webpage), *The Guardian*, https://www.theguardian.com/australia-news/2019/mar/04/the-killing-times-the-massacres-of-aboriginal-people-australia-must-confront.

[354] *Bringing Them Home* (1997), Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Commonwealth of Australia.

[355] Rosalind Kidd, 'Hard Labour, Stolen Wages – National Report on Stolen Wages' (2007) 11(3) *Australian Indigenous Law Reporter* 2. See also Standing Committee on Legal and Constitutional Affairs, The Senate, Unfinished business: Indigenous stolen wages report, December 2006, Parliament House, Canberra.

[356] Anthony explains that in northern Australia, pastoralists exercised an inordinate amount of power over the lives of Aboriginal cattlemen and their families: 'On northern frontiers, Australian colonisers assumed local powers over Aboriginal people. These colonisers were almost invariably pastoralists. The *Adelaide Advertiser* reported in 1904, "As the settlement extends farther out the country formerly occupied exclusively by the natives passes into the hands of the pastoralists". The pastoralists used their powers to take Aboriginal land and exploit their labour. Pastoralists' direct control over Aboriginal people was a counterpoint to the weak centralised authority that rested in the hands of the colonial government in the nineteenth century and the Aboriginal Chief Protector in the twentieth century'. See, Thalia Anthony, 'Criminal Justice and Transgression on Northern Australian Cattle Stations' in Ingereth Macfarlane and Mark Hannah (eds), *Transgressions: Critical Australian Indigenous Histories* (ANU Press, 1st ed., 2007) 39.

[357] Never Again, Inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia, Joint Standing Committee on Northern Australia, Interim Report, December 2020, Commonwealth of Australia.

[358] See Amy McQuire, 'Australia Day: Indigenous people are told to 'get over it'. It's impossible', (Webpage), https://www.theguardian.com/commentisfree/2014/jan/27/australia-day-indigenous-people-are-told-to-get-over-it-its-impossible. See also Nakkiah Lui, Australia Day is a time for mourning, not celebration, (Webpage) https://www.theguardian.com/commentisfree/2014/jan/26/australia-day-is-a-time-for-mourning-not-celebration.

[359] Anne Pedersen et al, 'Attitudes toward Indigenous Australians: The Issue of "Special Treatment"' (2006) 41(2) *Australian Psychologist* 85.

> modern prejudice construct. One of the major tenets of modern prejudice is that the target group is seen to have the right to opportunities, but that it wants more rights than anybody else.[360]

The resolution of these matters requires the Australian state to recognise Aboriginal sovereignty, negotiation of a treaty or treaties, and making space for Indigenous self-government. These unresolved matters form what is commonly referred to as 'unfinished business'[361] between Aboriginal and Torres Strait Islander people and the Australian state.

Yet as Strakosch explains, the resolution of 'unfinished business' tends to avoid questions of institutional reform, and instead focuses on social and attitudinal change (such as reconciliation). Australia, uniquely among the Anglophone settler colonies, has so far refused to engage with the question of sovereignty. Unlike New Zealand, the United States, and Canada, it has not entered into treaties or acknowledged the political existence of Aboriginal and Torres Strait Islander societies.[362] And because there is limited space for Indigenous self-government, relations between Aboriginal and Torres Strait Islander and non-Indigenous Australia remain complex, fraught, and contested.[363]

As Ivison explains, the past affects the present.

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[360] Anne Pedersen et al, 'Attitudes toward Aboriginal Australians in City and Country Settings' (2000) 35(2) *Australian Psychologist* 109, 115.

[361] The term 'unfinished business' is one that is widely used by Aboriginal and Torres Strait Islander people in relation to the many unresolved issues that still affect relations between Indigenous and non-Indigenous Australians and the state. It is recognition that while relations between Indigenous and non-Indigenous Australia have improved through the recognition of native title, the national apology to the Stolen Generations, and Closing the Gap on Indigenous health inequality, matters such as treaty, sovereignty and self-government remain unresolved and require a commitment by the state to reach a satisfactory resolution with Aboriginal and Torres Strait Islander people. For an overview, see Patrick Dodson, 'Beyond the Mourning Gate — Dealing with Unfinished Business' (at the The Wentworth Lecture, Canberra, A.C.T., 12 May 2000); Barbara Ann Hocking, *Unfinished Constitutional Business: Rethinking Indigenous Self-Determination* (Aboriginal Studies Press, 2005); William Jonas, '"Unfinished Business" - the Recognition of Aboriginal and Torres Strait Islander Rights' (2001) 5(1) *The Newcastle Law Review*.

[362] Elizabeth Strakosch 'Indigenous–Settler Relationships: Policy, Rights, Reconciliation, and Sovereignty' in Lewis and Tiernan (n 255) 338.

[363] Ibid 336.

> There is deep, underlying distrust between indigenous communities and the state, given the history of their relations. And relatedly, there are deep asymmetries of power, at multiple levels, between indigenous peoples and various agencies of the state.[364]

The political and legal challenge that countries such as Australia face – with a history of colonialism and dispossession – is in finding appropriate political expression for a just relationship with colonised indigenous people. It is one of the most important issues confronting political theory today. Ivison et al express the issue in these terms,

> As important as it is to understand how western and especially liberal political theory is implicated in the justification of colonisation, it is even more important to determine whether this complex tradition of thought might provide space for the contemporary aspirations of indigenous peoples.[365]

Wolfe argues that the central logic of settler colonialism is one of elimination of Indigenous cultural difference and the absorption of Indigenous people into the settler society.[366] Settler colonialism is an encounter between two political orders coloured by historical and ongoing violent conflict. It is a structure and not an event.[367] That is to say, settler colonialism is not a one-off, isolated event but a situation in which the colonising power remains to establish a new colonial society on the expropriated Indigenous land base. It then develops its own system of institutions, laws, policies, and economy that remain dominant over time.[368]

As Briggs explains, settler colonialism produces a 'uniquely tangled politics' when colonisers stay. 'In settler-colonial settings, Indigenous peoples, usually displaced minorities in their own lands, are governed within settler political orders and become caught up in settler projects of identity and belonging.'[369]

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[364] Duncan Ivison, 'Pluralising Political Legitimacy' (2017) 20(1) *Postcolonial Studies* 118, 124.

[365] Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2nd ed., 2000) 2.

[366] Wolfe, *Settler Colonialism* (n 254) 2, 27, 32.

[367] Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 254); Patrick Wolfe, 'Nation and MiscegeNation: Discursive Continuity in the Post-Mabo Era' [1994] (36) *Social Analysis: The International Journal of Social and Cultural Practice* 93.

[368] Wolfe, 'Settler Colonialism and the Elimination of the Native' (n 254) 399.

[369] Morgan Brigg, 'Identity and Politics in Settler-Colonialism: Relational Analyses beyond Domination?' (2016) 19(3) *Postcolonial Studies* 342 ('Identity and Politics in Settler-Colonialism').

A complete discussion of settler colonialism is not possible, but here I discuss two issues, which I argue motivate Aboriginal people to want to engage in deliberative and participatory democracy as a response to settler colonialism. These are our position as an extreme minority within Australia's model of majoritarian, representative democracy and the ongoing failure in Indigenous public policy.

## 4.6 Why participate and deliberate?

As with most colonised Indigenous peoples, settler colonialism has created a situation whereby we are a political minority within our own lands. Australia, as a majoritarian representative democracy, is therefore problematic.

As Lafont explains, some citizens systematically and repeatedly lose out when decisions are made in a majoritarian fashion. For permanent minorities, this right-to-vote version of equal opportunity can easily amount to the absence of any actual effective opportunity to prevent majoritarian outcomes that are unjust. A deliberative concept of democracy can help minority groups overcome such domination by requiring better reasons, while still upholding equal voting rights.[370] As Young also understands, majoritarian democracy can be problematic as politicians tend to act like 'entrepreneurs and brokers, looking for formulas to satisfy as many, and alienate as few, interests as possible'.[371]

Also, Young explains, the majoritarian, representative model of democracy encourages instrumental or strategic reasoning in which one seeks to maximise personal benefits at the expense of others.[372] The aggregative model (voting) 'offers only a weak motivational basis for accepting the outcomes of a democratic process as legitimate'. Even if the outcome is fair in that preferences reflect those that are more widely or strongly held, then there is no reason why those who do not share those preferences ought to abide by the results. 'They may simply feel that they have no choice but to submit, given that they are in the minority'.[373]

[370] Lafont (n 161) 75.

[371] Young, *Inclusion and Democracy* (n 172) 19.

[372] Ibid.

[373] Ibid 22.

Various authors have written extensively on the problems plaguing government-administered Indigenous affairs policy in Australia including Sullivan[374], Sanders[375], Altman[376], Strakosch[377], and Moran.[378]

But as Maddison and Nakata explain, a fundamental problem in government-administered Indigenous affairs policy is the tendency of non-Indigenous bureaucrats to frame Aboriginal and Torres Strait Islander people as a 'problem' requiring management and/or solutions developed by non-Indigenous bureaucrats and experts. Aboriginal people are rendered as a problem requiring state intervention to fix the situation.

The prevailing political discourse frames Aboriginal people as 'objects to be studied, and problems to be solved'. Indigenous people as subjects of domestic policy maintains 'the settler state's assertion of sovereign authority over Indigenous peoples'. What Maddison and Nakata describe has profound effects on the ideals of deliberative and participatory democracy within settler-colonial contexts. When Aboriginal people are positioned – discursively and practically – as both *helpless and complicit* in the problems they experience, the deliberative democratic ideal of citizens deciding on the laws or policies likely to affect them becomes difficult to realise. State paternalism frames Aboriginal people as incapable of solving our own problems. Laws and policies are enacted upon us rather than being developed with us.[379] State actors assume they possess the technical expertise to produce viable policy solutions. Deliberation with and the participation of Aboriginal people in developing solutions, is deemed unnecessary.

Very little in the existing literature has adequately theorised how settler colonialism impacts the normative claims of deliberative and participatory democracy, save for some notable exceptions. These include Jorge Valadez, who has discussed specifically the desire for Indigenous peoples within liberal democratic societies to be autonomous and self-governing

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[374] Sullivan, *Belonging Together: Dealing with the Politics of Disenchantment in Australian Indigenous Affairs Policy* (n 53).

[375] Sanders (n 46).

[376] Jon Altman, 'Indigenous Policy: Canberra Consensus on a Neoliberal Project of Improvement' in Chris Miller and Lionel Orchard (eds), *Australian Public Policy* (Bristol University Press, 1st ed., 2014) 115.

[377] Elizabeth Strakosch, 'The Technical Is Political: Settler Colonialism and the Australian Indigenous Policy System' (2019) 54(1) *Australian Journal of Political Science* 114.

[378] Mark Moran, *Serious Whitefella Stuff: When Solutions Became the Problem in Indigenous Affairs* (Melbourne University Press, 2016).

[379] Nakata and Maddison (n 54) 408.

Indigenous polities.[380] Others have discussed at a broader level the challenge of deliberative democracy in societies characterised by deep division, including Ian O'Flynn[381] and Ron Levy et al[382]

Valadez states that political legitimacy of a society depends on no one group being unduly and repeatedly disadvantaged by a government's democratic decision-making procedures that undermine the basic wellbeing of the members of the disadvantaged group.

> I contend that even under deliberative democracy, which places demanding conditions on understanding and taking into account the perspectives and interests of all members of the political community, some indigenous groups will find themselves continually losing out when collectively binding decisions are made after democratic deliberation.[383]

Valadez captures the conditions of settler colonialism, and the challenge Indigenous people face to have their concerns properly considered in government decision making.

> A just democratic society can bear the burden of particular groups being coerced to follow collective decisions with which they fundamentally disagree only if the realistic possibility exists that in future negotiations their point of view will win the day. However, when deep and pervasive cultural differences exist between minority indigenous groups and majority societies, this condition is not likely to be fulfilled.[384]

Valadez acknowledges that deliberative democracy is useful in culturally pluralistic societies, with its emphasis on mutual understanding among the citizens and inclusion of diverse voices in public discourse. By valuing rational persuasion rather than force or power in reaching political decisions, deliberative democracy in theory, tries to ensure that political decisions are fair to all members of the political community, thus preventing the 'tyranny of the majority'. When individuals and groups present reasons for a preferred policy decision they should

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[380] Valadez, *Deliberative Democracy, Political Legitimacy, and Self Determination in Multicultural Societies* (n 123).

[381] Ian O'Flynn, *Deliberative Democracy and Divided Societies* (Edinburgh University Press, 2006).

[382] Ron Levy, Ian O'Flynn and Hoi L Kong, *Deliberative Peace Referendums* (Oxford University Press, 1st ed. 2021); Appleby, Levy and Whalan (n 103).

[383] Valadez, 'Deliberation, Cultural Difference, and Indigenous Self-Governance' (n 123).

[384] Ibid.

provide reasons that are plausible not only to those who hold similar view to their own, but also to others who hold different views and interests.[385]

However, cultural incommensurability affects deliberation because when the members of different cultural groups engaged in deliberation adhere to frameworks with different empirical beliefs, normative principles, or epistemic procedures, there will be a lack of agreement or overlap in the conceptual frameworks used by deliberators from the different cultural groups – and this will make it difficult, and in some cases impossible, for them to agree on the basis of shared reasons.[386]

> Contemporary democratic societies containing Indigenous groups likely represent the most challenging and common cases of political communities with radical cultural differences. Moreover, indigenous values and beliefs in these areas are part of a conceptual framework that is markedly different from those generally held by settler societies. This means that disagreements in these areas are likely to be pervasive and systematic, recurring across a wide range of policy decisions, and not merely occasionally and in isolation.[387]

What Valadez is making clear is that a hallmark of settler colonialism is that even under the ideals of deliberative democracy, Indigenous people are more likely to consistently lose out because of the systemic nature of our exclusion. Valadez argues the cultural differences between Indigenous groups and settler societies may be of such significance that making space for Indigenous self-governance is justified.[388]

Banerjee is also critical of the normative claims of deliberative democracy in settler-colonial states. As he explains, for Indigenous people the issue is not deliberative democracy per se, but Indigenous sovereignty and self-determination. Banerjee criticises deliberative democracy scholars who, he says, appear to acknowledge some level of cultural incommensurability and power asymmetry in deliberating positions when it comes to Indigenous peoples but stop short of advocating Indigenous sovereignty but a 'conditional' form of sovereignty (self-

[385] Ibid 61.

[386] Valadez, 'Deliberation, Cultural Difference, and Indigenous Self-Governance' (n 123).

[387] Ibid 65.

[388] Ibid 60.

determination) in which communities 'negotiate and debate the future of their own conditions of existence' with the state.[389]

Another scholar sceptical of deliberative democracy under conditions of settler colonialism is Israeli scholar Bashir Bashir. He argues the claims of deliberative democracy are seriously challenged by historical injustice. As he states,

> Deliberative democracy is often celebrated and endorsed because of its promise to include, empower, and emancipate otherwise oppressed and excluded social groups through securing their voice and granting them impact in reasoned public deliberation.[390]

However, Bashir says deliberative democracy falters when confronted with particular types of historical injustices.

> It falters because it pays little attention to the historical dimension of injustices and the demands to which it gives rise. The historical dimension of longstanding injustices gives rise to a set of distinctive demands, such as collective memory of exclusion, acknowledgement of historical injustices, taking responsibility, and offering apology and reparations for causing these injustices, which go beyond the type of democratic inclusion that is often offered by deliberative democracy.[391]

For Bashir, historical injustices give rise to a set of special claims and demands that go beyond the mere recognition and accommodation of deep difference, cultures, values, languages, and asymmetries that are often proposed by theories such as those of Dryzek and Young.[392]

I would add to Bashir's assessment that in addition to the matter of historical injustice, what is equally challenging for deliberative democracy is to also accommodate the ideals of Indigenous sovereignty and self-government. At the heart of Indigenous–settler state political disagreement in Australia is the concept of an Indigenous sovereignty and right to self-government that competes with the sovereignty of the Australian state. As Appleby et al state,

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[389] Banerjee (n 125).

[390] Bashir (n 9) 127.

[391] Ibid 128.

[392] Ibid 135.; See also, Will Kymlicka and Bashir Bashir (eds), *The Politics of Reconciliation in Multicultural Societies* (Oxford University Press, 2010).

> Common to any constitutional legitimacy crisis is its significance; such a crisis involves disagreements between groups having sharply divergent views about foundational constitutional questions. Such crises are typically drawn out and seemingly intractable. They stem from the presence of competing constitutional orders in the same geographic space, a situation that we tend to see in deeply divided societies. In the context of a settler state, such as Australia, constitutional competition specifically arises out of the settler community's claims of ultimate and exclusive legal and political sovereignty, which notionally sits over and trumps any claims of First Nations sovereignty or self-determination.[393]

Aboriginal people seek out deliberation with government not only to try to improve the state's democratic governance but to challenge its legitimacy. This 'constitutional crisis' created by the conditions of settler colonialism is, I believe, not well understood by many deliberative democracy scholars.

This lack of engagement with Indigenous peoples and our political struggles is surprising given many leading scholars in the field reside in North America and Australia – settler-colonial states – where Indigenous rights, environmental controversies[394] and the state's disregard towards greater participation of Indigenous people in political decision-making is a regular feature of political relations in these states.[395]

Jensen Sass asserts that deliberative democracy has mostly been studied in democratic states, developed and Western, over a short period of human history.

> Our understanding of deliberation, of its prospects and limits, would be greatly enriched were we even minimally aware of its manifestation across a more diverse collection of

[393] Appleby, Levy and Whalan (n 122) 4.

[394] Kyle Whyte, 'The Dakota Access Pipeline, Environmental Injustice, and U.S. Colonialism' [2017] (19.1) *Red Ink: An International Journal of Indigenous Literature, Arts, & Humanities*; Walter H Mengden IV, 'Indigenous People, Human Rights, and Consultation: The Dakota Access Pipeline' (2017) 41(2) *American Indian Law Review* 441.

[395] As Davis states, the 'Uluru Statement from the Heart' is important statement of reform so that perhaps, finally, after decades and decades and decades, my people, our people, will find their rightful place in our own country'. See Megan Davis, 'Uluru Statement from the Heart: "And Remind Them That We Have Robbed Them?": The Henry Parkes Foundation 2018 Oration' in Mark Evans, Michelle Grattan and Brendan McCaffrie (eds), *From Turnbull to Morrison* (Melbourne University Publishing Ltd, 2019) 267; Appleby and Davis (n 54).

> societies and cultures, past and present. With this wider perspective, familiar questions could be asked anew, and perhaps answered differently.[396]

Sass argues that *why people deliberate* should be among the first questions deliberative democrats ponder. For colonised Indigenous people, the answer is to end settler colonialism, re-establish sovereignty and institute self-government. A hugely daunting task.

This thesis is an effort to develop a better understanding of deliberative and participatory democracy under conditions of settler colonialism. I argue that what motivates Aboriginal people to engage in deliberation with governments is, as Banerjee states, to realise Indigenous sovereignty and self-government, which goes beyond the ideal offered by normative accounts of deliberative democracy. For Aboriginal people in Australia, we seek the resolution of historical injustice and colonial conflict, not a mere exchange of rational arguments on policy proposals.

I conclude this discussion with the assertion that the fields of deliberative and participatory democracy have yet to engage with settler colonialism in order to understand how the normative claims of the theories fare in such situations. In the most recent and comprehensive text on deliberative democracy, a scan of the Index shows that the term 'settler colonialism' does not appear at all. The term 'colonialism' receives seven mentions, including two references to Africa and India. By contrast, the terms 'deeply divided societies' and 'multiculturalism' receive extensive mentions.[397] Yet political conflict between Indigenous people and the state is a dominant feature of politics in four large, and supposedly exemplary liberal democratic states – Canada, Australia, Aotearoa New Zealand, and the United States ('CANZUS' states).

The dispossession of Indigenous people from their lands resulting in the settler state's ongoing illegal occupation, as is the case with Australia, are circumstances more difficult to navigate – for both colonised and coloniser – than multiculturalism. The formation of the new nation state of Australia in 1901 included a constitution that actively excluded Aboriginal people. We were not recognised as Indigenous, self-governing polities entitled to role in sharing political and legal power within the new nation state. 'Thus, while the Constitution embodied a negotiated and agreed union of the colonies, there was no such agreed union with the colonised'.[398]

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[396] Jensen Sass, Deliberative Ideals Across Diverse Cultures, in Bächtiger et al (n 11) 86.

[397] Bächtiger et al (n 11).

[398] Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart, 2020) 21.

> Accordingly, there were no constitutional clauses drafted to protect Indigenous rights or guarantee them equality before the law. There was no provision for specific Indigenous representation or political participation within the constitutional compact, nor any structural accommodation establishing the appropriate level of Indigenous authority over Indigenous affairs. There was the opposite.[399]

This situation results in Australian democracy remaining plagued by historical injustices, unresolved grievances, various forms of inequality (economic, political) and power asymmetry that can render attempts at deliberation between Aboriginal people and the Australian state ineffective and disempowering.

One of the key findings in undertaking this research project is that settler colonialism is a largely under theorised and under researched phenomenon within the fields of deliberative and participatory democracy theory. This thesis makes a contribution towards a better understanding of 'deliberative and participatory democracy under conditions of settler colonialism'.

## 4.7 Conclusion

In this chapter, I provided a discussion of the conditions of settler colonialism in Australia, which continues to affect the contemporary efforts of Aboriginal to realise sovereignty and self-government. This included the 'law of colonialism', which employed the doctrines of discovery and *terra nullius* to acquire Indigenous lands and deny Aboriginal people rights to our traditional lands.

Being 'legally invisible' for two centuries, Aboriginal people harbour a deep sense of mistrust towards the Australian state and whether it can and will act in our best interests. We feel vulnerable and poorly served by Australian democracy. Perhaps more critically, there persists a crisis of legitimacy between Aboriginal people and the Australian state. Australia, at least at the national level of politics, continues to resist engaging with Aboriginal people on unresolved issues such as sovereignty and self-government, even after *Mabo* and the recognition of native title confirmed that Aboriginal people did indeed possess legal rights to our traditional land at the time of colonisation.

[399] Ibid.

*Mabo* and native title strengthen Aboriginal claims to sovereignty and the right to self-government, which the Australian state treats as too difficult to answer and therefore seeks to ignore the claims. Nonetheless, the expectation of Aboriginal people after *Mabo* was that Australia would now need to respond to these questions and negotiate a new political relationship with Aboriginal and Torres Strait Islander people; that Australia would need to contemplate a new form of inclusion for Aboriginal and Torres Strait Islander people within Australian democracy.

In the next chapter, I discuss the importance of the *Mabo* and the recognition of native title as a 'constitutional moment' in Australian democracy. Although Australian law treats native title as a *sui generis* property right, it raises issues more profound than 'questions of real estate' for Australian democracy, which I now turn to discuss.

# 5 Mabo: A 'Constitutional Moment' in Australian Democracy

The title of my thesis is 'deliberating native title' and my focus is on the native title system. The intention behind the title and my area of focus is to illustrate how different parts of the native title system engage with the idea of native title and make space for Aboriginal people to participate in decision making on the laws and policies that affect our lives.

The *Mabo* decision is historic because it was the first time the pre-colonial rights of Aboriginal and Torres Strait Islander people to our lands became 'visible' within Australian law.[400] At the time, the decision generated intense public debate[401], hyperbole[402], and polarising opinions including from those who believed *Mabo* was entirely 'inevitable'[403] to those who argued *Mabo* delivered nothing of substance for Aboriginal people.[404]

In this chapter, I discuss *Mabo* as representing a 'constitutional moment' – a rare historical turning point when the legal foundations of a state are challenged and constitutional matters considered settled, are unsettled. I then discuss *Mabo* as being significance for Australian democracy beyond 'questions of real estate'. That is to say, the recognition of native title entails recognition of the continuation of Aboriginal and Torres Strait Islander society as a source of *political authority*.[405]

I finish my discussion of the *Mabo* decision by arguing that the courts, by virtue of their ongoing role in deciding native title claims, continue to play an important 'publicity and legitimacy' role

[400] For Indigenous people, recognition by the institutions of settler-colonial states is a vexed issue. Though Aboriginal people believe that sovereignty and our rights as Indigenous people exist with or without formal recognition by Australia, I argue, institutional recognition by settler states may be problematic but can nonetheless be useful. While the native title process is widely criticised as costly and inherently unjust, Aboriginal people have and continue to secure recognition of their native title rights through the courts. As I will argue at the end of this chapter, courts play an important 'publicity' function struggles of Aboriginal people to secure sovereignty and self-government rights.

[401] John Gardiner-Garden, *The Mabo Debate – A Chronology* (Background Paper No.23, Commonwealth of Australia, 1993) 57; Murray Goot and Tim Rowse, *Divided Nation?: Indigenous Affairs and the Imagined Public* (Melbourne Univ. Publishing, 2007).

[402] Wootten explains how a prominent Australian businessman called the Mabo decision a 'communist plot' and accused the majority justices as being part of a 'conspiracy to overthrow the Constitution'. See Wootten (n 309).

[403] Bartlett, 'Mabo: Another Triumph for the Common Law' (n 44).

[404] Mansell (n 58).

[405] Lisa Strelein, Symbolism and Function: From Native Title to Aboriginal and Torres Strait Islander Self Government, in Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 189-202.

in the ongoing political and legal struggles of Aboriginal people. I argue that the cumulative effect of each native title determination (now numbering 600)[406] acts to further legitimise the sovereignty and self-government claims of Aboriginal people.

I now turn to discuss the *Mabo* decision as a 'constitutional moment' in Australian democracy. The framing of *Mabo* as a constitutional moment supports my overall argument that the native title has become a system for deliberative and participatory democracy for Aboriginal people and my discussion of the ideal of deliberative inclusion (Chapter 6) and native title as a contestatory mechanism (Chapter 8).

## 5.1 The 'Constitutional Moment' Theory

The *Mabo* decision is the subject of extensive academic scholarship so my aim is not to discuss it in detail but to provide a brief summary.

On 20 May 1982, Eddie Koiki Mabo, Sam Passi, David Passi, Celuia Mapo Salee and James Rice commenced proceedings in the High Court of Australia seeking legal recognition of ownership over their traditional lands on the island of Mer (Murray Island) in the Torres Strait. [407] Both the State of Queensland and the Commonwealth of Australia were named as defendants. Despite the potential historical significance of the claim, it caused no political alarm from Canberra or Brisbane at the time.[408]

The claim brought by the plaintiffs against the Queensland Government sought a declaration that they were the owners under customary law and holders of traditional rights in relation their home island Mer. Since time immemorial, they pointed out, the Meriam people had continuously occupied and enjoyed the Islands and had established settled communities with a social and political organisation of their own.[409]

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[406] See, National Native Title Tribunal, (Webpage), accessed 25/08/2023, http://www.nntt.gov.au/Pages/Statistics.aspx

[407] During the period before and immediately after the *Mabo* decision, the island home of Eddie Mabo and the other claimants was commonly referred to as Murray Island, the official, anglicised name used by government. In more recent times the name of the island has reverted back to Mer as used by the people of Mer themselves.

[408] Bryan Keon-Cohen, *A Mabo Memoir: Islan Kustom to Native Title* (Zemvic Press, 2013) 54.

[409] Richard Bartlett, *The Mabo Decision: Commentary and Full Text of the Decision in Mabo and Others v State of Queensland* (Butterworths, 1993).

After ten years of protracted litigation on 3 June 1992, the High Court delivered its historic verdict declaring the Meriam people to be 'entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer'.[410] While the High Court drew on the experiences of other jurisdictions such as the US in their judgment, the *Mabo* decision nonetheless presented Australia's legal and political system with theoretical and conceptual issues not universally understood or agreed at the time.[411]

This was due largely because the doctrine of *terra nullius* had stood as 'good law' for two centuries in Australian jurisprudence despite growing public awareness[412] that Aboriginal and Torres Strait Islander people had been unjustly dispossessed of their lands and subjected to colonial and Australian state violence, governmental neglect, and political marginalisation.

It is arguable that the *non-recognition* of native title for so long in Australian law is what makes *Mabo* so remarkable.[413] Recognition of the rights of Indigenous people to their lands had been established in law in other former British colonies including in the US (1823)[414], Aotearoa New

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[410] *Mabo and others v State of Queensland (No 2)* [1992] HCA 23; ALR 107 (n 12) per Brennan J.

[411] 'Native title involves concepts that are not traditionally the domain of the Australian courts, such as collective rights, legal pluralism, and issues of competing sovereignty'. Lisa Strelein, 'Conceptualising Native Title' (2001) 23(1) *Sydney Law Review* 95, 97.

[412] On 26 January 1972 Michael Anderson, Billy Craigie, Bertie Williams and Tony Coorey erected a beach umbrella opposite Parliament House (now known as Old Parliament House) which became they declared to be the 'Aboriginal Tent Embassy'. As Foley et al explain, the Embassy protest action aimed to raise public awareness that Aboriginal people had never ceded sovereignty nor engaged in any treaty process with the Australian government. See Gary Foley, Andrew Schaap and Edwina Howell (eds), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2014).

[413] As Reynolds states, 'The truly amazing achievement of Australian jurisprudence was to deny that Aborigines were ever in possession of their own land, robbing them of the great legal strength of that position, and of compensation which should have been paid following resumption by the Crown. The official view has always been that Aboriginal claims were always 'void before all'. The intellectual and moral gymnastics required to sustain that position have been quite extraordinary'. See, Henry Reynolds, *The Law of the Land* (Penguin Books, 3rd ed., 2003) 4.

[414] The foundational principles of American Indian law (including common law native title or aboriginal title) are based upon the judgments in three early US Supreme Court cases: *Johnson v M'Intosh* [1823] 21 US 543; *Cherokee Nation v Georgia* [1831] 30 US 1; and *Worcester v Georgia* [1832] 31 US 515. Collectively the cases are referred to as 'The Marshall Trilogy' because John Marshall CJ wrote the majority opinion in each case. As Pommersheim explains, these cases established the basic principles of Indian law. The cases dealt with land acquisition by settlers from First Nations Indian in the early colonial period of America. As Pommersheim explains, in the first case *M'Intosh*, the question Marshall CJ had to consider was, 'What is "the power of Indians to give, and private individuals to receive, a title which can be sustained in the Courts of this country"? The Court's answer was blunt. No such power existed'. The case engaged with the doctrine of discovery and the relationship of the 'discoverer' to the 'natives', not to other

Zealand (1874)[415] and Canada (1973).[416] As Bartlett explains, in the *Mabo* decision, the High Court was simply recognising native title in the tradition of other common law jurisdictions.[417]

In the end, the High court declared the long-standing assertion that the British acquisition of sovereignty had erased the pre-existing rights of Indigenous people to their lands was rejected.[418]

In the lead judgment, Justice Brennan declared:

> It is sufficient to state that, in my opinion, the common law of Australia rejects the notion that, when the Crown acquired sovereignty over territory which is now part of Australia it thereby acquired the absolute beneficial ownership of the land therein and accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty. Those antecedent rights and interests thus constitute a burden on the radical title of the Crown.[419]

The 'constitutional moment' theory is that of American legal theorist Bruce Ackerman. Though speaking about the constitutional history of the US, Ackerman argues most democratic states

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'discoverers'. 'In this realm, the "discoverer's" rights were "exclusive, no other power could interpose between them'. The potential choices were relatively straightforward: Native people and nations could be seen as having identical property rights to those of 'discoverers', having no property rights at all, or something in between. In the end, Marshall CJ struck an uneasy middle ground declaring that Indians did not have title but did have the rights of use and occupancy. In the context of Australia – and why I believe deliberative democracy scholars with an interest in constitutional courts have paid too little attention to the role of courts in recognising native title – is that it took 169 years for Australia to incorporate some of the principles in *M'Intosh* into the doctrine of native title into our own system of law. See Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (Oxford University Press, 2012) 88-124.

[415] *R v Symonds* [1847] NZPCC 387. Like *M'Intosh* in the US, this case concerned the ability of settlers to purchase land directly from Māori people.

[416] See *Calder et al v Attorney-General of British Columbia* [1973] SCR 313. The Calder case concerned the Nisga'a peoples of north-western British Columbia. The Nisga'a Tribal Council asked the Supreme Court of British Columbia to recognise that their title to lands in and around the Nass River Valley had 'never been lawfully extinguished'. The case was dismissed at trial. The Nisga'a Tribal Council took their case to the Court of Appeal of British Columbia, but that court dismissed it as well. They then took their case to the Supreme Court of Canada in which the majority 6:1 agreed that native title existed in Canada. However, a majority could not agree that the Nisga'a people's title had never been extinguished. Despite losing the case, Calder served to entrench Indigenous rights in Canadian law.

[417] Bartlett, 'Mabo: Another Triumph for the Common Law' (n 44).

[418] Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (n 111) 10.

[419] *Mabo and others v State of Queensland (No 2)* [1992] HCA 23; ALR 107 (n 12) 22 per Brennan J.

are 'dualist democracies' in which the practices of democratic governance and law making operate mostly under 'normal politics' and 'ordinary law making' for much of the time. However, on occasion when an issue arouses great interest or concern in public, legal, and political circles, the need for reform or radical change is necessary, and an episode of constitutional change is brought about by 'higher law making'.[420]

> During these 'constitutional moments', citizens engage in higher law making. These are often times of crisis or great change when nations are galvanised by issues and debate spreads and intensifies. In these moments, elites call on and listen to the People. A collective reassessment of values and principles results in a constitutional paradigm shift. These moments represent a popular constitutional amendment process outside the formal institutional channels of amendment.[421]

I recognise that the *Mabo* decision did not of course cause a constitutional crisis, result in a referendum, or even trigger moves to amend the Australian Constitution. However, like Ackerman's argument that certain events can facilitate a paradigm shift in the national consciousness, *Mabo* did cause a fundamental change to public perceptions and debate about the settlement theory of Australia and the place of Aboriginal and Torres Strait Islander people within the Australian state.

Framing *Mabo* as a 'constitutional moment' is not entirely inappropriate if we consider Aboriginal and Torres Strait Islander people played no formal role in the drafting of the Australian Constitution.[422] Also, if the 'constitutional moment' theory implies a shift in understanding about a nation's political and legal foundations and prompts widespread and

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[420] Ackerman based his theory on what he saw as three distinct constitutional moments in US history. The Founding and the enactment of the US Constitution in 1787; the Reconstruction amendments to the US Constitution between 1865 and 1870 after the Civil War; and the New Deal period under President Franklin Roosevelt in the 1930s in which the US government undertook large-scale public works program to alleviate poverty and unemployment. See, Bruce Ackerman, *We the People, Volume 1: Foundations:* (Belknap Press, 1993) 266-294.

[421] Ibid. 11.

[422] Our exclusion from beginning of Australian democracy did not go entirely unnoticed. For example, two Aboriginal men - John Noble and Jimmy Clements – protested on the steps at the royal opening of the new Commonwealth Parliament building in Canberra in May 1927. See Daley (n 64). Also, the first Day of Mourning organised by the Aborigines League (est. 1932) and the Aborigines Progressive Association (est. 1937) was held in 1938.

intense public deliberation in order to confront difficult legal, political, and social challenges, then *Mabo* and native title surely meets such a definition.[423]

Following *Mabo*, in the *Wik* decision, Justice Gummow stated that the 1992 *Mabo* decision changed established views of past historical events concerning the settlement of Australia.

> That view differed from assumptions, as to the extent of the reception of English land law upon which basic propositions of Australian land law had been formulated in the colonies before federation. To the extent that the common law is to be understood as the ultimate constitutional foundation in Australia, there was a perceptible shift in that foundation, away from what had been understood at federation.[424]

However, a constitutional moment requires more than a court decision – even an historic one. It also requires a legislature, an executive and political leaders to respond positively to the decisions of a constitutional court.

As Prime Minister at the time of the *Mabo* decision, Paul Keating made a number of defining acts as leader to emphasise the significance of *Mabo* to Australian democracy. His 'Redfern speech' to launch the International Year of Indigenous People in the months after the *Mabo* decision is recognised as the first acknowledgment by an Australia politician of the consequences of invasion, colonisation, and assimilation on the lives of Aboriginal and Torres Strait Islander

[423] Ackerman's theory has been widely analysed and criticised. In particular, his definition of 'non-textual' constitutional change is regarded as problematic. Only two of Akerman's 'constitutional moments' produced actual amendments to the US Constitution. The third (The New Deal) Ackerman says was a 'non-written amendment'. Ackerman argues a 'constitutional moment' may be a means for constitutional change without actually having to undergo a formal amendment to the text of the constitution. This aspect of Ackerman's theory has understandably attracted criticism. 'If one accepts that a principal goal of a written constitution is to provide a set of clear restraints on the exercise of public power, dispensing with the rules governing constitutional amendment can subvert the goals of constitutionalism itself and lead to tyranny'. For a discussion of Ackerman's theory and criticism of it, see Antonia Baraggia, 'Constitutional Moment' [2020] *Oxford Constitutional Law* <https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e674?rskey=XX6LSY&result=62&prd=OXCON>; Sujit Choudhry, 'Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?' (2008) 6(2) *International Journal of Constitutional Law*.

[424] *Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* [1996] HCA 40 (High Court of Australia, 1996).

people.[425] Keating also established a dedicated *Mabo* unit with the Department of Prime Minister and Cabinet and instigated an 18-month long consultation process with Indigenous leaders, mining and agricultural business leaders, state and territory governments, and the Australian public against widespread pressure to overturn *Mabo*.[426]

The parliament would eventually pass legislation to enact the *Native Title Act 1993* in December 1993. Ahead of introducing the Native Title Bill to parliament, Keating told his colleagues,

> This is one of the biggest, most important, things that we will ever do. One of the most significant pieces of social legislation we have introduced and will ever introduce. That is not overstating it.[427]

After the longest and most contentious parliamentary debate in Australian history (at that time), the Bill was passed on 23 December 1993 and became law on 1 January 1994.

The 'constitutional moment' theory taps into a belief that at certain points in a nation's history, legal and political decisions – informed by changing social expectations and enlightened thinking – can be a 'transitional' mechanism for a nation.[428]

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[425] '"Keating Told the Truth": Stan Grant, Larissa Behrendt and Others Remember the Redfern Speech 30 Years On', *The Guardian* (online, 9 December 2022) <https://www.theguardian.com/australia-news/2022/dec/10/paul-keating-redfern-speech-30-year-anniverary>.

[426] The *Mabo* decision sparked widespread political and media debate. Some business and political leaders claimed native title would lead to economic ruin and families were at risk of losing their homes amongst many unsubstantiated claims. As Prime Minister, Paul Keating made it a priority to ensure the opportunity presented by *Mabo* was not lost and undertook a lengthy process of public deliberation to explain the significance of the High Court's decision and address misinformation. Most famous is his 'Redfern Speech' to launch the United Nation's International Year of Indigenous People in December 1992. In this speech, Keating declared *Mabo* had done away with the bizarre conceit Australia had no owners prior to the settlement of the British. 'Mabo establishes a fundamental truth and lays the basis for justice'. See Speech by the Hon Prime Minister PJ Keating MP, Launch of the International Year for the World's Indigenous People, Redfern, Sydney, 10 December 1992. Keating's re-election in March 1993 in the midst of the scare campaign against *Mabo* is arguably a clear signal that much of the Australian public were accepting of the High Court's decision and the plans of the government to protect native title for the benefit of Aboriginal and Torres Strait Islander people. For a discussion of the turbulent period after the *Mabo* decision, see Gardiner-Garden, 'The Mabo Debate – a Chronology' (n 398); Rowse (n 33).

[427] Troy Bramston, *Paul Keating: The Big Picture Leader* (Scribe Publications, First, 2016) 506.

[428] The term 'transitional justice' is often used to describe a situation in which a society is moving from a state of injustice to justice, from oppressive government to government that respects the rule of law, from authoritarianism to democracy. It is concerned with the administration of justice across such a change of regime. Transitional justice can be equally relevant to the experience of minorities in a nonetheless, democratic society. 'Transitional justice is

As Hobbs writes, the recognition of native title represents a transitional justice measure in which 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale abuses, in order to ensure accountability, serve justice and achieve reconciliation'.[429]

*Mabo* confirmed the ancient relationship Aboriginal and Torres Strait Islander people hold in regards to our traditional lands. Yet this relationship is not acknowledged in the nation's most important legal document, the Australian Constitution. *Mabo* brought attention to the incongruity of Australia's 'constitutional silence'[430] regarding Aboriginal and Torres Strait Islander people, thus making the 'constitutional moment' metaphor an apt one.

As Brennan and Davis explain,

> Aboriginal societies have existed on the Australian continent for an estimated 60,000 years. There are nearly 700,000 Aboriginal and Torres Strait Islander people, around 3 per cent of the Australian population. The Constitution makes no reference to these First Peoples or their societies, laws, and cultures. Beneath that silence is a deeper story of the relationship between First Peoples and the Australian state, and an unresolved challenge for Australia's constitutional future.[431]

Despite what might be problematic in defining *Mabo* and the recognition of native title as a 'constitutional moment' to the extent that it did not result in any actual change to the Constitution, since 1999, constitutional reform to recognise Aboriginal and Torres Strait

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concerned, above all, with establishing a new political and legal order in place of one now seen to be illegitimate. Often, that illegitimacy is experienced differently in different segments of the population. The institutional dimensions of the society and the place accorded the traditions of minorities may well need to be addressed for all segments to be brought on board-and, if all segments cannot be brought on board, the consequences of separation or forcible incorporation need to be considered'. See Webber, 'Forms of Transitional Justice' (n 152); Strelein and Tran (n 54); Hobbs, 'Locating the Logic of Transitional Justice in Liberal Democracies: Native Title in Australia' (n 34).

[429] The Mabo decision, he writes, did not amount to a total 'politico-legal rupture' but did shift the normative foundations of the nation. Furthermore, the Native Title Act 1993 can be understood as a statutory compromise, embodying a 'quasi-or pseudo-constitutional' status; a legislative response that is both 'back-ward looking corrective justice and forward-looking security of tenure'. See, Hobbs, 'Locating the Logic of Transitional Justice in Liberal Democracies: Native Title in Australia' (n 34) 515.

[430] The only two mentions of Aboriginal people in the eventual constitution were discriminatory and absolved the federal level of government of any responsibility to create laws in relation to us. See Attwood, *The 1967 Referendum: Race, Power and the Australian Constitution* (n 68); Pritchard (n 337).

[431] Sean Brennan and Megan Davis, 'First Peoples', in Saunders and Stone (n 322) 27–55.

Islander people has been a regular feature of political discourse in Australia.[432] Native title possesses a transitional quality for Australian democracy that has thus far failed to be fully incorporated.[433]

That is to say, *Mabo* may have altered the foundation of property law in Australia, but as many legal scholars have argued, native title also raises issues of sovereignty, treaty, and Indigenous self-government. That is, questions beyond property or 'real estate', which I now turn to discuss.

## *5.2* Native Title: More Than a Question of Real Estate

In this section, I discuss the recognition of native title as raising important questions for Australian democracy beyond those of 'real estate'.[434] That is to say, native title is not simply recognition of a pre-colonial property right held by Aboriginal and Torres Strait Islander people, but also for reconciliation and the recognition and incorporation of Indigenous people's shared jurisdiction within the Australian state.[435]

Mick Dodson also criticised Australia's narrow interpretation of native title as simply a property right or a 'real estate issue' because it erases sovereignty and the political, social, and economic systems that unite and distinguish Indigenous people as a *polity.*[436] Despite what Justice

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[432] Megan Davis and Dylan Lino, 'Constitutional Reform and Indigenous Peoples' (2010) 7(19) *Indigenous Law Bulletin* 5; Davis, 'Indigenous Constitutional Recognition from the Point of View of Self-Determination and Its Exercise through Democratic Participation' (n 78).

[433] As Hobbs explains, transitional justice does not always entail a clear move from less just to more just relations, and even Mabo may be understood as not causing a minor normative rupture, but rather continuing the 'process of denying or containing Indigenous sovereignty'. See Hobbs, 'Locating the Logic of Transitional Justice in Liberal Democracies: Native Title in Australia' (n 34); Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart Publishing, 2020).

[434] Pearson was commenting some years after the Yorta Yorta case in which the Traditional Owners were deemed to have lost any relationship with their traditional land by the 'tide of history'. His fear was that the opportunity of *Mabo* as a catalyst for reconciliation and the remaking of relations between Indigenous people and the rest of Australia was going to be squandered by political and judicial leaders treating Mabo as simply a legal doctrine relating to questions of real estate. That is, where native title does or does not exist. This would be to miss the more important value of Mabo as what he called 'a once-in-a-nation's-lifetime opportunity' for national reconciliation. 'Legally, politically, historically, morally – I can conceive of no alternative foundation, either presently available or which can be conjured in the future'. See Noel Pearson, 'Mabo Oration: People, Nations, and Peace' (at the National Native Title Conference, Brisbane, 3 June 2005).

[435] See, for example, Vivian et al (n 73); Webber, 'Native Title as Self-Government' (n 134).

[436] Mick Dodson, 'From Lore to Law: Indigenous Rights and Australian Legal Systems Opinion' (1995) (1) *Alternative Law Journal* 2 ('From Lore to Law').

Brennan called 'non-justiciable' claim of Indigenous sovereignty within a domestic court in the Mabo decision[437], as Jonas states the 'rejection of *terra nullius* (in *Mabo*) was a rejection of the assertion that Indigenous people were not socially or *politically constituted* [emphasis added]'.[438]

Former UN Special Rapporteur for the Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations, and Chair of the UN Working Group on Indigenous Populations, Miguel Alfonso Martinez, refers to this move by states as 'the domestication of the indigenous question'.

> That is to say, the process by which the entire *problematique* of Indigenous people 'political status' is removed from the sphere of international law and placed squarely under the exclusive competence of the internal jurisdiction of the non-indigenous state.[439]

By the limiting of native title to a domestic property right matter, the Australian state retains power to extinguish native title if it so chooses.

As Behrendt explains, a casualty of the narrow interpretation in Australia of native title is that itis not conceptualised as giving rise to the right to self-government as is the situation in Canada as a result of the Supreme Court of Canada decision in *Delgamuukw v British Columbia*.[440] *Delgamuukw* is, like *Mabo*, the leading case on Indigenous land rights in Canada.

In *Delgamuukw*, Chief Justice Lamer defined Aboriginal title as based on exclusive occupation of land at the time of British assertion of sovereignty. 'If exclusive occupation at the time is proven,

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[437] *Mabo and others v State of Queensland (No 2)* [1992] HCA 23 ALR 107 (n 12) [37] per Brennan J.

[438] William Jonas, 'Native Title and the Treaty Dialogue' (at the Aboriginal and Torres Strait Islander Social Justice Commissioner and the International Law Association Seminar, Australian Human Rights Commission, September 2002).

[439] Miguel Alfonso Martínez, Erica Irene A Daes and Ribot Hatano, *United Nations Special Rapporteur Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations* (No E/CN.4/Sub.2/1999/20, UN, 22 June 1999).

[440] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (Supreme Court of Canada, 11 December 1997).

then the Aboriginal people in question have a right to exclusive occupation and use that's is not limited to their traditional uses of the land'.[441]

McNeil states that the High Court decision in *Mabo* and the Supreme Court judgment in *Delgamuukw* 'amount to the same thing', laying out a title equivalent to a fee simple estate that encompasses the entire beneficial interest in land including surface, subsurface and airspace for a potentially unlimited period of time.[442]

Furthermore,

> If the Indigenous rights and normative customs are the source of the rights in question, the content of the rights vis-à vis the rest of the world, would be determined by those laws and customs.'[443] And, more emphatically, the rights and customs are 'governmental in nature'.[444]

Yet sovereignty (exclusive occupation) and self-government are not recognised in Australian jurisprudence relating to native title.

As Lavery explains, the finding in *Milirrpum* that the Yolngu possessed a system of law pre-dating British 'discovery' in 1770 and the assertion of sovereignty in 1788 on the basis of 'no settled inhabitants and no settled law meant the jural landscape of New Holland (Australia) could no longer be said to be "law"-less in 1788'.

> It is estimated that there were some 500 distinct Indigenous peoples comprising 300,000 persons inhabiting the New Holland continent about the time of the British assertions of sovereignty in the late 18 and early 19th centuries. In these many hundreds of Indigenous societies similar systems of laws, like that of the Yolngu People,

[441] Kent McNeil 'The Sources and Content of Indigenous Land Rights in Australia and Canada', in Louis A Knafla and Haijo Jan Westra (eds), *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (UBC Press, 2010) 153 ('*Aboriginal Title and Indigenous Peoples*').

[442] Ibid. 160.

[443] Ibid. 162.

[444] Ibid. 163-164.

> ordered those societies. Far from being law-less, New Holland was resplendent with law and legal systems. [445]

The *Milirrpum* decision was not appealed but had left Australian law with many 'troubling questions'[446] regarding Indigenous law and custom, some of which would be answered in the *Mabo* case. *Mabo* clarified that Aboriginal society, rather than being 'without laws, without sovereign and primitive in their social organisation' was in fact a 'complex and elaborate system that governed Aboriginal life and relationships'.[447] Past beliefs that Aboriginal people were 'so low in the scale of social organisation'[448] they were deemed to possess no system of law that could be recognised by British law, was no longer socially and legally acceptable.[449]

So, while the recognition of native title overturned the myth of *terra nullius*[450], nonetheless the High Court chose not to recognise even a limited form of Indigenous sovereignty nor the

[445] Daniel Lavery, '"Not Purely of Law"– The Doctrine of Backward Peoples in Milirrpum' (2017) 23 *James Cook University Law Review* 36, 75.

[446] Lavery (n 444).

[447] Jonas (n 437).

[448] As Strakosch explains, a prevailing belief in Australia settler-colonial thought is that Aboriginal people were living in a mostly primitive state and British colonisation, though far from benign, was nonetheless benevolent and ultimately, justifiable. 'Resonating with Arendt's account of Western politics, the goal of settler colonialism lies beyond itself – to progress, to improve, to possess. This has justified all kinds of violence, depredation and dispossession in the name of a higher goal.' In some way, the term *terra nullius* expressed an acknowledgment that British colonisation, though arguably unjust, had nonetheless 'saved' or improved Aboriginal society. See Elizabeth Strakosch, 'Beyond Colonial Completion: Arendt, Settler Colonialism and the End of Politics' in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation* (Springer Singapore, 2016) 15.

[449] Legal scholar Bartlett said it was belated and long overdue recognition of native title. 'The common law of Australia has been brought into line with the rest of the common law world.' Richard Bartlett, 'Case Comment: *Mabo v State of Queensland*' (1992) Yearbook *Australian Mining and Petroleum Law Association* 15, 515.

[450] The Mabo decision is commonly described as having 'overturned' the doctrine of terra nullius. Former native title lawyer David Ritter questions if terra nullius was ever formally invoked in the settlement of Australia. 'Terra nullius is not a concept of the common law, and it had never been referred to in any case prior to Mabo as justifying a denial of native title. But the concept is essentially irrelevant to native title at common law. The real question before the court, and the question the court decided, was whether or not native title was part of the common law of a settled territory such as Australia'. See Ritter, 'The Rejection of Terra Nullius in Mabo: A Critical Analysis' (n 24).

'governmental' dimension of native title.[451] While recognising native title, the High Court also reaffirmed the validity of the British acquisition of sovereignty.[452]

However, as Ivison argues, despite the assertion by Australian courts that the acquisition of sovereignty of Australia is not justiciable in an Australian municipal court, 'this is false'.

> If the idea of there being a coordinate sovereignty between Aboriginal people and the Crown is coherent – and courts have increasingly recognized this to be the practical framework within which these issues can be considered then the possibilities for the recognition of Aboriginal law, and self-government more generally, remain open.[453]

Scholars such as Strelein[454], Webber[455], Hobbs[456], and Watson[457] make clear that native title speaks to other rights including sovereignty and self-government because by recognising Aboriginal rights in land, Australian courts are acknowledging the existence of Aboriginal law.

As Pearson states,

> No matter what the common law might say about the existence of native title in respect of land which is subject to an inconsistent grant, the fact is that Aboriginal law still allocates entitlement to those traditionally connected with the land subject of the grant. *Aboriginal law is not thereby extinguished because it survives as a social reality* (emphasis added). It is fictitious to assume that Aboriginal law is extinguished where the common law is unable to recognise that law. [458]

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[451] The concern, as expressed in the opinion of Brennan J, was that any recognition of Indigenous sovereignty would potentially risk the stability of Australia's legal system. 'In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.' *Mabo and others v State of Queensland (No 2)* [1992] HCA 23, xx.

[452] Ibid. The Court was not prepared to question the status of Australia as a 'settled' country, but it was prepared to examine the consequences of settlement and the way the common law was received into the territory.

[453] Duncan Ivison, 'Decolonizing the Rule of Law: Mabo's Case and Postcolonial Constitutionalism' (1997) 17(2) *Oxford Journal of Legal Studies* 253, 277.

[454] Strelein and Tran (n 54).

[455] Webber, 'Native Title as Self-Government' (n 152).

[456] Hobbs, 'Locating the Logic of Transitional Justice in Liberal Democracies: Native Title in Australia' (n 34) 354.

[457] Watson, 'Aboriginal Laws and Colonial Foundation' (n 60).

[458] Noel Pearson, 'The Concept of Native Title at Common Law' [1997] (Issue 5) *Australian Humanities Review*.

Similarly, former Chief Justice Robert French acknowledges that any non-recognition of Aboriginal law by Australian courts concerning native title does not diminish its existence.[459]

Unsurprisingly, Aboriginal people and legal theorists supportive of Aboriginal rights believe Australia's interpretation of native title as confined to questions of property are misguided in their failure to recognise the enduring sovereignty of Aboriginal people inherent in native title. As Webber states,

> Before colonisation Indigenous societies certainly were autonomous and governed themselves, they were in that sense sovereign. But it is questionable whether they would have conceived themselves as having a 'right to self-government'. Why would they? The claim of a 'right to self-government' only becomes necessary as a consequence of colonisation and the imposition of a colonial sovereign.[460]

For Webber, Pearson, and Strelein, native title in Australia should entail recognition of the right to self-government'[461] as it is in Canada[462] and the US.[463]

Yet the claims of sovereignty and self-government by Aboriginal people are dismissed by Australian governments as unworkable within Australia's current constitutional and democratic framework. The dismissal of *native title as self-government* by the Australian state is perhaps caused by a fear that recognition (of even a modest degree) of Aboriginal people as sovereign polities capable of self-government may produce a separatist move or break from the reach of Australian governmental power. This is not what I understand Indigenous self-government to be, although I recognise other Aboriginal people do consider a complete separation between Aboriginal people and the state as being desirable.[464]

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[459] 'Common law recognition does not operate upon traditional laws and customs nor upon the relationships with land to which they give rise. It is important to keep that proposition clear when considering also the nature of extinguishment'. See, Robert French, 'Native Title - A Constitutional Shift?' (at the JD Lecture Series, University of Melbourne Law School, 2009) 18.

[460] Webber in Ivison, Patton and Sanders (n 365) 64.

[461] Webber, 'Native Title as Self-Government' (n 152).

[462] Under section 35 of Canada's *Constitution Act 1982*, the government recognises the inherent right of self-government as an existing Aboriginal right.

[463] In the US, First Nations Indians are recognised as 'domestic dependent nations' within American law as a result of the US Supreme Court's decision in *Johnson & Graham's Lessee v McIntosh* [1823] 21 US 543.

[464] Michael Mansell and the Aboriginal Provisional Government (APG) take a position that we as Aboriginal people must have complete control over our political affairs. Moreover, Australia must recognise Aboriginal people's distinct

The failure of the High Court to recognise an inherent right to self-government in the doctrine of native title (as in Canada) means Aboriginal people must find spaces to negotiate this recognition through other means as I will discuss in chapters 9, 10, and 11. For Aboriginal people, recognition of our ongoing sovereignty and right to self-government demands a reconstituted relationship with the Australian state. It also entails the creation of new arrangements capable of facilitating cooperation, negotiation, and shared jurisdiction – that is to say, a new basis of Indigenous state relations in which a sphere of Indigenous governance is based on the ideals of deliberative and participatory democracy.

As O'Faircheallaigh explains,

> Indigenous self-government is less about separatism and more about Indigenous capacity to self-organise and self-manage. Where Aboriginal people and institutions are empowered to govern their communities, to make authoritative decisions, and have access to the resources required to give effect to those decisions.[465]

As Behrendt argues, Australia maintains a 'psychological *terra nullius*' in its attitude towards Aboriginal people. Present-day claims by Aboriginal people that our lands were stolen and remain illegally occupied are regarded by non-Indigenous Australia as ungrateful and ignorant of the benefits colonisation has delivered to Indigenous Australians.

> The way Australians perceive Aboriginal land rights reveals much about their perception of their own history and their sense of self. For most Australians, the right to own property and to have property interests protected is a central and essential part of their legal system. For Aborigines, Australian law has operated to deny property rights,

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legal status, including recognition and acceptance of Aboriginal passports, the issuing of Aboriginal birth certificates, and the sending of diplomatic delegations overseas to represent the interests of Aboriginal people. As the APG webpage states, 'Rejecting assimilation into the Australian state, the APG maintains that we as Aboriginal people have the right to decide the future of our lands and lives to the exclusion of colonial interference. We ran this country once, and our sovereignty as Aboriginal people is the authority we hold to run our country again.' See Mansell (n 6); Michael Mansell, 'Australians and Aborigines and the Mabo Decision: Just Who Needs Whom the Most' (1993) 15(2) *Sydney Law Review* 168 ('Australians and Aborigines and the Mabo Decision'); See also, 'Aboriginal Provisional Government', (Webpage), <http://apg.org.au/about.php>.

[465] Ciaran O'Faircheallaigh 'Native Title, Aboriginal Self Government and Economic Participation' in Brennan et al (n 90) 159.

> acknowledge them sparingly, and then extinguish them again; it has been a tool of oppression and colonization.[466]

Despite the limited recognition native title provides to the political claims of Aboriginal people, the terms *Mabo* and *native title* have come to occupy a place in Australian political discourse that articulates a narrative about the unresolved nature of relations between Indigenous and non-Indigenous Australia.[467] Native title provides therefore the language for a new understanding of Australian democracy as consisting of 'nations within the nation'.

I now turn to discuss the important legitimatising role that courts play in the sovereignty and self-government claims of Aboriginal people.

## 5.3 The Publicity Role of Courts in Native Title

A feature of Aboriginal people's ongoing use of the Australian courts in relation to native title is that each successful determination is a further *public confirmation* that Aboriginal and Torres Strait Islander groups continue to possess and exercise law and custom over their traditional lands.[468] Accordingly, the courts are recognising that a claimant group's system of traditional laws and customs, and by extension, sovereignty and self-government, is not some relic of pre-colonial history but a functioning part of an Aboriginal groups' contemporary system of governance and way of life.[469]

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[466] Behrendt, 'White Picket Fences: Recognizing Aboriginal Property Rights in Australia's Psychological Terra Nullius' (n 333).

[467] Tim Rowse, 'Tim Rowse Response to David Trigger' (2020) 31(1) *The Australian Journal of Anthropology* 34.

[468] Section 223 1(a) of the *Native Title Act 1993* states 'native title rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'. In order for a claim to be successful, the claimant's group must demonstrate to a degree the court can be satisfied with, as continuing a traditional connection to the area subject to claim from the time of sovereignty to the present.

[469] The claim that Aboriginal groups continues to hold a form of sovereignty that co-exists with Australian state sovereignty has been repeatedly denied by Australian courts. 'The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind is quite impossible in law to maintain.' See *Coe v Commonwealth* [1979] HCA 68 (n 412) per Gibbs J. Reynolds, *Aboriginal Sovereignty: Reflections on Race, State, and Nation* (n 278). However, as various legal scholars such as Strelein have argued, recognition of native title entails recognition of Indigenous political authority.

For Aboriginal people, the courts continue to confirm (implicitly) Indigenous sovereignty as persisting through our own law and custom and recognised by Australian law.[470]

As native title legal scholar Lisa Strelein observed, despite ongoing rejection by the courts of the notion of Indigenous sovereignty, there are 'unavoidable acknowledgements of Indigenous society present in the reasoning of native title cases that undermine the carefully constructed doctrinal denial'.[471]

This 'unavoidable acknowledgement of Indigenous society' is evident in the 2022 consent determination of the Wakka Wakka Traditional Owners of Southeast Queensland. In the judgment, Justice Rangiah of the Federal Court states,

> anthropological reports and the witness statements and affidavits provided by the claimants, provide cogent evidence of the continuity of the traditional laws and customs of the Wakka Wakka People extending back to the time of sovereignty within the claim area. The evidence supports the claim that the traditional laws acknowledged, and the traditional customs observed give the Wakka Wakka People the right to possess, occupy, use and enjoy the land and waters in the claim area.[472]

More significantly, at the special determination ceremony held on Wakka Wakka Country in the Aboriginal community of Cherbourg, Justice Rangiah told the more than 100 Wakka Wakka Traditional Owners:

> It is important to emphasise that the court is not giving the Wakka Wakka people anything. The court is simply recognising that which the Wakka Wakka people have always known – that this has always been and will always be your land.[473]

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[470] For a discussion of the nexus between recognition of rights in land and the right to self-government, see Webber, 'Native Title as Self-Government' (n 134); Ivison, 'Decolonizing the Rule of Law: Mabo's Case and Postcolonial Constitutionalism' (n 449); Strelein, *Dialogue about Land Justice: Papers from the National Native Title Conference* (n 40).

[471] Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (n 417).

[472] *Bell on behalf of the Wakka Wakka People #4 (No 2) v State of Queensland* [2022] FCA 371 (Federal Court of Australia, 12 April 2022) (Rangiah J).

[473] 'Wakka Wakka People Win Native Title Battle for Traditional Land, Including Cherbourg', ABC News, (Webpage), <https://www.abc.net.au/news/2022-04-13/wakka-wakka-native-title-federal-court-aboriginal-land-rights/100989260>.

While Justice Rangiah's words do not contain the term 'sovereignty', they nonetheless strongly convey his belief the Wakka Wakka people never lost or relinquished sovereignty to their land ('The land has always been'). And that they will continue to hold sovereignty into the future (will always belong to Wakka Wakka people'). Yet courts have and do, fail Aboriginal people.[474] However, legal failures can also aid public deliberation.

As Levy explains, courts and legal decisions can be a process of gradual filling (which he terms 'accretion') – of replacement and refilling – of the broad outlines of a legal right with novel content. Novel legal claims (such as native title or Indigenous right to self-government) may have 'little *a priori* content and is therefore largely empty of legal reasoning. The basis of a claim may be need more specific content to be produced through multiple cases and hearings.[475] Novel cases such as native title claims can (theoretically) fill gaps in public knowledge about an issue as courts and judicial decision-making serve as a conduit for underserved interests to find entry into public decision-making and potentially influence deliberation elsewhere.[476]

In his Mabo Oration at the 2008 National Native Title Conference, Joe Williams, the first Māori justice of the Supreme Court of New Zealand, spoke of several failed court cases that Māori claimants had initiated to prevent the privatisation of public radio and television stations fearing it would result in the loss of Māori language broadcasting. The claimants lost their cases, but eventually negotiated with the Aotearoa New Zealand government, funding for over 20 Māori radio stations and a public television station. As Williams said, the Māori claimants 'lost the battle, but won the war'.[477]

This 'sociological legitimacy' of the courts, Levy argues, can help amplify in the public sphere what would be otherwise undervalued interests of certain societal subgroups such as claims of Indigenous groups. When an Aboriginal claimant loses a case (such as in the *Yorta Yorta*) the outcome may prompt governments, and arguably the wider public, to consider the merits of the

[474] The Yorta Yorta claim is infamous for the passage 'The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs'. See *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* [1998] FCA 1606; *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2001] FCA 45 (Full Federal Court, 8 February 2001); *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58 (High Court of Australia, 12 December 2002).

[475] Ron Levy, 'Rights and Deliberative Systems' (2022) 18(1) *Journal of Deliberative Democracy* 28.

[476] Ibid. 30.

[477] Strelein, *Dialogue about Land Justice: Papers from the National Native Title Conference* (n 51) 21.

original claim and whether the legal outcome was just, and if not, to possibly look for alternative means of recognising or accommodating the claim of the group.[478]

As of August 2023, there have been exactly 600 successful native title determinations with more than 100 native title claims awaiting a determination.[479] Through native title and other statutory forms of land rights, Aboriginal and Torres Strait Islander people now have a recognised interest to more than 57% of the Australian land mass.[480]

This would appear to be a very powerful public confirmation that Aboriginal people continue to hold sovereignty over their traditional lands. To illustrate the importance of this steady accumulation of successful native title determinations, consider that in the thirty years of native title, Aboriginal and Torres Strait Islander people, who constitute just under 4% of the total Australian population, now have recognised rights under Australian law to almost 60% of the Australian landmass.

My claim that courts and the native title process still entail an important role in public deliberation and understanding of Aboriginal sovereignty and self-government is not dependent upon more *Mabo* or *Wik* like decisions of Australian courts. The expectation that every native title determination would make as profound an impact as *Mabo* is clearly unrealistic. My claim is that Australian courts continue to play an important role in 'deliberation about native title' in

[478] Levy (n 524) 31; See also Mendes (n 196) 131. For example, the public criticism of the Yorta Yorta case and the role of the court and justice system, prompted the Victorian Government in 2004 to initiate a process with the Victorian Traditional Owner Land Justice Group to establish an out-of-court settlement process for native title. In 2010, the Victorian Government enacted the *Traditional Owner Settlement Act 2010* (Vic) that enables the Victorian Government to recognise the rights of Traditional Owners and certain rights in relation to Crown land, similar to native title. Likewise, the failure of the Yolngu Traditional Owners claims in 1971 in *Milirrpum v Nabalco*, led to the Whitlam Government establishing the Woodward Royal Commission into land rights. The findings of the Commission would eventually to the enactment by the Federal parliament of the *Aboriginal Land Rights Act (Northern Territory) 1976*. In both cases, governments, arguably influenced by members of the public such as lawyers, human rights advocates, not to mention the Aboriginal claimants, compelled governments to offer alternative means of justice as a response to the failed court outcomes.

[479] As of 25 August 2023 there are exactly 600 successful native title determination registered on the NNTT's register of native title determinations with more than 100 native title applications awaiting a future determination by the courts. See NNTT, (Webpage), http://www.nntt.gov.au/Pages/Statistics.aspx

[480] Terri Janke et al, *Australia State of the Environment 2021: Indigenous, Independent Report to the Australian Government* (Commonwealth of Australia, 2021); Josh Nichols et al, 'Who Owns Australia?', (Webpage), *The Guardian,* <http://www.theguardian.com/australia-news/ng-interactive/2021/may/17/who-owns-australia>.

terms of the cumulative effect each determination of native title provides in terms of public deliberation about Aboriginal issues, including sovereignty and self-government.

To conclude this discussion on judicial deliberation and the important publicity role of the courts in native title, I draw on the words of Justices Gordon and Mortimer.

Justice Gordon in the *Love & Thoms* case said in her judgment,

> Native title is a significant acknowledgement of the position of Indigenous peoples that took place long after Federation. Native title recognises that, according to their laws and customs, Aboriginal Australians have a connection with country and have rights and interests in land and waters. As history has shown, that connection is not simply a matter of what the common law would classify as property. It is a connection which existed and persisted before and beyond settlement, before and beyond the assertion of sovereignty and before and beyond Federation. It is older and deeper than the Constitution.[481]

In the *Uutaalnganu (Night Island)* native title determination, Justice Mortimer stated:

> Every determination that native title exists is important. The recognition given by a determination of native title, for those who have long been denied any recognition by Australian law of their deep and abiding connection to their country, is a step in the struggle of Aboriginal and Torres Strait Islander peoples to regain what was taken away from them, and to make their own choices about how their country and its resources are protected, used and maintained.[482]

So, while the courts have not always been able to recognise the native title claims of Aboriginal people, they still perform an important publicity function. This includes the role courts continue to play in the legitimising the sovereignty and self-determination claims of Aboriginal people through ongoing successful native title determinations and acknowledgements by the courts as demonstrated in the words of Justices Rangiah, Gordon, and Mortimer.

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[481] *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia [2020] HCA 3* (High Court of Australia, 11 February 2020) per Gordon J.

[482] *Ross on behalf of the Cape York United #1 Claim Group v State of Queensland (No. 3) (Uutaalnganu (Night Island) determination)* [2021] FCA 1465 (Federal Court of Australia, 25 November 2021).

The *Mabo* decision made the rights to Aboriginal and Torres Strait Islander people to our traditional lands 'visible' in Australia democracy. By doing so, it emboldened Aboriginal people to claim other important political rights such as sovereignty and self-government that *Mabo* did not address.[483] The public debate regarding the political resolution of these matters between Aboriginal people and the Australian state remains ongoing.

## 5.4 Conclusion

In this chapter, I have discussed the *Mabo* decision as an example of judicial deliberation that made Aboriginal and Torres Strait Islander people 'visible' within Australian democracy and overturned the doctrine of *terra nullius*. As a 'constitutional moment', I have argued that *Mabo* brought political, legal, and public attention to Australia's 'constitutional silence' and the place of Aboriginal people in Australian democracy.

Though it was never expected that the recognition of native title would have an immediate effect on the restructure of governance arrangements in Australia it was expected the accommodation of Aboriginal sovereignty and self-government would, over time, be absorbed into Australia's system of democratic governance. That is to say, our place within Australian democracy would be one of differentiated inclusion, which I now turn to discuss.

[483] As Ivison states, 'The recognition of native title in Mabo was however, tightly circumscribed, and the scope for more ambitious claims left unclear'. See Ivison, 'Decolonizing the Rule of Law: Mabo's Case and Postcolonial Constitutionalism' (n 452) 272.

# 6 Native Title and the Ideal of Deliberative Inclusion

> Democratic participation in the existing judicial, legislative and executive institutions of governance in Australia is the only means available to Indigenous Australians to achieve and exercise power. But do the existing mechanisms of democratic participation by such a small minority, who are unique in that they are Indigenous to the country, and whose socioeconomic circumstances are so egregiously out of step with the rest of the country, work to ensure my people enjoy the same expectations of life as their fellow citizens? No, they do not.[484]

My discussion thus far has been largely context-setting. I outlined my intention to make 'visible' the deliberative and participatory practices of Aboriginal people in a largely unknown deliberative democratic space, the native title system. I summarised deliberative and participatory democracy theories and challenged a tendency of some scholars who argue deliberative and participatory democracy are two separate, though closely aligned, approaches to deepening democratic engagement and that they should not be equated or viewed as being the same. I argued the separation of deliberation from participation fails to appreciate the ideal of Indigenous self-government, which is much closer to the ideal of participatory deliberative democracy.

Recall that my research question asks, 'Has the native title system become a deliberative and participatory democratic space for self-determination by Aboriginal people? To answer this, I frame my discussion for the remainder of this thesis on the deliberative ideal of *inclusion*.[485]

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[484] Noel Pearson, *Up from the Mission: Selected Writings* (Black Inc., 2011).

[485] Recognition that Aboriginal people should have real power to make decisions on matters importance to and affecting Aboriginal people was identified as early as the 1976 royal commission into the administration of Australian government. In the report, the recommendation was to 'increase Aboriginal participation in the administration of Indigenous affairs policy'. The reported cited the problem traditional government departments staffed by non-Indigenous 'white career-minded public servants with neither the necessary knowledge or understanding of Aboriginals nor dedication to their interests' as 'unlikely to be sufficiently free of central bureaucratic restraints to be able to deal expeditiously with the urgent problems facing Aboriginals'. And 'Aboriginals are unlikely to identify with a government department and are unlikely to work happily within it'. Recommended changes included improvements in the administration of Aboriginal affairs through changes within the Department; growth of Aboriginal institutions; increasing participation, at the policy level, of representatively chosen Aboriginals; and increasing participation of Aboriginals in administration and service delivery. See *Australian Government Administration – Report of Royal Commission* (Coombs Report) (Commonwealth of Australia, 1976) 335-341.

Did the recognition of native title and the resulting increased opportunities for deliberation lead to greater inclusion of Aboriginal people in decision-making?

The epigraph to this chapter comes from Aboriginal lawyer and rights advocate Noel Pearson. What Pearson makes clear is that Australia's existing framework of democratic governance acts to exclude, and not meaningfully include, Aboriginal and Torres Strait Islander people. Our extreme minority status and socioeconomic inequality are barriers to our equal standing within Australian democracy on the basis of formal inclusion. For Pearson and many other Indigenous advocates, *Mabo* and native title were viewed as a necessary catalyst for a new and more inclusive form of Australian democracy for Aboriginal people.

The exclusion of Aboriginal people from participating in Australian democracy begins of course with British colonisation and *terra nullius.* During the 19th Century the status of Aboriginal people could be described as legally indeterminate, as we were considered neither British or colonial subjects, nor as Indigenous people maintaining sovereignty over our own lands. Then, at the end of the 19th Century, we were neither consulted nor permitted to play any official role in the constitutional conventions or the drafting of the Australian Constitution.

After federation, our exclusion continued in the form of harmful policies that physically and socially ostracised Aboriginal people from Australian society. As Aileen Moreton Robinson argues, 'legislation and state policies served to exclude Indigenous people from participation as citizens through their removal to reserves, missions, and cattle stations, where they lived everyday lives under regimes of surveillance'. 'Aboriginal people suffered mass dislocation as a consequence of Australia's efforts to isolate and exclude us.'[486]

It was not until the 1960s that we were afforded citizenship rights notionally on par with other Australians. Writing in 2022, Professor Peter Yu, a Yawuru man and former leader of the Kimberley Land Council, and now an ANU academic, spoke of the troubled relationship Aboriginal people have with Australian democracy:

> To suggest that the Australian constitution was founded on democratic principles is a perversion of history. The Constitution that federated the Australian nation was anything but democratic. It expressly excluded us. We were not to be counted in the census. It was founded on racism. It was a founding document for the governing of

[486] Moreton-Robinson (n 59) 13.

> white-settler Australia. It explicitly stopped the national parliament from making laws for First Nations Australians. The Australian Constitution did not allow the Commonwealth government to undermine the laws and practices of colonial state governments that were premised on our disappearance as a people.[487]

This chapter seeks to makes the following points.

Firstly, since the 1960s, Aboriginal people have called for greater differentiated inclusion through structural changes to Australian democracy that would enable us to participate in deciding the laws and policies that affect our lives. The structural changes we seek are new forums and processes that better enable us to participate in public decision making. We tend to call for enhanced procedures for deliberation and participation so that our voices will be heard in political decision-making.

The second is more practical. As an extreme political minority group, we simply do not have the numbers to influence or control political decisions through electoral politics. We have few other choices but to engage in deliberation and what O'Sullivan describes as moral persuasion to try to make governments take our concerns seriously.[488] We therefore seek forums in which our concerns can be heard and responded to by government. Hence, differentiated inclusion demands forums and processes for deliberative inclusion.

The ideal of deliberative inclusion is multifaceted and not easy to succinctly define. Most fundamentally, a definition of deliberative inclusion begins with the obvious point, it must include the participation of any and all affected parties in a deliberative forum or exchange. Additionally, minority or marginalised groups whose voice is often absent or overlooked, must be included. The presence of all affected and marginalised groups only partially fulfils the ideal of deliberative inclusion.

As Levy and Orr remind us, genuine deliberative inclusion requires more than participation. It also demands the thoughtful consideration and weighing of arguments. As they explain, inclusion is the first step in deliberation.

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[487] Peter Yu, 'Aboriginal Australians: Anything but Democratic, the Constitution Excluded My People', *The Sydney Morning Herald* (Webpage) (online, 10 June 2022) <https://www.smh.com.au/national/anything-but-democratic-the-constitution-excluded-my-people-20220608-p5asc1.html>.

[488] Dominic O'Sullivan, *Indigeneity: A Politics of Potential* (Policy Press, 2017) 73.

> Deliberative inclusivity has an additional meaning. Information in the forum should be weighed on its merits – the most relevant, valid, true, weighty, or coherent inputs to be sifted and separated from the rest.[489]

The point that Levy and Orr acknowledge is that reasoning giving and reciprocity are also important to the ideal of deliberative inclusion. As McLaverty explains, deliberation should involve the reciprocal giving on reasons, arguments, justifications in support to positions. People should be open to being persuaded by the force of arguments presented and willing to change their minds on the basis of arguments and where all interests and opinions are included in deliberation.[490]

Likewise, Fung and Wright emphasise the virtues of reasoning together and reciprocity for deliberative inclusion. 'The important feature of genuine deliberation is that participants find reasons that they can accept…not necessarily the one that they completely endorse or find advantageous.[491]

Thus, the working definition of deliberative inclusion for the purposes of this thesis is that firstly, Aboriginal are able to access forums and processes in order to participate in deliberation. And secondly, that not only is our presence recognised and our voices heard, but what we have to say is given thoughtful consideration by others. This expanded ideal of inclusion to also entail thoughtful consideration (what Scudder calls 'deliberative uptake') I discuss in further detail in Chapter 7.[492]

I begin this chapter in 6.1 by discussing the ideal of formal inclusion, also referred to as formal equality, is the notion that all member of a society be treated equally at all times.

I then argue in 6.2 that for Aboriginal people, the notion of unceded sovereignty and our historical exclusion from Australian democracy, we demand 'differentiated inclusion' and not

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[489] Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 1st ed, 2016) 125.

[490] Peter McLaverty 'Inequality and Deliberative Democracy' in Elstub and McLaverty (n 164) 39.

[491] Fung and Wright (n 128) 17.

[492] For Scudder, even if there is a broadening of diversity of voices included in a deliberative system, 'we nevertheless must also confront the challenge of uptake: ensuring these voices are actually heard and ultimately considered. If inclusive deliberation is to have a meaningfully democratic impact, we must search for ways to broaden the enactment of deliberative uptake'. See, Mary F Scudder, 'The Ideal of Uptake in Democratic Deliberation' (2020) 68(2) *Political Studies* 504, 505.

formal inclusion within Australian democracy. As Kymlicka explains, some states may need to accommodate difference through special legal or constitutional measures above and beyond the common rights of citizenship. It is these special measures to accommodate cultural difference that constitute the ideal of differentiated inclusion.[493]

I then discuss in 6.3 that in the absence of structural changes consistent with differentiated inclusion in Australia, the recognition of native title demands space for deliberative inclusion. As I will go onto discuss in later chapters, the native title system is where Aboriginal people seek to negotiate forms of deliberative inclusion through certain decision making processes, for example, environmental public policy.

The ideal of inclusion is important to Aboriginal people. It is through inclusion, in particular differentiated and deliberative, that we seek to convert our marginal societal position to a form of political belonging within Australian democracy in which our difference is acknowledged, and where our voices are not just heard but what we have to say is given thoughtful consideration by institutions, politicians, and the public.

My discussion of the tension between inclusion and exclusion within Australian democracy for Aboriginal people sets up my discussion for the rest of this thesis. In Chapter 8, I argue the native title system functions as what Philip Pettit calls a 'contestatory mechanism'. I then follow in Chapters 9, 10, and 11 with empirical examples of what differentiated inclusion and contestation looks like in reality. I discuss three deliberative and participatory democratic practices used by Aboriginal people within the native title system: deliberative policy analysis (Chapter 9), deliberative negotiation (Chapter 10), and prefigurative politics (Chapter 11).

I now turn to discuss the ideal of formal inclusion.

## 6.1 Deliberative Democracy and the Ideal of Formal Inclusion

[493] For Kymlicka, differentiated inclusion is premised upon an acceptance that liberal democracies with culturally distinct groups such as Indigenous people must do more to accommodate difference than the protection of the civil and political rights of individuals. The protection of common citizen rights for all, maybe insufficient for some groups. As Kymlicka explains, it is accepted that Canada is a multination state and that forms of difference can be accommodated only through special legal or constitutional measures above and beyond the common rights of citizenship. It is these special measures to accommodate cultural difference that constitutes the ideal of differentiated inclusion. See, Will Kymlicka 'Three Forms of Group-Differentiated Citizenship in Canada' in Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 153.

In this section, I provide a brief overview of formal inclusion, also referred to as formal equality.

Formal inclusion is the notion that all member of a society be treated equally at all times.[494] That is to say, all members of society are entitled to the same sets of rights and must adhere to the same laws and rules that govern that society.

As Gutmann argues, the strength of formal inclusion is its supposed neutrality and universal application. That is to say, formal inclusion treats everyone as being of equal worth in a democratic society, with equal access to a range of primary goods such as income, health, education, freedom of speech, association, the right to vote and hold public office, and the notion of 'one person, one vote'. Rights are available to all citizens regardless of gender or race. Forms of 'differentiated' inclusion are thought of by some as 'illiberal' because they supposedly violate the norms of neutrality and universalism. The 'impartiality' of formal inclusion, they argue, is the necessary price to pay to live within a society that treats people as equals regardless of ethnic, religious, racial or sexual identifies.[495]

Formal inclusion, as Gutmann explains, is therefore homogenising. That is to say, it seeks to eliminate, even punish, difference by invoking pride or worthiness in sameness.

> The demand for recognition may be satisfied on this scheme, but only after it has been socially and politically disciplined so that people pride themselves on being little more than equal citizens and therefore expect to be publicly recognised as such.[496]

Yet critics of formal inclusion argue it fails to address disadvantages that some groups – such as Indigenous people – experience, because of past discrimination or characteristics beyond their control such as race, gender, or socioeconomic circumstances.

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[494] Speaking of the situation in the US for First Nations people, Cornell and Jorgenson argue formal inclusion is problematic for Indigenous people in settler colonial states because it assumes a desire, or at least consent, for assimilation. The principle of social inclusion, despite its outward liberalness, can be problematic when applied to Indigenous people because inclusion assumes a desire for assimilation into mainstream culture and society and treats Indigenous people as just another group in need of assistance. Instead of focusing primarily on relief programs to address Indigenous disadvantage, policymakers need to reconsider social inclusion's core premise. See, Stephen Cornell and Miriam Jorgensen, 'What Are the Limits of Social Inclusion? Indigenous Peoples and Indigenous Governance in Canada and the United States' (2019) 49(2) *American Review of Canadian Studies* 283.

[495] Amy Gutmann 'Introduction' in Charles Taylor et al, *Multiculturalism: The Politics of Recognition* (Princeton University Press, 1994) 4.

[496] Ibid. 6.

In *Inclusion and Democracy*, Young states that a democratic decision is legitimate only if all those affected by it are included in the process of discussion and decision-making. When coupled with norm of equality, inclusion allows for maximum expression of interests, opinions, and perspectives relevant to the problems or issues for which a public seeks solutions.[497]

Political equality, Young explains, is fundamental to the ideal of democracy. Not only should all those affected by a democratic decision be included in decision-making, but also they should be included on equal terms.

In political conflict, Young argues, when people protest against exclusion and demand greater inclusion, 'they invariably appeal to ideals of political equality'.

> When discussion is inclusive, in this strong sense, it allows the expression of all interests, opinions, and criticisms, and when it is free from domination discussion participants can be confident that the results arise from good reasons rather than from fear or force or false consensus.[498]

For Dryzek, increased democratisation means the inclusion of various groups and categories of people in political life.

> Democracy is made more substantial and effective through greater inclusion of disadvantaged groups (ethnic and religious minorities, Indigenous peoples, elderly, LGBTIQA+, unemployed) for which the formal promise of democratic equality has masked continued exclusion or oppression.[499]

For Goodin, the ideal of an 'inclusive' society simply means those left out be brought fully on board. 'That is to say, inclusion means that those who are presently marginalized be made less marginal.'[500]

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[497] Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2nd ed., 2000) 23.

[498] Ibid. 24.

[499] John S Dryzek, 'Political Inclusion and the Dynamics of Democratization' (1996) 90(3) *American Political Science Review* 475.

[500] Robert E Goodin, 'Inclusion and Exclusion' (1996) 37(2) *European Journal of Sociology/Archives Européennes de Sociologie* 343, 346.

For Gastil, nations that claim to be democratic must satisfy the criterion of inclusion by welcoming into its political process all adults who exist within its boundaries. To the extent that a system counts people as adult members but excludes them from decision-making processes, such a system cannot call itself democratic.

> Once you are recognised as a member of a democracy you must have then have equal opportunity to participate in three related ways – putting issues on the agenda, expressing your views on those issues, and voting on those issues directly or indirectly.[501]

However, the ideals of equality and inclusion can be greatly affected by one's social group. As Beauvais explains, not all social groups arrive at life's starting line with the same resources.[502] Inequalities engender asymmetrical power relations that entail exclusions. Inequality and the resulting exclusions can be thought of as 'systemic constraints on social group members, limiting their ability to exercise and develop their individual capacities and their participation in political practices'.[503]

A fundamental feature of the ideal of formal democratic inclusion is the 'all affected interests' principle. What this entails is that all those members of a society whose interests are affected by a decision have a democratic claim that their interests should be taken into account in the process of decision making and implementation. Those who are subject to the jurisdictional authority of the state have a democratic claim to equal protection under the law and to be recognised as citizens.[504]

However, as Gutmann explains, quoting Charles Taylor, this insistence on cultural uniformity is too high a price. Liberal democracies cannot regard citizenship as a universal identity because people are unique and self-creating. 'As John Stuart Mill and Ralph Waldo Emerson recognised "people are culture-bearing"'.[505]

I take 'culture bearing' here to mean that some people not only have shared aspects of culture such as linguistic and racial similarity, but also shared life experiences such as a history of

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[501] John W Gastil, *Political Communication and Deliberation* (SAGE Publications, Incorporated, 2007) 5.

[502] Edana Beauvais, 'Deliberation and Equality' in Bächtiger et al (n 6) 144-145.

[503] Ibid. 146.

[504] Rainer Bauböck (ed.), *Democratic Inclusion: Rainer Bauböck in Dialogue* (Manchester University Press, 2018) 20.

[505] Taylor et al (n 494) 6.

discrimination and exclusion, of oppression, or of historical injustice. For Indigenous people here in Australia and elsewhere, the experiences of colonisation exert a powerful force on their sense of place within a democratic society.

Understanding that not all citizens share the same experience of democratic inclusion, theorists such as Gutmann and Taylor argue that what is needed is a politics of difference to challenge the politics of universalism:

> With the politics of equal dignity, what is established is meant to be universally the same, an identical basket or rights and immunities; with the politics of difference, what we are asked is to recognize is the unique identity of this individual or group, their distinctiveness from everyone else.[506]

Aboriginal people have enjoyed greater formal inclusion in Australian democracy since the 1960s. We now enjoy the same freedoms as other Australian citizens such as freedom of speech, association, and the right to vote. However, there are several problems associated with formal inclusion for Australian Aboriginal people and indeed for Indigenous people in other settler-colonial states.

Despite greater formal inclusion of Aboriginal and Torres Strait Islander people since the 1967 referendum, as Behrendt explains, it is increasingly evident that formal structures and institutions within Australia have not changed enough to equalise, let alone reverse, the socioeconomic impact of colonisation and past government policies and practices.[507] While the 1967 referendum both symbolically and practically included Aboriginal people within Australian democracy, as Hobbs explains it did so on neutral terms with no explicit recognition of Aboriginal and Torres Strait Islander people's distinctiveness.[508]

As such, critics argue that formal inclusion exacerbates the ongoing exclusion of Aboriginal people. Australian democracy's 'unbridled majoritarianism' gives minority Indigenous claims

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[506] Ibid. 38.

[507] Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (The Federation Press, 2003) 13.

[508] Harry Hobbs, 'Constitutional Recognition and Reform: Developing an Inclusive Australian Citizenship through Treaty' (2018) 53(2) *Australian Journal of Political Science* 176, 179 ('Constitutional Recognition and Reform').

'no particular recognition'. 'Exclusion remains the legacy of a colonial political order over which Indigenous people had no influence or connection.'[509]

As Kymlicka states, formal inclusion of Indigenous people in settler-colonial states overlooks an important fact: inclusion within the settler political order is of a forced or involuntary kind.[510] That is to say, colonised Indigenous people have never voluntarily joined or formally consented to formal inclusion within the settler state's political order. It is arguable that even in instances when treaties were entered into between Indigenous people and colonisers such as in the US and Aotearoa New Zealand, these were done so under highly unfavourable conditions.

The other factor that formal inclusion fails to address is the extreme minority status of Aboriginal people. In majoritarian liberal democracies, our claims, even if strenuously expressed through public deliberation, can often fail to produce the political outcomes we desire. In many democratic societies formal inclusion is articulated as *one person, one vote*. That is to say, all citizens hold the right to vote. However, Hobbs notes, democracy is more than a decision-making rule, and while majority decision-making is very likely to be the presumptive method for resolving disagreement, 'institutional arrangements must exist to empower numerical minorities. Where persistent electoral minorities exist, undifferentiated majority rule will be inappropriate.'[511]

While formal equality may satisfy some within the tradition of liberal democracy, substantive equality, also understood as differentiated inclusion, is what Indigenous people seek. I now turn to discuss this.

## 6.2 Indigenous People and the Ideal of Differentiated Inclusion

After the recognition of native title, Aboriginal leaders believed the tide had turned in both public sentiment and the willingness of the Australian state to negotiate with Aboriginal and Torres Strait Islander people on sovereignty and self-government matters. One of the drivers of public deliberation on native title and additional political claims became known as the 'social

[509] O'Sullivan (n 487) 75.

[510] Will Kymlicka, 'Three Forms of Group-Differentiated Citizenship in Canada' in Seyla Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 155.

[511] Harry Hobbs, 'Democratic Theory and Constitutional Design: Hearing Persistent Electoral Minorities' (2017) 24(4) *International Journal on Minority and Group Rights* 341, 357.

justice package', a political document that outlined the range of political reforms sought by Aboriginal and Torres Strait Islander people. Reforms called for included recognition of and support for self-determination as well as policies, institutional structures and legislation to empower Aboriginal and Torres Strait Islander people.[512]

Like the earlier Barunga Statement and the current Uluru Statement from the Heart, the 'social justice package' can be understood as a 'deliberative device' that aims to stimulate public deliberation and invite deliberation between Aboriginal people and the state on reforms to better include us in the decision making processes of government. For deliberative democrats, the value of public deliberation is the opportunity it provides for the weighing of arguments and exchange of reasons between members of the public. As Chambers explains, an active and critical public sphere takes on the important role as a space for the rational criticism of state power by citizens demanding accountability and justification from state actors.[513]

The ideal of Indigenous people being able to participate and take our place in a liberal, democratic society such as Australia on the basis of 'differentiated inclusion' has long been recognised as a means for addressing the false assumption that formal equality and democratic institutions produce laws that are neutral and create political and legal results that are equal.[514]

For Gutmann and Taylor, democratic societies insisting on universal or formal forms of inclusion pay too little attention to the matter of cultural diversity. As Gutmann explains, increasingly public institutions such as government agencies, schools, and universities, etc, have been criticised for failing to recognise or respect the particular cultural identities of citizens. 'It is hard to find a democratic or democratizing society these days that is not the site of some significant controversy over whether and how its public institutions should better recognize the identities of cultural and disadvantaged minorities.'[515]

While citizenship rights provide for formal inclusion, laws, policies and government actions can be exclusionary. In the case of Australia, Davis says the strong resistance Aboriginal people face when demanding a role in deciding the laws and policies that affect our lives is indicative of Australia's preference for a purely 'procedural' ideal of democracy, in which citizens'

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[512] 'Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures' (1996) 1(1) *Australian Indigenous Law Reporter* 76.

[513] Simone Chambers, 'Philosophic Origins of Deliberative Ideals' in Bächtiger et al (n 6) 65.

[514] Larissa Behrendt, 'Our Institutions in a Reconciled Australia' (2004) (4) *Journal of Indigenous Policy* 31.

[515] Taylor et al (n 550) 3.

participation is more or less limited to the right to vote. 'There is little scope for scrutiny of the quality of government decision-making between elections'.[516] Davis argues that the so called 'procedural fairness' of Australian democracy (one person, one vote) hides the inability of Aboriginal people as a minority group to influence law and policy making decisions.

As O'Sullivan explains, there are simply not enough of us (Indigenous people) to influence or control political decisions through electoral competition. We have no other option but to rely on moral persuasion not electoral strength to have political parties, and the wider public, take our concerns seriously.[517]

To overcome such a situation, reform of Australia's system of democratic governance that makes space for what can more aptly be described as shared jurisdiction between Aboriginal and Torres Strait Islander people and the Australian state is necessary. As Behrendt explains, Aboriginal people claim both equality within the Australian state and the right to define ourselves as a separate entity.[518] However, this fuller type of inclusion has proven challenging for Australian democracy.[519]

As Hobbs explains,

> The terms of Aboriginal and Torres Strait Islander inclusion into the Australian community are problematic. Australian citizenship is often articulated in an exclusionary manner, emphasising formal individual equality that conflicts with Indigenous peoplehood. If lasting reform to Australia's political and legal governance framework is to be realised, this understanding of Australian citizenship must be reconceived to make room for Aboriginal and Torres Strait Islander nationhood as co-sovereign on and of this land.[520]

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[516] Megan Davis, 'Listening but Not Hearing: When Process Trumps Substance' [2016] (51) *Griffith Review* 73, 74.

[517] O'Sullivan (n 487) 73.

[518] Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (The Federation Press, 2003) 14.

[519] Writing in the years just before the centenary celebration of Australia's federation, Dodson said Australia required a more fundamental and radical consideration of what citizenship is and means particularly as it effects Aboriginal and Torres Strait Islander people. 'The concept of citizen ship is ill defined, poorly understood, confused and confusing. We need to reassess citizenship and political participation as a nation. Our political and social organisation and the structural relationship between different groups of people and the nation need to be questioned'. See Mick Dodson, 'Citizenship in Australia: An Indigenous Perspective' [1997] (22) *Alternative Law Journal* 57.

[520] Hobbs, 'Constitutional Recognition and Reform' (n 507) 178.

There have been efforts to enact the ideal of differentiated inclusion within Australian democracy. In November 1972, the Whitlam Government adopted self-determination as official government policy as part of its far-reaching social reform agenda.[521] Self-determination was viewed as a response to the by then largely discredited policy of assimilation and to unequivocally reject the paternalism of policies of the past.[522]

Later, after 1983, the Hawke Labor Government continued a commitment to the principle of self-determination, Hawke promised to introduce a national land rights scheme that would give Aboriginal people inalienable freehold title for Aboriginal land, control over mining on Aboriginal land, compensation for lost land and other benefits. [523] Hawke also promised to negotiate a treaty with Aboriginal and Torres Strait Islander people after being presented with the Barunga Statement in 1988 by Galarrwuy Yunupingu and Wenten Rubuntja. The Statement, amongst a number of claims, called on the Australian Government and people to recognise the aspirations of Aboriginal people for self-determination.

> **Barunga Statement**
> We, the Indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights:
> - to self-determination and self-management, including the freedom to pursue our own economic, social, religious and cultural development;
> - to permanent control and enjoyment of our ancestral lands;
> - to compensation for the loss of use of our lands, there having been no extinction of original title;
>
> We call on the Commonwealth to pass laws providing:

[521] Will Sanders, Australian National University, and Centre for Aboriginal Economic Policy Research, *Towards an Indigenous Order of Australian Government: Rethinking Self-Determination as Indigenous Affairs Policy* (Discussion Paper No. 230/2002, Centre for Aboriginal Economic Policy & Research (CAEPR), 2002) 1.

[522] Aboriginal & Torres Strait Islander Social Justice Commissioner, Social Justice Report 2002, Australian Human Rights Commission, p.9.

[523] As precursor to the hysteria that would greet the *Mabo* decision, the proposed land rights legislation attracted strong criticism from mining interests and state governments such as Western Australia. Hawke's plans for the legislation were shelved. Professor Gary Foley, a Gumbainggir man from northern NSW, called the decision by Hawke 'one of the greatest acts of political bastardry in Australian history'. See, Gary Foley, 'How Bob Hawke Killed Land Rights' (2013) *Tracker: be informed, be involved, be inspired*; Gary Foley and Tim Anderson, 'Land Rights and Aboriginal Voices' (2006) 12(1) *Australian Journal of Human Rights* 83.

- A national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander affairs;
- A national system of land rights;
- We call on the Australian Government to support Aborigines in the development of an international declaration of principles for indigenous rights, leading to an international covenant.
- And we call on the Commonwealth Parliament to negotiate with us a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedom.[524]

The Barunga Statement, like the earlier Yolngu Bark Petition and the current Uluru Statement, are what I call 'deliberative devices'. That is to say, they publicly articulate the aspirations of Aboriginal and Torres Strait Islander people to the Australian people and governments, with the intention of inducing *public reflection*.[525] They are a mechanism to encourage public deliberation regarding the inclusion of Aboriginal and Torres Strait Islander people in Australian democracy on terms that recognise our distinct legal and political status as co-sovereigns in Australian democracy.

Barvosa explains that public deliberation requires catalysts to spark and to sustain public interest in an issue over time. In her study, she analyses public deliberation of social and legal equality for the lesbian, gay, bisexual, and transgender (LGBT) people in the US. As she explains, a deliberative catalyst can be an individual or group who initiates public deliberation so that others engage in conscious and informed reflection on a matter of public consideration.[526] Barvosa explains that deliberative catalysts can be further categorised into three types; deliberative entrepreneurs, deliberative packages, and precipitating events.

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[524] The Statement in notable for the comprehensive scope of issues that were – and remain – of concern to Aboriginal people. It also draws of language and principles contained in international covenants on economic, social and cultural rights; civil and political rights; and the convention on the elimination of all forms of racial discrimination. This demonstrates that by the late 1980s, Aboriginal people were viewing international concepts such as Indigenous people's rights to self-determination as important standard for Australian domestic politics. To review the entire Barunga Statement, see AIATSIS (Webpage),https://aiatsis.gov.au/explore/barunga-statement

[525] Though Young uses the term 'publicity', the idea is that in pluralistic societies, when groups express themselves publicly, they make themselves accountable to others. 'They must try to explain their particular background experiences, interests, or proposals in ways that others can understand, and they must express reasons for their claims in ways that others recognize could be accepted, even if in fact they disagree with the claims and reasons.' See Young, *Inclusion and Democracy* (n 172) 25.

[526] Edwina Barvosa, *Deliberative Democracy Now* (Cambridge University Press, 2018) 78.

Deliberative entrepreneurs are high profile public figures including celebrities who use their popularity to bring attention to particular public issues.[527] Deliberative packages are cultural products such as films, books, radio programs, presentations. The most effective deliberative packages are those that juxtapose competing ideas pertaining to an issue of public concern, thereby presenting the issue as a conundrum, which in turn prompts conscious thought. To be effective, they should frame issues creatively and avoid 'us-versus-them' type scenarios. The goal is to invite members of the public to reflect anew on an issue of common concern.[528] And finally, a precipitating event is unforeseen events that also spark public deliberation such as news media reporting of unprovoked violence or bullying against gay and lesbian persons.[529]

Similar to Barvosa, my use of the term 'deliberative device' entails the various thoughtful and strategic initiatives Aboriginal people produce that seek to induce public deliberation and compel people and politicians to reflect on the issue of Aboriginal rights and our demand for differentiated inclusion within Australian democracy.

For Aboriginal people, our sense of ongoing exclusion comes from the ongoing denial of our claims to sovereignty and a right of self-government. These are uncontroversial political claims and should be viewed as reasonable responses to the consequence of colonisation by the Australian state, and feature prominently in contemporary public discourse in relation to the political struggles of Aboriginal people with the Australian state.[530] Yet these claims are often dismissed as unworkable within Australia's framework of democratic governance. As Nettheim argues, self-determination within the Australian context should be viewed as Aboriginal and Torres Strait Islander people having the choice and ability to determine the nature of our relationship with the state.[531]

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[527] In Barvosa's study, she cites the influence of celebrities such as Ellen DeGeneres as being important 'deliberative entrepreneur' in the public debate on LGBT rights and marriage equality in the US. Ibid.

[528] Ibid 107.

[529] Ibid 113.

[530] This belief is often expressed as the right to self-determination (inclusive of sovereignty and self-government claims) which forms much of the political disagreement between Aboriginal people and the state. The literature on Indigenous self-determination is extensive. See Guntram FA Werther, *Self-Determination in Western Democracies - Aboriginal Politics in Comparative Perspective* (Greenwood Press, 1992); S James Anaya, 'A Contemporary Definition of the International Norm of Self-Determination' (1993) (131) *Transnational Law & Contemporary Problems*; Laura Rademaker and Tim Rowse (eds), *Indigenous Self-Determination in Australia* (ANU Press & Aboriginal History Inc., 2020).

[531] Garth Nettheim, 'The Consent of the Natives: Mabo and Indigenous Political Rights' (1993) 15(2) *Sydney Law Review* 223, 232 ('The Consent of the Natives').

As Strakosch explains, settler-colonial states such as Australia are preoccupied with attaining what *colonial completion* and the 're-founding of settler sovereignty'. As she explains, settler states such as Australia will only offer Aboriginal people the option of formal inclusion *as* decolonisation, and not a choice between inclusion, or decolonisation. And certainly not *inclusion and decolonisation* [emphasis added].[532] Thus, differentiated inclusion – as part of an effort to decolonise Australian democracy – is strongly resisted in Australia.[533] As Behrendt explains, Australia is least tolerant of 'empowerment rights' in which Aboriginal people get to make decisions on policies that will affect our lives.[534]

For O'Sullivan, the recognition of Aboriginal people as possessing a distinct political status and distinct political rights 'requires a plural political system' that is 'inclusive of Indigenous peoples with explicit institutional recognition of independent Indigenous nationhood on the one hand, and substantive Indigenous capacity to participate in state decision-making, on the other'.[535]

The various political claims of Aboriginal and Torres Strait Islander people for constitutional change, treaty, recognition of sovereignty and self-government, etc are hampered by the still dominant idea of Australia being a 'culturally homogenous nation' which denies 'peoplehood' status to Aboriginal and Torres Strait Islanders.[536] While the inclusion of Aboriginal and Torres Strait Islander people in the broader Australian polity has secured formal democratic rights for Indigenous people, the terms of such inclusion remain nonetheless problematic. As Hobbs argues,

> Australian citizenship emphasising formal individual equality conflicts with Indigenous peoplehood. If lasting reform to Australia's political and legal governance framework is to be realised, this understanding of Australian citizenship must be reconceived to make

[532] Elizabeth Strakosch 'Beyond Colonial Completion: Arendt, Settler Colonialism, and the End of Politics' in Maddison, Clark and Costa (n 126) 17.

[533] Behrendt, 'Our Institutions in a Reconciled Australia' (n 513) 164.

[534] Behrendt, 'White Picket Fences: Recognizing Aboriginal Property Rights in Australia's Psychological Terra Nullius' (n 333).

[535] Dominic O'Sullivan, *Sharing the Sovereign: Indigenous Peoples, Recognition, Treaties and the State* (Palgrave Macmillan US, 2020) 130.

[536] Hobbs, 'Constitutional Recognition and Reform' (n 507) 177.

> room for Aboriginal and Torres Strait Islander nationhood as co-sovereigns on and of this land.[537]

This tension between ideals of formal inclusion and a fuller, differentiated kind that makes space for the cultural and political distinctiveness of Aboriginal people is a characteristic of political conflict within settler-colonial contexts. Our concerns include foundational questions of sovereignty and nationhood and not just disagreement on policy issues (although this is also important) that we seek to negotiate and resolve with the Australian state.

The claims of Aboriginal people to sovereignty and self-government can be viewed, particularly by conservatives, as a threat to ideals of national unity and the sovereignty of the state.[538] As Ivison explains,

> Western political thought has often embodied a series of culturally specific assumptions and judgements about the relative worth of other cultures, ways of life, values systems, social and political institutions, and ways of organising property. Finding appropriate political expression for a just relationship with colonised indigenous peoples is one of the most important issues confronting political theory today.[539]

As Ivison explains, claims of a right to self-government by Aboriginal people in Australia are not based on a premise of secession, that is to say, of a formal separation from the Australian nation state or the creation of a stand-alone Aboriginal state (independent statehood). Rather, these claims are based on a rethink of the 'regulative norms and institutions' within already established nation-states. In particular, rethinking the constitutional base of the country, 'including the conceptions of sovereignty that underpin regulative constitutional and legal

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[537] Ibid. 178.

[538] 'The legal recognition of indigenous land rights presents significant challenges to Western legal systems, with such recognition typically impacted by, and balanced against, competing non-indigenous (frequently economic) interests in land or waters. Part of the difficulty involved in the legal recognition of indigenous land rights concerns the translation of indigenous relations with land into rights enforceable within Western legal systems. For indigenous peoples, the recognition of their indigenous title, should it be afforded, may bear little resemblance to, or reflect minimally on, their own conceptualisation of their relations to country.' See Katie Glaskin, 'Native Title and the "bundle of Rights" Model: Implications for the Recognition of Aboriginal Relations to Country' (2003) 13(1) *Anthropological Forum* 67 ('Native Title and the "bundle of Rights" Model').

[539] Ivison, *Can Liberal States Accommodate Indigenous Peoples?* (n 35) 2.

norms'. This is what Ivison calls a 'more multilayered account of sovereignty truer to post-colonial conditions'.[540]

Though speaking of the situation in Canada, Kymlicka nonetheless offers an insightful discussion of the complex reality that settler-colonial states confront when Indigenous as well as other linguistically and culturally diverse groups demand a form of inclusion based upon cultural difference. As Kymlicka states, in liberal democracies one of the major mechanisms for accommodating difference is the protection of civil and political rights for all citizens including freedom of association, speech, religion, movement, political organisation, etc The protection afforded by these common rights is sufficient for many citizens and forms of diversity in society.[541]

However, he states, 'it is widely accepted in Canada that some forms of difference can be accommodated only through special legal or constitutional measures, above and beyond the common rights of citizenship'. Kymlicka states that a major challenge for Canada has been the accommodation of cultural difference. 'Canada is a multination state. Its historical development has involved three distinct people or nations – English, French and Aboriginal.' This gives rise to what Kymlicka describes as 'differentiated citizenship'. Citizenship based on special representation rights and the right to self-government is claimed by Aboriginal people on the basis that they did not relinquish this right by virtue of their involuntary inclusion into the Canadian state.[542]

This situation is similar to that of Aboriginal people in Australia. The inclusion we seek requires accommodation of our right to self-government and recognition of unceded sovereignty, which form part of a broader claim of Indigenous rights. We seek more than equal rights. We seek the right to be different. This demand for differentiated inclusion has major bearing on the type of deliberation we seek with the Australian state. As Hobbs explains, this requires states to acknowledge and accept that Indigenous peoples are not merely an ethnic or cultural minority group, but a distinct society whose relationship to the state must be mediated in a *dialogic fashion* [emphasis added].[543] It must be a political relationship in which deliberation is of a *sovereign to sovereign* kind and not merely a stakeholder basis.

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[540] Ivison, 'Decolonizing the Rule of Law: Mabo's Case and Postcolonial Constitutionalism' (n 452) 253.

[541] Will Kymlicka, 'Three Forms of Group-Differentiated Citizenship in Canada', in Benhabib (ed.) (n 556) 153.

[542] ibid. 155.

[543] Harry Hobbs, 'Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia' (2019) 23(1–2) *The International Journal of Human Rights* 174, 176.

Indigenous advocates have long called for 'structural change' as a necessary component of strengthening the inclusion of Aboriginal and Torres Strait Islander people within Australian democracy. Formal inclusion has been strongly critiqued. As Behrendt states, a better understanding of how inequalities between Indigenous and non-Indigenous people in Australia has become institutionalised is achieved by understanding 'formal inclusion' as a tool that maintains an unequal *status quo* to perpetuate injustice.[544] In this sense, Australia's insistence on formal inclusion for Aboriginal people is, in fact, a deliberate act of exclusion. As the Uluru Statement from the Heart states, 'With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.'[545]

This is the fundamental challenge that settler-colonial nations face and which political theorists such as Tully[546], Benhabib[547], Langton and Davis[548] and others have sought to offer theoretical and practical solutions; that is, how to accommodate cultural difference and group rights in a liberal democratic system of governance.[549] As O'Sullivan argues, liberalism and pluralism are not incompatible ideals despite criticism that pluralism creates a kind of democratic 'anarchy'.[550]

As Taylor explains, for groups of citizens who are and do feel different, the denial of recognition of this difference can have negative effects – actual and perceived. Recognition and identity help to designate a person's understanding of who they are, of their fundamental defining characteristics as a human being. The absence of recognition or the misrecognition from others can affect a person or group of people who may suffer real damage if the rest of the society around them mirror back to them a confining or demeaning or contemptible picture of themselves. 'Non-recognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.'[551]

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[544] Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (n 506) 15.

[545] *Final Report of the Referendum Council ('Uluru Statement from the Heart')* (n 72).

[546] Tully (n 150).

[547] Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, 2002).

[548] Megan Davis and Marcia Langton (eds), *It's Our Country* (Melbourne University Press, 2016).

[549] Ivison, *Can Liberal States Accommodate Indigenous Peoples?* (n 35).

[550] O'Sullivan (n 534) 131.

[551] Ibid. 25.

Aboriginal people have and continue to assert that the Australian state recognise and engage with us as Indigenous polities and not as an ethnic or cultural minority group.[552]

To give further expression to the ideal of differentiated inclusion and why it is both necessary and just, Aboriginal people in Australia draw on international law and the recognition and articulations of concepts such as 'Indigenous rights' and the right to self-determination.

For Connolly and Campbell, Indigenous rights are defined as rights that are,

> …aspired to, claimed, held, and exercised by Indigenous people qua Indigenous people – that is by virtue of them being Indigenous people and not members of other groups, such as the class of citizens of a nation state or the class of a minority groups of the nation state. As rights, Indigenous rights may be conceived in terms of claims to do with some fundamental human interest or aspect of human wellbeing collective or individual. [553]

> The notion of Indigenous rights invokes a set of legal and other social mechanisms (public and private discourses, practices and institutions) for the recognition and protection of some or all aspects of Indigenous culture. It also invokes the idea that Indigenous rights do not transcend some or other social reality – they are not absolute in any metaphysical sense – but are struggled for, argued about, negotiated, and are subject to balancing with respect to other (often non-Indigenous) concerns and values.[554]

Likewise, UNDRIP contains several articles which are illustrative of the ideal of differentiated inclusion. For example, Articles 3 and 4 of UNDRIP state:

> Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.[555]

And,

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[552] Hobbs, 'Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia' (n 542) 176.

[553] Anthony J Connolly and Tom D Campbell, *Indigenous Rights* (Taylor & Francis Group, 2009) xi.

[554] Ibid. xvi.

[555] United Nations Declaration on the Rights of Indigenous People.

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.[556]

As these articles within UNDRIP make clear, Indigenous people insist on the right to participate in national political affairs in a manner in which we retain a degree of political autonomy.

For Indigenous people in liberal democratic nation states with a history of colonialism such as Australia, this ideal of inclusion – one that demands accommodation of our rights *as Indigenous people* and not as a minority group that identifies as Indigenous, has been partial and haphazard. In Australia, Aboriginal people still face the challenge of negotiating a form of inclusion in Australian democracy that makes space for our cultural difference and our right to self-determination that recognises our sovereignty and entails a political*, nation-to-nation* style relationship between Aboriginal people and the Australian state. Unfortunately, Australia has, as Davis explains, abandoned self-determination in recent years[557], which is arguably why continuing to assert such a right remains important in the face of state reluctance to resolve the matter of dispossession by accepting Aboriginal people never ceded their lands.

However, with the recognition of native title, calls for self-determination, institutional reforms, laws and policies to empower Aboriginal people to be politically autonomous and self-governing grew. They can be considered calls for greater deliberative inclusion, which I now turn to discuss.

## 6.3 The Ideal of Deliberative Inclusion

The ideal of inclusion is foundational to the theory of deliberative democracy and is widely discussed within the literature.[558] My intention in this section is not to elaborate in detail on this

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[556] Ibid.

[557] Davis, 'Indigenous Constitutional Recognition from the Point of View of Self-Determination and Its Exercise through Democratic Participation' (n 78) 10.

[558] As Parkinson and Mansbridge explain, a fundamental function of deliberation is to promote inclusion. The opposite is also true. That is, inclusion is important for deliberation: 'The inclusion of multiple and plural voices, interests, concerns, and claims on the basis of feasible equality is not simply an ethic added to democratic deliberation; it is the central element of what makes deliberative democratic processes democratic': John Parkinson

important value, but to simply emphasise its importance in the context of Aboriginal people and native title.

As alluded to earlier in this thesis, advocates of deliberative democracy like to emphasise its emancipatory potential for marginalised groups such as Indigenous people. Some scholars refer to deliberation as the 'weapon of the weak'[559] arguing that those who are few in number, are best served by politics based on argumentation and the exchange of reasons, rather than politics determined by greatest numerical support.

As discussed in the section on differentiated inclusion in this chapter, it is widely known and acknowledged that certain groups have and continue to face forms of marginalisation on account of their race, ethnicity, gender, socioeconomic status, and lived experience despite widespread acceptance of formal inclusion. Scholars such as Kymlicka and Bashir have demonstrated this to be the case in relation to Indigenous people.[560] As Warren and Mansbridge et al explain, for minority groups such as Indigenous peoples in so-called democratic societies, '[i]nclusion is not sufficient to democracy: if collectivities lack the capacity to act, inclusions remain powerless'.[561]

The ideal of inclusiveness is clearly central to the conceptions of deliberative and participatory democracy. Each approach holds the inclusion of a wide array of citizens in decision-making processes as both necessary and critical for reaching outcomes that could be accepted as being legitimate. Because of the importance placed on inclusion, both theories are viewed as able to foster the participation and empowerment of marginalised citizens in democratic processes.

However, the ideal of deliberative inclusion runs the opposite way: that is, deliberation can foster inclusion. Advocates of deliberative democracy say aggregative processes are somewhat lacking and that in addition to a transparent and legitimate procedural process of preference formation, people should also have the opportunity to engage in deliberation. And that

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and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012) 12.

[559] Gutmann and Thompson (n 164) 133.

[560] Kymlicka and Bashir (n 392).

[561] Mark E. Warren et al 'Deliberative Negotiation' in Jane Mansbridge and Cathie Jo Martin (eds), *Political Negotiation: A Handbook* (Brookings Institution Press, 2016) 144.

deliberation should entail forms of reason giving and justification via deliberative exchange.[562] It entails a back and forth between reason giving and reason taking between parties.

While Gutmann and Thompson recognise there are several principles that exemplify the spirit of deliberative democracy (reciprocity, publicity and accountability), in their articulation of the ideal of deliberative democracy, it is reciprocity that is critical to deliberative inclusion. That citizens owe one another justifications for the institutions, laws, and public policies that collectively bind them.

> Reciprocity suggests the aim of seeking agreement on the basis of principles that can be justified to others who also share the aim of reaching reasonable agreement. Deliberative democracy takes reciprocity more seriously than do other theories of democracy, and makes it the core of its democratic principles and practice.[563]

Iris Marion Young, like Gutmann and Thompson, endorses the values of reciprocity, publicity and accountability. However, Young argues that inclusion is not necessarily guaranteed in a deliberative forum or exchange that contains those three values. To prove this point, Young says that a forum may be dominated by a homogenous group (men) all sharing similar socioeconomic and cultural traits. This group may well meet the ideals of reciprocity, publicity and accountability, but clearly not inclusivity.[564]

As I will discuss in Chapter 11, in the absence of reciprocity, Aboriginal people may adopt of strategy of disengagement, turning away, and prioritising Indigenous nation building. As Elliot explaisn, dialogue on matters of justice and decolonization must be structured by principles of genuine mutual recognition and reciprocity. Given settler states reluctance to create grounds for reciprocity, turning away from the state must be an option.

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[562] Sarah Sorial, 'Deliberation and the Problems of Exclusion and Uptake: The Virtues of Actively Facilitating Equitable Deliberation and Testimonial Sensibility' (2022) 25(2) *Ethical Theory and Moral Practice* 215, 215.

[563] Gutmann and Thompson (n 18) 133.

[564] Iris Marion Young 'Justice, Inclusion, and Deliberative Democracy' in Stephen Macedo (ed), *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, 1999) 155.

> In other words, resurgence shows a concern to foster ongoing engagements with settler society that might help to unsettle, and eventually remove, obstacles to reciprocal dialogue and the renewal of relationships.[565]

This is an important point, and one that must not be forgotten; deliberative democracy is seldom if ever perfect, but rather a matter of degrees. Now it must be asked why (and whether) the recognition of native title is important to the ideal of deliberative inclusion. As I argued in Chapter 5, *Mabo* and the recognition of native title had a clear constitutional effect on Australian democracy. Writing shortly after the enactment of the *Native Title Act 1993,* Pearson said

> The more difficult questions of self-government and jurisdictional rights, sometimes called domestic sovereignty issues, need to be ventilated after we have nailed the land under our feet. We do not have the capacity to fight all of the wars at once. Each Aboriginal group and each Aboriginal organisation in each region will make their own decisions about these things.[566]

The form of inclusion Pearson and many others were expecting in a post-Mabo Australian democracy was not simply more opportunities to express our opinions, but genuine discussion regarding shared jurisdiction. In other words, Aboriginal leaders such as Pearson, anticipated the institutionalisation or formal processes of reason giving and exchange. That we would have greater opportunity to deliberate about the laws and policies that affect us. In this sense, deliberative inclusion for Aboriginal people is closely aligned to the principle of free, prior, and informed consent (FPIC) that states Indigenous people have a right of self-government and direct involvement in decision making processes.[567]

As should be clear from this thesis, a central tension to emerge in relations between Aboriginal people and the Australian state after the recognition of native title is the assertion of differentiated inclusion based in part on claims of sovereignty and the right to self-government.

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[565] Michael Elliott, 'Indigenous Resurgence: The Drive for Renewed Engagement and Reciprocity in the Turn Away from the State' (2018) 51(1) *Canadian Journal of Political Science* 61, 2.

[566] Noel Pearson, 'From Remnant Title to Social Justice' (1995) 6(3) *The Australian Journal of Anthropology* 95, 99.

[567] Article 18 of the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP) states 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions'. See United Nations, 'United Nations Declaration on the Rights of Indigenous Peoples'.

In Chapter 4, I discussed the history of colonialism and why the conditions of settler colonialism present a unique challenge for the claims of deliberative and participatory democracy in settler state such as Australia.

Nonetheless, deliberative democracy offers the best means for addressing the concerns of Aboriginal people and Australia's need to come to terms with historical injustice.[568] As Bashir explains, the challenge of historical injustice and ethno cultural diversity has compelled political and social theorists to develop more inclusive theories of democratic citizenship, of which deliberative democracy is one.[569]

As Westbury and Dillon explain, Indigenous exclusion in Australia is deeply structural in nature, and will not be easily reversed by a single policy or constitutional change. As they explain moves towards greater inclusion must involve explicit recognition of notions of shared sovereignty in key national institutional frameworks. Though challenging, it is the only way forward that is truly in the national interest.[570]

> 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.[571]

It is impossible to conceive of a lasting settlement between the Australian state and Aboriginal and Torres Strait Islander people being realised without deliberative inclusion. As Gutmann and Thompson explain, one of the objectives of deliberation is to provide the most justifiable

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[568] Recalling the claim that deliberative and participatory are considered emancipatory and transformative because they can better secure the 'equal participation of otherwise excluded social groups in public deliberation that can transform pre-existing assumptions held by the broader society about the legitimacy of the demands of socially excluded groups'. See, Knops (n 8) 596.

[569] Bashir (n 9) 128.

[570] Neil Westbury and Michael Dillon, 'Overcoming Indigenous Exclusion: Very Hard, Plenty Humbug' x.

[571] Ibid 3.

concept of dealing with moral disagreement. It also seeks to encourage public-spirited perspectives on public issues.[572]

In the aftermath of *Mabo,* claims of sovereignty and self-determination[573] became prominent in Australian public and political discourse.[574] That is because after the recognition of native title, claims of sovereignty and self-government could no longer be cast aside as mere ambit claims. The recognition of native title by the High Court, gave the claims of Aboriginal people a much stronger moral if not entirely legal basis. Australia's courts and system of law had recognised a right longed called for by Aboriginal people but denied by the Australian state.

As Ivison explains, pre-Mabo, Australia's settlement thesis was premised on the denial of Indigenous notions of land holding and self-government.[575] Ivison says the recognition of native title initiated a process of 'reinterpreting the grounds of mutual interaction between [I]ndigenous and non [I]digenous Australians that have hitherto been in place'. *Mabo* and native title forced a reconsideration of Australia's past and its present day laws, practices and processes of justice. It demanded a reassessment of the ethical basis of relations between Indigenous and non-Indigenous Australians.[576]

I interpret Ivison as suggesting the recognition of native title placed a strengthened onus on the Australian state to take seriously the reason giving of Aboriginal people. From the perspective of Aboriginal people, Australia could no longer avoid or deny the need to engage in genuine reasoning giving deliberation with Aboriginal people about the effects of colonisation and the new legal and political reality brought about by the recognition of native title.

Before the *Mabo* decision in 1992, recognising the claims of Aboriginal people was mostly a benevolent act of the state. For example, there had been recognition of Aboriginal people's

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[572] Amy Gutmann & Dennis Thompson 'What Deliberative Democracy Means' in Ricardo Blaug, *Democracy: A Reader* (Columbia University Press, 2017) 421.

[573] As Connolly et al explain Indigenous rights are embedded in Indigenous people's experience of colonisation. As such, land rights may be considered a discrete or stand-alone issue, but more often forms part of a wider set of Indigenous rights that include the 'political rights of self-determination, self-government, and sovereignty; treaty rights; land and natural resource rights; and cultural property rights'. In this regard, the Australian state likes to treat native title as a separate issue to do with property interests in land. It refuses to engage with native title as a matter that also encompasses political and treaty rights. See, Connolly and Campbell (n 552) xviii.

[574] Goot and Rowse (n 401).

[575] Duncan Ivison, *Postcolonial Liberalism* (Cambridge University Press, 1st edition, 2002) 107.

[576] Ibid 108.

rights in land through statutory land rights legislation in various states since the 1960s and 70s. These were in effect beneficial 'grants' of land to Aboriginal people by state governments. They did not recognise any 'pre-existing and continuing forms of Indigenous title' or indeed recognise Aboriginal people as polities as would native title.[577] As Jackson et al explain, there is a significant legal and political difference between land rights and native title.

Land rights, Jackson explains, is a form of legislative recognition of interests in land by the Commonwealth, State or Territory government granting a statutory right to or for the benefit of Aboriginal people. By contrast, native title is not a grant of the Crown but recognition of a title based on the 'laws and customs of the particular Indigenous society'. As Jackson et al explain, '[t]his is an important distinction to appreciate when working within Australia's system of land tenure, and, to some Indigenous people, it is one that carries significant political and philosophical weight'.[578]

What Jackson et al are alluding to is the political footprint of native title that many others have also recognised as inherent to the recognition of Aboriginal people's pre-colonial rights in land. I discussed this in the previous chapter (Chapter 5) when arguing that native title is more significant than 'questions of real estate' for Australian democracy. Native title raises more complex questions of sovereignty and shared jurisdiction that must find a way to be discussed between Aboriginal people and the Australian state.

> The changes in the political and legal environment occasioned by the recognition of native title should also be considered amongst the outcomes of native title. Native title is important in Australia's legal and political structures because it is a measure of our ability to accommodate the rights of Aboriginal and Torres Strait Islander peoples. The arms of the state cannot ignore the intensely symbolic nature of native title in their engagement with Indigenous peoples.[579]

The point is that until *Mabo* and native title, reason to grant rights to Aboriginal people, such as land rights, was the prerogative of government. It alone had the power to decide whether to grant the recognition of rights to land to Aboriginal people or not. The extent of deliberative inclusion of Aboriginal people in decision making processes was limited and dependent upon

[577] Jackson, Porter and Johnson (n 136) 156.

[578] Ibid.

[579] Lisa Strelein 'Symbolism and Function: From Native Title to Aboriginal and Torres Strait Islander Self-Government' in Langton et al (n 405) 190.

those in government. Inclusion is therefore at the behest of those in power. Native title did not overturn this situation completely, but it strengthened Aboriginal people's demands for institutionalised forms of deliberative inclusion.

Additionally, what makes native title therefore so important for the ideal of inclusion is that there are few other legal or political levers for Aboriginal people to use when deliberating with governments. Other levers are arguably the various cultural heritage legislation and the *Racial Discrimination Act 1975* (RDA). Yet, as I will discuss in the next chapter, the RDA has been suspended several times by the Federal government in order to pass racially discriminatory legislation.

In Australia, Aboriginal people cannot draw upon a treaty or treaties to keep governments accountable such as the Treaty of Waitangi in New Zealand. Nor do we have an arbitration body to handle matters of historical justice such as the Waitangi Tribunal. As discussed, Australian courts and legislatures, unlike Canada, have so far refused to recognise Aboriginal people as possessing an inherent right to self-government. And while Australia is a signatory to UNDRIP, there is no domestic legislation that expresses the ideals of UNDRIP. Therefore, with a robust framework for the protection of Indigenous rights in Australia, much falls upon native title.

As such, native title must do a disproportionate amount of political heavy lifting on behalf of Aboriginal people. As I will demonstrate in the following chapters, Aboriginal people use native as a 'contestatory mechanism' (Chapter 8) to influence public policy, negotiate treaty like agreements, and for make space for Aboriginal sovereignty and self-government. Native title has become the basis for a range of innovative deliberative and participatory forms of democratic engagement (democratic inclusion) it was never intended or designed to do so.

Thus, the recognition of native title does not guarantee deliberative inclusion. But it does make it more challenging for governments to deny or avoid the claims of Aboriginal people to treaty, sovereignty, and self-government. *Mabo* presented Australia with a choice to respond to both the past and the future.

The first act of deliberative inclusion came shortly after the passing of the *Native Title Act 1993.* In early 1994, then Prime Minister Paul Keating requested Indigenous leaders provide advice on additional measures the Australian Government should consider as part of a full response to the *Mabo* decision. Keating was prepared to view Mabo as the starting point of further deliberation.

Aboriginal and Torres Strait Islander people would present Keating with what became known as the 'social justice package'.[580]

In early 1995, some two and half years after the *Mabo* decision and a year after the introduction of the *Native Title Act 1993*, the Native Title Social Justice Advisory Committee submitted the *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* report to Keating. The document was developed through an extensive consultation process with Aboriginal and Torres Strait Islander people, led by ATSIC. Much of the public discourse from Aboriginal leaders in the post-Mabo period was an articulation of some or all of the components of the measures in the package that sought further reforms to secure and underpin native title rights and ensure 'social justice for Indigenous Australians'.[581]

The 'social justice package' was to be the third component of the Australian Government's political response to the *Mabo* judgment. The first being the *Native Title Act 1993* as the legislative response to the recognition of native title; the second, an Indigenous Land Fund to purchase land for those Indigenous groups whose native title had been effectively extinguished by the *Mabo* decision. And the third, a series of additional 'social justice measures' to address the present-day socioeconomic disadvantage Aboriginal people experienced as a consequence of dispossession.

It called for a relationship between the government and Aboriginal and Torres Strait Islander peoples to be founded upon the full acceptance and recognition of the fundamental rights of

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[580] Soon after the enactment of the *Native Title Act 1993* in January 1994, then Prime Minister Paul Keating requested Indigenous leaders develop a comprehensive list of additional measures the federal government could consider as part of a set of 'social justice' initiatives to reinforce the Mabo decision and seize upon the moment for structural change. The social justice package was considered to be the third part of the political response to Mabo and the recognition of native title – the first being the *Native Title Act 1993* and the second the Indigenous Land Fund. The social justice package therefore contains within it many of the measures felt were needed to reform the political relationship between Aboriginal and Torres Strait Islander people and government through structural and institutional change. They include constitutional reform, strengthening in domestic laws international instruments reinforcing Indigenous rights, cultural heritage protections, improving opportunities for economic development, and recognition of self-government for Indigenous people within a framework of self-determination. For the full report see Native Title Social Justice Advisory Committee, *Recognition, Rights & Reform: Report to Government on Native Title Social Justice Measures.* (Aboriginal and Torres Strait Islander Commission, 1995); 'Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures' (n 511).

[581] For example, the preamble of the *Native Title Act 1993* states, 'It is particularly important that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be *significantly supplemented*' (emphasis added). See *Native Title Act 1993*.

Aboriginal and Torres Strait Islander peoples as the original owners of this land with particular rights that are associated with such a status.[582] And, that the formulation of policies and delivery of programs that affect Aboriginal and Torres Strait Islander peoples must be negotiated by accepting the importance of empowerment for decision-making and planning at the community and regional levels, and the need for government at all levels to cooperate and negotiate with Aboriginal and Torres Strait Islander communities and organisations.[583]

As stated earlier, as well as being a list of reforms Aboriginal people wished to see within Australian democracy to strengthen our participation in decision-making processes, I described the social justice package as a 'deliberative device' like the Barunga Statement and the current Uluru Statement. A 'deliberative device' is a set of thoughtful political claims made publicly knowable to the Australian people and governments, with the intention of inducing *public reflection*.[584] They are an invitation to encourage public deliberation regarding the inclusion of Aboriginal and Torres Strait Islander people in Australian democracy on terms that recognise our distinct legal and political status as co-sovereigns in Australian democracy.

Yet, the social justice package never received a formal government response. Non-responsiveness is typical of Australia's unwillingness to engage seriously with the thoughtful claims and proposals of Aboriginal and Torres Strait Islander people.[585] Deliberative inclusion may begin with representations from Aboriginal people in deliberative forums and having input into processes, but it also requires decision-makers to actually respond to and incorporate the

[582] Native Title Social Justice Advisory Committee (n 578).

[583] The recommendations of the social justice package encompassed a wide range of issues, which the authors knew would require significant negotiation. There was an expectation that *Mabo* and native title was a new starting point in an ongoing process of reconciliation and reforming of the political relationship between Aboriginal and Torres Strait Islander communities and the Australian state. And, that the proposed changes would require new mechanisms for managing the process of reform. Ibid.

[584] Though Young uses the term 'publicity', the idea is that in pluralistic societies, when groups express themselves publicly, they make themselves accountable to others. 'They must try to explain their particular background experiences, interests, or proposals in ways that others can understand, and they must express reasons for their claims in ways that others recognize could be accepted, even if in fact they disagree with the claims and reasons.' See Young, *Inclusion and Democracy* (n 172) 25.

[585] In June 2017, only a few weeks after receiving the Uluru Statement from the Heart, then Prime Minister Malcolm Turnbull dismissed the proposed Voice to Parliament as unconstitutional on his belief it would be a 'third chamber of parliament' – an erroneous and misleading claim. See The Hon. Malcolm Turnbull MP, Prime Minister, Senator the Hon. George Brandis QC Attorney-General, Senator the Hon. Nigel Scullion Minister for Indigenous Affairs, Joint Media Release, Response to Referendum Council's Report on Constitutional Recognition (n 59).

contributions of Aboriginal people into the eventual outcomes. If not, then deliberative inclusion remains unfulfilled.

This reality prompts many Indigenous and non-Indigenous scholars to argue that the major barrier to the aspirations of Aboriginal and Torres Strait Islander people and our greater inclusion in Australian democracy is not our inability to speak or communicate effectively, but a persistent failure of political leaders and institutions *to listen*.

> Where sovereignty was never ceded and treaties were never negotiated, a persistent refusal to listen to First Nations forms the foundation of the settler colonial Australian state and haunts contemporary political relations. The Uluru Statement centres a political aspiration to be heard, set against this long history of settler colonial refusal to listen.[586]

As I will discuss in the next chapter (Chapter 7) this persistent failure to listen is neither accidental nor absentmindedness, but done so deliberately.[587] As Scudder explains, the failure of institutions and political leaders to listen and take on the opinions of citizens is antithetical to the ideal of democratic inclusion.[588]

Non-listening by democratic institutions and political leaders is also illustrative of what I described in Chapter 4 as deliberative and participatory democracy under conditions of settler colonialism. Non-listening by democratic institutions and political leaders within settler colonial states represents a lack of reciprocity, an ideal which as I have highlighted in this chapter is essential if genuine deliberative inclusion is to be realised. Yet too often, the concerns of Aboriginal people are routinely dismissed or overlooked within Australian democracy. This negatively affects our ability to influence laws and public policy. Which is to say, it denies full deliberative inclusion in decision-making.

The law of native title is unlikely to change substantively to accommodate this aspiration of Aboriginal people in the form of sovereignty and a right to self-government. So, Aboriginal people must continue to engage in deliberation and negotiation in order to bring about change,

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[586] Poppy de Souza and Tanja Dreher, 'Dwelling in Discomfort: On the Conditions of Listening in Settler Colonial Australia' (2021) 20(2) *Borderlands Journal* 30, 34.

[587] Davis, 'Listening but Not Hearing: When Process Trumps Substance' (n 515).

[588] Mary F Scudder, *Beyond Empathy and Inclusion: The Challenge of Listening in Democratic Deliberation* (Oxford University Press, Incorporated, 2020) 4.

at local, regional, and national levels, we seek. This is because, as I have asserted from the outset of this thesis, despite the many criticism of native title and the native title system, its recognition has nonetheless created new discursive basis for political claim making, deliberation, and negotiation for Aboriginal people.

## 6.4 Conclusion

The recognition of native title should have should have led to greater deliberative inclusion of Aboriginal people in Australian democracy. This thesis argues that this has in fact happened, but haphazardly and not to the degree (formal or institutional) that Aboriginal people would like. As I will discuss over the following chapters, the failure of greater deliberative inclusion in national level politics has led to Aboriginal people seek deliberative inclusion within the native title system through other means such as policymaking.

As I have explained, native title is important to the ideal of deliberative inclusion because it is so closely tied to the sovereignty and self-government claims of Aboriginal people. The recognition of native title created expectations that Aboriginal people would now participate in decision-making processes on laws and policies that affect our lives. Native title strengthened the understanding that Aboriginal people have a range of Indigenous rights that governments can no longer ignore.

Finally, discussions of deliberative democracy tend to emphasise the importance of speaking and of individuals presenting rational arguments and engaging with others respectfully. However, the ideals of deliberative and participatory democracy and differentiated and deliberative inclusion are challenged when a political leaders and institutions lack the deliberative capacity to listen, which I now turn to discuss.

# 7 Listening But Not Hearing: Australia's Persistent Failure to Listen

> Where sovereignty was never ceded and treaties were never negotiated, a persistent refusal to listen to First Nations forms the foundation of the settler colonial Australian state and haunts contemporary political relations. The Uluru Statement centres a political aspiration to be heard, set against this long history of settler colonial refusal to listen.[589]

As discussed, the main claim of my thesis is that the native title system has become an unintended forum for deliberative and participatory democracy for and by Aboriginal people

After the *Mabo,* native title and the associated claims of sovereignty and self-determination[590] became prominent in Australian public and political discourse.[591] The recognition of native title, despite misgivings about what it actually delivered, nonetheless emboldened Aboriginal people to challenge the assumed role of the Australian state to make laws and policies that affect the political, social, family and economic lives of Indigenous communities.[592] It also gave greater impetus for seeking ways to settle the unresolved legal and political claims left unanswered by the High Court in *Mabo* such as the recognition of sovereignty, treaty, and the right of Aboriginal people to self-government.

In the previous chapter (Chapter 6) I discussed several forms of inclusion. I discussed the tension between notions of formal inclusion and its supposed neutrality and the ideal of differentiated inclusion that seeks to overcome the inherent bias in formal inclusion for minority groups such as Indigenous people. I then discussed the ideal of deliberative inclusion as an important means for Aboriginal people to not just voice our opinions and aspirations but

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[589] Souza and Dreher (n 584) 34.

[590] As Connolly et al explain Indigenous rights are embedded in Indigenous people's experience of colonisation. As such, land rights may be considered a discrete or stand-alone issue, but more often forms part of a wider set of Indigenous rights that include the 'political rights of self-determination, self-government, and sovereignty; treaty rights; land and natural resource rights; and cultural property rights'. In this regard, the Australian state likes to treat native title as a separate issue to do with property interests in land. It refuses to engage with native title as a matter that also encompasses political and treaty rights. See, Connolly and Campbell (n 552) xviii.

[591] Goot and Rowse (n 401).

[592] Janet Hunt et al (eds), *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (ANU E Press, 2008) 4.

to also engage others in reciprocal reason giving. I also said that the recognition of native title provided Aboriginal people with an important reason to demand sovereignty and self government. Native title strengthened public discourse on these issues because it helped to shift public understanding about the settlement of Australia. The landmark decision of the High Court provided a new frame (legal, political, moral) for Aboriginal people to call upon as we sought to persuade non-Indigenous Australians that the issues of sovereignty and self-government deserved greater public and government attention.

One way we seek to persuade and bring attention to our issues is by engaging in public deliberation and making our claims publicly knowable. By doing so, Aboriginal people expect our democratic institutions and elected leaders to genuinely engage with us. Yet what value does public deliberation hold in a context in which national institutions and political leaders demonstrate an unwillingness to listen? How do we overcome a lack of political will?

The title and epigraph to this chapter come from Indigenous and non-Indigenous scholars who argue the major barrier to the aspirations of Aboriginal and Torres Strait Islander people is not our inability to speak or communicate effectively, but a persistent failure of political leaders and institutions *to listen*. And that this failure is neither accidental or absentmindedness, but done so deliberately.[593] The structural reform Aboriginal and Torres Strait Islander people call for seeks to ensure our voices are heard in the processes of government.

When Howard became Prime Minister, Indigenous issues including self-determination, reconciliation, native title and the Stolen Generations, dominated the public sphere. It was an eventful period for Australia and Aboriginal and Torres Strait Islander relations. The series of legal, political, and social issues being publicly debated appeared to be part of a major realignment between Indigenous people and the state.

Before becoming Prime Minister, Howard had voiced his strong opposition to notions of Indigenous self-determination and separateness. He was critical of efforts to recognise the unique status of Indigenous people within the wider Australian community, including the introduction of the Native Title Act, the ATSIC Act and the Aboriginal flag. He condemned Labor for pandering to what he believed to be special interest groups and political correctness. By

[593] Davis, 'Listening but Not Hearing: When Process Trumps Substance' (n 515).

contrast, Howard made a concerted effort to appeal to those section of the Australian public he felt were opposed to Labor's support of Aboriginal separateness.[594]

In office, Howard would undo many of the gains Aboriginal and Torres Strait Islander people had made since 1972. When Howard became Prime Minister in March 1996, a number of elements critical to institutionalising deliberative and participatory democracy were in place.

There had been of course been the 1992 *Mabo* decision, the *Native Title Act 1993* was in force, ATSIC was operating as specialist Indigenous public policy and service delivery agency and an established part of the administrative arm of the federal government.[595] Under the *Australian Human Rights Commission Act 1986*, the role of the Social Justice Commissioner with a statutory duty to monitor the *Native Title Act 1993* and publicly report to the federal Parliament on the effects of government policies on Aboriginal and Torres Strait Islander people's human rights, had also been established, and the decade of national reconciliation was at its midway point.[596] Since the 1970s a highly active 'Indigenous community-controlled sector' including Aboriginal legal and health services were developing policy and delivering services to Aboriginal people and communities.[597]

All of these elements were in place and working on behalf of Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander people were politically coalesced around

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[594] Andrew Gunstone, '"These Blokes Are Re-Inventing the 19th Century": The Howard Government's Record on Indigenous Affairs 1996-2006' (2007) (7) *Journal of Indigenous Policy* 41.

[595] In 1989 just a few years before the Mabo decision, the Hawke Government established ATSIC after a lengthy consultation process with Aboriginal and Torres Strait Islander people and organisations. ATSIC was proposed after a 1983 review of the previous Indigenous advisory body which was deemed as not being 'a significant instrument of Aboriginal political influence and power'. The objectives of ATSIC (amongst others) were 'to ensure maximum participation of Aboriginal and Torres Strait Islander people in government policy formulation and implementation', 'promote Indigenous self-management and self-sufficiency', and 'ensure co-ordination of Commonwealth, state, territory and local government policy affecting Indigenous people', 'advise governments at all levels on Indigenous issues', 'advocate the recognition of Indigenous rights on behalf of Indigenous peoples regionally, nationally and internationally', and 'deliver and monitor some (Indigenous specific) of the Commonwealth government's Indigenous programs and services'. See Bennett and Pratt (n 53) 5. See also *Aboriginal and Torres Strait Islander Commission Act 1989*.

[596] Sean Brennan, 'Reconciliation in Australia: The Relationship Between Indigenous Peoples and the Wider Community' (2004) 11(1) *The Brown Journal of World Affairs* 149; Megan Davis, 'Australia's Reconciliation Process in Its International Context: Recognition and the Health & Wellbeing of Australia's Aboriginal and Torres Strait Islander Peoples' (2014) 18(2) *Australian Indigenous Law Review* 11.

[597] Paul Cleary, *In Good Hands: The People and Communities Behind Aboriginal-Led Solutions* (Oxfam Australia, 2019).

notions of autonomy, self-determination, sovereignty, and community control.[598] Yet under Howard, these innovations would be either abolished, undermined, or discredited. He would abandon the bipartisan policy of Indigenous self-determination that existed for the previous 24 years since the Whitlam Government introduced it in 1972.[599] He would develop his own public narrative of 'practical reconciliation' and paint native title and Indigenous rights as being divisive and not in the national interest.[600]

Others have described the Howard era of government as 'paternalistic' (so too the Tony Abbott-led Coalition government of 2013–2015), because of its authoritarian attitude towards Aboriginal people.[601] Howard is representative of what Behrendt calls the lingering 'psychological *terra nullius*' inherent in Australian society.

> For Australia's Indigenous peoples, the legacy of *terra nullius* may have been overturned by the *Mabo* case, but another ideological enemy remains: as long as Australia has a dominant sector that embraces a *psychological terra nullius*, any legal advances are vulnerable to legislative extinguishment.[602]

Howard's paternalistic style of governance was premised on a belief that Aboriginal people lack the wherewithal to make decisions for ourselves. Paternalism implies a dominant role for the state as guardian or protector of the interests of Aboriginal people. It entails strong government control over Indigenous programs and organisations, an extensive auditing culture, rigorous bureaucratic oversight incorporated into Indigenous-specific legislation, and economic and political 'guardianship' reflective of earlier assimilationist and protectionist eras.[603] Paternalism

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[598] Nicole Watson, 'Howard's End: The Real Agenda behind the Proposed Review of Indigenous Land Titles' (2005) 9(4) *Australian Indigenous Law Reporter* 13.

[599] Gunstone (n 592) 41.

[600] As Hobbs explains, Howard and many members of his party came to power holding strong beliefs the High Court had wrongly decided Mabo and had voted against the introduction of the *Native Title Act 1993* in Parliament. See Hobbs, 'Locating the Logic of Transitional Justice in Liberal Democracies: Native Title in Australia' (n 34) 541.

[601] Deirdre Howard-Wagner, 'Governance of Indigenous Policy in the Neo-Liberal Age: Indigenous Disadvantage and the Intersecting of Paternalism and Neo-Liberalism as a Racial Project' (2018) 41(7) *Ethnic and Racial Studies* 1332; Altman (n 376); Shelley Bielefeld, 'Neoliberalism and the Return of the Guardian State: Micromanaging Indigenous Peoples in a New Chapter of Colonial Governance' in Will Sanders, *Engaging Indigenous Economy* (ANU Press, 2016) 155-169.

[602] Behrendt, 'White Picket Fences: Recognizing Aboriginal Property Rights in Australia's Psychological Terra Nullius' (n 333) 58.

[603] Alexander Page, 'Fragile Positions in the New Paternalism' in Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez (eds), *The Neoliberal State, Recognition and Indigenous Rights* (ANU Press, 1st ed, 2018) 185-200.

portrays Aboriginal people, communities, and culture as 'failures' in need of government intervention.

As Sullivan explains, government paternalism necessitates a discourse of dysfunction to justify government intervention in the lives of Aboriginal people. The discursive construction of the Indigenous person as ensconced in a self-inflicted, imprisoned and disadvantaged state of passivity and dysfunction and incapable of taking care of their own affairs, serves certain ends in that it justifies disciplinary and punitive forms of intervention through highly interventionist policy mechanisms deployed through income (individual) and funding (organisation and community) control. Government support is dependent upon conforming to disciplining measures such as linking family welfare payments to school attendance, and funding of community organisations through Shared Responsibility Agreements (SRAs).[604] By framing Aboriginal people, communities, and organisations as dysfunctional, the authority of the settler state to control Aboriginal people's lives is therefore rarely questioned and is viewed as both 'natural and necessary'.[605]

This view of people being unable to solve their own problems or participate in their own self-governance clashes with a fundamental belief of deliberative democracy. Advocates of deliberative democracy assert that people not only deserve a right to determine the laws and policies and type of government they are subjected to live under, but more importantly, that they are capable of deciding such matters for themselves. That is to say, deliberative democracy believes ordinary citizens are both entitled to and *capable of deciding* on the laws that govern them.[606] Paternalism robs citizens of such capability. As such, a paternalistic government violates the ideals of deliberative and participatory democracy.

As explained, three well-known examples are illustrative of the Howard government's paternalism and non- listening. I discuss each briefly below.

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[604] Sullivan calls these types of agreements 'heavy handed forms of social engineering'. The use of SRAs were offered to Aboriginal communities willing to modify behaviour in ways favourable to health, education, and the communal social and physical environment in return for allocation of discretionary funding for public purposes. 'SRAs resonated well with a public increasingly convinced of Aboriginal irresponsibility with well-intentioned public funds. At the same time, they offered political capital. With each signing the media was invited to celebrate the gift of yet another facility to the native population in return for a promise to be good.' See Sullivan, *Belonging Together: Dealing with the Politics of Disenchantment in Australian Indigenous Affairs Policy* (n 53) 33-47.

[605] Nakata and Maddison (n 42) 420; Maddison, Clark and Costa (n 127); Howard-Wagner, Bargh and Altamirano-Jiménez (n 659).

[606] Gutmann and Thompson (n 18).

### 7.1.1 The Native Title Amendment Act 1998 ('10 Point Plan')

The first example of institutional non-listening came in the form of another landmark native title decision of the High Court, the *Wik* decision of December 1996. By a slim majority of one, the High Court declared that a pastoral lease does not necessarily extinguish native title.[607]

The decision was bound to be contentious given the extensive coverage pastoral leases are in regional and remote Australia. The *Wik* decision now meant Aboriginal people could potentially claim native title over much more of the Australian mainland than had been commonly understood after *Mabo*. The *Wik* decision and the protracted political and media debate that followed is too complex to discuss at length[608] so I will limit my discussion to its effect on the ideal of inclusion.

Firstly, by finding that the grant of a pastoral lease did not extinguish native title but that it may continue to *coexist* with the rights of the pastoral leaseholder, the *Wik* decision strengthened the notion of coexistence. However, the court qualified this finding by declaring that while both Indigenous and non-Indigenous rights in pastoral leases could be dually recognised in an area, in the event of any inconsistency (conflict) it would be the rights of the non-native titleholder

[607] *Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* (1996) HCA 40 (n 472).

[608] I will provide a very brief summary of the *Wik* case and the Howard Government's response. In March 1996 the Keating Government, which had enacted the *Native Title Act 1993*, was defeated in the federal election. The Coalition Government led by John Howard gained office having promised during the election campaign to make native title more 'workable', once in government issued a discussion paper entitled 'Towards a More Workable Native Title Act'. On 27 June 1996 the Native Title Amendment Bill 1996 was introduced into the House of Representatives. On 17 October 1996 the government released an 'exposure draft' with further amendments. Then on 23 December 1996 the High Court handed down its decision in *Wik*. The Howard Government, concerned by the High Court decision, withdrew the bill in order to consider the implications of *Wik*. The Howard Government eventually released its 10 Point Plan on 8 May 1997 as its response to *Wik* and other proposed amendments to the *Native Title Act 1993*. In late June 1998 Prime Minister Howard announced the government had reached agreement with Independent Senator Brian Harradine on their proposed amendments which ensured passage of the legislation through the Senate. The House of Representatives eventually passed the Bill followed by the Senate on 8 July 1998. See *Sixteenth Report: Consistency of the Native Title Amendment Act 1998 with Australia's International Obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD)* (Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Australian Parliament, 28 June 2000) 23-25.

(pastoralist) that would prevail.[609] Meaning, simply, Indigenous interests must give way to non-Indigenous interests.

As a matter of land law, Godden explains that *Wik* was an opportunity for exploring new institutional forms for land management and coexistence that reflected diversity rather than the priority of exclusive possession by non-Indigenous landholders.[610] *Wik,* just like *Mabo,* had wider political significance.

Noel Pearson viewed *Wik* not as simply another evolution in the legal doctrine of native title jurisprudence but also as a test of Australia's commitment to political coexistence and reconciliation and a new understanding of the place of Aboriginal people within Australian democracy.[611]

Just like *Mabo*, the *Wik* decision strengthened the claims of Aboriginal people that our inclusion within Australian democracy should be on the basis of our 'differentiated status' as the original owners who had never ceded sovereignty and of being 'self-governing communities operating under our own source of laws prior to colonisation'.[612] That is to say, a more equitable inclusion of Aboriginal people within Australian democracy.

However, the Howard Government's response to *Wik* was not to accommodate 'differentiated inclusion', but an example of democratic exclusion. Even before the *Wik* decision, Howard had

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[609] Lee Godden, 'Wik: Feudalism, Capitalism and the State. A Revision of Land Law in Australia?' (1997) 5(2–3) *Australian Property Law Journal* 162, 167.

[610] As Godden explains, the Wik decision 'would appear a simple resolution of coexisting tenure and far from radical. It simply re-examined Australian land tenure. In it, the High Court made a predictable and legally, a relatively conservative decision yet it prompted legal and political furore in Australia verging on hysteria'. See, Ibid. 163.

[611] Pearson argued that the Wik decision was a test of Australia's commitment to reconciliation and that the High Court had put forward a compromise via its decision. The Wik decision, he argued, was compelling Indigenous and non-Indigenous Australia to negotiate how it will share occupation of the continent. 'That is the proposition put forward to us as Australians by our judicial elders for our consideration, to see whether as a people we would embrace those terms as a just compromise 204 years after the initial failure of recognition.' See Noel Pearson, 'The High Court's Abandonment of "the Time-Honoured Methodology of the Common Law" in Its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta: Sir Ninian Stephen Annual Lecture 2003' (2003) 8(2) *Australian Indigenous Law Reporter* 1, 3.

[612] 'In the case of Aboriginal and Torres Strait Islander peoples, their claims are embedded in and drawn from long histories as self-governing communities operating under their own source of laws prior to colonisation. When citizenship is understood as membership of a single-status community, these claims cannot be heard.' See Hobbs, 'Constitutional Recognition and Reform' (n 507).

signalled his intention to amend the *Native Title Act 1993.* With *Wik*, Howard now had a reason for making substantial changes to the legislation. Eventually he developed what became known as the '10 Point Plan' as his response to what he perceived as the chaos and uncertainty native title had created for the rights of two important constituencies for himself and his government – pastoralists and miners.[613]

After protracted and controversial public and political debate throughout 1997, in June 1998 the Howard Government passed its *Native Title Amendment Act 1998.*[614] The new legislation significantly weakened the rights of Aboriginal and Torres Strait Islander people while strengthening the rights of non-Indigenous interests in land.[615] Howard justified the decision by explaining in his opinion, the native title pendulum has swung too far in favour of Aboriginal people after the *Wik* decision. What he was doing was returning the legislation back to the middle.[616]

As Bartlett explains the amendments 'sought to diminish native title rights and to introduce limits on how and when claims might be made and the level of compensation. In doing so, the government abandoned and commitment to the maintenance of equality before the law. The Ten Point Plan provided for the subordination of native title rights to other non-Indigenous, non-native title rights'.[617]

Aboriginal people fiercely opposed the amendments. As the Social Justice Commissioner explained in the 1998 Native Title Report, 'Indigenous representatives rejected both the

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[613] Frank Brennan, *The Wik Debate: Its Impact on Aborigines, Pastoralists and Miners* (UNSW Press, 1998) ('*The Wik Debate*').

[614] As Hocking and Stern explain, Howard resorted to public disinformation to support his claim the amendments were necessary and just. 'The Australian prime minister at one point appeared on television with a large map of Australia claiming Aboriginals would still be able to claim 79% of Australia after the government's 10-point plan. No proof was provided of how this figure was reached.' See Barbara Ann Hocking and Esther Stern, 'W(h)Ither the Human Rights of Indigenous Australians (From Wik to Wickedness?)' (1998) 67(4) *Nordic Journal of International Law* 393, 407.

[615] Aboriginal & Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, Australian Human Rights Commission, 3.

[616] Transcript of the Prime Minister the Hon John Howard, television interview with Kerry O'Brien, *The 7.30 Report*, Australian Broadcasting Corporation, 4 September 1997, (Webpage), https://pmtranscripts.pmc.gov.au/sites/default/files/original/00010469.pdf

[617] Bartlett, *Native Title in Australia* (n 48) 57.

substance of the *Native Title Amendment Act 1998* and the process by which it was arrived at'.[618]

A statement by the National Indigenous Working Group also rejected the amendment bill, stating:

> We confirm we have not been consulted in relation to the contents of the Bill, particularly in regard to the agreement negotiated between the Prime Minister and Senator Harradine, and that we have not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law.[619]

As the Social Justice Commissioner goes on to explain, the legislative response to *Wik* by the Howard Government severely undermined the ideal of shared interests in land (coexistence) and the amendments have caused destruction to the most valuable resource for achieving reconciliation between Indigenous and non-Indigenous Australia: trust.[620]

In 1999, the United Nations Committee on the Elimination of Racial Discrimination (CERD) declared that the amendments were done without the consent of Aboriginal people as a breach of Australia's international human rights obligations.[621] In its decision, CERD said 'the lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention'. It stressed,

> …that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.[622]

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[618] Aboriginal and Torres Strait Islander Justice Commissioner, *Native Title Report 1998* (Australian Human Rights Commission, 1998) 8.

[619] Ibid.

[620] Aboriginal and Torres Strait Islander Justice Commissioner (n 616) 9.

[621] CERD Decision (2)54 on Australia, 18 March 1999.

[622] *Sixteenth Report: Consistency of the Native Title Amendment Act 1998 with Australia's International Obligations under the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* (n 692) 245-254.

The Howard Government rejected the CERD's decision, stating its comments were 'an insult to Australia and all Australians as they were unbalanced and do not refer to the submissions made by Australia on the native title issue'.[623]

The process for amending the *Native Title Act 1993* clearly fell short of the ideals of deliberative and participatory democracy and democratic inclusion. Aboriginal people were right to believe that, as a consequence of the recognition of native title, we should now have a more prominent and effective voice over what happens on our lands and that any proposed legal changes to native title law. Amending the *Native Title Act 1993* without the consent of Aboriginal people was carried out by a process that was decidedly un-deliberative to the extent that the concerns of Aboriginal people were largely ignored. and the native title rights of Aboriginal people were made unjustly subordinate because of a perceived infringement upon the rights of non-Indigenous pastoral interests.

I now turn to discuss the Howard Government's decision to abolish ATSIC.

### 7.1.2 Abolishing ATSIC

The Howard Government's decision to abolish ATSIC is another example of non-listening that disregards the ideals of deliberative and participatory democracy.[624]

ATSIC was the first, and so far only, attempt to establish a democratic institution with statutory powers to *speak* directly to the Australian Government. It was the peak Indigenous policy body in the development of laws and policies affecting Aboriginal and Torres Strait Islander people. It remains the most significant democratic innovation[625] to institutionalise Indigenous self-determination.[626]

However, in April 2004, Howard announced his intention to abolish ATSIC, stating,

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[623] Ibid. 108.

[624] Gunstone (n 592) 43.

[625] As stated earlier, a democratic innovation can be either processes or institutions that is newly created to illicit deliberation between parties on a policy issue. A democratic innovation seeks to reimagine and deepen the role of citizens in governance processes by 'increasing opportunities for participation, deliberation, and influence'. See, Elstub and Escobar (n 52) 14.

[626] Bennett and Pratt (n 53); Behrendt, 'The Abolition of ATSIC – Implications for Democracy' (n 242).

> We believe very strongly that the experiment in separate representation, elected representation, for indigenous people has been a failure. We will not replace ATSIC with an alternative body. We will appoint a group of distinguished indigenous people to advise the Government on a purely advisory basis in relation to aboriginal [sic] affairs.[627]

Indigenous leaders and members of the Opposition and crossbench in Parliament criticised the decision and argued that if ATSIC were to be abolished, it must be replaced with another Indigenous representative body. Ignoring criticisms, the Howard Government passed the ATSIC Amendment Bill 2004 on 16 March 2005, with no replacement body but a non-representative, government-appointed advisory board, the National Indigenous Council.[628]

Established under the *Aboriginal and Torres Strait Islander Commission Act 1989* in recognition of both the past dispossession of the Aboriginal and Torres Strait Islander peoples and the disadvantaged position of Indigenous people in Australian society, section 3 of the Act stated ATSIC's objectives were:

- to ensure maximum participation of Aboriginal and Torres Strait Islander people in government policy formulation and implementation;
- to promote Indigenous self-management and self-sufficiency;
- to further Indigenous economic, social, and cultural development, and
- to ensure co-ordination of Commonwealth, state, territory, and local government policy affecting Indigenous people.[629]

ATSIC clearly had a deliberative and participatory role in the development of Indigenous public policy. It had both an elected representative and an administrative arm with a legislative mandate to offer alternative advice to government on policy that better reflected the perspectives and interests of Aboriginal people.[630] It had to play a delicate balancing act as the primary representative voice for Aboriginal and Torres Strait Islander people at the national

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[627] Gunstone (n 592) 43.

[628] Ibid.

[629] Bennett and Pratt (n 53) 7.

[630] Its original structure included 60 regional councils, elected by the Aboriginal community. The regional councils were responsible for the allocation of resources within their jurisdiction and the election, from within their ranks, of the Commission's 20 board members. In that sense, the principle of self-determination had been embedded in the institutional structure and process of the Commission. See Ian Anderson, 'The End of Aboriginal Self-Determination?' (2007) 39 *Futures* 137.

level, while also operating as a government agency. Its strength lay in its broad legislative mandate to formulate and implement programs, monitoring their effectiveness, developing policy proposals, assisting, advising and cooperating with a range of stakeholders, and advising the Minister responsible for Indigenous affairs.

> This combination is unique, which helps to explain why the creation of ATSIC was seen as a bold innovation in Aboriginal affairs, and in Australian public administration more generally: ATSIC is both the peak indigenous body in Australia, but at the same time, its program delivery role means that the organisation also functions as a government department.[631]

ATSIC was able to develop and implement its own programs, monitoring the effectiveness of programs conducted by other government bodies and agencies, developing policy proposals, and advise the minister for Indigenous affairs. The aims of ATSIC were to maximise 'participation' of Aboriginal people in 'the development of self-sufficiency and self-management'. 'That is, ATSIC was tasked to maximise the participation of Aboriginal and Torres Strait Islander peoples in the formulation and implementation of programmes and to provide an effective voice within government.'[632]

In effect, ATSIC represented the ideal of Indigenous self-government that I outlined in Chapter 4, which entails deliberation, participation, and implementation of government programs. As Anderson says, ATSIC was seen by many as the definitive institutional manifestation of Aboriginal self-determination – a policy framework for Aboriginal affairs that had been in place since 1972.[633]

Both Behrendt and Anderson, experts on Indigenous law and public policy, argue the demise of ATSIC was not only consequential to Indigenous self-determination but also to Australian democracy.[634] As Anderson explains, the uptake of self-determination as the overarching policy construct in Aboriginal affairs was associated with changes in the relationship between Aboriginal people and the state. Before the adoption of self-determination, relations were characterised by 'racially rationed access to social welfare, and diminished social and economic

[631] Behrendt, 'The Abolition of ATSIC – Implications for Democracy' (n 242) 1.

[632] Ibid.

[633] Anderson (n 628) 138.

[634] Behrendt, 'The Abolition of ATSIC – Implications for Democracy' (n 242); Anderson (n 628).

participation in Australian nationhood' which largely excluded Aboriginal people from the body politic of the Australian state.[635]

ATSIC should rightly be viewed as a democratic innovation in Australia democracy. The consequence of the Howard Government abolishing ATSIC is that there has not been an Indigenous national voice or perspective in government policy formulation and decision making since. In the absence of an ATSIC type body, Australia has preferred to re-centre decision-making power to the Parliament, Prime Minister, relevant ministers and public service bureaucrats with responsibility for aspects of Aboriginal and Torres Strait Islander affairs.

The challenge Australia's democratic institutions such as the federal Parliament have with listening to Aboriginal people has not abated. At the time of writing (August 2023), parliamentary and public deliberation regarding a proposed referendum to enshrine a First Nations Voice to Parliament in the Australian Constitution has been marred by misinformation and unsubstantiated claims[636] including claims it could affect 'every decision of government'.[637]Some members of the Australian federal parliament still have a deep aversion to listening to the voice and concerns of Aboriginal and Torres Strait Islander people.

I now turn to discuss my third example, the 2007 Northern Territory Intervention.

### 7.1.3 Northern Territory Intervention

The final example I discuss is the Howard Government's response to the 2007 *Little Children are Sacred* report that contained allegations of widespread sexual assault against children in remote Aboriginal communities in the Northern Territory.[638] The report sparked extensive media coverage, much of which framed remote Aboriginal communities as highly dysfunctional, ravaged by alcohol, with children vulnerable to organised paedophile rings.

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[635] Anderson (n 628) 146.

[636] John Dryzek, Ron Levy and Selen A Ercan, 'In a Voice Campaign Marked by Confusing, Competing Claims, There's a Better Way to Educate Voters', *The Conversation* (19 June 2023) <http://theconversation.com/in-a-voice-campaign-marked-by-confusing-competing-claims-theres-a-better-way-to-educate-voters-206193>.

[637] Sky News Australia, 'Voice to Parliament Could "Influence Every Decision of Government": Peter Dutton' <https://www.skynews.com.au/australia-news/voice-to-parliament/voice-to-parliament-could-influence-every-decision-of-government-peter-dutton/video/2db297df2bcd68f9c89c49aa7a9f9b3b>.

[638] Rex Wild and Pat Anderson, *Ampe Akelyernemane Meke Mekarle* '*Little Children Are Sacred*' (Northern Territory Government, 15 June 2007).

Within a week of the release of the report, Howard and his then Minister for Indigenous Affairs, Mal Brough, declared a state of emergency in the Northern Territory with plans to send the Australian army into Aboriginal communities in the Northern Territory to restore law and order.[639] Within seven weeks, a comprehensive legislative package was enacted with the federal government holding ultimate legislative power to enact such legislation applying to the Northern Territory by reasons of ss 51(xxvi), 109 and 122 of the Australian Constitution.[640]

As Vivian and Schokman document in their analysis, by declaring a national emergency, the Howard Government was able to use the processes of the federal Parliament to persuade representatives to support their *Northern Territory Emergency Response* and the range of measures it deemed necessary to 'stabilise' Aboriginal communities.[641]

The speed and scope of the legislative measures was carried out with little opportunity for parliamentary oversight and no genuine engagement with the affected communities or Aboriginal leaders:

> Despite the introduction of 480 pages of legislation, the process of enactment, from the introduction of the Bills to Parliament on 7 August 2007 to Royal Assent on 17 August 2007, took a mere 10 days, with an inquiry by the Senate Standing Committee on Legal and Constitutional Affairs in the interim. In fact, the former Minister responsible for enacting the Northern Territory Intervention, Mal Brough, revealed in June 2008 that it took just 48 hours to formulate the policy that was the foundation for the measures.[642]

The crisis of child sexual abuse should elicit an immediate and strong response from government authorities, but the manner in which the Howard Government implemented

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[639] Transcript of the Prime Minister the Hon John Howard MP Joint Press Conference with the Hon Mal Brough, Minister for Families, Community Services and Indigenous affairs, Canberra, 21 June 2007, see https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/8XFN6%22

[640] Alison Vivian and Ben Schokman, 'The Northern Territory Intervention and the Fabrication of "Special Measures"' (2009) 13(1) *Australian Indigenous Law Review* 29, 80.

[641] As Vivian and Schokman, the Howard Government accused the Northern Territory Government of negligence on the matter of child sexual abuse in remote Aboriginal communities within days of the public release of the *Little Children Are Sacred* report. They proceeded to sideline a 'popularly elected government' and began introducing a series of 'national emergency' measures to stabilise and protect the effected Aboriginal communities. See Vivian and Schokman (n 638).

[642] Ibid. 80.

their response raises serious questions about the legitimacy and consent for government-backed action.[643]

There was no genuine consultation with those most affected – the Aboriginal communities of the Northern Territory. Despite the desire from Aboriginal communities affected to be supported by government and others, the issue became a question of informed consent, political and legal legitimacy, and the abuse of state power to override the *Racial Discrimination Act 1975* (RDA) and the concerns of Aboriginal people. The RDA was Australia's response to signing the *UN Convention on the Elimination of All Forms of Racial Discrimination* and is viewed as an important law that protects the rights of Aboriginal and Torres Strait Islander people.

> It is apparent that the Northern Territory Intervention was targeted directly at, and specifically impacts on Aboriginal people. Indeed, the inherently discriminatory nature of the Northern Territory Intervention is implicitly acknowledged by the exclusion of the RDA (and Northern Territory anti-discrimination legislation), preventing those who are subject to the Intervention's measures from seeking protection from discrimination or a remedy from harm by reason of discrimination.[644]

The Howard Government received widespread condemnation for their actions, which were deemed racially discriminatory and without the consent of the Aboriginal communities concerned. However, the government argued the measures were not discriminatory but beneficial and as such adhered to the intent of the RDA. The actions of the Howard Government were not viewed as legitimate by Aboriginal people and did harm to the role of government and the processes of the legislature, despite it trying to address a serious community safety issue.[645]

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[643] As former Social Justice Commissioner Tom Calma explains, the issues raised in the *Little Children Are Sacred* report were well known at the time. 'The report noted that much of the violence and sexual abuse was a reflection of past, current and continuing social problems. Some of these problems included poor health, alcohol and drug abuse, unemployment, gambling, pornography, poor education and housing, and a general loss of identity and control. Importantly, the authors of the report found that the reason for the perpetuation of such problems was the incapacity of past and current government programs to break the cycle of poverty and violence.' See Tom Calma, 'The Northern Territory Intervention – It's Not Our Dream Indigenous Australians and the Commonwealth Intervention' (2009) 27(2) *Law in Context: A Socio-Legal Journal* 14, 16.

[644] Vivian and Schokman (n 638) 83.

[645] As Fischer argues, 'Citizen participation is the cornerstone of the democratic political process' and deliberative approaches to law and policymaking have the potential to decrease conflict and increase acceptance of or trust in decisions by government and its agencies. See Fischer, *Reframing Public Policy: Discursive Politics and Deliberative Practices* (n 131) 205.

Despite the furore it created internationally and domestically, the Howard Government was able to implement its policies without much concern of public backlash. And despite denouncing the policy while in Opposition, when the ALP won the November 2007 federal election it continued the same policy once in government.[646]

The Northern Territory Intervention is a case in which the government knew it could pass legislation it deemed necessary while also characterising the Indigenous communities it was purporting to help as dysfunctional, irresponsible, and incapable of self-managing. Paternalism as exercised by governments treats Aboriginal people as incapable of making sound decisions and therefore requiring the government to act as a guardian in order to fix the problem of Aboriginal dysfunction.[647]

Paternalism as practiced by Australian governments frame Aboriginal people as incapable of self-management and therefore in need of government intervention. As such, state-practiced paternalism poses a significant problem for the most basic ideal of deliberative and participatory democracy (those likely to be affected by a decision must be involved in the decision-making process) to be realised.

What these examples demonstrate is what Scudder calls the lack of deliberative uptake. When citizens voice their concerns but are ignored by democratic institutions and political leaders, there can be no real sense of democratic inclusion, which I now turn to discuss.

## 7.2 The Ideal of Deliberative Uptake

Aboriginal people's demand for differentiated inclusion in Australian democracy has been curtailed by a persistent refusal of governments to hear. As Aboriginal constitutional law

[646] Vivian and Schokman (n 638).

[647] As Nakata and Maddison explain, when Aboriginal and Torres Strait Islander peoples themselves are understood as the problem, then changing the policy settings to 'fix them' seems like the solution. This focus on Aboriginal people as being the source of their own problems conveniently overlooks the effects of dispossession and many decades of failed government policy. Such a 'deficit' perspective remains wedded to a persistent Australian political discourse that insists on framing Indigenous people as objects to be studied and problems to be solved. In terms of government policy responses, Aboriginal people are 'acted upon' as subjects of domestic policy that demonstrates the settler state's assertion of sovereign authority over Indigenous peoples and its policy initiatives as forms of goodwill and benevolence. See Nakata and Maddison (n 54) 408.; See also, Elizabeth Strakosch, *Neoliberal Indigenous Policy: Settler Colonialism and the 'Post-Welfare' State* (Palgrave Macmillan UK, 2015) 52.

scholar Megan Davis, explains, Australian governments appear to listen to Aboriginal people, but not hear.[648]

While the examples I discussed of Howard period of government are the starkest illustration of non-listening and the challenge of deliberative and participatory democracy under conditions of settler colonialism, they are by no means the only examples. Other include the 2015 decision to overhaul the administration of Indigenous affairs policy without consultation with Aboriginal and Torres Strait Islander people[649], and the rejection of the Uluru Statement by then Prime Minister Malcolm Turnbull in 2017 also without any discussion with Aboriginal and Torres Strait Islander people.

As Mary Scudder explains, the failure of institutions and political leaders to listen and take on the opinions of citizens, is antithetical to the ideal of democratic inclusion. 'Without listening, deliberation lacks democratic force'.[650] For Scudder, efforts to democratise deliberation must go beyond formal inclusion to consider the extent to which citizens' perspectives are actually taken up by others. After inclusion, it is *deliberative uptake* that is essential if citizens are to have a say in the laws to which they are held.[651]

This ability of the Australian state to act in a paternalistic manner towards Aboriginal people is why substantive and not merely formal inclusion for Aboriginal people within Australian democracy is necessary. Paternalism – whether by individuals or institutions – greatly affects the success or otherwise of deliberative and participatory democracy. In situations in which politicians, governments, parliaments or indeed the broader society hold strong views that a

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[648] Davis, 'Listening but Not Hearing: When Process Trumps Substance' (n 515).

[649] In September 2013 the Tony Abbott led Coalition was elected to government. One of its first announcements was audit to cut federal government spending. The National Commission of Audit (NCA) was engaged to look for potential government savings. In the review, the NCA recommended Indigenous-specific programs, services and spending, to be consolidated from over 150 to just from 150 to 'no more than six or seven programs'. The Abbott Government enthusiastically took up the recommendations of the NCA and rebadged funding to Aboriginal programs and service providers the 'Indigenous Advancement Strategy (IAS)'. The changes also included a new competitive grant application process. With no prior consultation, Aboriginal community organisations across the country had only six weeks to reapply for their funding through a brand-new application system, with little instruction, or face potential closure. Page describes the IAS as destabilising and chaotic. See, Alexander Page 'Fragile positions in the new paternalism: Indigenous community organisations during the "Advancement" era in Australia' in Howard-Wagner, Bargh and Altamirano-Jiménez (n 601) 185-200.

[650] Scudder (n 586) 4.

[651] Mary F Scudder, 'The Ideal of Uptake in Democratic Deliberation' (2020) 68(2) *Political Studies* 504.

particular group of citizens are incapable or solving their own challenges, then the likelihood of listening and taking seriously their concerns and ideas on possible solutions, are likely to be overlooked. The space for more deliberative and participatory forms of democracy, will be limited.

Listening is an overlooked component of effective deliberation. As De Souza and Dreher explain, listening as a political practice remains under theorised, particularly in settler-colonial contexts. As they explain, a politics of listening seeks to transform politics beyond careful deliberative listening, to also consider prioritising or privileging First Nations voices and unsettling settler-colonial authority.

> We pay attention to how a commitment to political listening might register uncomfortable truths about historic, structural and ongoing settler-colonial violence – engaging with the broader histories of First Nations struggles for treaty, land rights, self-governance and truth-telling beyond the horizon of liberal democratic and rights-based claims to voice, including those that unsettle 'the nation'.[652]

As Morell explains, deliberative democracy may value everyone having the chance to speak, but this is not the same as making sure everyone *listens* to others.[653] People, including political leaders with lower deliberative abilities are problematic 'especially under difficult conditions' because they may 'not be predisposed to listen closely to the positions of others'. An individual's disposition to listen or not can affect the quality of deliberation.[654] For genuine deliberation to occur, it requires 'putting oneself in the position of the other and trying to see the situation from their perspective'.[655]

While the recognition of native title undoubtedly led to greater public deliberation on Indigenous issues, Howard felt no compulsion to treat these public claims (sovereignty, treaty, and self-government) with respect by creating political space for the discussion of these issues with Aboriginal leaders. For Morrell, one's empathetic predisposition is likely to have a 'significant effect on listening in deliberation' and it 'remains an open question whether those with lower empathetic predispositions can be encouraged to change'. 'If we cannot do so, then

[652] Souza and Dreher (n 584) 32.

[653] Michael E. Morrell 'Listening and Deliberation' in Bächtiger et al (n 6) 245.

[654] Ibid.

[655] Ibid. 246; Simone Chambers, *Reasonable Democracy: Jürgen Habermas and the Politics of Discourse* (Cornell University Press, 2018).

some participants may simply listen better than others, which may have detrimental effects on the quality of deliberation'.[656]

This inability of individual political leaders (and the governments they lead) to listen, poses an obvious and serious challenge to the aspirations of Aboriginal people. Megan Davis has characterised the deliberate ignorance of governments not to take the claims of Aboriginal and Torres Strait Islander people seriously as 'listening but not hearing'.[657] Davis suggests the problem Aboriginal face as a political minority within a dominant non-Indigenous culture lies not with the inability of Aboriginal people to talk or articulate what we mean and want to say, but the inability of those in power to listen.[658]

As Scudder et al explain, institutional listening is the active practice of listening by formal institutions through processes such as public hearings, independent inquires, court hearings, and royal commissions that listen, recognise, and respond to citizens' voices, particularly to the marginalised and vulnerable. Institutional listening shifts the responsibility from citizens to express their voice onto institutions to make themselves accessible and receptive.[659]

Citizens need a commitment that their voices will not only be heard but that the substance of what we are saying, will be listened to, considered, and an appropriate response provided. This, Scudder calls, 'deliberative uptake'.

> The democratic force of deliberation comes in large part from the uptake of citizen's input. By 'uptake' I mean giving due consideration to the arguments, stories, and perspectives that particular citizens share in deliberation. After inclusion, uptake ensures that citizens have a say in the laws in which they are held.[660]

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[656] Bächtiger et al (n 6) 246.

[657] Davis, 'Listening but Not Hearing: When Process Trumps Substance' (n 515).

[658] As an example, Davis points to the Australian Government-led 'Recognise' campaign on constitutional recognition and the process of the government to supposedly seek out the perspectives of Aboriginal and Torres Strait Islander people on constitutional recognition. Despite concerns Indigenous people raised with both the substance of the proposal itself and process of constitutional recognition, the government – along with the Parliament and a compliant media – pushed a narrative that constitutional recognition was wanted by Indigenous people in Australia. As Davis plainly states, 'We did not'. Although the government, media and presumably the Australian public seemed to be listening, 'they did not hear'. See, Ibid.

[659] Scudder, Ercan and McCallum (n 97) 42.

[660] Scudder (n 586) 20.

While deliberative democracy theorists have been pre-occupied with inclusion and ensuring marginal voices are heard in deliberative exchanges, listening and the uptake of our claims is more important. Scudder says that by emphasising the importance of inclusion, deliberative democracy theorists have overlooked the equally important aspect of how individuals or institutions consider and respond to different perspectives. Uptake is a more effective means for addressing notions of democratic exclusion.[661]

This idea that institutions and leaders have a duty to listen and take up the opinions and concerns of citizens or members of marginal groups, aligns with the argument of Dreher and Mondal, that the emphasis in a deliberative exchange, particularly between powerful and marginalised parties, needs to shift from 'voice' to 'response'.[662] The 'turn to listening' frames listening as a 'political practice' equally as important as 'voice'. Whereas voice emphasises speaking, freedom, representation and individual agency, listening by contrast emphasises receptivity, attentiveness and responsiveness.[663] In this move from voice to response, the onus is placed upon those with the power to act on the claims sought by other less powerful voices or actors.[664]

When formal empowered spaces refuse to listen, other non-formal public spaces that are not 'designed' but emerge as 'incidental' spaces of listening within existing formal political or governmental institutions become important. As I will argue in the next chapter (Chapter 7), the spaces and processes created within the native title system are a type of incidental listening and unintended deliberative space.

The individual and institutional inability to listen to Aboriginal voices is demonstrable in the current public and political debate concerning the Voice to Parliament proposal.[665] Rather than

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[661] Ibid. 22.

[662] Tanja Dreher and Anshuman A Mondal (eds), *Ethical Responsiveness and the Politics of Difference.* (Springer International Publishing AG, 2018) 4.

[663] Ibid. 5.

[664] There are instances when political leaders and institutions do act in response to the claims of Aboriginal people. The National Apology to the Stolen Generations by Prime Minister Kevin Rudd is a clear example of an institutional response to public claims. See, Stephen Mills 'I am sorry': Prime Ministerial Apology as Transformational Leadership' in John Uhr and Ryan Walter, *Studies in Australian Political Rhetoric* (ANU Press, 2014) 19-32.

[665] Despite a lack of national leadership on issues such as self-determination and treaty, several sub-national governments including Victoria, Queensland, Tasmania and the Northern Territory are engaged in treaty negotiations with Indigenous people. Victoria is the most advanced state in this regard and has supported the creation of the First Peoples' Assembly of Victoria as an independent and democratically elected body to represent Traditional Owners of

gain bipartisan support from both major political parties, the Liberal National Party (LNP) coalition has opted to oppose the Voice for a range of unsubstantiated and easily debunked reasons.[666]

In my discussion so far, what should be clear is that Aboriginal people have repeatedly demonstrated ourselves as being highly capable deliberators. What is more often more problematic is the unwillingness of elected officials and institutions to provide considered responses to these claims. As the Uluru Statement from the Heart proclaims, 'we seek to be heard' and we seek institutions that will be compelled to listen to the voices of Aboriginal and Torres Strait Islander people. The Voice to Parliament is premised on a presumption that the legislature and elected representatives will listen. As the discussion in this chapter demonstrates, this more often does not occur. The Voice is then somewhat of a misnomer. For Aboriginal people, we need the federal Parliament to institutionalise listening via a constitutionally enshrined set of ears with a responsibility to hear and respond to Aboriginal and Torres Strait Islander people's claims.

If Aboriginal claims of sovereignty and self-government, and the well-developed proposals on institutional and structural changes to Australian democracy, fail to garner an adequate

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Country in Victoria with cultural authority to negotiate with the Victorian Government. Through the Assembly, Traditional Owners in Victoria have called for the establishment of a number of new independent institutions to support treaty negotiations. The first new body is the Yoo-rrook Justice Commission, with powers to investigate past and ongoing injustices against Indigenous People in Victoria since colonisation. For many Indigenous People truth telling and the public sharing of experiences of injustice and discrimination are considered an essential first step in any treaty process. In June 2022, the Victorian Government passed legislation (Treaty Authority and Other Treaty Elements Bill 2022) after reaching agreement with the First Peoples' Assembly to establish a Treaty Authority that will function as an 'independent umpire' that sits outside of the usual government bureaucracy and will oversee the treaty process. See Yoorook Justice Commission, *Yoorook with Purpose: Interim Report* (Yoorook Justice Commission, 2022). Also, on 26 March 2023, the South Australian Parliament passed the First Nations Voice Bill 2023 an act that establishes Australia's first Voice to Parliament for First Nations people in South Australia.

[666] There has been much written in the media on the opposition by the LNP to the Voice proposal which I am not able to discuss at length. However, the point I wish to make is that even when information is provided by an authoritative and arguably neutral source such as the Australian Solicitor-General specifically addressing legal questions regarding the constitutional effects posed by the Voice to Parliament, this advice has been rejected and politicised rather than leading to more substantive deliberation about the proposal. See Cait Kelly, Natasha May and Natasha May (earlier), 'Advice on Voice a "Cynical Political Tactic" to Confuse Voters, Coalition Claims – as It Happened', *The Guardian* (online, 21 April 2023) <https://www.theguardian.com/australia-news/live/2023/apr/21/australia-news-live-renewables-superpower-clean-energy-summit-jim-chalmers-nsw-liberals-leadership-indigenous-voice-cost-of-living-interest-rates-drug-reform>.

response from national political institutions and leaders, is it a failure of Aboriginal voices, or is it a failure of the elected officials to listen, hear and understand the aspirations of Aboriginal people? The failure of democratic institutions and political leaders to listen is why Aboriginal people are right to be cynical that *more talking* is the answer.[667]

It is very obvious that Aboriginal people can speak forcefully and be publicly heard. Yet these efforts do not necessarily mean we are listened to or indeed understood. As Young explains, when members of a society do not perceive of themselves as belonging to the dominant cultural group, they may be suspicious of deliberation, especially if it seems to favour the powerful.[668]

The three examples of non-listening I discussed in this chapter are illustrative of the challenge of deliberative and participatory democracy under conditions of settler colonialism. They violate the deliberative norm that 'people should not be treated as objects of legislation, as passive subjects to be ruled'.[669]

Non-listening by democratic institutions and political leaders constrains Aboriginal and Torres Strait Islander people seeking to exercise self-determination or self-government through our political system. Davis argues Australia has a distinctly procedural approach to democratic engagement that necessitates a weak relationship between constituents and their representatives. A problem that is more pronounced for Aboriginal and Torres Strait Islander people.

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[667] David Claudie, '"We're tired from talking": The native title process from the perspective of Kaanju People living on homelands, Wenlock and Pascoe Rivers, Cape York Peninsula' in Frances Morphy and Benjamin R Smith (eds), *The Social Effects of Native Title* (ANU Press, 2007). I worked for a short period with David Claudie during my time with ACF. What he expresses is a familiar sentiment held by many Aboriginal and Torres Strait Islander people – a sense of exhaustion and exasperation – of the never-ending advocacy Indigenous people must do to get the state to listen and to respond to our claims. Talking is exhausting and my thesis in no way suggests we need to talk more. It is I believe incumbent upon the state to listen and work with Indigenous people on the solutions we put forward for deliberation. Also, in discussing my thesis with other Aboriginal people, I encountered scepticism that deliberative democracy theory could be helpful largely because many Aboriginal people question if more talking will produce better outcomes for us. Indeed, talk with an Aboriginal person involved in the struggle for sovereignty, self-government and self-determination and many will say how we are *tired of talking*.

[668] Iris Marion Young, 'Activist Challenges to Deliberative Democracy' in *Debating Deliberative Democracy* (Blackwell Publishers, 2003).

[669] Gutmann and Thompson (n 18) 3.

> Contemporary liberal democracies are procedural democracies. That is to say, citizen's participation is more or less limited to a procedural right (the right to vote) and less scrutiny paid to the quality of decision making between elections. In this regard, Australia is not unique.[670]

Deliberative democracy is of course, a response the limitations of procedural, aggregative democracy.[671] For Levy et al, electoral democracy, which simply tallies fixed preferences through voting, fails to provide opportunities for meaningful deliberation, a proposition that resonates strongly with First Nations people.[672]

> According to deliberative democratic theory, democratic choice should be not merely an exercise in majoritarianism or preference aggregation; it should also result from informed and reflective discussion and persuasion, which seeks to divorce policy-making from mere partisan loyalty and unreasoned power, and to meet the complexity of today's governance challenges.[673]

Despite increased use of public deliberation by Aboriginal leaders to call for structural and institutional reform to Australian democracy following *Mabo,* the anticipated dialogue and change, simply did not eventuate.

A decade after the end of the Howard era of government, Aboriginal people have responded to our sense of powerlessness to participate and deliberate upon the laws and policies likely to affect us by calling for a constitutionally enshrined 'First Nations Voice to Parliament'. [674] I do not intend to provide a lengthy analysis of the Voice but rather discuss how it represents the

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[670] Davis, 'Indigenous Constitutional Recognition from the Point of View of Self-Determination and Its Exercise through Democratic Participation' (n 78) 10.

[671] As Young argues, the aggregative model '…offers only a weak motivational basis for accepting the outcomes of a democratic process as legitimate. Even if the outcome is fair in that preferences reflect those that are more widely or strongly held, then there is no reason why those who do not share those preferences ought to abide by the results. They may simply feel that they have no choice but to submit, given that they are in the minority'. See Young, *Inclusion and Democracy* (n 172) 22.

[672] Ron Levy et al (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018) 1.

[673] Ibid.

[674] For full details on the Uluru Statement and the proposed Voice to Parliament, see Referendum Council, *Final Report of the Referendum Council* (June 2017); Marcia Langton and Tom Calma, *Indigenous Voice Discussion Paper* (National Indigenous Australians Agency (NIAA), 2021).

return to a deliberative, institutional innovation – like that of ATSIC – that seeks to provide Aboriginal and Torres Strait Islander people with a greater influence of laws and policymaking.

The ability of the federal Parliament to propose, make, and amend the laws it sees fit in relation to Indigenous people remains a significant point of tension between Aboriginal people and the state. The processes of parliamentary deliberation and decision making falls well short of the expectation held by Aboriginal people that laws passed must have our consent as set out in various articles in the UNDRIP.[675]

The 11 years of the Howard Government, from 1996 to 2007, saw enormous changes in the policy area of Indigenous affairs. Several key issues that largely dominated in the early 1990s were largely diminished during the Howard years. Self-determination and ATSIC were abandoned. Reconciliation was reframed to address the socioeconomic disadvantage experienced by Indigenous people. And native title was significantly wound back. Howard also refused to offer an apology to the stolen generations.

> The Howard Government might not quite have reinvented the 19th Century…but they have certainly been successful in their intention to wind back virtually all of the significant advances won by Indigenous people from the late-1980s to the mid-1990s.[676]

As it stands, there is no requirement that legislation designed to secure the advancement of Indigenous people either has their support or has been drafted in accordance with their wishes.[677] Yet public sentiment from non-Indigenous Australians has persistently indicated support for the ideal of reconciliation and also acceptance of Aboriginal and Torres Strait Islander people's demands to be consulted by government and more directly involved in deciding law and policies likely to impact Indigenous people.[678]

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[675] For example, articles 18 and 19 of UNDRIP state in part, Indigenous people 'have the right to participate in decision-making in matters which would affect their rights' and 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent'. See United Nations (n 12).

[676] Gunstone (n 592) 49.

[677] Harry Hobbs, 'First Nations, Settler Parliaments, and the Question of Consultation: Reconciling Parliamentary Supremacy and Indigenous Peoples' Right to Self-Determination' (2021) 58(2) *Osgoode Hall Law Journal* 337, 360. ('First Nations, Settler Parliaments, and the Question of Consultation').

[678] As Megan Davis explains, at the *Australia 2020 Summit* convened by then Prime Minister Kevin Rudd in April 2008, delegates of the Summit were strongly supportive of Indigenous recognition in the constitution and ranked Indigenous issues as the number one governance issues facing the nation. See 2008 Davis, 'The Long Road to Uluru'

## 7.3 Conclusion

In the years after the *Mabo* decision there existed many elements necessary for Aboriginal people to deliberate and participate in decision making in the form of ATSIC, a commitment to national reconciliation, an active Indigenous civil society in the form of the community-controlled sector, and a clearly expressed desire for self-government by Aboriginal people. Yet, under the period of Howard and Coalition government, Australia reverted to a paternalistic approach to Aboriginal people that included dismantling the various elements for Indigenous participatory deliberative democracy instituted since 1972.

The legacy of Howard and the Coalition government was that the 'idea' of native title was never perceived as 'constitutional moment' capable of transforming Indigenous–settler state relations. Not only did Howard manage to dismantle many of the elements for deliberative and participatory governance, but alienated Aboriginal people for a decade and discussion of meaningful institutional reform remained off the political agenda. It has only remerged in political discourse through the 2017 First Nations Voice to Parliament.

The opportunity offered by *Mabo* and native title to begin a dialogue about the past and a reformed future were never seriously entertained under Howard. What ensued instead was the sustained exclusion of Aboriginal people from meaningful participation in a range of highly political decisions (*Wik*, ATSIC, Northern Territory Intervention) that had profound effect on Aboriginal and Torres Strait Islander people.

I concluded this chapter by stating that the challenge Aboriginal people face in Australia is not our lack of voice, but the inability of those in power to listen. That is to say, Australia has a listening problem.

As the discussion in this chapter demonstrates, space for differentiated inclusion, deliberation and participation in decision-making processes has not been created at the national political level. Aboriginal people have had to create other spaces for deliberative and participatory forms of democratic engagement. In the next chapter (Chapter 8), I discuss the native title system as a contestatory mechanism and argue Aboriginal people have created deliberative and participatory spaces within the native title system separate from institutions such as parliament, which I now turn to discuss.

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(n 2); 'Polling – Voice to Parliament in the Constitution', *The Australia Institute* (31 July 2022), (Webpage), <https://australiainstitute.org.au/report/polling-voice-to-parliament-in-the-constitution/>.

# 8 Native Title as a Contestatory Mechanism

> The fact that a society is multicultural, then, means that the democratic state is going to have to take special steps to try and establish the equal and full contestatory power of those in minority groups. Otherwise the members of those groups will not be guaranteed of being treated as equals living in a proper two-dimensional democracy. They will live under the thumb of those in the majority and the mainstream.[679]

In the previous chapters, I discussed the effect of native title on the ideal of democratic inclusion for Aboriginal people within Australian democracy. I also discussed the importance of Mabo and the recognition of native title on the ideal of differentiated inclusion and described *Mabo* as a 'constitutional moment'. For many Aboriginal leaders, *Mabo* was thought to be the beginning of a change in political relations between Aboriginal and Torres Strait Islander people and the Australian state that would now include sovereignty and the right to self-government.

However, during the era of John Howard's Coalition government, the anticipated structural and political changes never eventuated. Instead, many of the elements that were in place for institutionalising deliberative and participatory democratic governance by and for Aboriginal people (ATSIC, self-determination) were dismantled under Howard. I discussed this failure by using the concepts of 'deliberative uptake' and 'institutional listening'. This, I have argued, is illustrative of a 'parliamentary sovereignty' that some scholars claim is a feature of Australian politics, particularly in relation to Aboriginal people and our ambitions for sovereignty and the right to self-government. Our rights and aspirations remain highly vulnerable to the whims of the Australian Parliament, Prime Minister and Government of the day.[680]

In this chapter, I argue that because of these difficulties with traditional sites of democratic decision-making, pursuing the goals of sovereignty and self-government shifted from the sphere of national politics to the deliberative sites and processes of the native title system. At a minimum, the recognition of native title ensured Aboriginal and Torres Strait Islander people could no longer be excluded from participating in decision-making processes. Hence, the native

[679] Philip Pettit, 'Minority Claims Under Two Conceptions of Democracy' in Ivison, Patton and Sanders (n 454) 213.
[680] As Behrendt asks, 'If Australia's institutions cannot protect one of the most vulnerable sectors of the Australian community, how democratic are they?' See Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (n 506) 15.

title system emerged as a de facto space for Aboriginal people to engage in deliberative and participatory democracy.[681]

The epigraph to this chapter is from political philosopher Phillip Petit. He argues that Western liberal democracies founded on colonisation and the dispossession of Indigenous people need to acquire a 'different conceptualisation of democracy' that is better able to accommodate the claims and aspirations of Indigenous people. Because colonisation creates situations in which Indigenous people are often politically marginalised, representative democracies, he argues, need to develop a 'richer' form of democracy that augments electoral democracy through the inclusion of a 'contestatory dimension'.[682]

Pettit, reflecting the ideals of deliberative democracy, suggests electoral democracy with its emphasis on voting as the primary tool for resolving political disagreement, is a type of democracy too 'thin' to deal satisfactorily with the claims of Indigenous people. Pettit does not specify whether his contestatory mechanism is a *process* or an *institution* (perhaps both?); in either case, however, it is something *additional* to manage the disagreement between Indigenous people and the state as a consequence of colonisation.

My argument is that native title provides this additional 'contestatory mechanism' for Aboriginal people to deliberate about the laws and policies that affect us – thus to participate in decision-making processes beyond what the law of native title recognises.

This chapter provides important context for the final three chapters of my thesis, in which I discuss three practices within the native title system that are indicative of 'a participatory deliberative approach to native title' by Aboriginal people. These are:

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[681] As Bauman et al explain, there is significant tension between governments and native title holders about what is and what is not native title and what is and what is not reasonable support for Aboriginal people to use and enjoy their native title rights. 'For native title holders, recognition of traditional rights in country is often hard won, euphoric and highly symbolic. It creates the expectation of positive outcomes such as greater involvement in decision-making and an improvement in social and emotional wellbeing.' See, Toni Bauman, Lisa Strelein and Jessica Weir (eds), *Living with Native Title: The Experiences of Registered Native Title Corporations* (Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS), 2013) 1.

[682] Philip Pettit, 'Minority Claims under Two Conceptions of Democracy' in Ivison, Patton and Sanders (n 454) 199-215.

a) Caring for Country, a unique Indigenous approach to environmental and cultural heritage management and an example of *democratisation through policy discourse*[683]

b) negotiated agreements known as 'comprehensive settlements' between native title holding groups governments that often recognise Aboriginal sovereignty and self-government, and which are examples of *deliberative negotiation*[684], and

c) Indigenous Nation Building, which refers to the strengthening of Aboriginal capacity for internal self-government and is an example of *prefigurative politics*.[685]

The three practices are extensions of the ideal of differentiated inclusion because Aboriginal people engage in these practices to enhance our participation in decision making beyond voting.

What also makes these practices noteworthy is they occur not within sites or settings dominated by powerful actors such as a parliament, but at the intersection of native title rights and public policy. As Australian political theorist Elizabeth Strakosch observes, Indigenous people must challenge the 'normalcy' of settler norms, laws, policies, institutions, and systems wherever they are encountered. 'The domain of public policy then becomes an important site of political encounter and engagement between Indigenous peoples and settler states.'[686]

Before I focus on the three 'participatory deliberative practices' in later chapters, I further elaborate here on my claim that native title acts as a 'contestatory mechanism'[687] within Australia's system of democratic governance. I follow this with a discussion of *Country* (the traditional lands of Aboriginal people) as an *Indigenous empowered site*. As well as being an important spiritual and cultural space, Country is an Indigenous political space for internal and external forms of deliberation and binding decision-making, and is a place where Aboriginal people engage in what Mansbridge calls *everyday talk*.[688]

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[683] Douglas Torgerson, 'Democracy Through Policy Discourse' in Hajer and Wagenaar (n 115) 113-138.

[684] Mark E. Warren et al 'Deliberative Negotiation' in Mansbridge and Martin (n 560) 141-196.

[685] Davina Cooper, 'Prefiguring the State' (2017) 49(2) *Antipode* 335, 335.

[686] Strakosch, *Neoliberal Indigenous Policy: Settler Colonialism and the 'Post-Welfare' State* (n 645) 2.

[687] Philip Pettit, 'Minority Claims under Two Conceptions of Democracy' in Ivison, Patton and Sanders (n 454) 199-215.

[688] For Mansbridge, 'everyday talk' by citizens in their private lives is seen as an essential practice in the effectiveness of deliberative democracy at broader societal levels. 'Everyday talk is not always self-conscious, reflective, or considered, but is nevertheless a crucial part democracies need if citizens are to rule themselves.' Through everyday talk, people come to know what they want and need as individuals and as collectives. See Jane Mansbridge, 'Everyday

## 8.1 Different Conceptualisations of Native Title

My argument that the native title system has become a de facto contestatory mechanism is in large part due to the difference between Aboriginal people and governments concerning what it is that native title is recognising. Recalling Ritter's observation that there exists a jural and a social understanding of native title, and my own observations of native title meetings that I attended, native title is an inherently contested concept.[689] As discussed in the chapter on *Mabo* and the recognition of native title, for Aboriginal people *native title is self-government*.[690]

As public policy scholar Michael Dillion explains, how one 'experiences' native title depends on their position in the native title system. Judicial interests will largely experience native title through the prism of relevant statutes and judicial precedents and legal processes. Policymakers will relate to the native title system differently to judicial officers. Similarly, third party interests will experience the native title system in fundamentally different ways to judicial officers, or native titleholders, or aspiring native titleholders, regulators, or policymakers.[691]

As I argue, for Aboriginal people, native title is recognition of sovereignty and forms an important part of a broader right to self-determination. 'Deliberating native title', which is the title of this thesis, seeks to capture this contestation over the meaning of native title and how this contest occurs within and across various institution, sites, process, and actors that constitute the native title system.

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Talk in the Deliberative System' in Stephen Macedo (ed.), *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, 1999) 211-239.

[689] David Ritter, 'Hypothesising Social Native Title', in Strelein, *Dialogue about Land Justice: Papers from the National Native Title Conference* (n 40) 118.

[690] Webber, 'Native Title as Self-Government' (n 152).

[691] Accordingly, courts, judges, and lawyers will largely understand native title as a legal process and doctrinal and jurisprudential characteristics and the *Native Title Act 1993*. Within the domain of policy, native title is viewed as an important legal right enabling Aboriginal people to potentially negotiate a range of economic and social benefits through agreement making. Alternatively, it may also be seen as a potential impediment to the rights of other landholders such as mining interests. See Michael Dillon, 'Systemic Innovation in Native Title', *CAEPR Discussion Paper No. 294* 24, 2 (Centre for Aboriginal Policy Research, ANU, 2018).

Contestation is, of course, a prominent concept in deliberative democracy theory.[692] As John Dryzek argues, all deliberation is a contestation of discourses.[693] Discourse, he explains, is a way of understanding, interpreting, and making sense of the world by helping those that subscribe to a specific discourse to construct meaning, and to define relationships, common sense, and what constitutes legitimate knowledge. A discourse rests on assumptions, judgments and contentions that provide the basic terms for analysis, debates, agreements, and disagreements and how people think about an issue. Discourses express a certain body or bodies of knowledge; they often have their own language and terminology. Discourse also helps to express or explain conventions of argumentation and logic of thought.[694]

Pogrebinschi argues that contestation can lead to democratic innovations and experimentation, including new forms of citizen participation and different notions of democracy. 'Democratic innovations comprise forms of citizen participation different than voting, associations, or demonstrations; hence, they innovate vis-à-vis electoral, pluralist, and contestatory forms of citizen participation'.[695]

While speaking specifically about the situation in Latin America, the observations of Pogrebinschi are nonetheless important for my discussion of deliberation within the native title system. As she explains, the term 'democratic innovations' is useful but the meaning it has acquired in the scholarship of deliberative democracy is misleading because it leaves aside a great deal of empirical evidence of citizen-driven innovation. Pogrebinschi argues that citizen participation is often seen as an end in itself, and hence democratic innovations are designed specifically to enhance more participation. Rather, she 'argue[s] that citizen participation is a means to achieve an end, namely the enhancement of democracy.' It is widely assumed democratic innovations comprise only institutions; but she also 'argue[s] that there are three kinds of democratic innovations, namely, institutions, processes, and mechanisms.'[696]

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[692] Mansbridge et al (n 21). 'Deliberative democrats have always placed a high value on contestation. Conflict in opinion was the very stuff of politics in the classic theory of Jürgen Habermas, for example. It is not conflict per se but the conflict of self-interests that for such theorists contaminated the "political." We argue, by contrast, in a further expansion of the deliberative ideal, that any ideal of the political, of legitimate democracy, and of deliberative democracy must include self-interest and conflicts among interests in order to recognise and celebrate in the ideal itself the diversity of free and equal human beings.'

[693] John S Dryzek, 'Legitimacy and Economy in Deliberative Democracy' (2001) 29(5) *Political Theory* 651, 657.

[694] John S Dryzek, *The Politics of the Earth* (Oxford University Press, 2021) 9-10.

[695] Thamy Pogrebinschi, *Innovating Democracy?: The Means and Ends of Citizen Participation in Latin America* (Cambridge University Press, 1st ed, 2023) 23.

[696] Ibid. 24.

For the purposes of this thesis, I argue the native title system can be understood as a de facto 'contestatory' mechanism of the kind Pettit and Pogrebinschi describe. It has become a system for both political contestation and innovation by Aboriginal people. We achieve this through our engagement in public policymaking, negotiating agreements, and rebuilding our capacity for self-government and decision-making. The recognition of native title has provided an enabling environment for Aboriginal people to assert sovereignty, exercise self-government, and rebuild our nationhood.[697]

To further illustrate the contestatory and innovative nature of the native title system, at the 2022 National Native Title Summit hosted by the Kabi Kabi Traditional Owners on the Sunshine Coast, the theme of the summit was 'Navigating the Spaces in Between' – to highlight the value of Indigenous ways of knowing, seeing, and being in the world. Several Indigenous keynote speakers employed a range of rich descriptions and metaphors to describe native title and the native title system.

Kevin Smith[698], CEO of Queensland South Native Title Services, used the ecological concept of brackish water to describe the native title system as a space of political coexistence. Brackish water forms in places where freshwater and seawater ecosystems meet, such as estuaries, lagoons, and wetland areas. They constitute 'transition environments'[699] for freshwater and marine species who must adapt to the mixed freshwater and seawater environment. As Smith explained, brackish waters produce a unique ecosystem: one not entirely fresh or saltwater, but that sustains its own life forms. It is a useful metaphor for native title, which is a space of legal, political, and intercultural complexity. 'Native title is the overlapping section of two distinct

[697] Numerous Aboriginal advocates and non-Indigenous legal and political scholars have drawn the connection between the recognition of native title and greater participation of Aboriginal people in Australian democracy on the basis of self-determination. Arguments include the strengthening of existing institutions such as ATSIC (before it was abolished in 2005), investment in Aboriginal regional governance bodies to empower Aboriginal groups to establish and maintain governance arrangements with state and federal governments. For a discussion of the relationship between native title and political participation, see Peter Yu, 'Aboriginal Issues in Perspective: Native Title Rights and Self-Determination' (1996) 31(2) *Community Development Journal* 164; Hannah McGlade, '"Not Invited to the Negotiating Table": The Native Title Amendment Act 1998 (CTH) and Indigenous Peoples Right to Political Participation and Self Determination under International Law' (2000) 1(1) *Balayi: Culture, Law and Colonialism* 97.

[698] Kevin Smith, CEO, Queensland South Native Title Service, National Native Title Summit, 3 June 2022.

[699] Giuseppe Cognetti and Ferruccio Maltagliati, 'Biodiversity and Adaptive Mechanisms in Brackish Water Fauna' (2000) 40(1) *Marine Pollution Bulletin* 7.

worlds or ecosystems where the rights and interests over lands and waters based on traditional laws and customs are recognised by the common law Australian legal system'.[700]

Craig Ritchie[701], CEO of AIATSIS described the native title system as a 'liminal space'.[702] Liminality describes a threshold or place of transition often through a rite of passage.[703] 'A liminal space can be a realm of great ambiguity, since the 'liminal entities are neither here nor there; they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremony.' A liminal space may upend existing hierarchies during which power reversals occur, or at least appeared to have occurred.[704]

And finally, Jamie Lowe, CEO of the National Native Title Council (NNTC) explained that through native title, Aboriginal and Torres Strait Islander people had attained 'self-determination by stealth'.[705] What I took Lowe to be suggesting was not that Indigenous people are involved in concealing our ambitions to be self-determining, but rather that Aboriginal people using their native title rights in innovative ways are able to realise varying degrees of self-determination. Though native title rights are limited and constrained by law, Aboriginal people can nonetheless

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[700] Kevin Smith, 'Keynote Address "Re-Imaging Australia Through First Nations Leveraging Native Title and Broader Rights", Kevin Smith, Chief Executive Officer Queensland South Native Title Services' (at the National Native Title Summit 2022, Twin Waters Resort, Sunshine Coast Queensland (Kabi Kabi Country), 1 June 2022).

[701] I took Smith's point to be that the native title system – like a brackish water ecosystem – is a space where two different systems of law and culture (settler-colonial and Indigenous) meet and learn to adapt in order to coexist and through this process, something potentially new and distinct emerges. Kevin Smith, National Native Title Summit, 3 June 2022.

[702] I took Ritchie to be suggesting that despite the Australian state's denial of Indigenous self-government, the practices of Indigenous political autonomy are nonetheless observable within the native title system. The native title system therefore acts as an 'in-between' space and therefore a potentially important area of democratic innovation and political encounter, a situation not entirely colonial yet also not entirely decolonised, but somewhere between. Craig Ritchie, keynote address, National Native Title Summit, 1 June 2022.

[703] The concept of liminality is widely used in the disciplines of sociology, anthropology and ethnography to describe the middle stage of a rite of passage (for example from 'boy to man') from one reality to a new one. 'To become an adult, one must go through a series of crucial experiences. This transition to adulthood does not simply happen naturally but has a specific structure, which a rite of passage sets in motion and thus reveals. To grow up, a child must first undergo a painful separation from family, literally dying "as" a child. This suggests that an experience is possible only if one first leaves something behind. It supposes some kind of clean slate, a break with previous practices and routines. The second phase is even more telling. Creation of a tabula rasa via the removal of previously taken-for-granted forms and limits is necessary for the passage to adulthood'. See Agnes Horvath, Bjørn Thomassen and Harald Wydra (eds), *Breaking Boundaries: Varieties of Liminality* (Berghahn Books, 1st ed, 2018) 17-19.

[704] Harry Wels et al, 'Victor Turner and Liminality: An Introduction' (2011) 34 *Anthropology Southern Africa* 1.

[705] Jamie Lowe, National Native Title Summit, 2 June 2002.

realise self-determination without it being formally named or recognised as such by the state, a kind of ephemeral but nonetheless real sense of self-determination for some Indigenous people.

Others have described native title as a 'recognition space' between Indigenous law and Australian common law[706], a 'place for spatial politics' and new possibilities[707], and a marketplace for buying access to Indigenous lands.[708] These various descriptions offer a far richer understanding of native title than official descriptions of a system of statutes, institutions, and processes for the administration and settlement of native title claims.[709]

I want to conclude this discussion of native title as a contestatory mechanism by clarifying my use of the term 'native title system'. Despite the obvious 'systemic' nature of the native title system, it is not my intention to undertake what deliberative democracy theorists might consider a 'systemic analysis' of the native title system.[710] That is to say, I am neither claiming the native title system to be a *deliberative system* nor discussing how *transmission*[711] between the various institutions, actors, and parts of the native title system occurs.

The term 'native title system' is simply one that has been used in various reports that refer to the many public, private, civil society, and Indigenous entities that are engaged in the resolution,

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[706] Pearson, 'The Concept of Native Title at Common Law' (n 457).

[707] Parry Agius et al, '(Re)Asserting Indigenous Rights and Jurisdictions within a Politics of Place: Transformative Nature of Native Title Negotiations in South Australia' (2007) 45(2) *Geographical Research* 194.

[708] Ritter, *The Native Title Market* (n 47).

[709] The official purpose of the system is often understood to be 'the efficient management of the various interest groups active in the system and the effective coordination of the institutions that comprise the system in their responsibility to determine native title claims and manage future land dealings ('future acts') that may affect native title'. Also, under the *Native Title Act 1993*, various institutions are given formal powers such as the Federal Court which holds 'jurisdiction to hear and determine applications filed in the Federal Court that relate to native title and that jurisdiction is exclusive of the jurisdiction of all other courts except the High Court'. The NNTT has powers to facilitate mediation between parties and to conduct research and reviews of certain matters if instructed to do so by the Federal Court. For a detailed discussion of native title system, see generally Bartlett, *Native Title in Australia* (n 37).

[710] For an overview of deliberative systems theory see Parkinson and Mansbridge (n 217); John Boswell, Carolyn Hendriks and Selen Ercan, 'Message Received? Examining Transmission in Deliberative Systems' (2016) 10(3) *Critical Policy Studies* 263 ('Message Received?'); Carey Doberstein, 'Venue Coupling and Actor Circulation in Deliberative Systems: Health Care Governance in Ontario' (2020) 15(3) *Journal of Deliberative Democracy*. In early discussions about my thesis, undertaking a systemic analysis of the native title system was considered but it soon became apparent that even within the time available for a PhD, this would not be possible. I do feel that the native title system does offer deliberative systems theorists a real-world example of a complex deliberative system.

[711] Boswell, Hendriks and Ercan (n 708).

administration, and management of native title. These include the 2013 report commissioned by the federal government to review the roles and functions of native title organisations[712] and the *Native Title Report 2007* which describes the native title system as consisting of various 'native title communities'.[713] Formal reviews and analyses of the native title system focus on the 'workability' of the system, how it serves the interests of various parties, and how native title might affect the 'national interest' and certainty of resource development.[714]

For the purposes of my thesis, the systems concept is useful to the extent that it highlights an important insight that deliberative systems thinking has contributed to the understanding of deliberative democracy. As Parkinson and Mansbridge explain, 'no single forum, however ideally constituted, could possess deliberative capacity sufficient to legitimate most of the decisions and policies that democracies adopt'.[715] There is a recognisable alignment then between the deliberative system ideal and the contestatory mechanism concept, which supports my claim that the recognition of native title has created 'deliberative spaces' for Aboriginal people to contest and influence public policy away from the formal institutions such as courts and national politics.[716]

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[712] The report states the 'native title system can be loosely defined to include the activities of native title holders including and number of organisations that defined under the Native Title Act 1993 including Registered Native Title Body Corporates (RNTBCs), Native Title Representative Bodies (NTRBs), Federal Government (particularly Prime Minister & Cabinet and Attorney Generals), state and territory governments, the Federal Court, NNTT, AIATSIS, multiple private agents delivering a range of services to the system'. See Deloitte Access Economics (n 41).

[713] Under Part 15 of the *Native Title Act 1993*, the Aboriginal and Torres Strait Islander Social Justice Commissioner is required to prepare a Native Title Report each year for federal Parliament. Through these reports the Commissioner gives a human rights perspective on native title issues and advocates for practical coexistence between Indigenous and non-Indigenous groups in using land. The 2007 Native Title Report described the native title system as consisting of several 'distinct communities' including government (ministers, government agencies), legal (Federal Court, NNTT), research (historians, lawyers, anthropologists, social scientists), and business (mining, pastoralism). See Aboriginal and Torres Strait Islander Justice Commissioner, 'Native Title Report 2007' (n 34). See also, the 2015 ALRC *Connection to Country Final Report* that makes reference to the operation of the 'native title system' and the need to 'balance the interests of various groups active within the system and the administrative burden of the native title claim process places upon various institutions'.

[714] Kirsten Anker and Prakash Shah, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Taylor & Francis Group, 2014) 6.

[715] Parkinson and Mansbridge (n 217).

[716] Ercan and Dryzek state that the question of sites of deliberation has always been at the core of scholarly debates on deliberative democracy, see Ercan and Dryzek (n 17); Carolyn M Hendriks, 'Coupling Citizens and Elites in Deliberative Systems: The Role of Institutional Design' (2016) 55(1) *European Journal of Political Research* 43. Ercan and Dryzek (n 17). See also (Mansbridge et al 2012).

As I argue, the native title system can be viewed as a unique deliberative space and an unintended 'democratic innovation' in which Aboriginal people are able to contest the meaning of native title as not simply a domestic property right, and assert sovereignty and the right to self-government right. As a 'contestatory mechanism' the native title system and the deliberative space it creates function as a 'critical public space and arena for the formulation of dissent and scrutinizing of representative democratic institutions'.[717]

Having stated the native title system functions as a contestatory mechanism, I now turn to discuss the importance of Indigenous-led planning and governance for a 'participatory deliberative approach to native title'.

## 8.2 Reclaiming Indigenous Planning and Governance

Key to the contestation of native title and adopting a 'participatory deliberative approach to native title' is the capacity of Aboriginal people and organisations to engage in internal and external forms of collaborative planning, negotiation, and decision making. In this section, I examine efforts by Aboriginal people to reclaim planning and governance.

In 2005 when I began work with the Australian Conservation Foundation (ACF), one of the first projects I worked on was a large regional workshop entitled the Kimberley Culturally Appropriate Economies Roundtable.[718] It was an initiative of ACF with the Kimberley Land Council (KLC) and a regional conservation organisation, Environs Kimberley.

The Kimberley Roundtable was held in October 2005 in the town of Fitzroy Crossing in Western Australia. The idea of an Indigenous 'culturally appropriate economy'[719] had been inspired by the work of the organisation Ecotrust Canada in British Columbia and their vision of a 'conservation-based economy' that provides meaningful work and good livelihoods for local

[717] Donatella Della Porta and Nicole Doerr, 'Deliberation in Protests and Social Movements' in Bächtiger et al (n 6) 393.

[718] To view outcomes of the event, see Rosemary Hill et al, *Kimberley Appropriate Economies Roundtable Forum Proceedings* (ACF, 2005).

[719] A similar workshop had been held in 2003, before I joined ACF, for the Cape York region with the Cape York Land Council and Balkanu Aboriginal Development Corporation. See Rosemary Hill et al (eds), *Culturally and Environmentally Appropriate Economies for Cape York Peninsula: Proceedings of an Appropriate Economies Roundtable, 5-6 November 2003, Cairns* (Rainforest CRC, 2004) ('*Culturally and Environmentally Appropriate Economies for Cape York Peninsula*').

communities, recognise Aboriginal rights and title, and conserves and restores the natural environment.[720]

Aboriginal people in remote regions such as Cape York and the Kimberley, like First Nations people in Canada, experienced economic marginalisation and exclusion from economic and land planning, which was largely controlled and driven by governments and industries.

The Kimberley Roundtable brought together Aboriginal Traditional Owners, their organisations (KLC), and a range of conservation organisations, academics, government agency staff, and international Indigenous and community development specialists. Envisioning a regional scale economy reflective of Aboriginal cultural values and respect for Aboriginal people's connection to Country was ambitious and exciting. The diverse range of participants – Aboriginal, government, business owners, and academics – also helped to ensure that the event was both deliberative and democratic. It was deliberative in the sense that it was discussion-based, involving competing visions of what constituted 'culturally appropriate economic development'. And it was democratic in the sense that it involved Indigenous and non-Indigenous, government and non-government, and private and civil society participants to participate in discussion about the future economic development of the region.

It was my first insight into how important community-based planning and the building of Indigenous governance was for Aboriginal people to become self-determining. The transformative potential of Indigenous planning and governance is a growing area of Indigenous scholarship by Indigenous and non-Indigenous scholars in colonial settler states of Australia, Aotearoa New Zealand, Canada and the US.

Hirini Mataunga is a Māori professor of planning who writes about Māori self-determination and Indigenous planning. As Mataunga explains, despite the dominance of non-Indigenous perspectives in the professional discipline of planning, 'planning isn't owned by the West, its theorists, or practitioners' but is a universal human capability. 'All communities plan and it is critical that Indigenous people define the word "plan" for themselves.'[721]

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[720] Ecotrust Canada was formed in 1991 and the conservation economy concept had emerged from environmental conflict over logging of old-growth forests on Vancouver Island in British Columbia in the 1980s and 1990s. First Nations groups were not only excluded from mainstream economy but also environmental campaigns to protect forests that were effectively on their traditional territories. See https://ecotrust.ca/

[721] Hirini Mataunga, 'Theorizing Indigenous Planning' in Ryan Walker, Ted Jojola and David Natcher, *Reclaiming Indigenous Planning* (McGill-Queen's University Press, 2013) 5.

> Critical questions for Indigenous peoples and planning has always been whose future, who decides what this future should or could look like? Who has the authority to control in the final decision-making power? Whose values ethics concepts and knowledge? What frameworks institutions and organisations are being used to guide planning process is that most affect indigenous people? Where are Indigenous people's position in the construction of their future?[722]

Like legal scholars and their critique of the law, planning scholars such as Mataunga argue planning has historically been complicit in the colonisation of Indigenous people. 'The aim of the colonial project has always been to clear the way for the settler state, its citizens, and economy. Planning has generally been complicit in this enterprise.' Planning, Mataunga argues, has a responsibility to both confront its own complicity in the oppression of Indigenous people and to better include Indigenous people, Indigenous knowledge and political authority in the 'shared' space of planning.[723] This notion of planning – whether in relation to land, or community and regional development – as a shared or contested space has been called by some planning scholars as a contact zone of colonial encounter.[724] This means that the legacy and effects of colonisation are an unavoidable element of any planning process that involves or affects Indigenous people.

Australian cultural geographer Sue Jackson views Aboriginal-led environmental planning such as Caring for Country as important for recasting relations between Aboriginal people and government. As Jackson states, before the *Mabo* decision, industries such as mining and agriculture undertook activities on Indigenous land without consultation, negotiation, or agreement with Aboriginal people.[725] As a consequence of native title, planning must be more responsive to Aboriginal people's relationship to their traditional lands (Country) because the exclusion of Aboriginal people from policy, planning, and decision making is now untenable.[726]

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[722] Hirini Mataunga, 'Theorizing Indigenous Planning' in ibid.

[723] Ibid. 9.

[724] Libby Porter and Janice Barry, *Planning for Coexistence? Recognizing Indigenous Rights Through Land Use Planning in Canada and Australia* (Routledge, 2016); Janice Barry and Libby Porter, 'Indigenous Recognition in State-Based Planning Systems: Understanding Textual Mediation in the Contact Zone' (2012) 11(2) *Planning Theory* 170 ('Indigenous Recognition in State-Based Planning Systems').

[725] Jackson, Porter and Johnson (n 136).

[726] Sue Jackson, Rene Woods and Fred Hooper, 'Empowering First Nations in the Governance and Management of the Murray-Darling Basin' in Barry T Hart et al (eds), *Murray-Darling Basin, Australia* (Elsevier, 2021) 313.

Professor John Borrows is an Anishinabe/Ojibway man and a member of the Chippewa of the Nawash First Nation in Ontario, Canada, who has written extensively on the connection among First Nations law, planning, and democracy. Borrows says settler governments and laws in environmental planning cast a long, dark shadow across First Nations' own governmental powers. A 'legal geography of space' constructed by the state marginalises Indigenous peoples in significant environmental decision-making. Borrows says societies must reformulate how we plan and participate in the design and governance of human settlements to meet growing number of environmental problems.[727]

Deliberative democrats such as Dryzek and Pickering also discuss the link between democracy and environmental policy and planning. They refer to this as the 'democracy-environment nexus' in which deliberative democracy may offer a way of strengthening environmental outcomes through more inclusive and respectful dialogue that prioritises long-term, shared interests over short-term, private ones.[728]

In relation to Aboriginal people and native title, the democracy-environment nexus is characterised by the use of planning processes that address environmental issues, enhance democratic participation *and* strengthen the exercise of Indigenous sovereignty and self-government.

As Lane and Hibbard explain, 'radical planning' seeks to overcome 'Indigenous subordination' through planning processes. Drawing on the work of John Friedmann[729], Lane and Hibbard argue Friedmann's theory of social transformation focuses on structural domination and the forces that reproduce it. 'Transformative planning in Friedmann's formulation begins with the development of a consciousness of oppressed futures and the possibilities of emancipation.

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[727] Borrows (n 112).

[728] As Pickering et al explain, the democracy-environment nexus rests on the notion that involving citizens in environmental planning can deliver a win-win for the environment and democratic participation. The democracy-environment nexus entails participatory, decentralised governance, citizenship and grassroots social movements as antidotes to environmental malaise by giving non-state actors voice, access and institutionalised channels for representation and participation in agenda-setting, monitoring and implementation, it is expected that stronger ownership and compliance – and ultimately enhanced environmental outcomes – will follow. See Jonathan Pickering, Karin Bäckstrand and David Schlosberg, 'Between Environmental and Ecological Democracy: Theory and Practice at the Democracy-Environment Nexus' (2020) 22(1) *Journal of Environmental Policy & Planning* 1 ('Between Environmental and Ecological Democracy'); John S Dryzek and Jonathan Pickering, *The Politics of the Anthropocene* (Oxford University Press, 2019).

[729] John Friedmann, *Planning in the Public Domain: From Knowledge to Action* (Princeton University Press, 1987).

Transformative planning is the process of identifying and implementing strategies for transforming the structures of oppression'.[730]

Like deliberative democrats who argue such planning processes offer a better method for legitimating policy actions separate from elections and orthodox consultation processes[731] for Aboriginal people, self-government is realised through Caring for Country. This relationship between planning and self-government is described by the Ngarrindjeri Nation.

> The challenge for Ngarrindjeri continues to involve negotiating a just relationship with the settler-state based on recognition as a First Nation with an a priori responsibility to 'Speak as Country' (Yannarumi). The Ngarrindjeri framework for integrated river management prioritizes First Nation capacity building and a sovereign responsibility to 'Care as Country'.[732]

For the members of the Ngarrindjeri Nation, '[a] nation-building approach in which Indigenous nations are recognized as sovereign partners in water management and planning can serve to address past dispossession and exclusion of Aboriginal people in planning'.[733]

In the same manner as deliberative democracy and deliberative policy analysis scholars, Aboriginal groups such as the Ngarrindjeri Nation see possibilities for enhanced Aboriginal sovereignty and self-government via the democracy–environment nexus of planning.

I now turn to discuss Country as an Indigenous empowered site.

## 8.3 Country: An Indigenous Empowered Space

[730] Lane and Hibbard (n 243) 174.

[731] Elstub and McLaverty (n 164) 70.

[732] Steve Hemming et al, 'A New Direction for Water Management? Indigenous Nation Building as a Strategy for River Health' (2017) 22(2) *Ecology and Society*.

[733] Steve Hemming et al, 'Indigenous Nation Building for Environmental Futures: Murrundi Flows through Ngarrindjeri Country' (2019) 26(3) *Australasian Journal of Environmental Management* 216; Steve Hemming et al, 'A New Direction for Water Management? Indigenous Nation Building as a Strategy for River Health' (2017) 22(2) *Ecology and Society*.

In this section, I discuss the traditional lands and waters of Indigenous people, 'Country', as being an empowered site for Aboriginal people.[734]

For Irene Watson, Country is 'good place, full of law and spirit, language, and stories of my ancestors'. As she explains,

> Aboriginal peoples hold a cultural and spiritual view of the world that embraces an ethic of caring for our homelands. In the beginning was the country of my peoples, the Coorong in South Australia, *ruwi* to the Tanganekald people that was sung by the ancestors, who sang our beginnings, from *Kaldowinyeri*. This is a difficult concept to translate into the languages and thinking of non-Aboriginal peoples. To own the land as it is understood in a property law context is markedly different from the more complex Aboriginal relationship to *ruwi*. In Western capitalist thought, *ruwi* becomes property, a commodity that can be traded or sold. But how can you sell an aspect of your historical, ontological self ?[735]

Anthropologist Deborah Bird Rose spent many years working with Aboriginal groups. She explained Country as follows,

> Country in Aboriginal English is not only a common noun but also a proper noun. People talk about country in the same way that they would talk about a person: they speak to country, sing to country, visit country, worry about country, feel sorry for country, and long for country. People say that country knows, hears, smells, takes notice, takes care, is sorry or happy. Country is not a generalised or undifferentiated type of place, such as one might indicate with terms like 'spending a day in the country' or 'going up the country'. Rather, country is a living entity with a yesterday, today and tomorrow, with a

[734] As Pleshet explains, the term 'Country' has a long lineage as an Aboriginal English term employed to refer to the 'traditional lands and waters' of Aboriginal people. 'Arthur (1996: 119–20) shows that the English word 'country' was used in connection with indigenous land as early as the 1840s. Its prominence in anthropological and popular writing can arguably be traced to the writings of Stanner in 1950s and 1960s. In his synthesis of debates about Australian indigenous land ownership and land use ('territoriality' and 'tenure'), he suggests that 'the land concept is too sparse and abstract. One is dealing, not with "land", but with "country", land already related to people' (1965:14). See Noah Pleshet, 'Caring for Country: History and Alchemy in the Making and Management of Indigenous Australian Land' (2018) 88(2) *Oceania* 183, 184.

[735] Watson, 'Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal Peoples' (n 54) 37.

> consciousness, and a will toward life. Because of this richness, country is home, and peace; nourishment for body, mind, and spirit; heart's ease.[736]

Yolngu leader Galarrwuy Yunipingu expressed his and his people's love of, and connection to, Yolngu Country by writing,

> The land is my back-bone. I only stand straight, happy, proud and not ashamed about my colour because I still have land. I think of land as the history of my nation. It tells us how we came into being and what system we must live. My great ancestors who lived in the times of history planned everything that we practise now.[737]

In addition to being an important cultural and spiritual landscape, Country has been described by Aboriginal people as a classroom[738], a university and place of education[739], and even a parliament.[740] For the purposes of this thesis, Country is also an important 'political space' for Aboriginal people. Country is of course at the heart of native title. All successful native title claims amount to a public recognition by Australian law that a claimant group maintains a strong and unbroken connection to their Country. This recognises the enduring connection Aboriginal and Torres Strait Islander people retain with their traditional lands through their

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[736] Deborah Bird Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996) 7.

[737] Galarrwuy Yunupingu, 'Letter from Black to White', (1977) 5(1) *Aboriginal Child at School* 37, 39.

[738] Altman and Kerins (n 134) 82-93.

[739] Marcia Langton explains in 1997 there was a move to establish a Centre for Indigenous Natural and Cultural Resource Management (CINCRM) at the then Northern Territory University (now Charles Darwin University). Its aims were to be a national and international place of research for Indigenous students and scholars to undertake research in natural and cultural resource management, community development and sustainable development issues. Langton goes onto the explain of the aspirations of Yolŋu leaders to establish a Garma Institute on the traditional lands of the Yolŋu people, as a 'bush university' where 'two ways' knowledge, both Yolŋu (Indigenous) and Balanda (non-Indigenous), would be taught. Marcia Langton, 'Joe Gumbula, the Inaugural Liya-Ŋärra'mirri Visiting Fellow' (2018) 47(3–4) *Preservation, Digital Technology & Culture* 91, 95-96.

[740] At the launch of an Aboriginal community bottled spring water initiative in East Arnhem Land in 2021, Yolngu leader and local MP Yingiya Guyula said the clans of East Arnhem Land viewed the area's water sources as culturally precious and knowledge-giving. 'Right behind us in the springs comes the spiritual knowledge water, and this is a place for a lot of knowledge ceremonies, where a lot of different clan groups come together, it's like a parliament house', he said, See ABC AM, 5 August 2021, https://www.abc.net.au/news/2021-08-05/aboriginal-community-mandjawuy-bottled-water-business/100350930

own law and custom.[741] Country is thus reaffirmed as a place of Aboriginal lawmaking and political decision-making.

Deliberative democracy scholars speak of the important role of empowered spaces and institutions such as courts, parliaments, tribunals, etc. An empowered space is one in which decisions are made that are binding upon others.[742] Yet for the decisions of an empowered space to be viewed as legitimate, they must be informed by and incorporate, to some extent, the public opinion of ordinary citizens.

The point is that in the theory of deliberative democracy, there are spaces of public opinion and will formation by citizens and spaces where binding decisions are made by those in power. I consider Country for Aboriginal people to be an Indigenous empowered site because this is where Aboriginal people often engage in internal forms of deliberation[743] and everyday talk[744], and also debate issues and exchange reasons with other actors including government, corporations, and civil society groups. Also, Country is where Aboriginal political authority, sovereignty, and nationhood are grounded.[745] As such, decisions made by Aboriginal people on Country will have a binding effect on both people and Country.

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[741] 'Many elements of proof can be drawn from the *Mabo* decision, which determined the nature of native title as based on traditional law and custom.' See Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (n 417) 116.

[742] As Boswell et al explain, for ideas or claims to be heard and acted upon by those in decision making institutions such as a parliament, 'transmission between public and empowered (decision-making) sites' must occur. It allows for claims to be exchanged between and among different sites so that claims and ideas may be 'challenged and laundered' through the system. As Boswell et al explain, the importance of transmission between public spaces and empowered sites for deliberative democracy was first emphasised by Jürgen Habermas and his 'two-track' model of democratic legitimation. The deliberative system is an extension of Habermas' earlier 'two track model' of deliberative democracy. Firstly, deliberation occurs in the public sphere as part of the process of 'opinion formation' in which affected publics reach agreement on how to deal with a contested policy issue. Second, these public opinions are then 'transferred' via the media, social movements or another means of publicity to empowered sites such as a parliament whereby 'public will formation' is debated, decisions made, and laws passed if necessary. See Boswell, Hendriks and Ercan (n 708) 264.

[743] What Goodin calls 'internal reflective deliberation'. See Robert E. Goodin, Democratic Deliberation Within', in Fishkin and Laslett (n 164) 54-79.

[744] Jane Mansbridge, 'Everyday Talk in the Deliberative System' in Stephen Macedo (ed.), *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, 1999) 1.

[745] As Rigney et al explain, the reassertion of Indigenous nationhood is a reaction to colonisation to 'dispel the colonial notion that Indigeneity is archaic and irrelevant in the modern world'. See, Daryle Rigney, Simone Bignall and Steve Hemming, 'Negotiating Indigenous Modernity: Kungun Ngarrindjeri Yunnan – Listen to Ngarrindjeri Speak'

To further emphasise the importance of Country, in a study of Indigenous governance in Australia, the authors Hunt et al explained that sustained and measurable improvements in the social and economic wellbeing of Indigenous people often occurs when the real decision-making power is vested in their communities – when people are able to build effective Indigenous-centred governing institutions, and when the decision-making processes of those institutions reflect the cultural values and beliefs of the people.[746]

Some deliberative democracy theorists recognise that not all citizens can or indeed want to engage in deliberation within traditional institutional settings. Spaces that are local and closer to where people actually live may be better for realising the ideals of deliberative democracy. For example, Dzur explains that while some deliberative democrats insist on specific forms and practices as necessary for creating deliberative spaces, grounded theorists look towards sites and pathways built by citizens, activists, and reformers:

> Grounded theorists are less concerned with norms of deliberative dialogue and more interested in the non-cognitive structures and practices that are bringing detached individuals closer together. Proximity is more important than rules of rational discourse. Deliberation and participation 'takes place in and around existing institutions not in the artifactual (and arguably artificial) world of mini-publics'.[747]

As Dzur further explains, '[c]onsent, legitimacy, sovereignty, and myriad other terms used in political theory can sound legalistic and formal, as if democracy were only about laws, regulations, and voting rules'. However, democracy is not only these things but also how 'we share tasks that constitute as a reflective and democratic people' – how we co-produce democratic goods such as education, justice, and security.

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(2015) 11(4) *AlterNative: An International Journal of Indigenous Peoples* 334; Stephen Cornell, 'Processes of Native Nationhood: The Indigenous Politics of Self-Government' (2015) 6(4) *International Indigenous Policy Journal*.

[746] In this study, Hunt et al present research on the interplay between Indigenous and non-Indigenous governance systems by various cases studies highlighting the competing 'cultures of governance' between Indigenous peoples and the Australian state. The stated aim of the research is to understand how Indigenous governance operates at the local level, its cultural foundations, values and principles, what is working, what is not, and why. 'Contesting governance' is the efforts of Aboriginal people engaged in local, on Country forms of governance to challenge state centred governance. See Hunt et al (n 617).

[747] Dzur (n 130) 17.

> We learn how to do this task-sharing productive activity well or poorly, consciously or not, in schools, workplaces, street corners, hospitals, courtrooms, and many other places. Laws and rules help shape institutions that allow citizens to act, of course, but it is the action itself that makes them democratic.[748]

What I understand Dzur to be implying is that sites of deliberation should be meaningful to the people involved and not only artificially designed and abstract spaces such as mini-publics. Additionally, 'task-sharing' implies a sense of collaborative action between parties towards solving or managing a policy problem. These features are evident in deliberation on Country from my experience. That is because deliberation on Country is done face-to-face between Aboriginal people and others. Also, being on Country is an immersive experience for non-Indigenous people – so much so that they may be more inclined to self-reflect on their roles as government officials and public servants. In my experience, many have questioned the effectiveness of the traditional, top-down approach of government agencies and public servants delivering services from faraway state or regional offices.[749]

## 8.4 Conclusion

As I will discuss in relation to the practice of Indigenous nation building in Chapter 11, deliberation 'on Country' is an important forum for everyday talk and e*nclave deliberation.*[750]Country for Aboriginal people is where political, community and economic development issues important to Aboriginal people are discussed, information and knowledge

[748] Ibid. x.

[749] Earlier I explained that many of the Aboriginal groups I worked with would often raise what were viewed as 'non-native title' issues in meetings with government officials. What I observed was Aboriginal people's more expansive and holistic concept of native title that included the right of Aboriginal people to be involved in decision making regarding a range of public policy matters such as housing, health, community development, and education. As such, native title became a 'deliberative space' for the negotiation of this broader ideal of native title as a right to make decision about both the land *and* the people living on that land. Because this discussion was taking place on Country, it was often difficult for non-Indigenous officials to deny the strong connection Aboriginal people had to Country and their desire for real decision-making power. These discussions could influence the thinking and understanding of government staff about relations between government and Aboriginal people and whether a top-down approach was appropriate or was it better to institute shared decision-making.

[750] Christopher F Karpowitz, Chad Raphael and Allen S Hammond, 'Deliberative Democracy and Inequality: Two Cheers for Enclave Deliberation among the Disempowered' (2009) 37(4) *Politics & Society* 576.

is shared, capacity is built, and time and resources are invested in the rebuilding of Indigenous governance institutions.

Having emphasised the importance of Country as a political space, in the next chapter (Chapter 9), I discuss Caring for Country as a distinct area of Indigenous-led environmental public policy expertise in Australia. As I will argue, Caring for Country has become a prominent area of Indigenous public policy expertise and an important process for Aboriginal people to engage in democracy through policy discourse.

# 9 Caring for Country: Democratisation Through Public Policy

In this chapter, I discuss the Aboriginal practice of managing the environment known as 'Caring for Country'.

The term 'Caring for Country' is the widely used term for Aboriginal and Torres Strait Islander, community-based natural resource management for the protection of traditional lands, sea, waterways and cultural heritage on Indigenous people's ancestral territories. It encompasses a range of environmental, natural resource and cultural heritage management activities undertaken by Indigenous communities and organisations across Australia for customary, community, conservation and commercial reasons.[751] It is an expression of the holistic relationship between Aboriginal and Torres Strait Islander societies and their customary land and sea Country that have evolved over at least 50,000 years. Through Caring for Country, Aboriginal and Torres Strait Islander people exercise customary law, jurisdiction and decision-making authority over their traditional lands.[752]

As stated, a key objective of my thesis is to make visible the hidden deliberative and participatory democratic practices of Aboriginal people within the native title system. As I will explain, Caring for Country is more than environmental management by Aboriginal people. It has also become means for Aboriginal people to participate in the development of public policy.

[751] The literature defining and describing Caring for Country is extensive. See, Rosemary Hill et al, *Indigenous Land Management in Australia: Extent, Scope, Diversity, Barriers and Success Factors* (2013) 94; Emma Woodward et al, *Our Knowledge, Our Way in Caring for Country: Indigenous-Led Approaches to Strengthening and Sharing Our Knowledge for Land and Sea Management. Best Practice Guidelines from Australian Experiences* (NAILSMA and CSIRO, 2020); Andra Putnis et al, *Healthy Country, Healthy People: Supporting Indigenous Engagement in the Sustainable Management of Northern Territory Land and Seas: A Strategic Framework* (CSIRO Sustainable Ecosystems, 2008).

[752] As Hill et al explain, in Australia Indigenous peoples 'assert sovereign rights and interests to collective self-determination and control over their customary estates, despite profound impacts from the colonial processes of territorial acquisition and state formation. The policy mechanisms established by Australian governments to respond to Indigenous claims have resulted in Indigenous control and responsibility for the environmental management of about one-fifth of the continental land mass.' See Rosemary Hill et al, 'A Typology of Indigenous Engagement in Australian Environmental Management: Implications for Knowledge Integration and Social-Ecological System Sustainability' (2012) 17(1) *Ecology and Society*.

Caring for Country has become important process for deliberative inclusion and democratisation through public policy for Aboriginal people.[753]

In this chapter, I will draw on my own empirical observations from my time working with a number of Aboriginal groups engaged in Caring for Country activities, as well as other published works on Indigenous environmental policy and planning.[754]

I begin this chapter by providing a summary of governance driven democratization as espoused by Mark E. Warren. Other scholars alternatively call it 'democracy through policy discourse'[755], 'governance driven democratisation'[756], 'government by discussion'[757], 'the argumentative turn in policy'[758], and 'empowered participatory governance'[759]. Despite their use of differing terminology, what these scholars hold in common is a belief that the participation of citizens in the policymaking process delivers benefits to both policy outcomes and an enhanced sense of democratic participation amongst citizens. I consider these forms of deliberative inclusion in the public policy process.

I then provide background information on the emergence of Caring for Country as a distinct area of environmental public policy in Australia. As I will explain, a number of separate developments emerged at roughly the same time that enabled Aboriginal people to assume a more inclusive role in developing environmental public policy. For example, at the global level, conservation groups and leaders called for the greater inclusion of Indigenous people, their lands and ecological knowledge in efforts to protect the world's biodiversity. In Australia, it was domestic moves to decentralise environmental planning and decision making away from government to local communities and the recognition of native title that played a critical role in the emergence of Caring for Country.

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[753] As Torgerson explains, democracy through policy discourse departs from the notion of liberal democracy being dependent upon a representative legislature whose decisions are given effect by an administrative public service apparatus. In this conceptualisation of democracy, there is an acquiescent public governed by technocrats. Democratisation through policy discourse entails an active citizenry engaged in discourse that enter into the processes of governance. See, Douglas Torgerson, Democracy Through Policy Discourse, in Hajer and Wagenaar (n 132) 113-138.

[754] Justin McCaul, 'Caring for Country as Deliberative Policymaking' in Moodie and Maddison (n 121) 51-71.

[755] Hajer and Wagenaar (n 132).

[756] Mark E Warren, 'Governance-Driven Democratization' (2009) 3(1) *Critical Policy Studies* 3.

[757] Fischer, Miller and Sidney (n 115) 225.

[758] Fischer and Forester (n 131).

[759] Fung and Wright (n 128).

Next, I present three examples of Caring for Country as what I call democratisation through policymaking using published studies concerning the environmental policy and practice work of the Dja Dja Wurrung and Ngarrindjeri Nations. I follow this with a discussion of the use by Aboriginal groups of what are known as Healthy Country Plans (HCPs), environmental management plans that incorporate important environmental objectives and outcomes based on Aboriginal law and custom. As I argued in the previous chapter, planning has become an important practice for Aboriginal people to both self-organise and to better realise our goals of sovereignty and self-government.

I finish by arguing that Caring for Country is an example of what I call deliberative policymaking. I now turn to discuss the concept of 'governance driven democratisation'.

## 9.1 Governance Driven Democratization

At the heart of governance driven democratization is the belief that purely elite developed solutions often fail to resolve complex public policy problems. By contrast, governance driven democratization increase the opportunities for those potentially affected by collective decisions, to influence those decisions.

Advocates of various forms of governance driven democratization argue greater inclusion and participation of citizens in governance matters can advance various democratic values including effectiveness, legitimacy, and social justice.[760] The greater participation of citizens is not just about creating better policies but also deepening democratic engagement. As I discussed in the chapter on inclusion (Chapter 6), Aboriginal people seek to participate in decision-making processes in which we can exercise sovereignty and self-government. Caring for Country therefore become a contestatory mechanism for participation in policymaking.

As stated, the proposition that citizens should have enhanced participation in policy-making processes is known by several terms including governance-driven democratisation as espoused by Mark Warren. For Warren, public policy and administration are at the front lines of the project of democratization.

> On the face of it, this development comes as something of a surprise to those who have viewed democratization as the mission of class agents and social movements, or as a

[760] Archon Fung, 'Putting the Public Back into Governance: The Challenges of Citizen Participation and Its Future' (2015) 75(4) *Public Administration Review* 513, 513.

> matter of establishing and reforming electoral processes and the rule of law. It is this domain – not in electoral democracy – that we are seeing a rebirth of strongly democratic ideals, including empowered participation, focused deliberation, and attentiveness to those affected by decisions. I shall refer to these developments as governance-driven democratization.[761]

For Warren, governance-driven democratisation is an innovative political space that sits between institutionalised political spaces such as courts and legislatures; and non-institutionalised spaces consisting of public deliberation and protest. As Warren explains, governance-driven democratization is characterised by 'citizen and public engagement' processes that may include everything from public hearings, stakeholder meetings, consensus conferences, town hall meetings, citizen juries, deliberative planning, participatory budgeting, even participatory theatre'.[762]

Fung and Wright have termed the participation of citizens in public policy initiatives addressing specific policy problems as 'empowered participatory governance' (EPG). In their study of four experiments in EPG[763], these are real-world experiments in the redesign of democracy to harness the energy and influence of ordinary people, including those from the lower strata of society, in the solution of problems that plague them. They all aspire to deepen the ways in which ordinary people can effectively participate in and influence policies which directly affect their lives.[764]

For Hajer and Wagenaar, their concept of deliberative policy analysis is a response to what they see as the many public policy problems that established policy approaches have failed to resolve and manage. A deliberative policy approach seeks to address complex public policy issues through cooperative efforts between new constellations of actors, but it does not replace

[761] Warren, 'Governance-Driven Democratization' (n 754) 3.

[762] Ibid. 6.

[763] The Fung and Wright study looks at public education and neighbourhood policing in Chicago; a habitat conservation planning project under the US Endangered Species Act that convenes stakeholders to empower them to develop ecosystem governance arrangements; the participatory budgeting process of Porto Alegre, Brazil, that enables citizens to participate directly in determining the city budget; and local participation reforms basic to the planning process in Kerala and West Bengal, India. Fung and Wright (n 128) 45-144.

[764] Ibid. 4-5.

traditional politics (voting, primacy of government decision-making etc); it rather 'reshapes what politics and policymaking are about'.[765]

For proponents of deliberative policy analysts such as Hajer and Wagenaar, policymaking seeks to bring different communities together to define, deliberate and produce social action to address a policy issue. 'Different communities bring different meaning into the policy process to share and deliberate through the process of interaction where local knowledge is not excluded.'[766]

> In many cases it is a public policy initiative that triggers people to reflect on what they really value, and that motivates them to voice their concerns or wishes and become politically active themselves. Public policy, in other words, often creates a *public domain*, as a space in which people of various origins deliberate on their future as well as their mutual interrelationships and their relationship to the government.[767]

As Fung explains emphasising the ideal of deliberative inclusion,

> Public participation can be a potent means to achieve key democratic values such as legitimacy, justice, and effectiveness in governance. From this perspective, public actors ought to view participation as a potential solution to some of the democratic challenges they face. Participation is not just good in itself. Carefully crafted which is not to say manipulated – participation can be an effective means to accomplish the values of good governance.[768]

As highlighted, deliberative democrats have applied various terms to the ideal of greater inclusion of citizens in the development of public policy. What they all consider to be essential to success, however, is communication between participants – politicians, policy makers, affected communities – who put forward policy proposals to one another. These proposals

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[765] Hajer and Wagenaar (n 132) 2.

[766] Frank Fischer and Piyapong Boossabong, 'Deliberative Policy Analysis' in Bächtiger et al (n 6) 584–594.

[767] Democracy, Hajer, Wagenaar etc., argue, can be enhanced by the participation of citizens in developing public policy through reflexive policy discourse to contest the meaning of policy and draw it into closer association with politics. This idea of democracy departs from the traditional image of democracy as one of a representative legislature whose decisions are given effect by an administrative apparatus. Maarten Hajer, 'A Frame in the Fields: Policymaking and the Reinvention of Politics' in Hajer and Wagenaar (n 115) 88.

[768] Fung (n 758) 514.

may include competing positions, so it is through organised dialogue that they try to seek consensus.[769]

What I intend to argue is that in addition to these benefits to policy and democratic governance, for Aboriginal people participation in environmental policy and planning is a means for exercising sovereignty and self-government. What makes Caring for Country an example of democracy through policy discourse or EPG is the ability of Aboriginal people to challenge the traditional approach to public policymaking in which governments or parliaments, supported by bureaucrats and/or experts, develop and implement public policy.[770] Under a traditional policy approach, citizens are expected to accept policies developed by bureaucrats and governments.[771] Policy as such is viewed as a technocratic exercise, not a process for greater self-government. By contrast, under a 'governance' approach to policy, citizens take on a more active role in developing solutions to known problems. Through Caring for Country Aboriginal and Torres Strait Islander people challenge the state's usual top-down role in policymaking by taking an active role in the governance of Country.[772]

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[769] Fischer, Miller and Sidney (n 115) 227.

[770] I define traditional policy approach as one which entailed public service bureaucrats developing a set of well-considered policies and strategies. Governments, elected officials, and bureaucrats would decide upon the most suitable option and then set about implementing the policy to address the original problem. The effectiveness of the policy and its outcomes are then monitored (hopefully) and adjustments are made as and when needed. However, I acknowledge that in the field of public policy and within the activities of government, there has been greater emphasis in recent years on public participation in contemporary policymaking and the creation of various types of processes and forums for public officials and members of the public to engage in dialogue on policy issues. In addition, that these types of innovation seek to address problems of social exclusion in policymaking process and which in turn contribute to democratic renewal. However, as discussed in Chapter 7, political leaders and institutions not listening to Aboriginal people and enacting laws and policies without our consent or participation remains a feature of Australia's political culture. Nonetheless, as Sullivan states, 'collaboration is a ubiquitous yet contested feature of contemporary governance. Collaboration is present across all tiers and spheres of governance from local to global, and it is embedded in the making, managing, and implementation of public policy'. See Helen Sullivan, *Collaboration and Public Policy: Agency in the Pursuit of Public Purpose* (Springer International Publishing AG, 2022) 1.

[771] As Torgerson explains, the traditional conceptualisation of liberal, representative democracy largely insulates the public from policy processes. Normally, policy is the domain of an administrative sphere of government, of professionals and technocrats who regulate and manage the various inputs and outputs of the policy process. It is representatives in a legislature, acting in the public interest, whose job it is to formulate policies, which are then given effect by an administrative apparatus, such as the public service. Douglas Torgerson, 'Democracy Through Policy Discourse', in Hajer and Wagenaar (n 115) 113.

[772] The recognition of native title has changed the policy-planning sphere. As planning scholars Sue Jackson and Ed Wensing argue, planning in Australia has had a profound impact on the lives of Aboriginal people and can be

As Johnson et al explain, the field of planning in Australia did not recognise the notion of prior Indigenous land ownership until challenged to appraise the 'ideological underpinnings' of settler colonialism in the 1970s.[773] Similarly, Jackson et al explain that before statutory land rights and recognition of common law native title, environmental and land use planning in Australia did not account for Aboriginal and Torres Strait Islander people's rights or interests, and so land use decisions having were made without their consent.[774]

> The description of caring for country as 'Indigenous people's land and sea management' logically draws attention to the environmental and landscape management outcomes of this activity, but caring for country also has benefits for the social-political, cultural, economic, and physical and emotional wellbeing of Indigenous people.[775]

This then makes Caring for Country important in terms of policy, democratic governance and addressing the effects of colonisation. As Kerins and Altman explain, Caring for Country planning does not focus solely on environmental outcomes but also on Indigenous community development. Caring for Country is crucial for 'recalibrating the power relationship between Indigenous people and government agencies'.[776] Understood in this light, Caring for Country is an effort by Aboriginal people to move from being *governed* to one of *governing*. Caring for Country is a process for politics and democratisation.

To manage Country, Aboriginal groups must strengthen their own strategic planning and management capabilities in order to participate more effectively in environmental planning. However, by doing so, they also become much more capable of asserting sovereignty and self-government through the policymaking process. As such, Caring for Country is a very political act.

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characterised as planning done on Indigenous people without their consent and was critical to dispossession. Consequently, planning by Indigenous peoples is now an important aspect of policy and planning practice as Aboriginal people assert their rights and interests in our traditional lands. See Ed Wensing and Libby Porter, 'Unsettling Planning's Paradigms: Towards a Just Accommodation of Indigenous Rights and Interests in Australian Urban Planning?' (2016) 53(2) *Australian Planner* 91; Jackson, Porter and Johnson (n 136).

[773] Louise Johnson, Libby Porter and Sue Jackson, 'Reframing and Revising Australia's Planning History and Practice' (2017) 54(4) *Australian Planner* 225, 227.

[774] Jackson, Porter and Johnson (n 136) 175.

[775] Jessica Weir, Claire Stacey and Kara Youngetob, *The Benefits Associated with Caring for Country – Literature Review* (AIATSIS, 2011) 26, 1.

[776] Altman and Kerins (n 134) 32.

> To many outsiders, Caring for Country may look like just an environmental employment program. However, talking with Indigenous landowners participating in community-based planning meetings reveals it is much more than this. It is a uniquely Indigenous development strategy assisting Indigenous people to take ownership of their own future, to shape it, and give it meaning.[777]

Finally, before providing background on the emergence of Caring for Country as an area of public policy, I wish to clarify several points.

Firstly, Caring for Country activities undertaken by Aboriginal people occur across a range of tenure types, not just land held under native title – for example, in state managed national parks and conservation reserves through joint management arrangements[778] and in Indigenous Protected Area (IPAs). Also, Caring for Country activities are carried out by Indigenous rangers, usually members of the group employed to manage country on behalf of the community. The employment of Aboriginal people in their communities is yet another benefit of Caring for Country as public policy. These jobs deliver benefits to Aboriginal and Torres Strait Islander people through better health, greater workforce participation, new Indigenous businesses, and lower expenditures on public health, policing, and welfare. [779]

A 2021 report estimated there are some 129 discrete Indigenous ranger groups managing Country[780] and 82 federally funded IPAs across Australia, constituting approximately 50% of Australia National Reserve System (NRS).[781] Together, Indigenous rangers, IPAs and Caring for Country activities are a major contributor to the protection and management of Australia's biodiversity and cultural resources.

Secondly, funding for Caring for Country activities comes from all levels of government – federal, state and territory governments. Additionally, philanthropic groups and conservation NGOs such as Bush Heritage also invest financially towards Caring for Country activities. More

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[777] Ibid 41.

[778] Toni Bauman, Claire Stacey and Gabrielle Lauder, *Joint Management of Protected Areas in Australia: Native Title and Other Pathways towards a Community of Practice Workshop Report* (Workshop Report, AIATSIS, 2012).

[779] Weir, Stacey and Youngetob (n 773).

[780] Andra Putnis et al, *Strong on Country: Sustaining Success in Indigenous Land and Sea Management in Australia* (Country Needs People, 2021) 13.

[781] Department of the Prime Minister and Cabinet, *Stories from Country…2015-2017: How Indigenous Rangers and Indigenous Protected Areas Are Strengthening Connections to Country, Culture and Community* (2019).

than simply managing the environment, Caring for Country is an alternative economic development pathway for many remote Indigenous communities that are often economically marginalised.[782] As Jon Altman and Sean Kerins argue, Caring for Country has emerged as a forum for reasserting rights in land, re-establishing cultural institutions and decision making, as well as deriving a living from the modern political economy.[783] By these measures, Caring for Country is clearly a public policy success.

The third point I wish to make is that although Caring for Country is concerned with environmental protection and management, it is not entirely compatible with Western concepts of environmental conservation.[784] Studies have highlighted the tension between Western, non-Indigenous ideals of conservation and the Aboriginal understandings of Country and the natural world.[785] Additionally, there have been several high-profile environmental controversies that highlight differences on the question of sustainability between Indigenous notions of Caring for Country and Western environmentalism.[786] For example, in 2013 a proposal to build a natural gas refinery at James Price Point near Broome in Western Australia sparked a lengthy and acrimonious battle between Aboriginal groups supportive of the development and

[782] Altman and Kerins (n 134) 36.

[783] Ibid. 213.

[784] Jenny Pickerill, 'Black and Green: The Future of Indigenous–Environmentalist Relations in Australia' (2018) 27(6) *Environmental Politics* 1122; Eve Vincent and Timothy Neale, 'Unstable Relations: A Critical Appraisal of Indigeneity and Environmentalism in Contemporary Australia' (2017) 28(3) *The Australian Journal of Anthropology* 301; Woodward et al (n 857).

[785] As Rose explains, the terms 'conservation' and 'conservationist' are contemporary terms that have emerged in response to present day ecological threats due to modernity. Aboriginal people never faced a comparable situation such as ecosystem collapse as a result of overuse or degradation. So, in a contemporary sense, the term 'conservationist' is not applicable to Caring for Country. For Rose the question is not whether Aboriginal people meet the definition of a conservationist but rather questions of knowledge and understanding about Aboriginal people's land management practices and philosophy within which they are embedded. 'There is so much to be learned from Aboriginal people about land management with fire, about the species of the continent, about relationships among living things, and between living things and the seasonal forces, about how to understand human society as a part of living systems, taking humanity seriously without making of it the centre of creation. In studying these differences, I have come to the view that there is so much to be learned, and the continent is so needy, that every moment spent in a fruitless debate about whether or not Aboriginal people had the kind of conservation ethic that is familiar to non-Aboriginal people is a moment wasted.' See Rose (n 734) 4.

[786] As Vincent & Neale explain, environmental and mining controversies such as the dispute over the proposed Adani coal mine in central Queensland, creates divisions between both Wangan and Jagalingou Traditional Owners as well as disputes with government and the company. That is to say, some Aboriginal people support mining, while others are opposed. Cases such as these they say, demonstrate the potential risk of equating 'green and black' notions of environmentalism and sustainability as being closely aligned or indeed, the same. Vincent and Neale (n 782).

conservationists opposed to the proposal.[787] In Cape York Peninsula in 2005, Aboriginal leader Noel Pearson and many Cape York Traditional Owners voiced strong opposition to the Queensland Government's Wild Rivers legislation to prohibit high impact development such as mining on or near free flowing, pristine rivers in the region. Pearson argued the laws were a denial of Aboriginal people's right to economic development, and counterproductive to the hard-won rights of Aboriginal people for the recognition of native title.[788]

Finally, I do not wish to overly romanticise the efforts of Aboriginal people through Caring for Country.[789] The reality is, the state continues to hold the resources and power to impose its will as and when they please. However, the recognition of native title has ensured Aboriginal people can no longer be excluded from planning processes that affect Aboriginal lands whether held under native title or not. The legal recognition of native title means governments and others must consult and negotiate with Aboriginal people. It is arguable that native title also compels governments and other parties to include Aboriginal peoples in decision-making processes that may go beyond formal requirements of legislation as more of a moral imperative. The result is native title creates many instances of engagement and collaboration between Aboriginal people and others.

As Timothy Neale et al argue collaborations between Aboriginal people in managing their traditional lands with the institutions of settler governments are emergent and pragmatic experiments in exploring the bounds of what is possible through unexpected transformations that emerge through doing collaborative or participatory work.[790] As Hill and Williams explain, because of the significance difference between Indigenous and non-Indigenous understandings

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[787] Sarah Burnside, 'James Price Point: Victory or Loss?' (June 2013) (124) *Arena Magazine*.

[788] For Pearson, the Wild Rivers legislation was preventing Aboriginal people from 'using our land'. The legislation was aimed at appeasing environmentalists in inner city Brisbane at the expense of Aboriginal people in Cape York Peninsula. Pearson argued the imposition of the legislation was done without the consent of Aboriginal people, effectively contravening UNDRIP which Australia had signed in 2009. See Timothy Neale, *Wild Articulations* (University of Hawai'i Press, 2017) 78-80.

[789] Despite the widespread uptake in Caring for Country by Aboriginal groups across Australia, as Jackson et al argue, even after the recognition of native title, the legacy of *terra nullius* remains embedded in Australia's understanding of property law, land tenure and administration to the extent that the interests of Aboriginal people can still be completely ignored. Australian planning routinely proceeds as if the places being planned are blank slates, empty (or at least deficient) but waiting to be activated, completed and fulfilled by the things that planning policy can catalyse. See, Jackson, Porter and Johnson (n 136) 55-56.

[790] Timothy Neale et al, 'Walking Together: A Decolonising Experiment in Bushfire Management on Dja Dja Wurrung Country' (2019) 26(3) *Cultural Geographies* 341.

of the world, deliberative democratic processes may be more capable of facilitating meaningful participation between these two groups, particularly in the context of land management decision making and planning.[791]

In this regard, the domain of environmental public policy is an important space for Indigenous self-determination. As Warren says, policy is now the front line of democratisation and democratic innovation.

> People are becoming less deferential to authority and have more small 'd' democratic instincts. Moreover, organized groups have increasingly gained expert capacities themselves, and are able to challenge government and corporate technocrats by introducing contestation into the domain of knowledge.[792]

I now provide a short summary on the background to Caring for Country as a distinct area of public policy.

## 9.2 Background on Caring for Country as Public Policy

No single Indigenous community, group or organisation lays claim to creating or owning the term 'Caring for Country'. All Aboriginal and Torres Strait Islander groups feel a deep responsibility to look after the natural, cultural and spiritual health of their traditional lands and waters.

> Indigenous customary law embraces powerful obligations to protect and maintain the health of biophysical environments: and connections with healthy environments sustain Indigenous culture and knowledge. Resilient Indigenous societies and healthy environments therefore depend on and support each other.[793]

However, as a recognisable area of public policy, Caring for Country emerged in the 1970s 'homelands movement'[794] and has over time become a well-established concept in

[791] Rosemary Hill & Liana Williams 'Indigenous Natural Resource Management: overcoming Marginalisation produced in Australia's Current NRM Model' in Taylor, Robinson and Lane (n 135) 198.

[792] Warren, 'Governance-Driven Democratization' (n 754) 7.

[793] *Beyond Respect: A Central Role for Indigenous People in Australian Land and Sea Management* (NAILSMA, 2014).

[794] Altman explains that in the 1970s and 1980s the 'homelands movement' saw Aboriginal people move to re-occupy their traditional lands. Living on country required Aboriginal people to engage in traditional hunting of wildlife for

contemporary Australian public policy lexicon.[795] Today, the land management activities of Aboriginal people deliver conservation benefits to the Australian nation as well as economic development benefits for many remote and under developed Aboriginal communities.[796]

A 1991 report commissioned by the Australian National Parks and Wildlife Service and funded by ATSIC was one of the first public uses of the term 'Caring for Country'. The report highlighted Australia's general lack of knowledge about land degradation on Indigenous-held lands and identified the challenges Aboriginal land managers faced in accessing mainstream government funding to tackle environmental issues on their traditional lands.[797] The report argued that the land management activities of Aboriginal people were important and legitimate in terms of Australia's national environmental interests, yet grossly underfunded by governments.[798]

Then in 1995, the Northern Land Council (NLC) established the first dedicated Caring for Country Unit (CFCU). Land management had become a top priority for Aboriginal people in the Northern Territory after the return of large areas of land through the *Aboriginal Land Rights Aboriginal Land Rights Act 1976 (Northern Territory) Act 1976*. As Storrs and Cooke explain, the CFCU set about establishing partnerships with a range of national and territory government agencies to support Indigenous land management, their catchcry being 'the land needs its people'.[799]

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food. By the 1990s, Aboriginal people were seeing a range of environmental threats that needed managing. From the early 1990s Aboriginal people began to tackle emerging and increasingly recognised environmental threats on the tropical savannah with a community-based Caring for Country movement facilitated by Aboriginal land councils and regional organisations. These community ranger initiatives were largely underwritten by the Community Development Employment Projects scheme. Caring for Country activities sought to ameliorate emerging environmental threats about which people living on country and using country for livelihood were becoming acutely aware; often indigenous knowledge provided the critical ecological baseline against which to identify new threats like previously unknown weed outbreaks on flood plains. Altman and Kerins (n 134) 14.

[795] Pleshet (n 732); Altman and Kerins (n 134) 26.

[796] Altman and Whitehead (n 23); Martin van Bueren et al, *Working for Our Country: A Review of the Economic and Social Benefits of Indigenous Land and Sea Management* (Country Needs People, 2015); Weir, Stacey and Youngetob (n 881).

[797] Elspeth Young et al, *Caring for Country: Aborigines and Land Management* (Australian National Parks and Wildlife Service, 1991).

[798] Ibid.

[799] Michael Storrs and Peter Cooke, 'Caring for Country: The Development of a Formalised Structure for Land Management on Aboriginal Lands within the Northern Land Council Region of the Northern Territory' (2001) *Journal of Australian Indigenous Issues* 7, 75.

As Aboriginal people were seeking support for managing Country[800] and Australia was on the cusp of recognising the pre-colonial property rights of Aboriginal and Torres Strait Islander people via the *Mabo* decision, several international initiatives would make way for the greater inclusion of Aboriginal people in environmental management.

The first was the *Our Common Future* report of the World Commission on Environment and Development (Brutlandt Report)[801] calling on governments to do more to tackle the increasing degradation of the natural environment. The report recognised that for many of the world's Indigenous people, their survival as distinct cultural groups was dependent upon their use of traditional ecological knowledge and living in harmony with the natural environment. Yet, this way of life had also come at a cost for Indigenous people in terms of inequalities in socioeconomic development, poorer health, and lower levels of formal education.

> Hence, the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibility in resource use. And this recognition must also give local communities a decisive voice in the decisions about resource use in their area.[802]

The second event was the 1992 Earth Summit in Brazil and subsequent Rio Declaration calling for greater recognition and involvement of the world's Indigenous people into tackling environmental issues such as biodiversity loss. This call was accompanied by recognition of Indigenous rights to lands and was now coupled with calls to utilise Indigenous traditional knowledge in strategies to combat environmental degradation globally and domestically. Principle 22 of the Declaration states:

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture

[800] As Altman and Whitehead explain, at the time Australian governments and policy makers had not fully grasped the imperative to invest in Indigenous community based natural resource management. See Altman and Whitehead (n 23) 2.

[801] Gro Harlem Brundtland, *Report of the World Commission on Environment and Development: Our Common Future ('Brundtland Report')* (UN World Commission on Environment and Development, 1987).

[802] Chapter 4, 'Population and Human Resources', in Ibid.

and interests and enable their effective participation in the achievement of sustainable development.[803]

In Australia, governments were adopting a more decentralised approach to environmental management and decision making through initiatives such as Landcare.[804] Beginning in the 1980s, the Landcare movement sought to give local landholders, such as farmers, greater decision-making responsibilities rather than maintaining a 'top-down' decision-making model to managing the environment.[805] Then in 1997 the Natural Heritage Trust (NHT) initiative expanded upon the Landcare approach by making greater funds available to regional natural resource management (NRM) bodies, NGOs and landowners to design and deliver NRM projects to suit local circumstances. The objectives of both Landcare and NHT – of empowering local level parties most affected by environmental issues to make decisions regarding land management – aligned with the desire of Aboriginal people to have greater decision-making power over Country vested with them, rather than with public service bureaucrats sitting in distant government offices.[806]

As Robinson and Lane explain, poor levels of Indigenous participation in Australia's social and environmental policies sparked considerable debate about Indigenous rights and the place of Indigenous people in the environmental policymaking process in Australia.[807] Australia's conservation movement had to confront its own colonial legacy by acknowledging its traditional approaches to environmental protection, such as declaring national parks over the lands of Indigenous people without consent, were a contemporary form of dispossession.[808] Governments and conservation groups responded by developing strategies and policies to recognise Indigenous people's rights in environmental management policies and laws

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[803] Lance N Antrim, 'The United Nations Conference on Environment and Development' in Allan E Goodman (ed.), *The Diplomatic Record 1992-1993* (Routledge, 1st ed, 2019) 189.

[804] Environment & Communications References Committee, *National Landcare Program* (The Senate, 2015) 10.

[805] Rob Youl, Sue Marriott and Theo Nabben, *Landcare in Australia: Founded on Local Action* (SILC and Rob Youl Consulting Pty. Limited, 2006).

[806] Ibid. 6.

[807] In the post *Mabo* period, the growing knowledge and understanding about Australia's history of dispossession and status of Indigenous people in Australia was the subject of wider public deliberation. This shift in public consciousness coincided with the move towards decentralising land and environmental management decision-making. Cathy Robinson and Marcus Lane, 'Boundary Riding' in Walker, Jojola and Natcher (n 825) 397.

[808] David Lawrence, *Managing Parks/Managing 'Country': Joint Management of Aboriginal Owned Protected Areas in Australia* (Research Paper No.2, Department of the Parliamentary Library, 1997) ('*Managing Parks/Managing "Country"*').

in Australia.[809] New conservation models such as IPAs[810] based on the international standard of a 'community conserved conservation area'[811] were adopted to give greater management responsibility to Indigenous groups.[812]

Then, in 2007, the Australian Government introduced the Working on Country[813] program with funding of $47.6 million over four years for Indigenous conservation programs and rangers.[814] Their published reports highlight that the range of benefits, opportunities, and outcomes in relation to Caring for Country in Australia is now extensive.[815] These include better health, better education, greater workforce participation, creation of Indigenous businesses, lower expenditures on public health, policing, welfare, and economic benefits.[816]

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[809] Hill et al, 'Indigenous Land Management in Australia: Extent, Scope, Diversity, Barriers and Success Factors' (n 857) 6.

[810] In 1997, the first IPA, Nantawarrina, was established in the Flinders Ranges in South Australia after discussions between the Federal government and Aboriginal groups about the inclusion of Indigenous held lands into the national reserve system. IPAs are an internationally recognised form of protected area that Indigenous people voluntarily declare on Indigenous-held lands. They now make a sizeable contribution to the protection of Australia's unique environmental and cultural heritage. Dermot Smyth, 'Indigenous Protected Areas in Australia' (2006) 16(1) *Parks: International Journal for Protected Area Managers*; Putnis et al (n 887).

[811] As Langton et al explain, community-oriented protected area such as IPAs in Australia are a way of 'supporting the lifeways of Indigenous peoples and local communities, assist in the preservation and maintenance of their traditional biodiversity related knowledge, and enable Indigenous peoples and local communities to participate in both customary subsistence and market economies'. See Marcia Langton, Zane Ma Rhea and Lisa Palmer, 'Community-Oriented Protected Areas for Indigenous Peoples and Local Communities' (2005) 12(1) *Journal of Political Ecology*.

[812] Rosemary Hill, 'The Effectiveness of Agreements and Protocols to Bridge Between Indigenous and Non-Indigenous Toolboxes for Protected Area Management: A Case Study from the Wet Tropics of Queensland' (2006) 19 *Society & Natural Resources* 577, 578.

[813] 'Caring for Country' and 'Working on Country' are associated terms but with different meanings. As Kerins explains, 'Caring for Country' is the Aboriginal English expression for Indigenous-led environmental management. 'Working on Country' is the term the Australian Government has given to the funding program that provides 'sustainable employment for Indigenous people in protecting and conserving the environment. Both terms are part of 'the discourse on Indigenous policy in Australia'. 'Discourse plays a role in wider social processes of legitimation and power; emphasising the constitution of current truths, how they are maintained and what power relations they carry with them. Caring for Country is therefore an effort towards challenging the institutional power of government agencies.' See Altman and Kerins (n 134) 26.

[814] Kathleen Mackie and David Meacheam, 'Working on Country: A Case Study of Unusual Environmental Program Success' (2016) 23(2) *Australasian Journal of Environmental Management* 157, 160.

[815] Altman and Kerins (n 117); Weir, Stacey and Youngetob (n 881); Hill et al, 'Indigenous Land Management in Australia: Extent, Scope, Diversity, Barriers and Success Factors' (n 857); Woodward et al (n 857).

[816] David Campbell, 'Aboriginal Involvement in Caring-for-Country: An Economic Case Study in Primary Preventative Health' (2015) 23(6) *Australasian Psychiatry* 623 ('Aboriginal Involvement in Caring-for-Country'); Rosalie Schultz

Since 2007, Caring for Country projects have created more than 2,100 full-time, part-time and casual jobs and some 129 Indigenous ranger groups[817] that provide meaningful employment, training and career pathways for Aboriginal and Torres Strait Islander Australians.[818] On these measures, Caring for Country is clearly a successful and unique area of Indigenous-led public policy expertise as measured by its popularity amongst Aboriginal groups and growth in terms of increased funding.

A 2016 study of the Working on Country program described it as an Australian environmental public policy success.[819] Key to the success, claim the authors, has been the commitment of government officials to listen to Indigenous peoples' ideas about how the program should be run.[820] A 2020 report argues the success of the Caring for Country projects is dependent on Indigenous people and others such as government and non-Indigenous research organisations working in partnership that builds respect and appreciation for Indigenous knowledge and support for Indigenous voices in decision-making processes.[821]

The 2021 Australian State of the Environment report estimated Aboriginal people now hold rights of various kinds to almost 60% of the Australian landmass.[822] In 2017 the Australian

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and Sheree Cairney, 'Caring for Country and the Health of Aboriginal and Torres Strait Islander Australians' (2017) 207(1) *The Medical Journal of Australia* 8; Bueren et al (n 905); Diane Jarvis et al, 'Are Indigenous Land and Sea Management Programs a Pathway to Indigenous Economic Independence?' (2018) 40(4) *The Rangeland Journal* 415.

[817] Putnis et al (n 887) 13.

[818] Department of Prime Minister & Cabinet, 'Indigenous Ranger Programs' (18 March 2016), (Webpage), <https://www.niaa.gov.au/indigenous-affairs/environment/indigenous-ranger-programs>.

[819] Mackie and Meacheam (n 812).

[820] An important catalyst for this new approach was a 2006 visit by the then Secretary of the Environment Department with leaders of the NLC to visit the remote region of Arnhem Land in the Northern Territory. The trip highlighted the inadequate funding and lack of policy coordination to support Indigenous land management. This visit and discussion resulted in senior government and agency executives committing to secure government support and for the Working on Country policy concept. Ibid.

[821] 'We seek engagements and partnerships where we think our knowledge will be treated the right way. This can mean taking a very slow approach to building a partnership, and testing partners to see if they are respectful and trustworthy, before knowledge is shared. Taking the time and interest to build relationships between people will underpin positive experiences in knowledge sharing. Relationship-building demands that all partners recognise and respect multiple cultural backgrounds and knowledge's in creating a safe space for sharing.' Woodward et al (n 857) 112.

[822] Janke et al (n 539).

Government announced $15 million for new IPAs and in 2020 $700 million over 2021–2028 for the Indigenous Ranger Program.[823]

And to further highlight the prominent place of Indigenous-led conservation in Australian public policy, in June 2022 at the UN Ocean Conference in Lisbon, Portugal, Australian Minister for the Environment and Water Tanya Plibersek said Australia intended to double the number of Indigenous rangers by the end of the decade so as to benefit from Aboriginal and Torres Strait Islander people's knowledge about caring for land and sea country.

> For more than 65,000 years, Australia's Indigenous people have cared for land and sea country – 'country' being so much more than its physical properties. There is much Australia, and the world, can learn from their example.[824]

This growth in Caring for Country in terms of jobs created, policy influence, and government funding over the past 40 years has been described as a 'quiet revolution' in Australian environmental policy.[825]

In summary, Caring for Country has emerged as a distinct area of Indigenous public policy due to a number of enabling factors, including international conservation initiatives to better engage with Indigenous people and our ecological knowledge, moves to decentralise environmental decision-making in Australia, and the recognition of land rights and native title.

Having discussed the background to the emergence of Caring for Country as a distinct form of Indigenous-led public policy, in the next section I discuss three examples of Caring for Country as a form of deliberative policymaking using the concept of deliberative policy analysis. In addition to creating jobs and attracting government monies, as I have argued, Caring for Country can also be measured in terms of its democratising effect.[826] I begin by analysing the

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[823] Minister for Indigenous Australians 'Funding certainty for Indigenous Rangers', 10 March 2020, media release, https://ministers.pmc.gov.au/wyatt/2020/funding-certainty-indigenous-rangers

[824] Katharine Murphy, 'Tanya Plibersek Declares Environment "Is Back Front and Centre" in Australia at UN Ocean Conference', *The Guardian* (online, 27 June 2022) <https://www.theguardian.com/environment/2022/jun/27/tanya-plibersek-declares-environment-is-back-front-and-centre-in-australia-at-un-ocean-conference>.

[825] Putnis et al (n 887).

[826] Justin McCaul, 'Caring for Country as Deliberative Policymaking' in Moodie and Maddison (n 121).

work of the Dja Dja Wurrung Traditional Owners and their collaboration with Victorian Government to manage wildfires.

### 9.2.1 Dja Dja Wurrung

Bushfires are a major environmental and public safety concern every summer in Australia. Recent bushfire events indicate these environmental hazards are becoming more extreme and frequent as a consequence of climate change such as the 2019/2020 'Black Summer' bushfires which claimed 34 lives and a significant amount of property, and burned approximately 9 million hectares in southeast Australia.[827]

Timothy Neale, an anthropologist with research interests in natural hazards, environmental disasters and the politics of settler and Indigenous relations, has published several studies of collaborations between Aboriginal groups and government agencies engaged in fire management. As Neale explains, in Australia, Aboriginal people are becoming more formally involved and influential in government agencies with legal responsibility for the management of their ancestral territories, their environments and the management of bushfires.[828] What Neale is describing is what I define as democratic inclusion. The enhanced capacity of aboriginal people to participate in the decision making processes of government. Caring for Country offers this opportunity for aboriginal people.

In their case study, Neale et al discuss the experience of the Dja Dja Wurrung Traditional Owners in Victoria and their efforts to re-establish traditional fire management practices (*djandak wi* or 'healthy fire') on Dja Dja Wurrung Country in collaboration with a state government bushfire management agency. The traditional lands of the Dja Dja Wurrung Traditional Owners are located in northern Victoria. Fire is an important tool Aboriginal people use to manage the natural environment and the case is an example of environmental policymaking enhancing Indigenous political authority over their traditional lands.

> The use and management of landscape fires has been of vital cultural and ecological importance to Aboriginal peoples across the continent for millennia and, today, fire practices remain highly important to many Aboriginal peoples, a central expression

[827] Timothy Neale, 'What Tradition Affords: Articulations of Indigeneity in Contemporary Bushfire Management' (2023) 64(1) *Current Anthropology* 72.

[828] Neale et al (n 897).

> of their co-constitutional relations with place and a meaningful cultural connection to ancestors.[829]

As Neale et al explain, the collaboration between Victorian Government bush fire agencies and Dja Dja Wurrung Traditional Owners is not some straightforward revival of a technical environmental practice but rather open-ended social and ecological experiments in 'decolonisation'. By actively collaborating with the Dja Dja Wurrung Traditional Owners to manage a recurring public and environmental threat, the state and staff of the government agencies involved are recognising political authority of Dja Dja Wurrung to their traditional lands.[830]

As Neale states, legal rights to control and manage Country through native title and other statutory land rights legislation has been the focus of Indigenous peoples' political activism in Australia for some time. While the willingness of governments to invest in Caring for Country is one indicator of its public policy success, it has a clear democratising benefit as a means for decolonising relations between government environment agencies and Traditional Owners.[831]

Recognising that decolonisation is a problematic term, in the sense that within Australia it is highly unlikely that any Aboriginal peoples will soon gain full autonomy over their Country, Neale et al nonetheless argue that a practice such as bushfire management can be a 'site of emerging experiments in the redistribution of legal and political authority over country'.[832] Collaborations between government agency staff and Aboriginal people with a continuing sovereign connection to their land are experiments in that they are 'device[s] to materialise questions' that then allow for 'the emergence of questions that could not be asked before'.

> It opens 'the possibility of envisaging ways in which knowledge/space/society could be transformed'. Initiatives to create new Indigenous-led or collaborative forms of environmental management can be both 'decolonising' and 'experimental', as they can politically and legally *displace* settler power and authority, though their ultimate dimensions, effects and outcomes are uncertain.[833]

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[829] Ibid.; Deborah Bird Rose, *Country in Flames: Proceedings of the 1994 Symposium on Biodiversity and Fire in North Australia* (Biodiversity Unit, Department of the Environment, Sport and Territories, 1995).

[830] Neale et al (n 897).

[831] Ibid. 346.

[832] Ibid.

[833] Ibid.

What Neale et al describe as decolonisation through policy discourse, deliberative policy analysis scholars such as Torgerson call 'democracy through policy discourse'. As Torgerson states, 'The prospect is that democracy may be enhanced not against or in spite of policy discourse, but through it'.[834] Both are concerned with displacing technocratic, state based authority with greater citizen expertise. Additionally, what Neale et al describe is consistent with the claim I make in Chapter 8 that native title and the native title system functions as a contestatory mechanism. The recognition of Aboriginal people rights in land has opened up possibilities for aboriginal people to challenge the states historically dominant role in environmental policymaking.

As Neale et al explain, there are many intercultural, interpersonal, and bureaucratic obstacles that hinder decolonising collaborations between government agencies and Aboriginal people through the policymaking process. Conducting interviews with the Indigenous and non-Indigenous participants, Neale et al found that many were 'motivated by shared ideological commitments to partnership'.[835] Some participants argued that government agencies and Aboriginal Traditional Owners 'should be partners' in bush fire management on the basis that 'settler governments and their various institutions owe a historical debt to traditional owner groups such as Dja Dja Wurrung' for 'past (and present) mistreatment'. Thus, they argue, bushfire agencies have a moral obligation to 'do better'. However, these moral and historical justice obligations are limited because policy settings and enabling legislation mean natural hazard agencies 'are not conceived as instruments of social justice or equity, they are in "the business of risk management", not reconciliation'.[836]

In my time working with several Aboriginal groups that used their native title to undertake Caring for Country, I observed something very similar. Aboriginal people would assert that, as Traditional Owners, they had a cultural obligation to protect their traditional lands, something government agencies did not. This claim would be supported by additional claims that, as Traditional Owners of Country, the group never ceded sovereignty to their lands so they remain the rightful owners and managers. Government agencies were perpetuating dispossession and

[834] Hajer and Wagenaar (n 132) 113.

[835] Neale et al (n 897) 350.

[836] Ibid.

*terra nullius* by not empowering Aboriginal people to assume management responsibility for Country.[837]

The Dja Dja Wurrung case can be understood as an exercise in deliberative democracy to the extent that the discussion of how best to manage wildfires involves the exchange of views based on practical reasons and processes to hopefully arrive at a mutually agreed position and set of policies. The need to find a mutually acceptable way to combine Indigenous traditional ecological knowledge and responsibility for managing fire on the one hand, with the statutory responsibility of the government agency to manage bushfire threats on the other, can result in an agreement on how best to solve the problem that meets the aspirations of each party.

As Neale et al demonstrate, Indigenous and non-Indigenous participants stated that the success of the endeavour relied upon Dja Dja Wurrung and the government actors 'establishing relationships of trust, obligation, and honesty'.

> Being 'open' or 'vulnerable' is not typical of relationships between higher and lower level staff in these agencies. Nor is it typical of the relationships between higher-level staff and the external 'stakeholder' groups they routinely interact with, such as foresters, environmentalists and Aboriginal groups. Bushfire agencies, like other emergency management agencies, are command-and-control organisations with a robust hierarchal structure and corresponding culture.[838]

In conclusion, Neale et al suggest the increased opportunities for Dja Dja Wurrung to collaborate in fire management policy and planning is a product of international and domestic

[837] These types of exchanges were common in my experience. There were some very obvious benefits to empowering Aboriginal groups to undertake environmental management work on their own Country and in state-managed national parks including the cost effectiveness of employing local Aboriginal people rather than deploying staff from capital cities or regional towns. But more importantly, empowering Aboriginal people to manage Country was a way of recognising the unceded sovereignty and right of Aboriginal people to manage their traditional lands. These conversations did not always lead to the desired outcome sought by Aboriginal people – more often I witnessed government agency staff say they did not disagree that Aboriginal people should be managing their own Country on the basis they are the rightful owners of the land that had been unjustly dispossessed. However, they did not have the authority to support empowering Aboriginal people because other senior government staff, including even the minister responsible, may not agree. Nonetheless, these deliberative exchanges were, I believe helpful in terms of raising questions that, as Neale et al explain, were not possible beforehand.

[838] Neale et al (n 897) 349.

policies that encourage greater collaboration between state governments and Indigenous peoples in environmental and natural resource management.

However, Neale et al caution that increased involvement in participatory governance approaches to public policy issues is no panacea solution to the unequal power relations between Aboriginal people and government agencies. The use of techniques, programmes and forums devised to induce collaboration between Indigenous and non-Indigenous communities or publics affected by a given policy matter may simply reconstruct the 'dynamics of closure and control that they seek to overcome'.[839]

> By deploying a participatory approach, state actors may often gain a social licence while continuing to retain the power to parse between stakeholders, excluding some and including others who will then have their demands diffused through exhausting consultative processes. Rather than take participatory governance as a banal good, Chilvers and Kearnes suggest, we should approach each instance of participation as an empirical and contingent 'experiment' that can be assessed according to its strategies and results; such experiments are not pre-given but 'actively produce publics, public issues, material commitments and forms of democratic engagement'.

As Neale et al describe it the Dja Dja Wurrung experiment in policy collaboration is an act of decolonisation. It is an effort to build respectful relations that acknowledge past wrongdoing. Deliberative policy analysis, like normative deliberative democracy, values reciprocity and relationships.

> One of the most important outcomes of collaborative dialogue is that new relationships and social capital are built among players who would not ordinarily even talk to one another, much less od so constructively.[840]

Through dialogue, participants learn what the issue means to others. 'They were able to have an empathetic understanding of why another stakeholder would take a particular view because they understood the conditions and problems other stakeholders faced and the history they had

[839] Ibid. 354; citing Jason Chilvers and Matthew Kearnes, *Remaking Participation: Science, Environment and Emergent Publics* (Routledge, 2016) 35.

[840] Judith E. Innes & David E. Booher 'Collaborative Policymaking' in Hajer and Wagenaar (n 132) 42-44.

gone through'.[841] That is to say, deliberation through policymaking can enhance both self-understanding and mutual understanding.

In the end, Neale et al state based on what Indigenous and non-Indigenous participants in this collaborative governance experiment told them, the work of 'walking together' on bushfire policy has been difficult but 'involved far more than a contract, resourcing, traditional knowledge or government policy. … These sites, individuals, practices and relationships have been transformed or, to use Chilvers and Kearnes' phrasing, *actively produced through the collaboration*'.[842]

I now turn to discuss the example of Ngarrindjeri Nation.

### 9.2.2 Ngarrindjeri Nation

In the state of South Australia, the Ngarrindjeri Nation[843] are another Aboriginal group exercising sovereignty and self-government through Caring for Country.
The Ngarrindjeri Nation offers arguably the most in-depth account of democratisation through policymaking in the context of native title, given they have published widely on their experiences.[844] One prominent member of the Ngarrindjeri Nation is Professor Daryle Rigney, Director of the Indigenous Nations and Collaborative Futures Research at the University of Technology Sydney. Professor Rigney and his various collaborators have published an extensive

[841] Ibid. 43.

[842] Neale et al (n 897) 354.

[843] The lands of the Ngarrindjeri Nation include the southern-most region of the Murray-Darling Basin (MDB), Australia's largest river system. According to the statutory Murray Darling Basin Authority, the MDB stretches across four states (Queensland, New South Wales, Victoria, South Australia) and one territory (Australian Capital Territory), spanning 77,000 kilometres of interconnected rivers. Management of the water within the MDB is highly political, often pitting Aboriginal interest to protect Country and sustain Indigenous communities economically and culturally, against conservationist concerns, and the water resource needs of irrigators and farmers. See Murray Darling Basin Authority, (Webpage), https://www.mdba.gov.au/why-murray-darling-basin-matters

[844] Ngarrindjeri say they like to draw public attention to their political and governance structures and capabilities as key to Ngarrindjeri successes in planning and changing government policy and management processes. They publish widely and often in order to assert a powerful discourse of Indigenous environmental knowledge associated with First Nations rights concerning governance of Country. See Rigney, Bignall and Hemming (n 848); Hemming et al (n 836); Ngarrindjeri Nation and Steve Hemming, 'Ngarrindjeri Nation Yarluwar-Ruwe Plan: Caring for Ngarrindjeri Country and Culture Kungun Ngarrindjeri Yunnan (Listen to Ngarrindjeri People Talking)' in Luke Mosley et al (eds), *Natural History of the Coorong, Lower Lakes, and Murray Mouth Region (Yarluwar-Ruwe). Royal Society of South Australia* (University of Adelaide Press, 2018).

body of empirically-grounded research on the experiences of Ngarrindjeri in environmental management of Ngarrindjeri Country and the assertion of Ngarrindjeri nationhood.[845]

As Rigney explains, Aboriginal sovereignty is still not accommodated in Australia. Faced with this reality, Aboriginal people often revert to articulating sovereignty in 'ecological and ontological' relational terms. Aboriginal sovereignty must therefore be 'performed' chiefly through what Rigney calls *acting as Country* by 'focusing on the agency of Indigenous populations'. As First Peoples, we are connected to the living bodies of land, water and sky and reclaiming Aboriginal sovereignty involves rebuilding an effective capacity to *act as Country*.[846]

Ngarrindjeri have used public policy processes in land and water resource management as a platform to shape policies in relation to land and water management, build their capacity for self-government, and affirm Ngarrindjeri sovereignty.

> We argue that Ngarrindjeri and other First Nations in settler societies such as Australia have developed complex resistive, interactive and transformational legal and policy strategies for Country that can be positively influential in changing the political processes and structures of authority that determine global water management.[847]

The Ngarrindjeri have been involved in several high profile legal and political battles[848], which, in their words, have 'equipped them with an increased political literacy and understanding of the settler legal system'. Ngarrindjeri leaders have used these experiences to rebuild the Ngarrindjeri Nation and revitalise their own authoritative structures of political representation. Their political struggles and Caring for Country practices have strengthened their governance capabilities making Ngarrindjeri more capable and effective in asserting Ngarrindjeri rights and

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[845] Hemming et al (n 836); Rigney, Bignall and Hemming (n 848); Steve Hemming and Daryle Rigney, 'Unsettling Sustainability: Ngarrindjeri Political Literacies, Strategies of Engagement and Transformation' (2008) 22(6) *Continuum* 757 ('Unsettling Sustainability').

[846] Daryle Rigney, 'Building Nations, "Acting as Country"', *University of Technology Sydney* (29 October 2020) (Webpage) <https://www.uts.edu.au/research-and-teaching/research/explore/impact/building-nations-acting-country>.

[847] Hemming et al (n 836) 217-218.

[848] Robert van Krieken, 'Kumarangk (Hindmarsh Island) and the Politics of Natural Justice under Settler-Colonialism' (2011) 36(1) *Law & Social Inquiry* 125. In 1993, a proposal to construct a bridge from Goolwa, near the mouth of the Murray River, to Hindmarsh Island would trigger both a Royal Commission (Hindmarsh Island Royal Commission) and a High Court case (*Kartinyeri v Commonwealth* (1998) 195 CLR 337) on the legality of building the bridge.

interests in the lands and waters that comprise Ngarrindjeri *Yarluwar-Ruwar* (spirit/body/Country).[849]

In 2007, they established the Ngarrindjeri Regional Authority (NRA) to enable Ngarrindjeri people to operate politically as a national government representing regional Ngarrindjeri organisations and broader Ngarrindjeri community. To build their capacity, Ngarrindjeri used their networks, including scholars at Flinders University, as well as accessing funding through various government environmental programs. These human and financial resources assisted Ngarrindjeri to map, understand, analyse and undertake work to transform the colonising systems of power that affect the governance capacity of Indigenous Nations and Country.[850]

In 2009 Ngarrindjeri Nation negotiated a formal agreement (*Kungun Ngarrindjeri Yunnan — 'Listen to what Ngarrindjeri have to say'*) (KNY)) with the Government of South Australia. In that agreement was recognition by the state of traditional ownership of Ngarrindjeri lands and waters and a commitment to establish a process for negotiating and supporting Ngarrindjeri rights and responsibilities for Country.

> The KNY strategy has provided the framework for the South Australian Government to support Ngarrindjeri to build their core capacity to engage in Caring for Country activities during initiatives such as the Murray Futures Coorong, Lower Lakes and Murray Mouth Recovery Project and to become long-term contributors to regional Natural Resource Management.[851]

In 2015, the Ngarrindjeri Nation in partnership with the South Australian Government won an Australian environmental award for best practice in water management of the Coorong, Lower Lakes and Murray Mouth (CLLMM) part of the Murray Darling Basin (MDB).[852]

As Ngarrindjeri explain, cultural rights to land and water and Indigenous political authority are intertwined (expressed as *Yannarumi* meaning '*acting or speaking lawfully as Country*'). Vital to the success of Ngarrindjeri is a community-developed plan (*Ngarrindjeri Nation Yarluwar-Ruwe Plan*) for engaging with government. This planning document was prepared by Ngarrindjeri leaders in 2007 on behalf of the Ngarrindjeri Nation to communicate the Ngarrindjeri vision for

[849] Hemming et al (n 836) 219.

[850] Ibid.

[851] Ngarrindjeri Nation and Hemming (n 842) 3.

[852] Hemming et al (n 836).

caring for their lands and waters. As they explain, prior to having their own community developed management plan, Ngarrindjeri were effectively excluded from regional planning and their own aspirations were not represented in government plans or implementation strategies.[853]

> A key purpose of the Ngarrindjeri plan was to better educate government and nongovernment agencies, researchers and the wider Australian public on Ngarrindjeri connection to Country and their associated rights and obligations to *Yarluwar-Ruwe*. In doing so, the plan clearly links Ngarrindjeri cultural, social and economic perspectives to the broad Caring for Country vision for Ngarrindjeri. It is now officially recognised by both state and federal governments and continues to frame Ngarrindjeri negotiations impacting the health of Ngarrindjeri lands and waters.[854]

To illustrate the connection between Caring for Country (as a form of environmental management public policy) and the ideals of sovereignty and self-government, Ngarrindjeri explain that in their various negotiations with the South Australian Government, they assert an inherent right and responsibility to enjoy, use and protect the flow of water through their Country (Yarluwar-Ruwe). 'This right exists because Murrundi (River Murray) is a lifeblood of the Ngarrindjeri Nation. The Ngarrindjeri notion of *Yannarumi* (meaning 'acting or speaking lawfully as Country') provides a framework for the expression of Ngarrindjeri values'.[855]

As Ngarrindjeri explain, an agreement signed in 2014 with the South Australian Government – a Speaking as Country Deed – commits each party to negotiations in adherence to *Kungun Ngarrindjeri Yunnan* ('Listen to Ngarrindjeri people speaking'). 'What they listen to is Ngarrindjeri Yannarumi (speaking lawfully as Country). Yannarumi conveys the Ngarrindjeri conceptualisation of existence as bound to the ecological conditions that provide, define and sustain life: Ngarrindjeri cannot be considered as separate from the interconnected lifeworld that is Ngarrindjeri Ruwe-Ruwar'.[856]

As Ngarrindjeri explain, agreements made under the KNY negotiation regime sit at the interface of Indigenous and non-Indigenous systems of law. 'They recognise the independent legal traditions and the sovereign responsibility of each participant in the partnership, foregrounding

[853] Ngarrindjeri Nation and Hemming (n 842) 3.

[854] Ibid.

[855] Hemming et al (n 731) 222.

[856] Rigney, Bignall and Hemming (n 743) 342.

mutual acknowledgement and shared agency'. This principled respect for Indigenous sovereign authority is a very significant development towards decolonisation and 'reconciliation' in Australia. Furthermore, we argue that such measures of Indigenous sovereignty incorporating a power to negotiate policy outcomes through successful relationships are necessary groundwork for the protection of cultural rights and the protection of the environment.[857]

As Ngarrindjeri themselves explain, they have effectively articulated their sovereign Aboriginal environmental rights and have successfully negotiated these rights with the South Australian state producing legal and political innovations that enable shared authority in the co-development of natural resource management policy.[858]

What the Ngarrindjeri describe is what Torgerson calls 'reflexive policy discourse that challenges established power dynamics'. By *acting as Country* and asserting sovereignty and nationhood in policy discussions, Ngarrindjeri become 'dissident policy professionals' that challenge the prevailing policy process and discourse. Reflexive policy discourse illustrates the political characters of *policy* (emphasis in original). Because it seeks to challenge power dynamics, policy discourse moves beyond functional and technical matters to enter a domain of constitutive politics that questions the established policy process.

> It is here that the challenge posed by new social movements – environmental, aboriginal, feminist – to established power happens to coincide with the aspirations of dissident policy professionalism to foster a democratic mode of policy discourse.[859]

What the Ngarrindjeri Nation demonstrate is that while claims for formal recognition of sovereignty and self-government often meet resistance within national politics, the domain of policy and planning offers a more practical way of asserting and acting sovereign.

I now turn to discuss the use of what is termed Aboriginal groups' 'Healthy Country Planning', which are environmental management plans based upon Aboriginal law and custom.

### 9.2.3 Healthy Country Planning for Political Coexistence

[857] Hemming et al (n 836) 221.

[858] Hemming et al (n 836).

[859] Hajer and Wagenaar (n 132) 117.

In the previous chapter, I discussed the importance of planning for Aboriginal people and deliberative and participatory democracy. In this section, I discuss the use by Aboriginal groups involved in Caring for Country of a deliberative planning process known as 'Healthy Country Planning'.

Again, I draw on my professional experience of working, between 2011 and 2015, for a national conservation organisation, Bush Heritage Australia (BHA). When I began work with BHA, the organisation was in the final stages of negotiating a 10-year agreement to support the Caring for Country program of the Wunambal Gaambera Traditional Owners in the far north Kimberley region of Western Australia about 600 kilometres northeast of the town of Derby.

Wunambal Gaambera Country is large, encompassing approximately 2.5 million hectares of the north Kimberley region. Exclusive native title has been secured through two successful determinations.[860] Wunambal Gaambera people call their Country 'Uunguu – their living home'. Managing and protecting Uunguu is based on their Wanjina Wunggurr Law which is unique to and only exists in relation to Wunambal Gaambera Country as it has for millennia.[861]

With financial and planning support from BHA, Wunambal Gaambera Traditional Owners were able to develop a Healthy Country Plan (HCP) to articulate the group's aspirations for looking after their 'Uunguu' in accordance with Wanjina Wunggurr Law. As the Wunambal Gaambera Traditional Owners explain in their plan, Caring for Country is done in accordance with 'our Wanjina Wunggurr Law, protecting and sharing our cultural places as our traditional Law says'.

For Wunambal Gaambera Traditional Owners an important objective for developing an HCP was to ensure they were 'respected as the proper owners and managers of Wunambal Gaambera Country'. Implementing the plan would ensure they can maintain the necessary 'cultural knowledge of our elders' and give present day Wunambal Gaambera people and 'future

[860] *Goonack v State of Western Australia [2011] FCA 516* (Federal Court of Australia, 23 May 2011); *Peurmora v State of Western Australia* (2012) FCA 1334 (Federal Court of Australia, 27 November 2012).

[861] The offices of the Wunambal Gaambera Aboriginal Corporation which represents the native title interests of the Traditional owners is located in the small community of Kalumburu and the 400 members of the Wunambal Gaambera nation reside in several towns of in the Kimberley region such as Derby, Broome, and Kununurra. See Heather Moorcroft et al, 'Conservation Planning in a Cross-Cultural Context: The Wunambal Gaambera Healthy Country Project in the Kimberley, Western Australia' (2012) 13(1) *Ecological Management & Restoration* 16, 18.

generations a healthy life'.[862] For the Wunambal Gaambera people, to manage Country *properly and legally*, is to do so in accordance to their Wanjina Wunggurr Law. That is to say, only Wanjina Wunggurr Law (as representing the sovereignty and political authority of the Wunambal Gaambera people) can be used to legitimately and properly manage Wunambal Gaambera Country.

The Wunambal Gaambera Traditional Owners were one of first Aboriginal groups to use an HCP as a conservation planning tool. As Heather Moorcroft explains, in 2008 there was growing awareness within the Australian conservation sector that to address national environmental challenges and achieve conservation outcomes, partnerships with Indigenous land owners would be essential.[863]

Moorcroft is an environmental planning specialist who has helped to develop HCPs and written extensively about the relationship between conservation and Indigenous peoples.[864] As she explains, developing an HCP requires engaging with multiple actors that can be involved in both environmental management and native title. In 2006, Wunambal Gaambera Traditional Owners invited BHA to be a key partner to help them develop and implement their HCP. As well as BHA, other partners are the KLC and the Australian Government's IPA and Working on Country programs.[865]

The HCPs are developed through a participatory, 'Country based planning' process in which Aboriginal people identify their own management aspirations and strategies for their entire traditional land estate. They seek to integrate environmental management strategies with their own cultural responsibilities (which could also be understood as 'political authority') to manage

[862] 'Wunambal Gaambera Healthy Country Plan' <https://wunambalgaambera.org.au/wp-content/uploads/2020/06/Healthy-Country-Plan.pdf>.

[863] Moorcroft et al (n 969) 16.

[864] Heather Moorcroft, 'Paradigms, Paradoxes and a Propitious Niche: Conservation and Indigenous Social Justice Policy in Australia' (2015) *Local Environment* ('Paradigms, Paradoxes and a Propitious Niche'); Heather Moorcroft and Michael Adams, 'Emerging Geographies of Conservation and Indigenous Land in Australia' (2014) 45(4) *Australian Geographer* 485; Heather Moorcroft, 'Coming to Terms with the Occupation of Nature: Engagements between Indigenous Australians and Conservation Organisations'.

[865] Heather Moorcroft, Wunambal Gaambera, 'Healthy Country Plan', in Penelope Figgis, James Fitzsimons and Jason Irving, 'Innovation for 21st Century Conservation' 217, 118.

Country.[866] According to Moorcroft, the Wunambal Gaambera HCP project was conceptualised in two phases: with a two-year community-based, participatory planning process followed by a 10-year implementation stage, both formalised by legal agreements between Wunambal Gaambera Aboriginal Corporation (WGAC) and their partners.

As discussed in the previous chapter, Country for Aboriginal people is an empowered space for both internal and external forms of deliberation. The two-year community-based planning process can be considered what deliberative democrats call 'enclave deliberation'.[867]

Deliberative democrats are aware that in any situation there exist disparities in power and the discursive abilities of groups which can result in deliberation becoming decidedly unequal.

As Karpowitz et al explain, theorists and practitioners have struggled with how to establish deliberative equality in the face of stark differences of power in liberal democracies. While designers of deliberative forums try to ensure deliberative inequities are neutralised to ensure 'inclusion of disempowered speakers and discourses', others believe another important step in this strategy is to enable 'disempowered groups deliberate in their own enclaves (interest groups, parties, and movements) before entering the broader public sphere'. Thus, enclave deliberation serves to allow marginalised groups to 'coalesce by discovering their common interests and identities, strengthening their resolve to advocate for themselves, and building organizations that can do so effectively'.[868]

In the context of Caring for Country, internal planning processes enable members of the group to develop their own strategies and options relating to what they would like to see happen with their Country and community.

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[866] Moorcroft et al (n 969); Lee Godden and Stuart Cowell, 'Conservation Planning and Indigenous Governance in Australia's Indigenous Protected Areas: Conservation Planning in Indigenous Protected Areas' (2016) 24(5) *Restoration Ecology* 692.

[867] As Karpowitz et al explain, enclave deliberation is a stage in a deliberative process in which less powerful groups deliberate on their own in order to form their own perspective, visions, and aspirations away from the pressures and influence of more powerful actors. Enclave deliberation can thus serve the larger cause of a fully inclusive public discourse by giving disempowered or marginalized groups an opportunity to develop their own unique perspectives and arguments, which might otherwise be overlooked or ignored. Karpowitz, Raphael and Hammond (n 748).

[868] Ibid. 582.

As Sheiner et al explain, Wunambal Gaambera community members said they wanted to use their native title determination to inspire the community to 'take active steps to manage, possess, use and enjoy their native title'. They did not want to sit back and wait for others to say what they wanted to do on Wunambal Gaambera Country. Wunambal Gaambera Traditional Owners decided that it should be them who takes the lead in deciding what happens on their Country. 'At the workshop this was called a proactive approach to native title and not a reactive approach.' Wunambal Gaambera people recognised that getting native title was not an end in itself. It was seen as a step towards getting Wunambal Gaambera people back out on Country and leading more fulfilling, productive and richer lives.[869]

In a study of the Walpiri Traditional Owners in the Southern Tanami region of central Australia by Preuss and Dixon, the planning process is described as a 'two-way deliberative process'. This 'two-way' approach (known in Warlpiri as *jarnku mirni mirni*) refers to Indigenous and non-Indigenous people equally and actively sharing their different, yet often complimentary, knowledge systems and skill sets towards a joint goal. At the core of the two-way approach is a focus on recognising, valuing and utilising both Indigenous and non-Indigenous ecological knowledge systems in environmental planning and management.[870]

Like the other examples in this chapter, for Walpiri Traditional Owners, environmental planning becomes a forum for negotiating shared jurisdiction with government authorities relating to land management.

> Warlpiri people use the phrase 'sit down together' to refer to deliberative processes in which various stakeholders exchange information and views about issues and negotiate plans for action through consideration of likely consequences and trade-offs. Deliberative processes have been widely recognised as an essential strategy to reconcile tensions between the interests and priorities of local people and national conservation agencies.[871]

[869] See Paul Sheiner, Bevan Stott and Cathy Goonack, 'Managing Exclusive Possession, Conference Paper, National Native Title Conference, 6 June 2018, Broome, Western Australia' (2018).

[870] Karissa Preuss and Madeline Dixon, '"Looking after Country Two-Ways": Insights into Indigenous Community-Based Conservation from the Southern Tanami' (2012) 13(1) *Ecological Management & Restoration* 2, 4 ('"Looking after Country Two-Ways"').

[871] Ibid. 12.

In the past, government environmental agencies and conservation non-government groups based their conservation strategies on the priorities of non-Indigenous science and a 'preservationist' mindset[872] which has been the source of much conflict between Indigenous people and the conservation sector.[873] In addition to this preservationist approach to environmental planning and management has been a disregard for the rights of Aboriginal people to their traditional lands and their omission from environmental planning and policy processes. Planning and decision making regarding Aboriginal land was more often done without either the participation, let alone consent, of Aboriginal people.

Some scholars argue that environmental planning and land management in Australia remain welded to the doctrine of *terra nullius*.[874] Caring for Country offers a process to address *terra nullius* and dispossession, which is why I, like others such as Kerins, argue that it is a misunderstanding to view Caring for Country as simply land management. It is a political act. Deliberative democracy scholars such as Fung echo this belief, that policy is political, in wider sets of cases. 'Citizen participation is not just about policy; it is also deeply political.'[875]

The development of plans to manage Country is an investment in the capacity of Aboriginal self-government, which enhances the exercise of sovereignty. Thus, Caring for Country creates a nexus of deliberation over interests of government, Indigenous, conservation, native title, and Aboriginal sovereignty in relation to land management. It inevitably invokes discussion of – or at least acknowledgment of – past acts of dispossession, since the recognition of native title provides tacit acknowledgment of unceded sovereignty.

As Moorcroft states, 'In Australia, social justice issues of Indigenous disadvantage and

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[872] 'The Western preservationist view of "wilderness" contends that there is an inverse relationship between humans and the natural environment. To best protect the natural environment, harmful activities by humans should be minimise in order to keep nature as pristine as possible. This may include banning activities such as hunting or resource use. By contrast, Indigenous Australians' relationship with and understanding of the natural environment is firmly based on the connectedness of humans and the environment, ancestral association to land, and resource utilisation.' See Moorcroft et al (n 969) 17.

[873] See for example, Langton, Rhea and Palmer (n 809); Vincent and Neale (n 782).

[874] As Jackson et al explain, the recognition of native title has helped to secure the proprietary interests of Aboriginal people over large areas of land in Australia and this is undoubtedly a positive outcome. There are however shortcomings in both native title and ongoing barriers to participation in environmental planning that will require Aboriginal groups to 'continue to mobilise themselves and their communities, develop political and community development plans and collaborate with supportive parties'. See Jackson, Porter and Johnson (n 136) 191.

[875] Fung (n 758) 513.

recognition are fundamentally grounded in the rights to land and sea'. What Moorcroft argues, and which I also believe, is that the return of land through native title, the growth in Caring for Country, and the uptake of HCPs by Aboriginal groups has created a nexus between conservation and Indigenous social justice. As Moorcroft states, the two 'have become intrinsically linked' creating what she calls a 'propitious niche'. Achievements secured under an Indigenous social justice agenda such as the return of land via native title are being enjoyed by conservation, whilst Indigenous social justice is increasingly becoming dependent on conservation.[876]

Despite the recognition of native title and other statutory land rights regimes returning large areas of land back to Aboriginal ownership or management, Indigenous Australians remain socially disadvantaged.[877] As Hill et al argue, Aboriginal people within the domain of environmental policy and planning, must drive the process to ensure non-Indigenous conservation planners and government representatives listen to and take on board Indigenous governance structures and local protocols, priorities, and traditional ecological knowledge.[878]

The aspirations of Aboriginal groups are generally to protect and sustainably manage their traditional lands contained within HCPs. These aspirations are predominantly couched in the language of environmental conservation and often use indicators such as landscape health and plant and animal abundance as measures of success. But HCPs are founded upon Aboriginal law and responsibility to properly manage Country. They are, I argue, an expression of Aboriginal sovereignty and self-government.

As Lane et al argue,

> Planning is concerned with mediating between diverse claimants, it has both a problem-solving focus and a future-seeking dimension that is concerned with improving the circumstances of human existence, commonly expressed as equality and sustainability. Most important, it has an emancipatory role; it has the potential to transform the

[876] Moorcroft (n 862) 591.

[877] Ibid.

[878] Hill et al, 'Indigenous Land Management in Australia: Extent, Scope, Diversity, Barriers and Success Factors' (n 857).

> structural dimensions of oppression – what John Friedmann has called the transformative force of planning'.[879]

Democratisation for Aboriginal people is therefore better attained through policymaking and planning processes such as Caring for Country. That is because through planning processes we are able to substantively influence an area of public policy that incorporates the political and cultural authority of Aboriginal people. Despite the marginalisation Indigenous people experience in terms of equal participation in the wider domain of Australian democracy, in the case of Caring for Country not only have Indigenous people created a public policy innovation but in doing so are exercising sovereign authority over their traditional lands and demonstrating, to whatever degree possible, their capacity for self-government.

## 9.3 Caring for Country as Deliberative Policymaking

In this chapter, I have discussed three examples of Aboriginal Caring for Country and the importance of planning to the exercise of sovereignty and self-government. I want to finish this chapter by arguing why Caring for Country can be considered an example of deliberative policymaking.

Much of the published research on Caring for Country emphasises its success in terms of increased financial investment by governments, increased number of Indigenous rangers employed, the growth in IPAs, and its social and economic benefits for Aboriginal people.[880] These are all undoubtedly important measures of public policy success.

However, what I have emphasised through these examples is that Caring for Country projects are also critical sites of engagement on policy and planning between Aboriginal people and the state. That is to say, the policy processes of Caring for Country act to both deepen democratic engagement and enable the exercise of sovereignty and self-government for Aboriginal people. As this thesis argues, the recognition of native title has created a unique deliberative space for Aboriginal people to assert sovereignty and self-government through the processes of public policymaking. The recognition of native title ensures governments and others are no longer able to impose policies and decisions regarding the management of the natural environment over

[879] Michael Hibbard, Marcus B Lane and Kathleen Rasmussen, 'The Split Personality of Planning: Indigenous Peoples and Planning for Land and Resource Management' (2008) 23(2) *Journal of Planning Literature* 136, 138 ('The Split Personality of Planning').

[880] Putnis et al (n 887); Janke et al (n 539).

land where Aboriginal people have a recognised native title interest (arguably even when groups don't).[881] The domain of environmental management has become what Agius et al call a 'politics of place'.[882]

> Indigenous peoples' claims to place provide a largely hidden backdrop to contemporary spatial politics in many settler states. Despite the Indigenous histories as the sole agents of place in making Australian landscapes, colonial and post-colonial erasure of the institutions of Indigenous self-governance, place and identity have often rendered Indigenous agency as absent, archaic or insignificant in the dominant practices of economic, legal and political place-making. Judicial acknowledgement of persistent native title in Australian landscapes was, therefore, a significant shift in the politics of place in Australia.[883]

As Howitt and Lunkapis explain, 'One of the key challenges for planning theory, then, is to acknowledge and address the coexistence of peoples with very different sorts of claims to, relationships with and understandings of place – and each other – and its implications for just, equitable and sustainable decision-making in planning systems'.[884]

I interpret the observations of Agius, Howitt and Lunkapis as supportive of my assertion in Chapter 8 as the contestatory nature of native title.

As Neale et al explain in the Dja Dja Wurrung case study, by working together on an environmental management problem of concern to both Dja Dja Wurrung and the Victorian Government, Caring for Country becomes a process in which both parties confront a 'couple of centuries oppression and government control' through the policy process.[885] Neale suggests

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[881] As Jackson et al explain, native title has changed how policy and planning proceeds. 'Planners must now operate within the understandings of the High Court's decision in Mabo, the Native Title Act 1993 (Cth) and an array of state-level legislative frameworks that respond to Indigenous claims to land and create legal obligations relating to Indigenous cultural heritage. All of these mean that Indigenous property rights, culture, social relations and aspirations need to be understood by planners if we are to work collaboratively to advance Indigenous goals.' See Jackson, Porter and Johnson (n 136) 4.

[882] Agius et al (n 810).

[883] Ibid. 195.

[884] Richard Howitt and Gaim James Lunkapis, 'Coexistence: Planning and the Challenge of Indigenous Rights' in Jean Hillier and Patsy Healey (eds), *The Ashgate Research Companion to Planning Theory: Conceptual Challenges for Spatial Planning* (Routledge, 2016) 109.

[885] Neale et al (n 897) 349.

what Dja Dja Wurrung Traditional Owners are undertaking is not simply an environmental activity but a form of democratic engagement through fire management public policy.[886] While not explicitly employing the language of deliberative democracy, the principles, values and processes they describe are no doubt recognisable to deliberative democracy scholars.

> What has evolved is a complex political and social process that establishes spaces for dialogue and exchange between participating groups to facilitate negotiation of native title in fair and just ways. Participation is voluntary, and all parties enter the negotiation space as equals. Building real working relationships and mutual understanding between the parties is supported. The focus is not centred on where native title does or doesn't exist, but on the practicalities of how coexistence might be realised.[887]

Caring for Country as described in the experiences of Neale et al and others is what Torgerson describes as reflexive policy discourse. As Torgerson explains in a traditional policymaking context, the state and other experts assume a privileged position as knowledge holders but within the Caring for Country context, this assumption is challenged. The line that normally separates the policy discourse of experts (public servants) from the public discourse of citizens (Traditional Owners) is unsettled and redrawn.[888]

Caring for Country as a process wrestles policy expertise away from the usual empowered actors and sites of the political system such as government departments. It is replaced by a 'ground up and community driven' policy process as Aboriginal groups seek to assume a greater role in managing Country. Its upsets the traditional model of governmental policy and decision-making being an unchallenged practice of the state's administrative sphere. As Hunold explains, 'In a traditional policy making approach, those in power simply impose their will or ideas on those with less power'.[889]

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[886] Neale et al (n 897).

[887] Agius et al (n 810) 197.

[888] Hajer and Wagenaar (n 132) 134.

[889] Christian Hunold, 'Deliberative Policy Making' in *International Encyclopedia of Political Science* (SAGE Publications, Inc., 2011).

Caring for Country 'deepens democracy' for Aboriginal people because it enables a genuine influence in the development of public policy.[890] As Hill and Williams explain, deliberative democracy has a strong alignment with Indigenous-led conservation planning:

> The theoretical framing of deliberative democracy as a means of addressing differences in human understandings of the world suggests that such processes should be more capable of enabling the meaningful participation of Indigenous people in NRM decision making and planning.[891]

As Warren explains, governance driven democratisation entails deliberation and participation on particular policy problems. Governance driven democratisation is a response to democracy deficit, particularly the dissatisfaction with electoral democracy. It is 'delinked' from electoral democracy and has a greater capacity to draw different constituencies into dialogue.[892] One feature of Warren's theory is the proposition that governance driven democratisation is essentially elite driven. That is to say, by elected officials or bureaucrats. I disagree. In the case of Caring for Country, demands for greater participation and decision making in environmental planning and policy processes has been driven by Aboriginal people and organisations.

Nonetheless, I agree with Warren that the advantage of planning and policy spaces is that they are uncoupled from adversarial, parliamentary politics. Recalling my analysis in Chapter 7 of the inability or unwillingness of the federal Parliament to listen to Aboriginal voices and create space for deliberation on sovereignty and self-government, planning and policy processes become an important and accessible alternative forum for deliberative and participatory democracy between Aboriginal people and the state.[893]

The domain of policy and planning strengthens democratic participation because engagement in public policy democratises the relationship between citizens and the state as 'discourse

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[890] Patrick Heller and Vijayendra Rao (eds), *Deliberation and Development: Rethinking the Role of Voice and Collective Action in Unequal Societies* (World Bank Group) 4. ('*Deliberation and Development*').

[891] Rosemary Hill and Liana Williams, Indigenous natural resource management: overcoming marginalisation produced in Australia's current NRM model, in Taylor, Robinson and Lane (n 135).

[892] Warren, 'Governance-Driven Democratization' (n 754) 6.

[893] Walker, Jojola and Natcher (n 805); recalling Borrows' argument that engagement between Indigenous people and governments can change how certain legal issues are understood and provide scope for Indigenous customary law. Dialogical engagements create opportunities for laws to be re-interpreted and accommodated in spaces other than on the courts or other formal institutions of law. See Borrows (n 94).

merges with the process of governance'. 'The prospect is that democracy might be enhanced not against or in spite of policy discourse, but through it.'[894]

Despite considerable criticism of native title and what it delivers, the recognition of rights in land has nonetheless created opportunities for the participation of Aboriginal people in public policy and governance.

As I have argued, Caring for Country is a form of democratisation through public policy as it enables Aboriginal people to reassert sovereignty and self-government within a 'politics of place' created by native title.[895] As I discussed in Chapter 6, Aboriginal people have persistently called for differentiated inclusion in which we are able to influence the laws and policies that affect us. And as discussed in Chapter 7, at the national political level, differentiated inclusion if often rejected or at least strongly resisted. The Australian state refuses to create space for our direct participation in the decision-making processes of government. The most blatant case of this rejection of differentiated inclusion was of course the Howard government's decision to abolish ATSIC that was a deliberative body with a mandate to include the views of Aboriginal people in the development of laws and policies.

The refusal at the national political level to space for differentiated inclusion (and by implication, deliberative inclusion) has meant Aboriginal people have to seek out other spaces and other processes to have our voices heard in decision making. The example I have discussed is Caring for Country. Within this context, Aboriginal people have innovatively used environmental planning and policy as means for managing Country in accordance with traditional law and custom and by doing so, exercise a degree of sovereignty and self-government.

## 9.4 Conclusion

In this chapter, I applied deliberative policy analysis to the area of public policy known as Caring for Country. Engaging with the theories and empirical studies of various deliberative and participatory democracy scholars, I argued the domain of environmental policy and planning is an important forum for Aboriginal people to participate in decision-making. Native title and practice of Caring for Country has created space for participatory governance. Additionally,

[894] Douglas Torgerson, 'Democracy Through Policy Discourse', in Hajer and Wagenaar (n 115) 113.

[895] Agius et al (n 810).

Caring for Country enables Aboriginal people to exercise a degree of sovereignty and self-government.

The influence of Caring for Country as public policy can be measured in terms of growth in government funding and the uptake of Caring for Country by Aboriginal groups since the first Caring for Country Unit established by the NLC in 1995 and the first IPA in 1997. There are now many hundreds of Indigenous ranger groups, over 80 IPAs and funding has grown from an initial government investment of $47 million in 2007 to $700 million in 2021 to support Aboriginal people managing Australia's natural and cultural heritage. In these terms, it is clear that Aboriginal people and Caring for Country have become a significant influence on environmental policy in Australia.

I now turn to discuss agreement making as another form of deliberative and participatory democracy practiced by Aboriginal people within the native title system.

# 10 'Treaty Like' Agreement Making Through Native Title

> We recognise that this land and its waters were settled as colonies without treaty or consent. [896]

Unlike North America and Aotearoa New Zealand, where the British also colonised and dispossessed Indigenous people, there is no history of treaty making in Australia.[897] This situation makes the need to negotiate a treaty between Aboriginal and Torres Strait Islander people and the Australian state, almost two and a half centuries later, a difficult one for many to accept.

In this chapter, I discuss the practice of agreement making made possible through the recognition of native title by using the concept of 'deliberative negotiation' as espoused by deliberative democracy advocates such as Jane Mansbridge[898] and Mark Warren. Early formulations of deliberative democracy theory considered negotiation a form of strategic bargaining and therefore antithetical to the ideals of deliberation. But as Mansbridge argues, deliberative democracy can and should make room for negotiation and self-interest. 'In short, in the view of many contemporary theorists, deliberation can either include or have a productive relationship with bargaining and negotiation.' [899]

In particular, I discuss deliberative negotiation as a response to what Mansbridge calls 'legislative gridlock' in democratic politics whereby the legislature fails to convert the wills of citizens into a collective decision. A gridlocked system, Mansbridge explains, tends to defeat or stall emerging claims and thereby maintains 'existing patterns of inclusion and exclusion into place' by failing to respond to problems and opportunities driven by social and economic change.[900]

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[896] Prime Minister John Howard, 11 May 2001, cited in Brennan, Gunn and Williams (n 87).

[897] Anker and Shah (n 712) 6.

[898] Jane Mansbridge and Cathie Jo Martin (eds), *Political Negotiation: A Handbook* (Brookings Institution Press, 2016).

[899] As Mansbridge explains, 'The classic statements of deliberative democratic theory defined deliberation in opposition to negotiation. As deliberative theory has developed, that opposition has weakened'. See, Jane Mansbridge, *Deliberative and Non-Deliberative Negotiations: HKS Faculty Research Working Paper Series RWP09-010* (Harvard Kennedy School, John F. Kennedy School of Government, 2009).

[900] Mansbridge and Martin (n 560) 144.

The unwillingness of the state to recognise Aboriginal sovereignty and the right to self-government since *Mabo* represents a form of political gridlock or stalemate in Australian politics. Aboriginal people demand the Australian state recognise our unceded sovereignty and agree to negotiate treaty, and recognise our right to self-government. Yet the Australian state largely resists these matters. As Yawuru man and senator for Western Australia in the federal parliament Patrick Dodson explains, Australia and its political leaders conveniently ignore the fact land was stolen from Aboriginal people by force.

> In their wisdom, these prime ministers have conveniently ignored the fact that the land was taken from First Nations people by force, without consent or compensation. There was never any agreement as to how the rights and interests of the First Nations people were to be accommodated in the constitution. This rhetoric is aimed at delegitimising the genuine position of the First Nations as sovereign peoples. It has the effect of neutralising our sovereignties, subsuming our legitimate difference (what makes us legally distinct as a people) and projects the notion of citizenship equality.[901]

This political inertia, particularly at the national political level to negotiate sovereignty, treaty, and self-government, is why I argue these issues never disappear, they simply find other forums to be discuss. As I argue in this thesis, these matters have shifted to the native title system, making it a contestatory mechanism (Chapter 8) and an unintended forum for deliberative and participatory democracy. In other words, the negotiating treaty like agreements in the absence of a formal treaty making framework is illustrative of the contestatory nature of the native title system.

In the context of negotiating treaty like agreements that recognise aspects of Aboriginal sovereignty and right to self-government, I discuss a specific kind of agreement, 'comprehensive settlements'.[902] As Tran et al explain,

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[901] Patrick Dodson, 'Challenge of Negotiation: Learning the Hard Way' [2018] (60) *Griffith REVIEW* 58, 61.

[902] According to Bradfield, Patrick Dodson says there is a need for a layer of negotiations which moves Indigenous-state relations beyond a level of citizenship which is simply 'the same' as all other Australians. Similarly, Mick Dodson views comprehensive agreement making as a 'constitutional' exercise and the reimagining Australia and the place of Indigenous peoples within it. See Dr Stuart Bradfield, 'Agreeing to Terms: What Is a "Comprehensive" Agreement?' (2004) 2(26) *Land, Rights, Laws: Issues of Native Title* 17; Krysti Guest, *The Promise of Comprehensive Native Title Settlements: The Burrup, MG-Ord, and Wimmera Agreements* (Discussion Paper No 27, AIATSIS, 2009).

> Calls for comprehensive agreement-making come under the backdrop of an international human rights regime which recognises the fundamental rights of Indigenous peoples to self-determination, to freely determine their political status and to maintain and strengthen their distinct political, legal, economic, social and cultural institutions.[903]

In the absence of a formal treaty or treaties, 'comprehensive settlements' can go some way towards addressing past injustices as well as helping to redefine future relations and interactions. Without a treaty, comprehensive settlements between Aboriginal groups and Australian governments have an unavoidable 'political intent'.[904] This is because, rather than deny the sovereignty and self-government claims of Aboriginal people, these ideals are included in settlements as a sign of respect in order to eliminate 'unnecessary antagonism'.[905]

Again, an intended purpose of this thesis is to illustrate how the normative ideals of deliberative and participatory democracy apply to the circumstances of settler-colonial Australia and the practices of Aboriginal people within the native title system. As stated, my intention is to make 'visible' the largely invisible world of deliberative participatory democracy practices of Aboriginal people within Australian democracy. Agreement making between Indigenous peoples and settler-colonial states does not feature prominently in the literature on deliberative negotiation. In what follows I hope to demonstrate how the ideals of deliberative negotiation are contained within 'treaty like' agreements negotiated between Aboriginal people and Australian governments that recognise issues such as unceded sovereignty and the right to self-government.

I now turn to discuss the ideal of deliberative negotiation.

## 10.1 The Ideal of Deliberative Negotiation

[903] Dr Tran Tran et al, *Comprehensive Settlement: Heads of Agreement* (AIATSIS, 2021) 38, 4.

[904] As Strelein argues, Australian governments should seek to reach agreements through treaties and comprehensive settlements and other mechanisms in order for Australia to negotiate its place on the lands of Aboriginal and Torres Strait Islander people which it 'occupies without consent, without surrender and without justice'. See Lisa Strelein, 'Agreement without Compromise: Maintaining the Integrity of Indigenous Sovereignty in Negotiations with Governments' (2021) (2) *Australian Aboriginal Studies* 81.

[905] Mansbridge (n 897) 13.

Early formulations of deliberative democracy theory treated negotiation as a form of bargaining and therefore antithetical with the ideals of deliberation.[906] 'The classic statements of deliberative democratic theory defined deliberation in opposition to negotiation. As deliberative theory has developed, that opposition has weakened.'[907]

As Mansbridge explains, Cass Sunstein is credited with developing the concept of 'deliberative negotiation' in the context of the US judiciary and his theory of 'incompletely theorized agreements'.[908]

> Incompletely theorized agreements play a pervasive role in law and society. It is rare for a person, and especially for a group, to theorize any subject completely - that is, to accept both a highly abstract theory and a series of steps that relate the theory to a concrete conclusion. In fact, people often reach incompletely theorized agreements on a general principle. Such agreements are incompletely theorized in the sense that people who accept the principle need not agree on what it entails in particular cases. Incompletely specified agreements have distinctive social uses. They may permit acceptance of a general aspiration when people are unclear about what the aspiration means, and in this sense, they can maintain a measure of both stability and flexibility over time. At the same time, they can conceal the fact of large-scale social disagreement about particular cases.[909]

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[906] Mansbridge (n 897).

[907] Ibid. 1.

[908] As Sunstein explains, legal systems adopt a specific strategy for producing agreement amidst pluralism and conflict, what he calls 'incompletely theorized agreements'. Parties to a disagreement may opt to agree on a result with a 'relatively narrow or low-level explanations for it'. They need not agree on fundamental principles. 'The distinctive feature of this account is that it emphasizes agreement on (relative) particulars rather than on (relative) abstractions. This is an important source of social stability and an important way for diverse people to demonstrate mutual respect, in law especially but also in liberal democracy as a whole.' What I take Sunstein's theory to be suggesting is that parties can negotiate an outcome from very different foundational perspectives but still reach an agreement that does not require to completely justify foundational questions. In the case of negotiating comprehensive settlements in the context of native title, Aboriginal people hold sovereignty and self-government to be a foundational issue. This may conflict with governments who reject the notion of Aboriginal sovereignty. In contrast, empowering Aboriginal people to participate in decision making may be viewed by both as positive outcomes. Providing recognition of a form of Aboriginal authority will satisfy both parties. Cass R Sunstein, 'Incompletely Theorized Agreements Commentary' (1994) 108(7) *Harvard Law Review* 1733; Cass R Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, Second Edition, 2018).

[909] Sunstein (n 906) 1739.

As Mansbridge explains, outside the judicial realm, Sunstein argued forms of deliberative negotiation allows citizens to find commonality – and a common way of life – without producing unnecessary antagonism. They allow people to show each other a high degree of mutual respect, civility, or reciprocity by agreeing not to discuss deeply contested issues fully as a way of deferring to each other's strong convictions.[910]

As Warren et al explain, deliberative negotiation sits between the two extremes of *pure deliberation* and *pure bargaining* and is considered an important democratic tool through which citizens and their representatives make collective decisions that affect their lives.

> By negotiation in the political realm, we mean a practice in which individuals, usually acting in institutions on behalf of others, make and respond to claims, arguments, and proposals with the aim of reaching mutually acceptable binding agreements.[911]

Mansbridge explains this shift in understanding of the role of negotiation by deliberative theorists:

> Contemporary theorists exploring the concept of deliberation have moved significantly away from the classic ideal in this, as in other, respects. Amy Gutmann and Dennis Thompson, for example, argue that 'Deliberative democracy makes ample room for bargaining. So long as all sides in a political controversy accept moral reciprocity [mutually acceptable reasons and accommodation based on mutual respect] (*parentheses in original*) as a constraint on their reasons for action, bargaining is a deliberatively legitimate way of resolving political conflicts that would otherwise remain unresolved'.[912]

Negotiation often implies the notion that parties have fixed positions or sets of resources, meaning one parties gain is a loss for the other. Negotiation may be characterised by strategic action, mistrust, and information asymmetry. A bargaining process may involve one party manipulating information about the benefits or costs of policy alternatives and using threats of sanctions such as exiting negotiations in order to pressure the opponent into concessions.[913]

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[910] Mansbridge (n 897) 12.

[911] Mark E. Warren et al 'Deliberative Negotiation' in Mansbridge and Martin (n 560) 151.

[912] Mansbridge (n 897) 6.

[913] Daniel Naurin & Christine Reh, 'Deliberative Negotiation' in Bächtiger et al (n 6) 729.

As Naurin and Reh explain, deliberative negotiation seeks to strike a balance between pure forms of deliberation and negotiation. The goal is to produce what they term 'integrative solutions' which may be of a *full* or *partial* kind. In *fully integrative* negotiation, the parties find a creative way to approach the problem, which provides both with what they actually want while neither party loses: a kind of win-win outcome. Such an agreement 'dissolves' any conflict or shows that a perceived conflict was only apparent.[914] This, they argue, is a rare occurrence. Nonetheless, 'the promise of deliberative negotiation is that it potentially can increase the legitimacy needed for agreements to remain stable. It may also strengthen the subjective legitimacy of the outcome by providing the participants with a process characterized by fairness and respect'.[915]

More often, deliberative negotiation produces a *partial* solution. When parties bring a host of issues on which they place different priorities, they can trade on those issues. A compromised outcome may be reached where parties do not find a way of achieving a fully integrated solution but still engage in communication based on mutual justification and respect. Through *partially integrative solutions,* parties can discover ways of exploiting 'differing valuations of a conflict for joint gain'.[916]

In this scenario, conflict is not completely dissolved but by prioritising interests and negotiating on matters of low priority for one party and high priority for the other, a solution of a mutually agreeable kind can be reached. Outcomes then consist of fair compromise without necessarily abandoning individual 'motivations and preferences'. 'Deliberative negotiation recognises there are conflicts regarding preferences but the aim is not to question the nature of the conflict but to identify legitimate ways of reaching agreement'.[917]

Warren et al suggest there are five types of agreement-seeking procedures on a spectrum, with pure deliberation to pure bargaining sitting at either end. In between are three types of deliberative negotiation. Almost all actual political negotiations include interactions of several of these five types, and a few include all of the types. 'We use negotiation as an umbrella term to include all processes ranging from pure deliberation through the three forms of deliberative negotiation to pure bargaining'.[918]

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[914] Mansbridge and Martin (n 560) 156.

[915] Bächtiger et al (n 6) 729.

[916] Daniel Naurin and Christine Reh, Deliberative Negotiation, in ibid. 731.

[917] Ibid. 729.

[918] Mark E. Warren et al 'Deliberative Negotiation' in Mansbridge and Martin (n 560) 153-156.

Pure bargaining, they explain, lacks deliberative elements. 'Rather than disclosing information to find ways of achieving joint gains, the negotiators will take advantage of any information asymmetries in the situation to reveal no more than what is strategically useful.'[919] Pure bargaining has strongly negative connotations often includes threats, including the threat of exiting from negotiations. It is characterised by 'misrepresentation, particularly by not revealing one's hand so to speak, and "haggling"'.[920]

As Warren et al explain, deliberative negotiation in the political realm constitutes a 'practice in which individuals, usually acting in institutions on behalf of others, make and respond to claims, arguments, and proposals with the aim of reaching mutually acceptable binding agreements'.

> By deliberative negotiation, we mean negotiation based on processes of mutual justification, respect, and reciprocal fairness. Such negotiation includes elements of arguments on the merits made by advancing considerations that the other parties might accept; searching for zones of agreement and disagreement; and arguing about the terms of fair processes as well as outcomes, with a background of sufficient mutual terms of fair processes respect for those arguments to have motivating force. Deliberative negotiation takes place in a context of relative openness and disclosure about interests, needs, and constraints.[921]

Another important aspect of deliberative negotiation is that parties should engage from positions of equal power. 'The simplest statement of the equality norm of a just negotiation is that all parties to a negotiation should have equal power.' In the event of there not being equal power, negotiations are affected to the extent that the part with most power is able to coerce or threaten the negotiation process. This may not involve any use of force or sanction but simply the ability to leave the negotiation.

But as Mansbridge acknowledges, the reality that coercive power being fully absent from deliberative negotiation 'is not only impossible to achieve; it is even hard to envision'.[922] This is

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[919] Ibid. 161.

[920] Mansbridge et al develop a set of deliberative negotiation typologies ranging from pure bargaining to pure deliberation with *fully* and *partially* realised outcomes that can be produced from deliberative negotiation. See ibid. 153-156; Bächtiger et al (n 6) 730-731.

[921] Mark E. Warren et al 'Deliberative Negotiation' in Mansbridge and Martin (n 560) 151-152.

[922] Mansbridge (n 897) 10.

true of negotiations between Aboriginal groups, governments and private interests.[923] Additionally, the right to negotiate provisions under the *Native Title Act 1993* have been criticised as giving preference to non-Indigenous interests for 'certainty' in relation to their proposed land use activities at the expense of delivering 'land justice' for dispossession to Aboriginal and Torres Strait Islander people.[924]

This reality makes negotiating 'treaty or treaty like' agreements all the more remarkable. As I will discuss, native title has nonetheless provided a forum for the negotiation of 'treaty like' comprehensive settlements. The ability of Aboriginal people to negotiate such agreements through native title helps to overcome what Warren et al call 'legislative gridlock', which can 'damage democracy's ability to get things done'.[925]

What my discussion of comprehensive settlements will illustrate is that deliberative negotiation does occur between Aboriginal people and the Australian state within the native title system. In addition, these examples are illustrative of deliberative and participatory democracy within the context of settler colonialism and the political struggles of Indigenous people.

I now turn to discuss the importance of treaty in the relations between Aboriginal people and the Australian state.

## 10.2 Calls for Treaty in Australia

> Voice. Treaty. Truth.[926]

[923] A study by O'Faircheallaigh suggests that under native title legislation, the agreement making through ILUAs and right to negotiate are flawed because of 'fundamental inequalities in the bargaining power of Indigenous peoples in their dealings with corporations and the state', the variable legal context in which agreements are negotiated, and how strongly Indigenous groups are politically organised in order to negotiate effectively. See, Ciaran O'Faircheallaigh, 'Explaining Outcomes from Negotiated Agreements in Australia and Canada' (2021) 70 *Resources Policy*.

[924] Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title* 16.

[925] Mark E. Warren et al 'Deliberative Negotiation' in Mansbridge and Martin (n 560) 144.

[926] There are three elements to the Uluru Statement from the Heart. 1) The enshrining of a First Nations Voice to Parliament in the Australian Constitution (Voice); 2) establishment of a Makarrata commission for treaty and agreement making (treaty); and 3) a national truth telling process (truth). See, Referendum Council (n 672).

Records show that the instructions the British Lords of the Admiralty provided Captain James Cook upon his departure from Britain in 1768, were 'to take possession with the consent of the indigenous people' but in cases where he found a territory to be uninhabited to claim it as 'first discoverers and possessors'. Despite clear instructions for Cook to seek the consent of Aboriginal people, we know he – and later Governor Phillip – made no effort to do so. The belief amongst British colonists was that Aboriginal people were too primitive and lacking any form of government or laws that the British could recognise and so they took possession of the land in the name of Britain under the authority of international law.[927]

As Langton explains, Britain had used treaties for the settlement of disputes from at least the 13th Century.[928] However, in the case of Australia, the British felt no compulsion to negotiate a treaty because the 'existence of the original peoples was simply denied altogether'.[929] The absence of a treaty or treaties was further exacerbated by the High Court's failure to seize the opportunity presented by *Mabo* to address 'historic grievance about land justice'. Australia's 'lack of sophistication' hinders the place of Indigenous peoples in the modern nation state and development of Indigenous rights and institutions.[930]

As Dodson and Strelein acknowledge, the British negotiated treaty agreements with Native Americans and Canadian Aboriginal peoples on the basis that they constituted

> sovereign peoples who had their own laws and were capable, as nations and tribes, of forming and breaking their own alliances with others, including colonial powers, and who had national or tribal territories under their control. The treaty process acknowledged that there is or was a distinct relationship between the two groups that were defined in those agreements. These treaties had the international character of agreement making – *nation to nation* [emphasis added].[931]

Because Britain did negotiate treaties with other Indigenous peoples, a treaty or treaties between Aboriginal and Torres Strait Islander people and the Australian state remain(s) an

[927] Attwood, 'Law, History and Power: The British Treatment of Aboriginal Rights in Land in New South Wales' (n 268) 173.

[928] Marcia Langton, 'A Treaty between Our Nations?' (2001) (No. 50) *Arena Magazine* 28, 29.

[929] Langton et al (n 411) 30.

[930] Ibid.

[931] Dodson and Strelein (n 139) 828.

important political objective for Aboriginal people.[932] Therefore, agreement making between Aboriginal people and governments in Australia takes on a particular importance in the context of native title.

Despite the lengthy lapse in time between British colonisation and the present day, negotiation of a treaty is still possible. As Brennan et al explain, it was only in the 1970s that Canada entered into modern day treaties with First Nations people between national and provincial governments. 'It was a political decision by the democratically elected government of the day. Treaty-making has been policy and practice in Canada for more than a generation and is a long way from being finished.'[933]

In Australia, public calls for a treaty between Aboriginal and Torres Strait Islander people have been a part of public discourse since the 1970s. As Haughton and Kohen explain, in 1977 the National Aboriginal Conference (NAC), established under the Malcolm Fraser government to provide Aboriginal views to the government, was one of the first bodies to call for treaty negotiations. At the NAC National Conference in April 1979 members of the NAC called for a 'Treaty Commitment' between the Aboriginal Nations and the Australian Government. The NAC decided that the agreement should have an Aboriginal name – Makarrata, a Yolngu word referring to a process of reconciliation after conflict.[934]

The Fraser government then set up a committee to inquire into 'the feasibility of a compact, or "Makarrata", between the Commonwealth and Aboriginal people'. The NAC made a submission to the Senate inquiry that said in part that 'that Aboriginal and Torres Strait Islander people had maintained their sovereignty and nationhood and should be treated as equal in political status

[932] Several states in Australia (Victoria, South Australia, Queensland, and Northern Territory) are negotiating treaties or have indicated an intention to negotiate treaty with Aboriginal and Torres Strait Islander people. Negotiations in Victoria are the most advanced with the creation of the First Peoples' Assembly of Victoria as an independent and democratically elected body to represent Aboriginal Traditional Owners in Victoria to negotiate with the Victorian Government. Also, the Final Report of the Referendum Council, said 'The pursuit of Treaty and treaties was strongly supported across the Dialogues. Treaty was seen as a pathway to recognition of sovereignty and for achieving future meaningful reform for Aboriginal and Torres Strait Islander Peoples. Treaty would be the vehicle to achieve self-determination, autonomy and self-government'. See *Final Report of the Referendum Council ('Uluru Statement from the Heart')* (n 72).

[933] Brennan, Gunn and Williams (n 87) 201.

[934] James Haughton and Apolline Kohen, *Aboriginal and Torres Strait Islander Treaties, Constitutional and Legal Recognition and Representation in Australia: A Chronology* (Department of Parliamentary Services, 31 March 2022) 31.

with the Commonwealth'. The eventual Senate Standing Committee on Constitutional and Legal Affairs delivered a report on the idea of a treaty in 1983 which rejected the ideal of a 'treaty' as unrealistic given Indigenous peoples' lack of international standing, but recommended that a compact or Makarrata could be created based upon the inclusion of a new section in the Constitution granting a power to the Commonwealth government to enter into a compact with representatives of the Aboriginal people.[935]

Calls for a treaty from Aboriginal and Torres Strait Islander advocates re-emerged in the lead up to the 1988 bicentennial of British colonisation. Later in 1988, the *Barunga Statement* was presented to then Prime Minister Bob Hawke by Galarrwuy Yunupingu and Wenten Rubuntja of the Northern and Central Land Councils. The statement called for a treaty, a compensatory scheme for the loss of traditional lands, national land rights legislation, an elected Aboriginal and Torres Strait Islander representative body, action against discrimination by police and the justice system, self-determination and the protection of human rights.[936]

Hawke responded by stating his government would enter into a treaty with Indigenous Australians by 1990, a promise his government ultimately failed to honour.[937] Treaty remains one of a number of matters of 'unfinished business' between Aboriginal and Torres Strait Islander people and the Australian state.[938]

Yet, Australia, at least at the national political level, continues to baulk at the proposition of negotiating a treaty – or treaties – with Aboriginal and Torres Strait Islander people.[939] For

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[935] Ibid. 32.

[936] Ibid. 34.

[937] Aaron Corn & Neparrna Gumbula, 'Now Balanda Say We Lost Our Land in 1788' in Langton et al (n 411) 111.

[938] It has once again re-emerged as a political priority for Aboriginal and Torres Strait Islander people as part of the Uluru Statement's call for a Makarrata Commission. See Shireen Morris and Harry Hobbs, 'Imagining a Makarrata Commission' (2023) 48(3) *Monash University Law Review*.

[939] In 2000, former Prime Minister John Howard dismissed the idea of a treaty between Indigenous people and the Australian state by saying, 'an undivided united nation does not make a treaty with itself'. Yet several states in Australia are negotiating treaties or have indicated an intention to negotiate treaty with Aboriginal people including Victoria, South Australia, Queensland the Northern Territory. Victoria is the most advanced state in this regard, and has supported the creation of the First Peoples' Assembly of Victoria as an independent and democratically elected body to represent Traditional Owners of Country in Victoria with cultural authority to negotiate with the Victorian Government. Through the Assembly, Traditional Owners in Victoria have called for the establishment of a number of new independent institutions to support treaty negotiations. The first new body is the Yoo-rrook Justice Commission, with powers to investigate past and ongoing injustices against Indigenous People in Victoria since colonisation. For

Hobbs, the absence of a treaty or treaties in Australia results in a political and legal system that neither constitutionally protects Indigenous rights nor provides for specific mechanisms to promote Indigenous interests in the processes of Australian government.[940] Treaty-talk in Australia, particularly at the national level, is plagued by the assumption that a treaty would amount to a radical, perhaps impossible, shift in Australia's public law system.[941]

As Hobbs argues, negotiation of a treaty or treaties would reflect the reality of Australia as a pluri-legal state and a substantively more inclusive notion of Australian citizenship.[942] A treaty would recognise Aboriginal people as distinct polities with a citizenship status very different to those of other Australians 'based on their status as prior self-governing communities'. Also, a treaty should be reached by a fair process of negotiation conducted in good faith that gives due recognition to each party as a 'polity'. And lastly, a treaty would recognise and establish terms and mechanisms for Aboriginal decision-making and control that amounts to at least a limited form of self-government.[943]

Of course, treaty negotiations have been elusive at the national level; however, there is progress on treaty negotiations at the sub-national level in Australia.[944]

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many Indigenous people truth telling and the public sharing of experiences of injustice and discrimination are considered an essential first step in any treaty process. See, Yoorook Justice Commission (n 663).

[940] Hobbs, 'Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia' (n 542) 175.

[941] Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 38, 3.

[942] Hobbs, 'Constitutional Recognition and Reform' (n 507) 185.

[943] Ibid.

[944] There have been various initiatives undertaken by state and territory governments in Australia to negotiate treaty with Indigenous people within their jurisdictions including the 2016 announcement by the Victorian Government to negotiate a treaty with Aboriginal Victorians. Also in 2016, the Northern Territory Chief Minister Michael Gunner declared his government would establish a subcommittee on Aboriginal affairs to 'drive public discussions on a treaty' between the Northern Territory and Indigenous nations. Then in December 2016, discussion began between the South Australian Government and three Indigenous nations aimed at finalising a treaty. In July 2017, South Australia commenced negotiations with three Aboriginal nations: the Ngarrindjeri, Narungga and Adnyamathanha and appointed Dr Roger Thomas, a senior Kokatha and Mirning man, as Treaty Commissioner for South Australia. In 2018, the South Australian Labor Government signed the Buthera Agreement with a number of Indigenous nations but lost the 2018 election and the incoming Liberal Government abandoned the treaty process. In 2022, Labor was re-elected and the new government has committed to renewing the treaty process in South Australia. See Haughton and Kohen (n 932); Hobbs and Williams (n 939). In February 2023, the Path to Treaty Bill was introduced into the Queensland Parliament. The bill was passed by the Queensland parliament on 10 May 2023, see https://statements.qld.gov.au/statements/97711

The unwillingness of the Australian state, represented here as the federal government, to negotiate a treaty or treaties is the reason, I believe, the native title system has become an unintended deliberative democratic space for Aboriginal people. I made a similar point in the previous chapter, in which I said the lack of 'deliberative space' in national politics meant practices such as Caring for Country become de facto forums for deliberative and participatory democracy.

As Langton et al explain, before the 1992 *Mabo* decision, statutory land rights schemes and to some extent cultural heritage legislation provided a limited framework for Aboriginal people to engage in agreement making with governments. However,

> native title is important because, for the first time, it engaged large groups of Aboriginal and Torres Strait Islander peoples in a process of recognition of their jurisdiction through negotiation and agreement making. It has provided a platform on which much negotiation, both native title and non-native title, has been built.[945]

Under the *Native Title Act 1993*, Aboriginal people enjoy a special 'right to negotiate'[946] and enter into what are known as Indigenous land use agreements (ILUAs)[947], one of few positive features of the largely discriminatory reforms to native title legislation under John Howard's *Native Title Amendment Act 1998* (Cth).[948] A search of the NNTT's Registrar of Indigenous Land Use Agreements shows that from the commencement of the *Native Title Act 1993* on 1 January

[945] Langton et al (n 411) 16.

[946] The special 'right to negotiate' for native title holders outlined in the preamble of the Act: 'Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate (emphasis added) its form, must be provided to the holders of the native title. However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.' *Native Title Act 1993* (n 579).

[947] ILUAs are legally binding on parties to deliver certain responsibilities and outcomes. An ILUA clarifies what activities can be undertaken on the land in question, and what compensation (resources, funds) are payable for impairment or loss of native title. They facilitate the exchange of resources – funds, employment – for access to native title lands. They are legal contracts – a transaction – to cover costs for services rendered, and in some cases, a modicum of compensation for loss of native title.

[948] Deirdre Howard-Wagner and Amy Maguire, 'The Holy Grail or The Good, the Bad, and the Ugly?: A Qualitative Exploration of the ILUAs Agreement Making Process and the Relationship Between ILUAs and Native Title' (2010) 14(1) *Australian Indigenous Law Review* 71.

1994 until December 1999, just six ILUAs were registered with the NNTT. By contrast, between 1 January 2000 and December 2004 after the 1998 amendments, 123 ILUAs were registered.[949]

Yet as Agius et al explain, while the 'right to negotiate' and ILUA provisions of the *Native Title Act 1993* encouraged a shift towards negotiated settlement of land use conflicts concerning native title, agreement making in the native title system is mostly a domain for legalism and not an opportunity for Indigenous Australians to achieve self-determination.

> Questions of self-determination and justice for indigenous Australians seem to have been overwhelmed by technical questions about the administration of the Native Title Act. Indeed, Australia's native title system rapidly developed as a domain for experts from which many Aboriginal and Torres Strait Islander Australians are deeply alienated.[950]

Despite being socioeconomically disadvantaged and lacking political power, Langton et al argue, Aboriginal peoples' agreement making with governments is nonetheless helping to forge 'a new approach to governmental and Indigenous affairs that, to varying degrees, gives Indigenous people a genuine decision-making role in a range of issues affecting their lives and their territories'.[951]

As Strelein notes, a paradox seems to have emerged within the native title system in which the courts have narrowed their juridical interpretation of native title's meaning have expanded the notions of Indigenous political autonomy, authority and jurisdiction through agreement making, creating a 'conflict between the "legal conclusion" of native title and "the idea" of native title'.

> Native title may have been curtailed by the courts as a result of impossible standards of proof, intricate inquiries and problematic jurisprudence. Yet, the idea of native title, or what native title symbolises, may have formed the basis for greater recognition of the

[949] NNTT, (Webpage), http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-Register-of-Indigenous-Land-Use-Agreements.aspx

[950] Parry Agius et al, 'Doing Native Title as Self Determination: Issues From Native Title Negotiations in South Australia' (2003).

[951] Langton et al (n 411) 25.

> rights of Aboriginal and Torres Strait Islander peoples to negotiate directly with government from a position of sovereign authority.[952]

While treaty remains off the negotiation table within national politics, nonetheless treaty like settlements negotiations have and are taking place within native title negotiations. I now turn to discuss comprehensive settlement, which I argue are examples of deliberative negotiation within the native title system.

## 10.3 Comprehensive Settlements: An Example of Indigenous Deliberative Negotiation

In the context of Australia and the broader political claims of self-determination by Aboriginal people, 'comprehensive settlements' have emerged as means for Aboriginal people to negotiate treaty-like agreements in the absence of an institutional framework for treaty making.[953] Native title therefore offers an alternative forum for such negotiations.

Writing in 2004, Bradfield explains,

> The term 'comprehensive agreement' has a particular resonance in a jurisdiction such as Canada, where it generally involves negotiation between First Nations and the state about land, and the jurisdiction to be exercised over that land. By contrast, Australia has limited practical experience with 'comprehensive' agreements, or settlements.[954]

These types of agreements or settlements are considered 'comprehensive' because they seek to address historical injustice issues and include recognition of Indigenous people's jurisdiction or and as political entities.[955]

The ILUAs are the key mechanism for negotiation between Aboriginal groups holding native title, governments, and other parties within the native title system.[956] ILUAs are voluntary agreements negotiated between native title groups and others concerning the use of land and

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[952] Lisa Strelein, 'Symbolism and Function: From Native Title to Aboriginal and Torres Strait Islander Self-Government' in ibid. 190.

[953] As discussed, the treaty negotiation process in the state of Victoria is providing important lessons in terms of what institutional and deliberative processes are necessary for state-based treaty making. Tran et al (n 1011).

[954] Bradfield (n 900) 2.

[955] Bradfield (n 900).

[956] For a discussion of ILUAs under the *Native Title Act 1993*, see Bartlett, *Native Title in Australia* (n 48) 690-706.

waters. They follow on from a successful native title claim when the claimants, now formally recognised as holding native title rights to a particular area, are able to negotiate with other parties. However, ILUAs can also be used by Aboriginal groups that have not yet secured (and may not secure) a successful native title determination to nonetheless negotiate certain benefits such as employment or compensation. That is to say, they may be used in instances when an Aboriginal group does not hold native title, but a collaborative relationship is sought by all parties including governments or companies.[957] The exact contents of an ILUA can vary and will depend on the strength and location of the native title determination and the negotiating ability of the group.[958]

ILUAs often articulate how the rights of native titleholders are to be recognised as well as contain the terms and conditions for parties seeking to access and undertake development activities on native title held lands. An ILUA may include compensation or range of benefits native title holders will receive as a consequence of a proposed land use activity such as mining.[959] ILUAs may also cover other activities such as the construction of infrastructure such

[957] A determination of native title is the strongest means for having ownerships rights over traditional lands and waters recognised under Australian law. However, native title claims can be expensive and take up to a decade to determine. Some Aboriginal groups may be persuaded that their claim may not yield a positive determination – either by consent or a court determination. For groups unlikely to secure a positive determination, ILUAs can nonetheless be a beneficial outcome as Traditional Owners. ILUAs are not recognition of native title but a legal contract binding on all parties that outline benefits and responsibilities. In a sense, ILUAs can be a gesture of goodwill used by governments, businesses, civil society groups, and institutions that want to establish good relations with an Aboriginal group who may not hold native title rights over their traditional lands. See Howard-Wagner and Maguire (n 946).

[958] In order from weak to strong, the hierarchy of native title determinations are a) by consent, b) non-exclusive, or c) exclusive. There are three types of ILUAs available under the *Native Title Act 1993*; 1) body corporate agreements; 2) area agreements; and 3) alternative procedure agreements. A consent determination is when parties opt not to litigate but reach a mutual agreement to recognise native title over an area. A determination may be 'non-exclusive' meaning native title holders have a weaker set of rights limited to access, hunting and fishing over their traditional lands. Exclusive possession is the strongest form of native title and is akin to a grant of freehold in which native titleholders are able to exclude other parties from their lands and can be compensated for any impairment upon their native title rights.

[959] ILUAs are used in relation to mining activities even though mining is often opposed by many Indigenous communities and the cause of community animosity. There exists an extensive body of scholarly and media commentary on the impacts of mining – environmental, cultural, and material – and Indigenous people all of which cannot be discussed at length in this thesis. The term 'resource curse' tries to explain a complex paradox that can emerge in communities (often Indigenous) located on or adjacent to lands rich in mineral resources. Though ideally situated to benefit from economic development generated by mining activity, they in fact experience poverty and community dysfunction. See Ciaran O'Faircheallaigh, 'Resource Development and Inequality in Indigenous Societies'

as roads, telecommunications, rail, housing etc. ILUAs are normally negotiated with the prescribed body corporate (PBC) representing the native title-holding group. They may also include information as to what extent native title rights will be impaired, what ongoing access native titleholders have to their lands, and recognition of native title as coexisting with the rights of other parties.[960]

However, while ILUAs have no doubt delivered benefits to many native titleholders, most ILUAs are *transactional* rather than *political or* treaty like.[961]

As such, ILUAs and the 'right to negotiate' provisions of native title have been criticised as a mechanism for giving non-Indigenous parties interested in access to Indigenous lands, greater 'certainty' for their commercial objectives rather than delivering genuine 'land justice' for the dispossession of Aboriginal people.[962] Nonetheless, at the time of writing, there are more than

(1998) 26(3) *World Development* 381; Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the "Resource Curse" and Australia's Mining Boom' (2008) 26(1) *Journal of Energy & Natural Resources Law* 31 ('Poverty in the Midst of Plenty'); Brenda L Parlee, 'Avoiding the Resource Curse: Indigenous Communities and Canada's Oil Sands' (2015) 74 *World Development* 425 ('Avoiding the Resource Curse'); Other such as Langton (at this point was an advocate for partnerships between mining interests and Indigenous communities) argue there are clear benefits between mining and Indigenous economic development, see Marcia Langton, *Boyer Lectures 2012: The Quiet Revolution: Indigenous People and the Resources Boom* (ABC Books, 2012) ('*Boyer Lectures 2012*'). A recent book highlights the toll many years of litigation can have on Indigenous communities and social cohesion as they struggle to manage mining activity on their traditional lands, see Paul Cleary, *Title Fight – How the Yindjibarndi Battled and Defeated a Mining Giant* (Black Inc., 2021).

[960] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006* (Australian Human Rights Commission, 2006).

[961] As Ritter explains, the legal and political controversies that were common in the early days of native title have given way to a fully functioning market place in which Aboriginal people trade their native title rights with companies and governments seeking to access their lands. 'The most often used agreement making parts of the Native Title Act function as a market arena, in which resource interests haggle with native title groups that trade their permission for exploration or extraction to go ahead. The 'new culture of agreement making' is that of the bazaar'. Ritter argues the expression 'agreement' should be more technically referred to as a 'contract', which are common place in capitalist societies. This is what I mean by transactional. That native title agreements can be more like contractual agreements that specify a range of financial inducements offered to Aboriginal people in order to access lands held under native title. By contrast, treaty like agreements are overtly political. While still offering financial compensation, they also explicitly recognise the sovereignty and self-government rights of Aboriginal people in question. See, Ritter, *The Native Title Market* (n 47) 1-4.

[962] Burnside (n 922).

1,451 ILUAs registered with the NNTT, suggesting they are a popular and well-used tool for negotiation within the native title system.[963]

However, my intention is not to discuss the various kinds of ILUAs or make any comment on the general use of ILUAs[964] but instead to focus on a specific form of agreement: 'comprehensive settlements'.[965]

Despite the potential positive outcomes of ILUAs for Aboriginal people, agreement making under native title is a fraught process that can magnify the large disparity in negotiating power between the state, corporate interests, and native title groups caused by 'fundamental inequalities in the bargaining power of Indigenous peoples in their dealings with corporations and the state'. Outcomes of any agreement will therefore depend on 'how strongly Indigenous groups are politically organised in order to negotiate effectively'.[966]

Comprehensive settlements are less common but potentially more important because they embody and recognise forms of legal pluralism. That is to say, they represent the outcome of negotiations between parties that recognise each as possessing a system of law and political authority. This is what makes such settlements overtly political and governmental character as opposed to a standard ILUA.[967] Additionally, in the absence of any formal treaty making framework, comprehensive settlements under the guise of native title allow Aboriginal groups to contest the notion of Australia consisting of a single sovereign.

Writing in 2009 on three early case studies of comprehensive settlements, Katie Guest argues that under then Prime Minister Kevin Rudd, the Australian Government took a less stringent 'real estate approach to native title', and a more 'whole-of-government' approach more cognisant of native title's 'political footprint'.

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[963] NNTT, (Webpage), 25 August 2023, http://www.nntt.gov.au/Pages/Statistics.aspx

[964] For a discussion of various examples of agreement making under native title see Howard-Wagner and Maguire (n 946); Deirdre Howard-Wagner, 'Scrutinising ILUAs in the Context of Agreement Making as a Panacea for Poverty and Welfare Dependency in Indigenous Communities' (2010) 14(2) *Australian Indigenous Law Review* 15; O'Faircheallaigh (n 921); Lee Carol Godden and Lily O'Neill, 'Agreements with Indigenous Communities: The Native Title Act in Australia' in *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (Oxford University Press); Lily O'Neill, 'The Role of State Governments in Native Title Negotiations: A Tale of Two Agreements' (2014) 18(2) *Australian Indigenous Law Review* 29.

[965] Guest (n 900).

[966] O'Faircheallaigh (n 921).

[967] Brennan, Gunn and Williams (n 87) 310.

> The Commonwealth's new resolve to include native title as part of its whole of government approach to Indigenous issues, rather than merely a legal doctrine relating to real estate, is a great leap forward. But to effect durable change, governments must also recognise the political footprint of Mabo and the living political economy of many Indigenous groups.[968]

Citing the work of Langton et al[969], Guest writes,

> whilst the political footprint of native title is not overtly recognised by governments, recognition of political aspects of native title have begun to develop in practice through the culture of agreement making generated by native title and engaging with Aboriginal polities and Aboriginal jurisdictions.[970]

Comprehensive settlements imply a 'nation to nation' relationship expressed through a written document.[971] Comprehensive settlements therefore help broker 'political settlements' rather than transactional agreements within the realm of native title negotiations that have previously not been contemplated or felt to be feasible. Comprehensive settlements are a product of native title's contestatory nature as discussed in Chapter 7.

In what follows I discuss three comprehensive settlement processes: the 1999 South Australia whole-of-state ILUA, the 2017 Noongar Settlement, and the 2020 Yamitji Nation Settlement. In each example, Aboriginal people formed negotiating teams to lead deliberations with state

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[968] Guest's study looks at three comprehensive settlements: 1) the Ngarluma and Yindjibarndi Burrup Agreement ('the Burrup Agreement'); 2) the Miriuwung and Gajerrong Ord Global Agreement ('the MG-Ord Agreement'); 3) the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk Peoples Agreement ('the Wimmera Agreement'). See Guest (n 900) 8.

[969] Langton et al (n 411).

[970] Guest (n 900) 7.

[971] Bradfield recognises there is a risk in employing terms such as 'comprehensive settlements' which may have different meanings in other contexts, such as in Canada. Also, what one person may consider comprehensive may not be considered so by another. The term 'comprehensive' can therefore be subjective. However, I do not wish to engage in this debate but recognise using specific terminology can and does create debate about the exact or intended meaning and its appropriateness etc. I do however agree with Bradfield's general observation that what distinguishes a 'comprehensive settlement' from a normal agreement in the context of native title is that they are a particular type of agreement which aspires to be more than a simple commercial or transactional arrangement, even if it does not constitute a clear nation-to-nation type treaty. See Bradfield (n 900).

governments. I consider all three forms of deliberative negotiation that overcome the political gridlock that persists around recognition of Aboriginal sovereignty and self-government.

### 10.3.1 South Australia ILUA

In 1999, Aboriginal groups in South Australia engaged in whole-of-state negotiations with the state government. The process commenced in May 1999 when the government hosted a meeting of representatives from the South Australian Chamber of Mines and Energy (SACOME), the South Australian Farmers Federation (SAFF) and the Aboriginal Legal Rights Movement (ALRM). The idea of a state-wide native title negotiation strategy was born and was taken up in collective discussions within and between these 'peak bodies', who soon committed to pursuing a state-wide process.[972]

The objective of adopting a whole-of-state approach was to avoid litigation as the process for recognising native title in South Australia. The decision to negotiate on a whole-of-state basis was driven by a recognition by Indigenous leaders such as Parry Agius and others that much of what constituted negotiation under the auspices of native title, did not 'secure political resolution and certainty'.

As Agius et al explain, agreements between Aboriginal people and governments are 'political decisions' in which Aboriginal people 'exercise self-governance'. As such, agreements should not be made by or unduly influenced by non-Indigenous legal experts. 'The politics of these [agreement making] processes are best understood as constructed within and between claimant groups, and it is essential that these political decisions are *properly political* [emphasis added]'.[973]

As Agius et al described it, native title had helped to transform the 'politics of place', yet the value of native title was being squandered in most negotiations between native title holders and the state. What I take 'squandered' to mean is that many Aboriginal groups at the time were often too eager to reach an agreement for a range of social benefits (funding, employment, services etc) over greater legal, and arguably political, certainty. The urgency to secure 'minor gains in deal making' was perhaps understandable given the adverse socioeconomic situation of most Indigenous communities. Also, it was perhaps believed political outcomes were less

[972] Parry Agius and Richie Howitt, 'Different Visions, Different Ways: Lessons and Challenges from the Native Title Negotiations in South Australia'.

[973] Ibid.

feasible given the strong opposition to Indigenous self-determination by the federal government under John Howard and the Liberal National Party in the late 1990s.

But Agius et al believed social justice, self-determination, and the prospects for grass-roots nation building by Aboriginal groups could be attained through a reconsideration of the ideas of agreement making and self-government.[974]

They argued whole-of-state negotiations were an opportunity to create new spaces for collectively considering and redefining inter-cultural relations in South Australia.[975]

> The State-wide ILUA process provides South Australians with opportunities to actively engage in the politics of place to rebuild place relations and interests in fair and just ways across and within multiple scales. The national Native title debate has generally been hostile and divisive and delivered little in terms of real, just and equitable meaning and value to the overdue recognition of Indigenous rights and interests in place. By contrast, South Australia's inclusive, negotiated, whole-of state approach, which has been widely acknowledged as uniquely constructive and engaging, demonstrating strong prospects for outcomes that are exemplary has opened both discursive and material space for a new politics of place and place-making.[976]

This description aligns with the Mansbridge et al call that negotiations be based on mutual justification, respect, and reciprocal fairness.[977]

In their negotiations, Aboriginal people developed a process that replaced agreement making as a series of one-off, single agreements between the state, other parties, and an individual native title group. They established a Congress of South Australian Native Title Management Committees to act as a peak body representing all Aboriginal groups and their perspectives in negotiations with the state. They also demanded resources to develop the Committee's capacity to manage complex negotiations and participate directly in decision-making and deliberations

[974] Ibid.

[975] Ibid. 195.

[976] Ibid.

[977] Mansbridge and Martin (n 560) 151.

about native title and Indigenous rights.[978] Discussions regarding native title and agreement making then became what Agius and others call a discussion about the 'politics of place'.[979]

> Indigenous peoples' claims to place provide a largely hidden backdrop to contemporary spatial politics in many settler states. Despite the Indigenous histories as the sole agents of place in making Australian landscapes, colonial and post-colonial erasure of the institutions of Indigenous self-governance, place and identity have often rendered Indigenous agency as absent, archaic or insignificant in the dominant practices of economic, legal and political place-making. Judicial acknowledgement of persistent native title in Australian landscapes was, therefore, a significant shift in the politics of place in Australia. The emergence of agreement making as a common approach to addressing Native title claims in Australia has recently seen Indigenous Australians succeeding in creating innovative negotiation spaces that have redefined coexistence of settler and Indigenous places (for example, Langton et al, 2004b; 2006).[980]

As Agius et al discuss, negotiations brought together government, Indigenous landowners and industry stakeholders to develop an all-inclusive, state-wide ILUA.

> What has evolved is a complex political and social process that establishes spaces for dialogue and exchange between participating groups to facilitate negotiation of native title in fair and just ways. Participation is voluntary, and all parties enter the negotiation space as equals. Building real working relationships and mutual understanding between the parties is supported. The focus is not centred on where Native title does or doesn't exist, but on the practicalities of how coexistence might be realised.[981]

The South Australia state-wide ILUA is an example of how native title can be a catalyst for deliberation beyond more than a single agreement and instead involve multi-stakeholder, multi-scale political deliberation. Negotiations were conducted on principles recognisable to deliberative democrats:

> For example, rather than treating negotiations as a contest between adversaries, the Main Table parties developed mutually acceptable negotiation protocols and processes.

[978] Agius and Howitt (n 970).

[979] Agius et al (n 810).

[980] Ibid. 195.

[981] Ibid. 197.

> Such considerations by the parties have resulted in processes that address power imbalances, capacity needs, understandings, uncertainties, relationships, respect and trust, and the defining of responsibilities to enable the making of informed decisions. Time has also been an important element of getting the process right, and the Main Table parties all endeavour to ensure sufficient time is available to address all participants' needs – something parties to litigated native title proceedings rarely have.[982]

The South Australian negotiations represent what Mansbridge describes as negotiations that are open, fair, mutually respectful, mutually justificatory, and non-coercive. And that parties may recognise conflicting interests but pursue mutual justification and respect and the search for fair terms of interaction and outcomes.[983]

I now turn to discuss the Noongar Agreement.

### 10.3.2 Noongar Comprehensive Settlement Agreement

The Noongar native title claim involved the resolution of six native title claims in southwest Western Australia. The Noongar claim area totalled more than 200,000 square kilometres and included several different subgroups of Noongar people – the Ballardong, Yued, Whadjuk, Wardandi, Pinjarup, Bibbulmun, Wilman, and Mineng.[984]

Lodged in 2003 as a single Noongar application on behalf of all Noongar People, the claimants received a successful determination by the Federal Court in 2006 by Justice Wilcox.[985] What made the Noongar determination so significant at the time was it was the first decision recognising native title over an Australian capital city (Perth). However, the decision was subsequently overturned by the Full Federal Court in 2008.[986]

However, rather continue litigation through the courts, the Noongar people and their representative organisation, the South West Aboriginal Land and Sea Council (SWALSC) entered

[982] Ibid. 198.

[983] Mansbridge (n 897) 2.

[984] Hobbs and Williams (n 939) 29.

[985] *Bennell v Western Australia* (2006) FCA 1243 (Federal Court of Australia, 19 September 2006).

[986] *Bodney v Bennell* (2008) FCAFC 63 (Federal Court of Australia, 23 April 2008).

into negotiations with the Western Australia Government in 2009.[987] In July 2013, the Western Australia Government issued terms of its settlement offer. Almost a year and a half later in October 2014, the SWALSC Noongar Nation Negotiation Team and the Western Australia Government reached an agreement-in-principle on the text of the settlement offer. The settlement was then discussed internally by Noongar people and approved through a number of Noongar authorisation meetings held between January and March 2015.[988]

As Kelly and Bradfield explain, the Noongar settlement took twelve years to negotiate. For Noongar people, native title and the negotiation of a settlement was a means to an end and a platform for self-determination.

> People use the term 'full and final settlement' and in reality we do settle native title but there is something else which is going to happen and that is to develop a platform so that we can actually run our own agenda in the future.[989]

The settlement was and remains the largest and most comprehensive native title agreement. It includes six separate ILUAs, over $1 billion in financial compensation to the native title groups, and recognition of the settlement through a new Act of parliament – the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016.* [990]

The Preamble of the Act states:

> *Since time immemorial, the Noongar people have inhabited lands in the south-west of the State; these lands the Noongar people call Noongar boodja (Noongar earth).*
>
> *Under Noongar law and custom, the Noongar people are the traditional owners of, and have cultural responsibilities and rights in relation to, Noongar boodja.*
>
> *The Noongar people continue to have a living cultural, spiritual, familial and social relationship with Noongar boodja.*
>
> *The Noongar people have made, are making, and will continue to make, a significant and unique contribution to the heritage, cultural identity, community and economy of the State.*

[987] Glen Kelly & Stuart Bradfield 'Negotiating a Noongar Native Title Settlement' in Brennan et al (n 354) 249-256.

[988] Hobbs and Williams (n 939) 30.

[989] Brennan et al (n 354) 250.

[990] *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016*.

> *The Noongar people describe in Schedule 1 their relationship to Noongar boodja and the benefits that all Western Australians derive from that relationship.*
>
> *So it is appropriate, as part of a package of measures in full and final settlement of all claims by the Noongar people in pending and future applications under the Native Title Act 1993 (Commonwealth) for the determination of native title and for compensation payable for acts affecting that native title, to recognise the Noongar people as the traditional owners of the lands described in this Act.*

While technically a contractual agreement because it is negotiated under provisions of the *Native Title Act 1993*, the outcome is undoubtedly political and recognition of Aboriginal self-determination. As Bradfield argues, in order to be 'comprehensive', a settlement should involve more than a simple commercial arrangement which facilitates development, the number of items to be agreed, or the amount of territory it covers, but also the extent of recognition afforded Indigenous peoples as partners in a process of *political accommodation* [emphasis added].[991]

During negotiations, the Noongar Traditional Owners insisted that their political authority be reflected in any final agreement – something not usually articulated in a commercial contract. As Kelly and Bradfield explain, for Noongar people the settlement with the State of Western Australia was about securing recognition and cultural and customary rights over traditional lands in order to lay a 'platform for self-determination'.[992] Noongar Traditional Owners did not want their agreement to be restricted to a 'marginal set of rights over a very limited amount of land, they wanted recognition of Noongar people as the traditional owners for the South West and as possessing *a body of law and custom that continues to today* [emphasis added]'. In short, recognition of their sovereignty, political authority and right to self-government.

The Noongar Settlement also calls on the Western Australia Government to commit to a 'whole of government' approach to honouring the agreement. This means the Noongar Settlement also involves a suite of government departments, including the Office of the Premier, making a legally binding commitment to work with the Noongar people and their governance institutions on securing long term sustainable economic and community development outcomes for the Noongar people.[993]

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[991] Bradfield (n 900).

[992] Glen Kelly and Stuart Bradfield, 'Negotiating a Noongar Native Title Agreement' in Brennan et al (n 354) 250.

[993] Department of Premier and Cabinet, Western Australia Government, (Webpage), https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/south-west-native-title-settlement

Upon completion of terms of the settlement in 2015, then Premier of Western Australia Colin Barnett said in a media statement that the Noongar Settlement was 'a historic achievement in reconciliation' and an 'extraordinary act of self- determination by Aboriginal people ... provid[ing] them with a real opportunity for independence'.[994] It is clear that this settlement requiring the Western Australia Government to acknowledge the political authority of Noongar Traditional Owners, commit to a government-to-government set of relations, and have the agreement enacted in legislation, is no simple contractual agreement. Indeed, legal scholars Harry Hobbs and George Williams describe it as Australia's 'first treaty'.

Hobbs and Williams recognise that under existing international law norms (Vienna Convention on the Law of Treaties) a treaty is 'an international agreement concluded between States'. Given Aboriginal groups in Australia are not recognised as states, agreements struck between Indigenous people and national or sub-national governments cannot be considered treaties under international law. They, however, question this reasoning.[995]

Referring to a 1997 report by the Special Rapporteur on the Sub-Commission on Prevention of Discrimination and Protection of Minorities on treaties with Indigenous peoples, Hobbs and Williams argue that the report says that when European nations were colonising other lands and establishing formal legal relationships with the Indigenous people of these territories, they were clearly aware that they were negotiating and entering into contractual relations with sovereign nations, with all the international legal implications of that term during the period under consideration.[996] As Hobbs and Williams observe, a treaty is an agreement of a specific type – 'a means for resolving differences between Indigenous peoples and those who have colonised their lands'.

> A treaty is a political agreement to be reached by way of negotiation. Negotiation is the appropriate process for resolving differences between Indigenous peoples and the State as it: reduces the risk that the rights and interests of significant groups will be ignored; brings relevant information and perspectives to the decision-making process;

[994] Premier Colin Barnett, 'Noongars Vote to Accept Historic Offer', *Government of Western Australia* (30 March 2015) <https://www.mediastatements.wa.gov.au/Pages/Barnett/2015/03/Noongars-vote-to-accept-historic-offer.aspx>.

[995] Hobbs and Williams (n 939).

[996] Hobbs and Williams (n 714).

> and recognises that winner-take-all processes are unlikely to endure or to produce good policy.[997]

Critical to such negotiations is recognition of Indigenous peoples as *polities* and not merely as a minority or stakeholder group.

> A polity is a distinct political community composed of individuals collectively united by identity. It can take many forms, including a nation-state, empire, or a sub-state unit. Indigenous communities in Australia have a long history operating as a distinct society, with a unique economic, religious and spiritual relationship to their land.[998]

As Hobbs and Williams explain, the nature of the final Noongar Settlement has other observers of native title agreement-making arguing that the settlement is reflective of 'an important maturing of native title dispute resolution'.[999]

Others, such as Shireen Morris, argue such settlements demonstrate that native title settlements can be expanded to 'include cultural redress, an accounting of history and formal apologies, in addition to land and financial compensation'. Indeed, the Noongar Nation's 'innovative' comprehensive settlement 'shows some of the potential that already exist' for structuring an appropriate relationship between the State and Indigenous peoples.[1000]

The Noongar settlement, like the South Australia example, meets the terms of deliberative negotiation as articulated by Mansbridge and Martin et al

> By negotiation in the political realm, we mean a practice in which individuals, usually acting in institutions on behalf of others, make and respond to claims, arguments, and proposals with the aim of reaching mutually acceptable binding agreements.[1001]

I now turn to discuss the Yamatji agreement.

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[997] Hobbs and Williams (n 939).

[998] Hobbs and Williams (n 714).

[999] Simon Young, 'From the Bike to the Bus: The Noongar Native Title Settlement', *The Conversation* (15 July 2013) <https://theconversation.com/from-the-bike-to-the-bus-the-noongar-native-title-settlement-1595>.

[1000] Hobbs and Williams (n 939).

[1001] Mansbridge and Martin (n 560) 151.

### 10.3.3 Yamatji Nation Agreement ILUA

The 2020 Yamatji Nation Agreement ILUA was another large and significant example of deliberative negotiation, registered by the NNTT on 30 July 2020. The Agreement included the Southern Yamatji, Hutt River, Mullewa Wadjari and Widi Mob claimant groups and the State of Western Australia covering 48,000 square kilometres, making it, like the Noongar Settlement, one of the largest native title determinations in Australian history. According to the Western Australia Government media statement, the Yamatji Nation Agreement 'resolves the Western Australian Government's compensation liability for the impairment and/or extinguishment of native title in the agreement area and includes a package of benefits for the Yamatji people, totalling approximately $500 million'.

To negotiate with the state, the Yamatji Traditional Owners established a 12-person Traditional Owner Negotiation Team (TONT) with each of the claimant groups nominating and authorising a representative to join the TONT.[1002] Negotiations on the settlement involved members of the TONT and representatives of the State of Western Australia between November 2017 and December 2019.[1003] In the Yamatji ILUA, the names of the many Aboriginal native title claimant groups and their representative organisations are included as signatories along with the Premier representing the State of Western Australia, as well as ministers for the government departments of Aboriginal affairs, environment, land, culture and the arts, mines, regional development, tourism, water, and parks and conservation, which is illustrative of the comprehensive, whole-of-government, nature of the agreement.

Like the Noongar Settlement, the preamble of the Yamatji ILUA states:

> The Parties acknowledge that:
>
> (a) The Yamatji Nation continue their spiritual, emotive and physical connection to the lands and waters from the past, into the future and today and for many thousands of years prior to British colonisation.
>
> (b) The lands of the Yamatji Nation were not terra nullius or 'land belonging

[1002] The nomination of properly authorised representatives to speak on behalf and represent an Aboriginal group is a very important feature of Aboriginal culture. In political or legal deliberations, those representing a group must have the permission to do so from the wider group or they risk acting without Traditional Owners consent.

[1003] 'The Agreement', *Yamatji Southern Regional Corporation Ltd.* <https://www.yamatjicentral.com.au/the-agreement>.

to no-one' when European settlement occurred.

(c) The Yamatji Nation is made up of a number of different identity groups. Variations in pronunciation and spelling occur. Yamatji Nation is made up of people who identify as Amangu, Badimia, Naaguja, Nhanaghardi, Nhanda, Mullewa Wadjari, Wajarri, Wattandee, Widi, and Wilunyu.

(d) The ancestors of the Yamatji Nation, Old People and spirits, are forever present to protect people, culture and country.

(e) The traditional laws and custom of the Yamatji Nation guides its people and Traditional Elders in their cultural responsibilities, obligations and continuing relationships to our country, land and waters, including the seas.

(f) The people of the Yamatji Nation practice cultural, spiritual, familial and social relationship with the land and waters and these practices are recognised in this Agreement.

(g) The Yamatji Nation assert their inheritance, rights and obligations to maintain and progress significant and unique contributions to the heritage, cultural identity, community and economy of the State.

And similar to the Noongar Settlement, what is clear in the text of the Yamatji ILUA is the acceptance by the Western Australia Government of the Yamatji Traditional Owners as a 'Nation'. This assertion of nationhood (with the implied recognition of sovereignty) is what distinguishes a comprehensive settlement from a traditional, transactional type ILUA.

Greg McIntyre, famous for being a member of the legal team that represented Eddie Mabo and the other Mer claimants in the historic *Mabo* decision, was also part of the legal team representing the Yamatji Nation in their negotiations with the Western Australia Government. As he explains, the Yamatji negotiators had the benefit of observing the process in the Noongar Settlement. The Yamatji insisted any settlement must provide a basis for self-determination and long-term economic independence for the people of the Yamatji Nation.

> The State's negotiators embraced that philosophical position and came up with some innovative ideas for a package which the Government could deliver. It comprised a variety of components: cash, mining rental revenue, funding for governance and business development, joint venture and tourism opportunities, cultural heritage protection measures, recognition of native title, access to housing properties for sale,

leasing or development, land transfers, including commercial land, granting of water licences, joint management with the state of the conservation estate.[1004]

As well as the recognition of Yamatji nationhood, the settlement also includes $325 million in cash, as well as commercial property, access to housing properties for sale, leasing or development, revenue streams from mining, and from leasing or sale of land assets, funding for business development and funding to develop water resources under the Yamatji Nation's Strategic Aboriginal Water Reserve for use or trade. The settlement ensures the people of the Yamatji Nation are now the largest landholder in the mid-west region of the state, which is dominated by mining developers and joint venturers seeking to undertake resource development activities in the Agreement area.

The critical ingredient for native title groups negotiating comprehensive settlements is their own institutional and governance capacity to build Indigenous self-government from the bottom-up. This requires financial, legal, administrative expertise. Not all groups that claim or secure native title have the means to negotiate strong comprehensive settlements because they lack these vital resources. Native title does not guarantee financial compensation or resources for all native title groups and only groups that have mineral resources on their lands are able to negotiate commercial agreements with mining companies that can be in the millions and tens of millions of dollars. Those groups are a small fraction of the overall number of PBCs.[1005]

Inadequate funding of Aboriginal groups to negotiate properly with the state, businesses, and other parties is one of the inequitable features of the native title system. In native title negotiations, it is native title groups – whose land is the focus of deliberation – that will have the least resources and the power around the negotiating table.[1006] The important point I make in this discussion of agreement making is that those groups with native title that have the capacity

[1004] Greg McIntyre, 'Indigenous Equality: The Long Road' (2021) 8(2) *Griffith Journal of Law & Human Dignity* 20-21.

[1005] The PBC webpage provides up to date information on a wide range of native title matters, including the number of registered PBCs. The webpage lists 11 large PBCs from a total of 234 as of 10 March 2022. See https://nativetitle.org.au/find/pbc

[1006] Under the right to negotiate provisions in the *Native Title Act 1993*, parties must negotiate 'in good faith'. Good faith bargaining as an advent of industrial relations law sough to address the often substantial power imbalance between the contracting parties. However, the *Native Title Act 1993* does not define 'good faith' leaving it open to interpretation by the NNTT which has tended to side with the non-native title party. See Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title* 16; see also Ciaran O'Faircheallaigh and Tony Corbett, 'Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions' [2006] *University of Western Australia Law Review*.

and resources to engage in comprehensive settlement type negotiations are practicing a form of treaty-making and nation-to-nation diplomacy through such settlements. Although they do not have the status of a treaty (domestically or under international law), they are nonetheless negotiated from a place of sovereignty by Aboriginal groups. They are, as explained earlier, *acting as nations* in deliberation and agreement making with the state.

Comprehensive settlements as I have discussed here, align with what Mansbridge and Martin et al describe as deliberative negotiation. In particular, comprehensive settlements have offered a means for recognition of Aboriginal sovereignty and self-government, matters which experience political gridlock at the national level of politics. Native title and the native title system, and processes such as comprehensive settlements, offer means for the resolution of these matters to some degree.

## 10.4 Conclusion

In this chapter, I argued that native title and the native title system have acted as an alternative forum for the negotiation of sovereignty and self-government through comprehensive settlements. The native title system with its opportunities for agreement making and negotiation (albeit limited) offers a necessary 'contestatory mechanism' to overcome the legislative gridlock on the questions of sovereignty and self-government in national politics in Australia.

An important feature in all of these examples of deliberative negotiation between Aboriginal people and governments is the insistence on recognition of Aboriginal peoples' statuses as distinct polities and nations. As Kelly and Bradfield explain, for Noongar people, it was recognition of their 'nationhood' they were seeking through the settlement process.[1007]

This insistence on 'nation-to-nation' recognition through negotiated settlements is, I argue, a distinguishing potential feature of deliberative participatory democracy within the context of settler colonialism. These type of 'deliberative negotiations' are made possible by the recognition of native title and the processes its offers, such as ILUAs and agreement making.

[1007] Kelly and Bradfield (n 33) 15.

# 11 Indigenous Nation Building as Prefigurative Politics

In previous chapters, I discussed how the recognition of native title precipitated widespread public deliberation and political claim-making by Aboriginal people. In the post-*Mabo* period, Aboriginal people increased calls for 'differentiated inclusion' within Australian democracy to accommodate sovereignty, self-government and greater participation in law and policymaking. I said the problem in Australian politics is not Aboriginal people's lack of voice, but the inability of the state to listen. That is to say, Australia has a listening problem.

In this final chapter, I discuss the efforts of some Aboriginal groups in Australia to reimagine and re-assert their political status through 'Indigenous nation building'.[1008] In this chapter, I frame Indigenous nation building as a form of *prefigurative politics* in which Aboriginal groups seek to bring about the kind of future society they aspire to. A prefigurative political strategy focuses on implementing the changes or practices one is seeking rather than asking others to make changes on one's behalf. Those practising prefiguration refuse to wait for the state to enact the changes Aboriginal people seek, instead opting to enact and perform the aspired changes in the present-day.[1009]

The purpose of this chapter is to highlight that Indigenous nation building is grass roots response to the failure of Australian democracy to make space for the 'differentiated inclusion' of Aboriginal people and the recognition of sovereignty and self-government. The implications of Indigenous nation building for deliberative and participatory democracy are that rather than wait for some ideal moment when the sovereignty and self-government claims of Aboriginal people are recognised by the state, Aboriginal people opt to act sovereign even if the Australian state refuses to recognise this reality.

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[1008] As Smith explains, prior to colonisation, Indigenous nations were sovereign entities. Today, Indigenous groups continue to assert that they have never ceded their sovereignty to the modern nation-states in which they now reside. Many Indigenous groups in Australia and the US are forging new ways to rebuild and reassert their nationhood and autonomy. The process of nation-rebuilding includes a deliberate resurgence of Indigenous modes of governance based on traditional culture with new strategies, tools, institutions and structures of self-governance. Smith states that because Indigenous nations existed prior to their colonisation, they do not rely on legislated rights or treaty recognition from settler states for their cultural legitimacy — although rights and recognition (such as native title) can strengthen a nation's self-determination and decision-making powers. See, Diane Smith et al, *Developing Governance and Governing Development: International Case Studies of Indigenous Futures* (Rowman & Littlefield, 2021) 110-111.

[1009] Cooper (n 683).

My objective in this chapter is not to elaborate on each example of Indigenous nation building in Australia, but to analyse these efforts through the lens of deliberative participatory democracy. Hence, I seek to demonstrate how Aboriginal peoples' efforts to rebuild their capacity for self-government is a feature of deliberative participatory democracy under conditions of settler colonialism. Through nation building, Aboriginal people are creating new political spaces to build their own deliberative capacity in order to challenge the presumed role of the Australian state to make and decide laws and policies.

In this chapter, I begin with an overview of the Indigenous political strategy of 'turning away'. I then discuss Indigenous nation building before moving to discuss the theory of prefigurative politics. I frame Indigenous nation building as an example of what Toby Rollo calls a deliberative 'everyday deed'. As Rollo explains, an everyday deed is an intentional act that serves as both political speech and as political action that 'speaks for itself'.[1010]

I conclude the chapter with a discussion of Indigenous nation building as the making of space for what Nancy Fraser calls a 'counterpublic' for Indigenous sovereignty. As Fraser explains, subaltern counterpublics emerge as a response to the various forms of exclusions some groups experience within dominant society. Counterpublics are public arenas for alternative discourses and, as such, 'help expand discursive space'.[1011]

I now discuss 'turning away'.

## 11.1 Turning Away from the State

For Aboriginal people, without genuine deliberative and participatory democratic processes that accommodate our voices, we have little say or role in deciding the laws and policies which affect us. Under conditions of settler colonialism, a genuine option for Indigenous people is to actively *disengage* from deliberation with the state and focus on internal capacity building. Though there has been an increase in government rhetoric and practice to consult with Aboriginal people, government consultation has become performative rather than a mechanism for genuine deliberation, participation and structural change.

[1010] Ibid. 589.

[1011] Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' [1990] (25/26) *Social Text* 56, 67.

Indigenous nation building therefore entails a deliberate 'turning away from the state' premised upon what some Indigenous scholars in North America such as Glen Sean Coulthard and Audra Simpson and Australian Indigenous scholars such as Irene Watson call the *politics of refusal* that rejects the state projects of 'recognition' and 'reconciliation'.[1012]

As Simpson argues, 'refusal' is held by Indigenous people as an alternative to the recognition politics of settler-colonial society. As Simpson explains, settler states offer 'recognition' as the philosophical and institutional remedy to 'historical injustice' – to matters of dispossession, violence, and ongoing material and political inequality. '"Refusal" rather than recognition is an option for producing and maintaining alternative structures of thought, politics and traditions away from and in critical relationship to state.'[1013] Recognition does not bring an end to settler colonialism and its oppressive structures bearing down on the lives of Indigenous people.[1014]

Because the politics of refusal entails a deliberate 'turning away from the state', this would appear to fail to meet the ideals of deliberative and participatory democracy, which promulgates an *increase* and not a *decrease* in engagement between citizens and the state. However, by describing nation building as turning away, I am not suggesting Aboriginal people have forsaken completely the ideals of deliberative and participatory democracy. Rather it is a strategic response to settler state's failure to listen, to institute 'differentiated inclusion' by making space for Aboriginal sovereignty and self-government.

For Coulthard and Simpson, Indigenous nationhood requires Indigenous people to prioritise internal capacity building and re-establish the institutional means for Indigenous nationhood, self-governance, and decision-making processes.[1015]

According to Coulthard, Indigenous people who have been colonised and continue to be dominated by the settler-colonial state and its institutions, revert to practices of 'self-recognition' in which they 'critically revalu[e], reconstruct … and redeploy … culture and tradition' and, in the process, radically transform their own self-consciousness as political

[1012] Coulthard (n 148); Audra Simpson, 'The Ruse of Consent and the Anatomy of "Refusal": Cases from Indigenous North America and Australia' (2017) 20(1) *Postcolonial Studies* 18.

[1013] Simpson, 'The Ruse of Consent and the Anatomy of "Refusal": Cases from Indigenous North America and Australia' (n 1010) 19.

[1014] Ibid. 20.

[1015] Coulthard (n 148); Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Duke University Press, 2014).

agents (2007: 456, cited in Williams 2014: 10).[1016] In short, Aboriginal and Torres Strait Islander people are engaged in rebuilding traditional authority, modes of self-government and engaging with the state as distinct, sovereign people asserting political agency, even if the state refuses to acknowledge such claims.

The turn inward should not be viewed as simply resistance and refusal by Aboriginal people, but as a provocative act to *enhance democratisation*. Greater democratisation comes about as a consequence of an Aboriginal nation strengthening its political authority and governmental competence that will challenge the power of the state.

For Coulthard, a member of the Yellowknives Dene First Nation, Indigenous people must therefore be prepared to selectively 'turn away' from engaging with the discourses and structures of settler-colonial power in order to 'engage with the state's legal and political discourses in a more effective way'.[1017] In a sense, Indigenous nation building is a strategic response to settler colonialism. Turning away from engagement with the state communicates dissatisfaction with the present situation, while the rebuilding of internal capacity to negotiate with the state, indicates a willingness to re-enter into dialogue at some future point in time.

As Elliott explains, turning way is an important aspect of Indigenous resurgence and nation building.

> 'Indigenous resurgence' centres on three contentions: (1) that colonialism is an active structure of domination premised, at base, on Indigenous elimination; (2) that the prevailing normative-discursive environment continues to reflect this imperative; and (3) that Indigenous peoples must therefore turn away from this hostile environment and pursue independent programmes of social and cultural rejuvenation. The principal movement advocated under the resurgence paradigm thus appears as one of disengagement with the settler order.[1018]

As such, rather than continually lose out when deliberating with the state, some Aboriginal groups choose to focus on developing their own institutions and capacities for self-government. In doing so, Aboriginal groups seek to challenge and ultimately transform relations between

[1016] Howard-Wagner, Bargh and Altamirano-Jiménez (n 601) 8.

[1017] Coulthard (n 148) 45.

[1018] Elliott (n 1145) 1.

Aboriginal people and the dominant settler state. In the context of Australian politics, Aboriginal groups have little electoral power and building broad support through public deliberation is time consuming and energy draining. Turning away and inward to prioritise nation building is therefore more attainable and empowering.

Disengaging is therefore a strategic move to try to induce government action on more acceptable terms. As Birch and Birch state, to disengage is to seek to establish a productive and equitable relationship beyond symbolic gesture and a form of recognition that does little more than maintain existing colonial relationships.[1019]

Ultimately, Indigenous nation building seeks to create conditions for political association more aligned to the aspirations held by Aboriginal people; our presence as Indigenous polities holding sovereignty over our traditional lands and the right to self-government are formally acknowledged and accepted by the state.

For Aboriginal people, being self-governing and asserting nationhood are articulated in Articles 3, 4 and 5 of UNDRIP, which affirm Indigenous people are free to determine their political status.

> **Article 3**
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> **Article 4**
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
>
> **Article 5**
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

[1019] Tony Birch, '"On What Terms Can We Speak?" Refusal, Resurgence and Climate Justice' (2018) 24/25 *Coolabah* 2.

Later in this chapter, I frame Indigenous nation building as an example of prefigurative politics, a practice whereby groups or social movements enact the kind of future society they aspire to.[1020] By *acting sovereign*, Indigenous nation building seeks to transform Australian democracy by imagining a democratic future that has yet to materialise.

Next, I discuss the emergence of 'Indigenous nation building' in Australia. I then discuss this as part of a prefigurative response to settler colonialism by Aboriginal people. I then discuss Indigenous nation building as a deliberate turning away from the state and discuss what this deliberate disengagement means for deliberative and participatory democracy under conditions of settler colonialism.

I now turn to discuss Indigenous nation building.

## 11.2 Indigenous Nation Building

In this section, I discuss the emergence of Indigenous nation building in Australia.[1021]

[1020] For Fians, prefigurative politics refers to the strategies and practices employed by political activists to build alternative futures in the present and to effect political change by not reproducing the social structures that activists oppose. Prefiguration is often part of activist-led social experiments that create new ways of reimagining society and contesting representative democracy. Prefigurative politics' refers to how people through their activism, foster a new kind of society. It is characterised participative democracy, inclusiveness, and direct action. See, Guilherme Fians, *Prefigurative Politics*, ed Felix Stein et al (2022) <https://www.anthroencyclopedia.com/entry/prefigurative-politics>; See also, Davina Cooper, 'Towards an Adventurous Institutional Politics: The Prefigurative "as If" and the Reposing of What's Real' (2020) 68(5) *The Sociological Review* 893 ('Towards an Adventurous Institutional Politics').

[1021] As explained, the project of 'nation building' has been adopted more recently by Aboriginal group seeking to become self-governing and largely influenced by research in the US. In Australia, 'Indigenous governance' has enjoyed a much longer period of research focus. Yet the aims of nation building and Indigenous governance are similar if not the same. That is, to identify the success factors for Indigenous people and their organisations to become self-governing. As Hunt et al explain, Indigenous people in Australia have been determined to increase their authority and capacity over their own self-governance for some time now. Indigenous people also cited the lack of competence within governments to the ongoing socioeconomic disadvantage Indigenous people experience. 'The issue of governance preoccupies Indigenous communities, organisations, and leaders who have been bitterly disappointed with the political rhetoric and institutional failures of the Australian state over many decades. Indigenous groups are increasingly considering whether governance offers them an avenue to greater self-determination, when the official policy by that name did not, and while many remain so dependent on the state.' See, Hunt et al (n 621) 5. See also, Diane Smith et al, *Developing Governance and Governing Development: International Case Studies of Indigenous Futures* (Rowman & Littlefield, 2021).

Strictly speaking, any Aboriginal group with or without native title can undertake Indigenous nation building. It is the prerogative of any Aboriginal group that wishes to assert their nationhood, to do so.

However, native title is critical because a successful native title determination provides the important land basis for rebuilding traditional institutions and the opportunity to securing financial resources derived from the negotiation of agreements because of native title. As I have argued throughout this thesis, for Aboriginal people native title is the implicit recognition of sovereignty and the right to self-government. Therefore, in this sense, native title is an indispensable catalyst for Indigenous nation building.

Additionally, in the absence of other mechanisms such as a framework for negotiating a treaty or treaties, enactment of part or all of UNDRIP via domestic legislation, or recognition that Aboriginal people hold distinct political rights, native title becomes one of the few avenues for exercising Indigenous nationhood.

> In the current Australian legal and political landscape, one such opportunity that is an 'enabling space' for the development of Indigenous governance is through the statutory regime of 'native title'.[1022]

As Ingram explains, since the demise of ATSIC and the end of any formal endorsement of self-determination as the basis of Indigenous policy in Australia, native title is one of the few opportunities for Aboriginal people to pursue economic development, cultural heritage protection, Caring for Country, education, health and other capacity building exercises. Despite the well-documented deficiencies in the native title process and jurisprudence, as Ingram states, Aboriginal people have nonetheless been innovative in their exercise of native title.[1023]

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[1022] Funding for Aboriginal groups in the post determination phase of native title is limited with the official entity that all native title holding groups must form, a prescribed body corporate (PBC) receiving funding of approx. $50,000–$80,000pa. The recognition of native title does not come with compensation so groups must seek to leverage their native title rights to benefit financially in whatever way they can. Many groups have negotiated mining agreements and therefore have funds to invest in their rebuilding efforts. Or as in the case of the Noongar Nations, have reached a comprehensive settlement with the state that secures funds and other benefits that will aide their nation building efforts. This lack of guaranteed compensation and the market mentality that permeates the agreement making makes nation building a challenge for Aboriginal groups. See, Ivan Ingram 'Indigenous Governance and Native Title in Australia' in Smith et al (n 1147) 29.

[1023] Ibid 31.

Since the 1990s, research on Indigenous nation building in the US has been led by the Harvard Project on American Indian Economic Development (Harvard Project)[1024] and Native Nations Institute (NNI) at the University of Arizona.[1025] The focus of this research has been to understand the key factors that facilitate and sustain Indigenous nation building.[1026] Indigenous nation building is still evolving in Australia but collaborations between US and Australian scholars is ongoing.[1027]

An early publication on First Nations sovereignty and nation building in the US, Cornell and Kalt argue strategies to improve the socioeconomic circumstances for First Nation Indian people in the US must be tied to Indian sovereignty and nationhood.[1028]

> Sovereignty, nation building, and economic development go hand in hand. Without sovereignty and nation-building, economic development is likely to remain a frustratingly elusive dream.[1029]

As Cornell and Kalt explain, beginning in the 1970s, Indian First Nations were seeking to transform themselves and their relationship the US government by demanding national government support for 'self-determination'. 'This shift toward self-determination allowed First Nations to 'engage in genuine self-governance, to turn sovereignty as a legal matter into de facto sovereignty: sovereignty in fact and practice.'[1030]

Since the 2000s there have been various collaborations between Australian and US researchers with a shared interest in Indigenous nation building and self-government. Despite vastly

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[1024] https://hpaied.org/

[1025] https://nni.arizona.edu/

[1026] Cornell (n 864); Stephen Cornell and Miriam Jorgensen, 'Indigenous Nations in Postracial America: Rethinking Social Inclusion' (2020) *The Review of Black Political Economy*. See also Native Nations Institute, University of Arizona, (Webpage), https://nni.arizona.edu/programs-projects/what-native-nation-building

[1027] Stephen Cornell, '"Wolves Have A Constitution:" Continuities in Indigenous Self-Government' (2015) 6(1) *International Indigenous Policy Journal*; Miriam Jorgensen, Alison Vivian, Anthea Compton, Donna Murray, Debra Evans, and Janine Gertz 'Yes, the Time is Now: Indigenous Nation Policy Making for Self-Determined Futures' in Moodie and Maddison (n 122) 129-147.

[1028] Stephen Cornell and Joseph P Kalt, 'Sovereignty and Nation-Building: The Development Challenge in Indian Country Today' (1998) 22(3) *American Indian Culture and Research Journal* 187.

[1029] Ibid. 188.

[1030] Ibid.

different legal, political and historical circumstances between the US and Australia, the findings of US-based research are readily applicable to Australia.[1031]

> When Indigenous governance is based on genuine decision-making powers, practical capacity and legitimate leadership at the local level, it provides a critical foundation for ongoing socioeconomic development and resilience.[1032]

In Australia, as Smith et al write, Indigenous nation building has gained popularity amongst Aboriginal people and organisations, as well as scholars, practitioners and policymakers working in native title and Indigenous governance. Indigenous nation building efforts are a response to the state's refusal to genuinely engage with Aboriginal people on matter important to use including sovereignty and self-government. Efforts to re-establish traditional governance structures are therefore an overt political act.

> One of the potent ways Indigenous peoples are tackling these questions (of Indigenous rights) and the often-painful challenges involved is through nation-rebuilding: that is, by strengthening their ability to act in solidarity as a polity; that is, to act as an organised political entity with a collective identity, and so give shape to a form of collective self-governance that will enable them to wield contemporary power and authority for their own determined purposes.[1033]

The study by Smith et al highlights the nation building efforts of several groups including the Ngarrindjeri, Gugu Bahdun, and Wiradjuri Aboriginal Nations. Though there is growing interest in the possibilities of Indigenous nationhood, these examples are still largely aspirational with few examples of Aboriginal groups functioning as fully-fledged self-governing nations. Much of

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[1031] For example, since 2010 the Jumbunna Institute for Indigenous Education and Research at University of Technology Sydney (UTS) and the NNI, in partnership with the Gunditjmara, Gugu Badhun, Ngarrindjeri, Nyungar and Wiradjuri Nations have enaged in research on nation building in Australia. They found that some Aboriginal and Torres Strait Islander nations in Australia were creating decision-making institutions and processes of self-governance to effectively define their goals, strategically implement these priorities, and enter into beneficial partnerships with governments and other entities. In other words, the Aboriginal Nations participating in the research were seeking to self-govern in the same sense as it is understood in North America. Daryle Rigney et al, *Indigenous Nation Building and the Political Determinants of Health and Wellbeing* (Discussion Paper, Lowitja Institute & Jumbunna Institute for Indigenous Education and Research, 2022) 18.

[1032] Ibid.

[1033] Smith et al (n 1147) 110.

this theoretical work focuses on identifying the basic success factors to rebuild Indigenous nationhood.[1034]

One group to do so successfully and publish their experiences is the Ngarrindjeri nation. As Hemming et al explain, for many decades now, the Ngarrindjeri Nation, its leaders and people have expressed a sovereign vision for healthy lands, waters, people and all living things. However, this political strategy for Country and Indigenous nation (re)building remains largely invisible.[1035] The lack of acceptance by institutions of the Australian state to recognise Ngarrindjeri and indeed other Aboriginal nations, has motivated Ngarrindjeri to engage in their own nation building.

As Hemming et al explain, despite the realisation that state recognition of Ngarrindjeri sovereignty and authority is not always forthcoming,

> [O]ur 'leaders have since used this insight to support the (re)building of the Ngarrindjeri Nation and have revitalised authoritative structures of political representation by making the peak governance bodies of *this Aboriginal Nation* [emphasis added] more capable and effective in asserting Ngarrindjeri rights and interests'.[1036]

A key initiative was establishing the Ngarrindjeri Regional Authority (NRA) in 2007 to act as an external-facing entity, allowing Ngarrindjeri to operate politically through a peak body 'representing the regional Ngarrindjeri organisations and broader Ngarrindjeri community'. The NRA provides 'state and federal governments, and other agencies, with a formal point of contact for the purpose of communication and negotiation concerning projects and policy proposals with a potential impact on Ngarrindjeri rights and interests'.[1037]

This focus on building the internal capacity of Ngarrindjeri and forming political representative bodies to engage with external parties, seeks to counteract settler state intransigence. These initiatives are, as I argue, demonstrative of both enclave deliberation and prefigurative politics.

For the Wiradjuri Nation, internal capacity building has focused on language and cultural revival. As Murray and Evans explain, the Wiradjuri process of nation building firstly seeks to

[1034] Hemming et al (n 848); Rigney (n 978).

[1035] Hemming et al (n 848) 217.

[1036] Ibid 219.

[1037] Ibid. 219.

honour Wiradjuri Elders, language teachers, and community leaders who 'continue to turn up' and participate in and lead community events and education.[1038] 'Our focus is now on what *we* do, and not on what others such as state and federal governments are *not* doing'.[1039]

This commitment to develop and enact a Wiradjuri future vision did not exist 20 years ago. As Murray and Evans explain, Wiradjuri did not yet realise that by not having a vision and staying in what they call 'service delivery mode'[1040] they would not be able to achieve their aspirations.

Wiradjuri leaders were inspired by their time spent with First Nations groups and scholars at NNI at the University of Arizona. After participating in this program and being both inspired by what they learnt and realising they faced many of the issues First Nations people in the US were coping with, they brought the lessons learnt back to their own community. As Murray and Evans explain, 'What we learnt was there (in Arizona) was life changing. In effect we had travelled far to rediscover what our ancestors and elders back home had tried to tell us'.[1041]

The Wiradjuri nation-building initiatives reflect their commitment to rebuilding internal deliberative capacity for self-governance. These included developing and offering two education qualifications for both Wiradjuri people and non-Indigenous people. One is in Wiradjuri in language and culture and the other in Wiradjuri nation building.[1042]

For the Wiradjuri, what they learnt from First Nations people and scholars in the US helped to shift Wiradjuri thinking from 'service delivery mode' to asking more challenging questions of themselves.

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[1038] Smith et al (n 1147) 167.

[1039] Ibid.

[1040] Many Aboriginal groups and community organisations rely on funds from government to deliver various services into their communities. This situation ensures power remains in government hands to the extent that funding can be withdrawn by government at any point. An overreliance on short-term government funding can inhibit Aboriginal groups from criticising the government and its decisions for fear of funding being cut. Many Aboriginal groups therefore view 'service delivery' on behalf of governments as not conducive to the ideals of self-determination as it can constrain Aboriginal independence.

[1041] Smith et al (n 1147) 173.

[1042] Ibid. 169.

> Why are we always discussing the negative issues? Why don't we focus and act on our collective assets and strengths? Why can't we have our own Indigenous governance structure based on our strengths? Who gets to make decisions about our future?[1043]

In another case study of the Gugu Badhun Aboriginal Nation, Theresa Petray and Janine Gertz state that Gugu Badhun Aboriginal Nation are creating spaces in which settler-colonial power is limited, rather than waiting for governments to make space for them.[1044]

Like the Ngarrindjeri Nation, community planning and governance are viewed as the bedrock of Gugu Bahdun nation building efforts. The key feature is to build an economic base premised upon a strong cultural foundation. As Petray and Gertz explain, without a strong Indigenous cultural basis, economic development by Aboriginal people risks their own fundamental principles and freedoms by being co-opted or corrupted by capitalism.[1045]

Like the observation of Cornell and Kalt, Indigenous economic development (as a feature of nation building) must be attached to a cause greater than simply more jobs and income, Gugu Badhun Aboriginal Nation push back against neoliberal approaches that promote Indigenous employment and Indigenous business enterprise on the building of individual wealth.

> The dominant policy approach promotes a view that Indigenous economic development can only be achieved through mainstreaming, which means conformist engagement with the free market via the sale of labour and through the operation of a commercial business (Altman, 2007). Moreover, mainstream economic development programs are often centred on government economic priorities which don't always align with Indigenous community values.[1046]

As I argue, Ngarrindjeri, Wiradjuri, and Gugu Badhun Aboriginal Nations and their efforts at nation building are acts of 'prefigurative resistance and a move towards self-determination'.[1047] They require internal forms of deliberation in order for the groups to clarify their own priorities, before then engaging with government institutions and processes.

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[1043] Ibid. 174.

[1044] Theresa L Petray and Janine Gertz, 'Building an Economy and Building a Nation: Gugu Badhun Self-Determination as Prefigurative Resistance' (2018) 12(1) *Global Media Journal* 12.

[1045] Ibid.

[1046] Ibid.

[1047] Ibid.

Nation building is about putting sovereignty and self-government into practice rather than simply demanding its recognition. Political theorists such as Sunstein warn that enclave deliberation amongst like-minded individuals may lead to 'group think' or the adoption of extreme views developed in isolation from others. However, Sunstein also recognised that deliberation amongst enclaves that are connected to the broader public sphere can contribute to a more equitable and pluralistic democracy.[1048]

Despite the concern of groupthink, I argue that this is why Aboriginal people engage in enclave deliberation and is precisely the point of Indigenous nation building. Enclave deliberation amongst Aboriginal people seeks to strengthen group solidarity relating to the ideals of Indigenous nationhood, sovereignty, and self-government.

In addition to being a form of enclave deliberation, Indigenous nation building is also an act of prefigurative politics which I now turn to discuss.

## 11.3 Theory of Prefigurative Politics

> Prefigurative politics does not just refer to specific forms of protests in which the very process of planning, carrying out, and embodying political action becomes part of the message activists aim to convey. It also denotes direct ways of living democracy.[1049]

In this section, I draw on the concepts of *prefigurative politics* – a practice that groups or social movements employ to bring about the kind of future society they aspire to. A prefigurative strategy focuses on implementing the changes or practices one is seeking rather than asking others to make changes on one's behalf. Those practising prefiguration refuse to wait, instead opting to enact and perform the aspired changes in the present-day.[1050]

In employing prefigurative strategies, Indigenous groups are rejecting reliance on the state to act in good faith towards the progressive change groups are seeking. The practice of

[1048] Carolyne Abdullah, Christopher F Karpowitz and Chad Raphael, 'Affinity Groups, Enclave Deliberation, and Equity' (2016) 12(2) *Journal of Deliberative Democracy* 3.

[1049] Guilherme Fians, *Prefigurative Politics*, Felix Stein et al . (eds) (2022) 7. <https://www.anthroencyclopedia.com/entry/prefigurative-politics>.

[1050] Cooper (n 683).

prefigurative resistance in Indigenous nation building is captured in the maxim employed by Aboriginal people to *think sovereign* and *act sovereign*.[1051]

Law and political theory scholar, Davina Cooper, explains that central to the ideal of prefigurative politics is the 'reimagining of the state'.

As Cooper explains,

> Reimagining the state invokes a series of crucial questions about what it takes to be a state – recognising that states and state-thinking bear the baggage of different conceptual histories and geopolitical trajectories. The standard liberal answer, from the Global North, is that states involve institutional apparatuses with control over territory, populations and things, along with the organised deployment of legitimate force in conditions where this is recognised by other states. Nation-states can govern territory and populations, and use coercive force, for equality-supporting as well as hierarchical ends. But if states are to be deliberative, democratic, responsible and socially just, new conceptions of what it means to be a state are also required.[1052]

For Cooper, prefiguration is practice orientated and happens when new values or ethics are enacted. Cooper says, in the words of Maeckelbergh (2011:3), 'prefiguration is something people do'.[1053] Adherents of prefigurative strategies have tended to come from social movements, activists, and anarchist-inspired politics such as the anti-globalisation movement. They acknowledge that there is an existing 'way of doing things' (the state or global capital way), but that this way is wrong. Radical change is unlikely to emerge from (or within) the state but only from 'outside'; and it is the presence or potential for an outside which is key, for it is here where real transformative struggles occur.[1054]

The purpose of prefigurative politics is to conceptualise and undertake moves towards an alternative way of self-organising and of engaging with the state and other political and market actors. However, the effort is not concentrated on changing the state (which is an exhaustive and often fruitless undertaking) but rather to enacting small, localised alternatives to the

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[1051] Petray and Gertz (n 1042).

[1052] Davina Cooper, Nikita Dhawan and Janet Newman, *Reimagining the State: Theoretical Challenges and Transformative Possibilities* (Taylor & Francis Group, 2019) 5.

[1053] Cooper (n 683) 336.

[1054] Ibid. 337.

mainstream system. The Gugu Badhun Aboriginal Nation strategy for nation-based economic development seeks to build an economy that allows their people to live meaningful lives on Country, and contributes to the strengthening of culture, country and community.[1055] As discussed in the previous section, land management figures strongly in Indigenous economic development and nation building strategies, and this is no different for Gugu Badhun.

Like the work of anti-globalisation or climate change activists, key to their effort to transform society and how politics is done, is to help others imagine a different future. Native title, despite its questionable record of delivering justice to Aboriginal and Torres Strait Islander people, has been a catalyst in the resurgence of Indigenous nation building. This movement to re-establish Indigenous institutions is reflective of efforts of Indigenous people in other jurisdictions such as Canada and Aotearoa New Zealand.[1056]

For scholars of prefigurative politics, the rationale for such thinking is a response to the dissatisfaction people have of contemporary economic and democratic systems. People see their world as characterised by violence, oppression, inequality, injustice and corruption that must be tackled through means other than politics as usual. Concern with human induced ecosystems collapse and the consequences for human economic activity on non-human life prompts people to call for an urgent and radical rethinking of the ways in which humans work, live, produce, and consume. 'Prefigurative politics' offers alternatives to current modes of human production and consumption.[1057]

As I argue, the recognition of native title has provided the impetus for Aboriginal people to engage in Indigenous nation building and by doing so, not just imagine, but begin to forge a relationship with the Australian state based on Aboriginal sovereignty and self-government. As Cooper explains, prefiguration is a popular part of progressive, left politics and is part of an ongoing political practice towards a 'socially just future'. In a world in which 'fiercely unjust practices' may be widely prevalent, 'prefiguration refuses to wait' and instead 'prefigurative politics perform present-day life in the terms that are wished-for, both to experience better practice and to advance change'.[1058]

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[1055] Petray and Gertz (n 1042).

[1056] Kirsty Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford University Press, 2010).

[1057] Lara Monticelli and Arturo Escobar, *The Future Is Now: An Introduction to Prefigurative Politics* (Bristol University Press, 2022) 1.

[1058] Cooper (n 683) 335.

Additionally, adherents of prefiguration do not believe in waiting for some ideal 'right time and space' to emerge in order for ordinary politics to change. But rather, to act

> …as if preferred meanings are currently operative, while knowing that they are not, both to reimagine what things could mean and to put new meanings into practice. Refusing the naturalised dominance of status quo understandings, conceptual prefiguration treats the terms through which everyday life and institutions are understood and enacted as if they could be otherwise.[1059]

Jeffrey and Dyson state that,

> Unlike straightforwardly protesting against a dominant regime, prefigurative formations involve activists directing effort into performing now their vision of a 'better world' to come. Prefigurative politics is an inherently spatial and performative genre of political activism in which people enact a vision of change – through organisation, design, architecture, practices, bodies, or something as simple as a gesture or demeanour – and promote this as indicative of an imminent or more distant 'future'.[1060]

Prefiguration is concerned with both imagining and practicing a future vision of politics and democracy. 'The point of prefigurative agency is, after all, that it *demonstrates* [emphasis added], rather than argues, that an alternative is possible, reasonable, and necessary.'[1061]

From the perspective of deliberative and participatory democracy, Rollo suggests activism and protest are the most well understood examples of prefigurative speech and deed. He argues activism, public demonstration, civil disobedience, are often depicted exclusionary, uncivil, and therefore as detracting from deliberative ideals of rational, ethical, and inclusive politics. However, disruption through activism can forge high levels of civility by urging 'greater inclusion and more equitable treatment of marginalized groups overall'.[1062]

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[1059] Ibid. 336.

[1060] Craig Jeffrey and Jane Dyson, 'Geographies of the Future: Prefigurative Politics' (2021) 45(4) *Progress in Human Geography* 641, 643.

[1061] Rollo (n 1008) 595.

[1062] Ibid. 594.

Protest and activism is certainly a feature of Aboriginal people's strategy for political change. However, nation building is arguably a new and innovative feature of Indigenous people's deliberative democratic practice.

In their study of three Aboriginal Nations (Gunditjmara, Gugu Bahdun, and Wiradjuri) engaged in nation building, Jorgenson et al argue all groups are doing so not because of supportive government policies that enable or support nation building, but because of their own desire to do so.[1063] This highlights that Aboriginal people realise there may never be some ideally imagined moment in which the Australian settler state recognises our sovereignty and right to self-government.[1064] Nation building as an act of prefigurative politics, is therefore a response to this situation.

For Aboriginal groups such as the Gugu Bahdun, prefiguration entails *acting sovereign* as a means of unsettling settler state dominance.

> For Gugu Badhun, economic development, while not the only component, is an important part of their program of self-determination. It is a prefigurative act that requires strong foundations of decision-making and governance within the Nation.[1065]

'Acting as a nation' is often the 'final' piece in the rebuilding of Indigenous nationhood. After having clarified internal governance and relevant cultural matters, an Indigenous nation must be able to 'practise the sovereign authority it claims'. Acting as a nation involves the identification and pursuit of the nation's goals, responding to problems and opportunities, and managing external partnerships so that they enhance the powers of the Nation.[1066]

Knowing that space to negotiate these outcomes with the Australian state is most often not forthcoming, Indigenous nation building has emerged as a response to this non-response, so to

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[1063] Miriam Jorgensen, Alison Vivian, Anthea Compton, Donna Murray, Debra Evans, and Janine Gertz 'Yes, the Time is Now: Indigenous Nation Policy making for Self-Determined Futures' in Moodie and Maddison (n 122) 129.

[1064] As Cooper et al explain, advocates of prefiguration do not rely upon the state to reform itself or its elimination. 'Rather than focusing on the state's reform or, conversely, on its elimination, prefigurative conceptualising asks two questions. First, what state meanings arise when we imagine better kinds of states; second, how might these meanings be enacted in the present? In other words, how might we actualise these meanings – operating as if they were already viable?' Cooper, Dhawan and Newman (n 1050) 171.

[1065] Petray and Gertz (n 1042) Decolonisation, Prefiguration, and Indigenous Economies section, para 11.

[1066] Rigney et al (n 1157) 22.

speak. Aboriginal people are making new democratic spaces that are local and focused on 'reclaiming the everyday' in which 'everyday life becomes a space of resistance'.[1067]

As explained in the previous two chapters, ordinary democratic practices such as environmental planning (Caring for Country) and agreement making ('comprehensive settlements') are given greater political and legal meaning by Aboriginal people even if the Australian state refuses to acknowledge they are recognising Aboriginal sovereignty through these practices. These are, in a sense, prefigurative political acts.

As Forno and Wahlen explain, everyday life is full of mundane and ordinary activities, formal and informal ways of 'doing things' such as maintaining social relations and reproduction. They are the 'essential yet taken for granted' actions individuals, groups or communities may undertake as they engage with the world around them. Prefigurative political thinking thus emerges from these mundane interactions when they combine with people's motivations to imagine and 'construct an alternative future'.[1068] Some Aboriginal groups use the expression *'think sovereign, plan sovereign, act sovereign'* regarding their move towards rebuilding Indigenous nationhood.[1069] Being sovereign becomes an everyday practice.

The motivation behind 'prefigurative politics' and the emphasis on everyday life is an attempt to create on a small, local scale, the type of future world one envisions.

> In this sense, everyday practices can help to prefigure what society could look like in the future, as well as forming part of a broader repertoire of collective action by emphasizing cultivating cultural values for such a future. Everyday practices can thus demonstrate that alternatives are not a distant dream but can be considered in the here and now.[1070]

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[1067] Francesca Forno & Stefan Wahlen 'Prefiguration in Everyday Practices: When the Mundane Becomes Political', in Monticelli and Escobar (n 1182) 119.

[1068] Ibid. 120.

[1069] The phrase 'think sovereign' etc. is one I heard during a meeting between authors of a book on Indigenous public policy to which I contributed a chapter. The phrase seems to be a slightly different articulation of Cornell's description of the necessary elements for Indigenous self-government, which he defined as requiring three elements: 1) identifying as a nation; 2) organising as a political body; and 3) acting as an Indigenous nation by making decisions etc. See Cornell (n 743).

[1070] Monticelli and Escobar (n 1055) 124.

In a sense, all deliberation can be considered a form of prefigurative politics. For example, the purpose of more deliberation is supposedly to resolve disagreement or at the very least increase understanding between parties. Likewise, the greater inclusion of citizens in decision-making processes is to overcome a perceived deficit in participation. Both seek an improvement on the current situation.

As della Porta explains, by calling for changes democratic governance to counter social injustice, social movements play an important role in democratic innovation. Progressive social actors, she argues, 'experiment with democratic innovation in their internal practices'.

> In fact, their activities are orientated towards *prefiguration of alternative of internal democracy* [emphasis added]. Self-reflective actors, they experiment with new ideas of democracy, which are then the basis of proposed changes in democratic governance.[1071]

Using the example of social movements groups occupying public spaces (encampments or *acampadas*), della Porta states that these are examples of citizens enacting the preferred version of democracy which is inclusive and entails grass roots decision making, community planning and strategising. Camps are not only places of talking and listening, but building of collective identities. Camps were not only a demonstration of opposition or resistance to existing structure of democracy, but also to 'prefigure new relations and forms of democracy'.[1072]

Like Caring for Country and comprehensive settlements that provide recognition of Aboriginal sovereignty and self-government in the absence of formal or institutionalised recognition, prefiguration works by changing the world on a small scale.

> Reimagining society locally may not bring about immediate large-scale changes, but it models the society one seeks to build, thus informing its participants' practices and ways of thinking beyond local activist settings. This work of imagination is not to be underestimated: as climate change, structural racism, and a global pandemic require shifts of mentality and behaviour, practices involving open dialogue, solidarity, and

[1071] Donatella della Porta, *How Social Movements Can Save Democracy: Democratic Innovations from Below* (Polity, 2020) 17.

[1072] Ibid. 18.

> mutual support can provide us with alternative answers to issues that appear not to be sufficiently addressed by institutional politics.[1073]

In this light, Indigenous nation building is the effort of Aboriginal groups to 'reimagine' our relationships with the Australian state. It also involves reimagining of the Australian state itself from a single sovereign state to a multi sovereign and legally plural state. In this reimagined state, the sovereignty of Aboriginal nations is recognised and the institutional and structural means for Indigenous self-government is present. In the imagined, plurinational state, Aboriginal people having recognised rights to decision making and control over their affairs.

This entails a transformation that makes greater space for a more deliberative and participatory mode of democratic engagement between Aboriginal people and the Australian state. Indigenous nation building is therefore a progressive and transformative political project that can potentially effect democratic engagement and produce important empirical and theoretical insights for the fields of deliberative and participatory democracy.

Having the discussed Indigenous nation building as a form of prefigurative politics, I now discuss how Indigenous nation building affects deliberative and participatory democracy.

## 11.4 Indigenous Nation Building as an 'Everyday Deed' of Deliberative and Participatory Democracy

As already established in this chapter, the decision for Aboriginal groups to disengage and turn away from the state aims to induce more equitable, future forms of political association, are a prominent feature of Indigenous political theory. They are less so in theories of democracy and deliberative democracy.

Mark Warren and Toby Rollo[1074] are two who have theorised about the effect of disengagement and 'exit' in democratic theory. As Warren states, in political and democracy theory, 'exit' mechanisms are largely under theorised. 'The key reason is that democratic theorists have adopted, usually implicitly, what I shall call here a "voice-monopoly" model of democracy.'[1075]

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[1073] Fians (n 1018) 13.

[1074] Rollo (n 1008).

[1075] Mark E Warren, 'Voting with Your Feet: Exit-Based Empowerment in Democratic Theory' (2011) 105(4) *The American Political Science Review* 683, 684.

What Warren alludes to is the predominance of voice in deliberative democracy theory. 'Through public opinion, electoral representation, peoples' interests, preferences, and values formed into voice and translated into policies'.[1076] As Warren argues, 'exit' can be an act of empowerment with a 'residual communicative content'. That is to say, 'exit might empower and communicate in ways that advance democratic goods'.[1077]

Warren's claim that exit and/or disengagement are under theorised in deliberative democracy theory, is reflective of my argument that deliberative and participatory democracy under conditions of settler colonialism is largely understudied within the field. In settler-colonial settings, Indigenous people may be left with little option but to withdraw from engaging with the state until such future time, the conditions for deliberation are more equitable. When Aboriginal people refuse to engage or participate with the state, it communicates (verbally and non-verbally) dissatisfaction with the current conditions for deliberation, namely, the lack of inclusivity. By withdrawing, Aboriginal people seek to delegitimise the authority of the state.

Here in Australia, member of the Tanganekald, Meintangk Boandik First Nations Peoples and professor of law at the University of South Australia, Irene Watson, is highly critical of what she describes as the 'masquerade of recognition' that native title purports to provide Aboriginal and Torres Strait Islander people. Like Coulthard and Simpson, she rejects the notion of recognition by the state through its own system of law because it does little to actually change relations between Aboriginal people and the settler state.

> While the illusion of recognition runs, we still live without the freedom of our culture, and economic and civil rights, taken for granted by most citizens of Australia. We don't have the freedom from genocide to live on the lands of our ancestors, and is it law or rights, which will give us freedom? We struggle from the impact of powerful political and economic groups who mythologise native title as a source of land and other cultural and economic 'rights'. The truth is, it won't produce these rights and many of us are no longer waiting.[1078]

[1076] Ibid. 686.

[1077] Ibid. 696-697.

[1078] Irene Watson, 'There Is No Possibility of Rights without Law: So Until Then, Don't Thumb Print or Sign Anything!' (2000) 5(1) *Indigenous Law Bulletin* 5. See also Watson, 'Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal Peoples' (n 42).

The other state project many Indigenous people and scholars reject is the process of 'reconciliation'.

Australia's national reconciliation process emerged after then Prime Minister Bob Hawke failed to deliver on two key promises: national land rights legislation and the negotiation of a treaty between the Australian state and Aboriginal and Torres Strait Islander people. As Brennan explains, given this background, reconciliation seemed a poor imitation of actual justice for Aboriginal and Torres Strait Islander people. 'It was viewed as a politically soft option, which non-Indigenous Australians would find unthreatening precisely because it would do little to challenge their legal, political, and economic dominance.'[1079]

Also, as discussed, when then Prime Minister John Howard responded to the 1996 *Wik* decision with his 10-Point Plan to weaken native title law, many Aboriginal advocates such as Noel Pearson condemned the move for undermining the ethos of both native title and reconciliation. Accordingly, Aboriginal and Torres Strait people lost faith in the reconciliation process ensuring that at the end of the decade of reconciliation in 2000, rather than some triumphant moment of reform in Indigenous and non-Indigenous relations, national reconciliation appeared to limp over the finish line.[1080]

As Maddison states, the national reconciliation process in Australia (1991–2000) was strongly criticised by Indigenous people for its 'intense resistance' to decolonisation and for prioritising the education of non-Indigenous people at the expense of delivering actual justice for Indigenous people, thereby remaining within acceptable political boundaries and did not create space for deeper political transformations.[1081]

The inherently dialogic projects of recognition and reconciliation both failed to deliver substantive change for Aboriginal and Torres Strait Islander people. This situation understandably produces great cynicism amongst Aboriginal people in terms of whether more

[1079] Brennan (n 594) 150.

[1080] As Brennan explains, three years after the Council for Aboriginal Reconciliation (CAR) final report to the federal government, a Senate Committee inquiry found reconciliation had completely slipped from the national agenda and little was being done to address the Council's final recommendations. Ibid. 156.

[1081] Sarah Maddison, *Conflict Transformation and Reconciliation: Multi-Level Challenges in Deeply Divided Societies* (Routledge, 1st ed, 2015) 44.

talking will produce better outcomes. As I discussed in Chapter 7, Australia has a listening problem.[1082]

The realisation that deliberating with the state can bring about little actual change, prompts Aboriginal people to develop alternative political strategies. As Ivison explains, the continuing reality of enduring injustices render the politics of recognition and reconciliation deeply problematic. Central to the problem of recognition is that the 'recogniser' (in this case, the state) exerts considerable power over the 'recognisee' (Indigenous people). In response, Indigenous people turn towards other more empowering strategies, 'including a self-conscious reconstitution of Indigenous identities and ways of life as independently as possible from the liberal settler state'.

> This often takes the form of a refusal to accept the terms of the recognition game through a daily counter-assertion and enactment of alternative, grounded ways of life and sovereignties. The focus here is on resurgence, as opposed to recognition, and on the means necessary for rebuilding Indigenous communities on terms not defined in advance by the state and its agencies.[1083]

As the title of this chapter makes clear, Aboriginal people view 'turning away from the state' as a legitimate and necessary activity. Stepping away from further engagement with the state and focusing on Indigenous 'resurgence' becomes a more attractive option when further dialogue with the state is unlikely to produce the change sought. As political strategies, refusal,

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[1082] I would argue that a feature of Australian democracy is the performative promise of political leaders and governments that they will listen to the voices and words of Aboriginal people. For example, in his 2016 Close the Gap speech in the Federal Parliament, then Prime Minister Malcolm Turnbull said, 'It is equally important we listen to Aboriginal and Torres Strait Islander people when they tell us what is working and what needs to change. It's our role as government to provide an environment that enables Indigenous leaders to develop local solutions. It is time for Governments to 'do things with Aboriginal people, not do things to them'. A year later, the decision of the Federal Court in *McGlade v Native Title Registrar* [2017] FCAFC 10 threatened the future operation of a proposed coal mine in central Queensland owned by Indian mining billionaire, Gautam Adani. During a state visit to India in 2017, Turnbull was reported to have assured Mr Adani that the 'native title issue would be fixed' to allow the mine to proceed. The Wangan and Jagalingou Traditional Owners of the land on which the mine was situated and who were opposed to the mine, called it a 'national betrayal to sacrifice Aboriginal rights' in such a manner. See Wangan and Jagalingou Family Council, https://wanganjagalingou.com.au/turnbull-offers-to-sacrifice-aboriginal-rights-to-adani-in-an-act-of-national-betrayal/

[1083] Duncan Ivison, 'Justification, Not Recognition' (2016) 8(24) *Indigenous Law Bulletin* 9, 15.

resurgence, and turning away are well known concepts in Indigenous political theory, they are less so in theories of deliberative and participatory democracy.

However, as stated, some deliberative democracy scholars recognise that choosing not to deliberate can be a legitimate choice and have attempted to incorporate theories of exit and disengagement within the field of deliberative democracy. For example, as Rollo explains, democratic decision-making is deemed legitimate to the extent that it has been informed by free and informed exchanges among citizens and their representatives with the focus on citizen's voice as the primary form of participation. But as Rollo states, deliberative democracy theory seems not well equipped to account for the 'agency or exclusion of those who do not participate directly in deliberation, including Indigenous groups who may voluntarily chose to 'exit from deliberation'.[1084]

Deliberative democracy theory has long focused on the primacy of 'voice' as the most important aspect of citizen deliberation. 'This means deliberative theory is not well equipped to identify and account for the agency or exclusion of those who do not participate directly in deliberation.'[1085]

Rollo goes on to explain that in the absence of speech, 'deliberative deeds', defined as intentional acts, can become significant. A deliberative deed is a political act insofar as it seeks to contest collective norms, yet like speech, it may only qualify as democratic insofar as it exhibits the qualities of reasonableness, equality, and inclusion. What is important is that deliberative deeds are recognisable and intelligible as intentional acts that serve as both political speech and as political action that 'speaks for itself'.[1086]

In this light, Indigenous nation building and turning away can be considered a 'deliberative deed' to the extent that it is an intentional act to strengthen the deliberative and democratic capacity of an Indigenous nation as a response to settler state's failure to listen. It ultimately seeks to challenge and transform relations between Aboriginal people and the dominant settler state.

[1084] Toby Rollo, 'Everyday Deeds: Enactive Protest, Exit, and Silence in Deliberative Systems' (2017) 45(5) *Political Theory* 588.

[1085] Ibid.

[1086] Ibid. 589.

As I illustrated in Chapter 7, during the Howard years of government, institutional non-listening and parliamentary supremacy as features of Australian political culture is often incompatible with the ideals of deliberative and participatory democracy. When parliaments and political leaders continually ignore the voices and concerns of Aboriginal people, this can be powerful motivation to reconsider the usefulness of engaging with the state. Indigenous nation building becomes a more productive use of time and resources. Where there is a clear lack of reciprocity in Indigenous–settler relations (which represents a failure of the ideals of deliberative democracy) then Aboriginal people are highly unlikely to see merit in continuing to deliberate.[1087] The decision to exit deliberation is caused by a lack of trust in politicians and political institutions.[1088]

Disengagement for Indigenous people is often a last resort that nonetheless communicates a clear political message.[1089] But as Warren defines it, disengagement or exit for deliberation need not be total. That is to say, it may be done in order to produce a more favourable response. As Warren states, exit can be a means for inducing responsiveness.[1090] In this sense, Indigenous nation building is strategy aimed at evoking greater responsiveness from the Australian state on matters such as sovereignty, treaty, participation, and self-government.

[1087] As Fung explains, the use of coercive and non-persuasive actions by powerful actors can be so deep (extreme failure of the will to reciprocity) and their power so compelling (very unfavourable circumstances of inequality) that deliberation is no longer a tenable goal. See Fung (n 191) 404.

[1088] Stoker and Evans argue there is a steady decline in political trust in liberal democracies, including Australia. Through survey data, they claim a clear majority (74%) of Australians are deeply unsatisfied with the norms and values of contemporary politics and the performance of the Federal parliament in reaching decisions (p.124). Like Warren, they cite the work of Albert Hirschman ('Exit, Voice, and Loyalty') to argue that without trust in the system of democracy or in its capacity to improve, people will lose faith in the system and will leave or exit (p.128).

[1089] For example, in 1997, as the Howard Government was seeking to pass its highly discriminatory amendments to the native title legislation through the parliament, Pat Dodson declined to renew his position as Chair of CAR. Dodson's decision did not derail or conclude the process of reconciliation but was a symbolic act of disapproval at the actions of Prime Minister Howard and his government. The refusal of Dodson to continue to lead the national reconciliation process was a highly symbolic act of exiting given how reasonable, thoughtful and fair minded Dodson was as a deliberator and negotiator. Rather than delegitimise the reconciliation process, Dodson's actions brought public attention to the unreasonableness of Howard and his government and their undermining of the process. See W Sanders, 'Journey Without End: Reconciliation between Australia's Indigenous and Settler Peoples' 3-5. ('Discussion Paper No. 237/2002').

[1090] Warren, 'Voting with Your Feet: Exit-Based Empowerment in Democratic Theory' (n 1073) 684.

As a deliberative deed, turning away communicates in a non-violent and non-confrontational way to those in power that there exists an inequality or a lack of respect and reciprocity in the existing relationship.

I recognise my argument of 'disengaging' may appear counterintuitive to the normative accounts of deliberative and participatory democracy. However, under conditions of settler colonialism, I argue that such a move is both necessary and understandable as a means to reorientate deliberation back to a position of greater equality.

Recalling the observation of Fung that too often, deliberative democrats assume deliberation and participation take place under 'highly favourable conditions', rather than 'sub-optimal circumstances'.[1091] Needless to say, nation building and the politics of refusal do not feature in either deliberative or participatory democracy as a democratic innovation or indeed as a means for deepening democracy.

Again, my assertion is that deliberative and participatory democracy lacks an appreciation of the dynamics of settler colonialism and the difficulties it exerts on the efforts of Indigenous people to engage with the state. This is because, as Fung and Warren argue and set out in this chapter, many of the normative accounts of deliberative and participatory democracy assume efforts to resolve political conflict occur in a (idealised) neutral environment.[1092] As such, deliberative and participatory democracy may not look like or behave in line with their normative accounts.

As Goodin states, there is a presumption that all consequential deliberation must be external and directed towards others. However, deliberation also involves a process of internal, self-reflective deliberation within. Goodin asserts that part of internal reflection requires us to make sense of others, their utterances and their actions, by mentally 'putting ourselves in the other's place'.

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[1091] Fung (n 191) 398.

[1092] As Young explains, the theory of deliberative democracy tends to assume participants engage in deliberation free of constraints on time, resources, they bring no unconscious prejudices etc. 'Ideal processes of deliberative democracy lead to substantively just outcomes because deliberation begins from a standpoint of justice.' All affected persons are able to participate, speak and criticise, free of threat or coercion. 'Such conditions would seem to exist only within institutions that enable self-development of everyone and no-one is subject to domination. No existing democracy is as just as that.' See Young, *Inclusion and Democracy* (n 172) 33-36.

Aboriginal claims of sovereignty and self-government are a challenge to the Australian state to imagine a differently composed, Australian nation state. It challenges the perception that there is a single, indivisible, Australian sovereignty embodied by and asserted by the state. Amongst Aboriginal and Torres Strait Islander people, the proposition that Indigenous sovereignty and self-government co-exists with Australian sovereignty is understood and accepted as factual and self-evident. Yet formally, the Australian state largely does not recognise or acknowledge these features of Indigenous political authority. This is why, as discussed in Chapter 8, native title can be understood as a contest of discourses over the meaning of what native title recognises and entails.

For Goodin 'deliberation within' requires self-reflection and an ability to make others 'imaginatively present'. Canadian legal scholar and political philosopher Patrick Macklem argues that Indigenous sovereignty and self-government claims often fall victim to limitations of the settler state's 'legal imagination'.

> Law can and ought to serve as a vehicle for the realization of self-government by Canada's First Nations. The law currently exhibits a structural resistance to the aspiration of native self-government, however, despite recent jurisprudence sympathetic to the needs and interests of native people. My hope is that locating the precise places in which resistance to self-government manifests itself in the Canadian legal imagination, it will become possible to ascertain the ways the law can transform itself so as to become an instrument of native empowerment.[1093]

Whether acknowledged by the state or not, Aboriginal people in Australia have begun to re-establish Indigenous nationhood and governance institutions as a means of reasserting sovereignty as a consequence of legal recognition to rights in land such as native title. As one Aboriginal person explained the situation in Australia, 'If we wait for government to recognize our rights, we'll die waiting. So why not just get on with our own agendas?'[1094]

My final point is that while deliberation and participation is indeed positive, it comes at a great cost to Aboriginal people. In doing all of this external-facing deliberative work, we have

[1093] Macklem (n 88) 390-391.

[1094] William Nikolakis, Stephen Cornell and Harry Nelson (eds), *Reclaiming Indigenous Governance: Reflections and Insights from Australia, Canada, New Zealand, and the United States* (University of Arizona Press, 2019) 23.

neglected to rebuild our own governance capabilities. Engaging in deliberation is ultimately meant to produce better policy solutions and outcomes.

Since the 1960s, Aboriginal and Torres Strait Islander people have invested much time and resources into public deliberation such as parliamentary inquiries, royal commissions, advocacy campaigns, petitions, and academic research demonstrating how the Australian state could recognise our sovereignty and rights to self-government. When these efforts produce no notable change in our circumstances or indeed structural arrangements between Aboriginal people and the Australian state, it is understandable that we conclude our efforts could be better invested elsewhere. Deliberation begins to look like a tool of the state to control Aboriginal people.

As discussed in Chapter 6, after Mabo and the recognition of native title, calls for the institutionalisation of differentiated inclusion increased. Unlike in Canada and the US, native title in Australia does not include either a form of Indigenous sovereignty or the right to self-government. As such, nation building therefore serves as a practical demonstration of what Aboriginal sovereignty and self-government looks like in the hope that by acting sovereign, it may open the minds and shift the view of those in government. Indigenous nation building acts as an important forum for developing alternative vision of Indigenous–state relations, which I now turn to discuss.

## 11.5 Indigenous Nation Building as Counterpublic for Aboriginal Sovereignty

In this final section, I discuss Indigenous nation building as the creation of what Nancy Fraser describes as 'subaltern counterpublics'.

In this thesis, I have argued that the recognition of native title has been significant to calls for greater inclusion of Aboriginal and Torres Strait Islander people within Australian democracy. However, these calls and the necessary structural changes continue to be resisted. Indigenous nation building is a response to this situation as Aboriginal people seek to build their capacity for self-government.

Fraser's concept of a counterpublic was in response to Habermas' influential notion of a 'public sphere as a theatre for political participation enacted through the medium of talk in democratic theory'. For Fraser,

> It is the space in which citizens deliberate about their common affairs, hence, an institutionalized arena of discursive interaction. This arena is conceptually distinct from the state; it a site for the production and circulation of discourses that can in principle be critical of the state. The public sphere in Habermas's sense is also conceptually distinct from the official-economy; it is not an arena of market relations but rather one of discursive relations, a theater for debating and deliberating rather than for buying and selling. Thus, this concept of the public sphere permits us to keep in view the distinctions between state apparatuses, economic markets, and democratic associations, distinctions that are essential to democratic theory.[1095]

Fraser's feminist critique of the Habermasian public sphere was based on what she saw as the lack of diversity in the concept. The 'bourgeois conception of the public sphere, as described by Habermas', was not adequate for a meaningful critique of democracy in late, pluralistic, capitalist societies. Fraser nonetheless recognises Habermas' idea of the public sphere as indispensable to critical social theory and to democratic political practice, although the idea is not wholly satisfactory.[1096]

For Fraser, despite the rhetoric of publicity and accessibility that the public sphere proclaimed to entail, it nonetheless featured a number of inherent exclusions, such as gender. In Habermas' vision of public talk, the ideal style of speech was 'rational, virtuous, and manly'. 'In this way, masculinist gender constructs were built into the public sphere concept.'[1097]

As Fraser explains, subaltern counterpublics emerge as a response to exclusions within dominant society. Counterpublics are public arenas for alternative discourses and as such, 'help expand discursive space'.

> In principle, assumptions that were previously exempt from contestation will now have to be publicly argued out. In general, the proliferation of subaltern counterpublics means a widening of discursive contestation, and that is a good thing in stratified societies.[1098]

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[1095] Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' (1990) (25/26) *Social Text* 56, 57.

[1096] Nancy Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (Routledge, 2014) 70-71.

[1097] Fraser (n 1009) 59.

[1098] Ibid 67.

And, Fraser elaborates,

> I propose to call these subaltern counterpublics in order to signal that they are parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses, which in turn permit them to formulate oppositional interpretations of their identities, interests, and needs. [1099]

As Mansbridge explains, through the critical lens of feminism, Fraser challenged Habermas' unitary understanding of a single public sphere with her conceptualisation of a plurality of contesting 'counterpublics'. For Fraser, the ideal of a single, comprehensive public sphere as espoused by Habermas does not reduce but exacerbates societal inequality.

> I contend that, in stratified societies, arrangements that accommodate contestation among a plurality of competing publics better promote the ideal of participatory parity than does a single, comprehensive, overarching public.[1100]

Fraser goes on to explain that, in societies in which various forms of inequality exists (socioeconomic, discursive, political), 'deliberative processes in public spheres will tend to operate to the advantage of dominant groups and to the disadvantage of subordinates'.

> In that case, members of subordinated groups would have no arenas for deliberation among themselves about their needs, objectives, and strategies. They would have no venues in which to undertake communicative processes that were not, as it were, under the supervision of dominant groups.[1101]

Building upon Fraser's feminist critique of the Habermasian, unitary public sphere, Mansbridge articulated the need for subordinate groups to create what she terms 'enclaves of resistance',

> …in which those that lose in each majority vote…can rework their ideas and their strategies, gathering their forces and deciding in a more protected space in what way or whether to continues the battle.

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[1099] Ibid.

[1100] Ibid. 66.

[1101] Ibid.

As Mansbridge explains, within these 'enclaves of resistance' 'people can come to understand their interests better, explore their common and conflicting ideas in a setting of mutual encouragement'.[1102]

Karpowitz et al have defined 'enclave deliberation' as internally focused deliberation amongst individuals or social groups, which experience various forms of political marginalisation and disempowerment. Normatively, the ideal of enclave deliberation is that marginalised or disempowered groups are given space to deliberate amongst themselves before entering into a wider deliberative forum consisting of a cross-section of society. That is to say, they are one stage in a larger deliberative process with governments and a wider cross section of society.

> We extend this argument to civic forums, maintaining that it would be better for equality, and therefore for the quality of deliberation, to create opportunities within and among forums for enclave deliberation among the least powerful.[1103]

The aim of enclave deliberation is to ensure the perspectives of marginalised participants have the opportunity to be discussed away from the influence of more powerful actors in order to counteract background inequalities such as differences in education, deliberative capacity, and economic and social status.[1104]

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[1102] Jane Mansbridge 'The Long Life of Nancy Fraser's "Rethinking the Public Sphere"', in Banu Bargu, Chiara Bottici, and ProQuest, *Feminism, Capitalism, and Critique: Essays in Honor of Nancy Fraser* (Palgrave Macmillan, 2017) 105.

[1103] Christopher F Karpowitz, *Deliberation, Democracy, and Civic Forums: Improving Equality and Publicity* (Cambridge University Press, 2014) 91.

[1104] An example of Indigenous enclave deliberation that is part of broader civic deliberative process that includes governments and a broader cross of Australian society is the Uluru Statement from the Heart. As Appleby and Davis explain, the Statement was the result of an Indigenous-designed and led process of regional dialogues across the nation designed to articulate what Aboriginal and Torres Strait Islander people understood constitutional recognition to mean to them. Until the Uluru Statement, the process of constitutional recognition was largely concerned with amending the wording of Australia's Constitution. That is to say, it was largely focused on symbolic change. Until the Uluru Statement, government officials had simply failed to appreciate that Aboriginal and Torres Strait Islander people were unsatisfied with symbolic change and wanted meaningful, structural change. Through the regional dialogue process Aboriginal and Torres Strait Islander people were able to discuss their own interests, beliefs, and values, on the question of constitutional recognition. What emerged as the top priorities was the importance of truth-telling and having a voice in deciding law and polices which affect us. The deliberative dialogue process helped to produce an informed consensus across Aboriginal and Torres Strait Islander communities on their preferred reform proposal. What emerged was a rejection of symbolism and a call for treaty-making, truth-telling, and a constitutionally enshrined 'Voice to Parliament'. See Appleby and Davis (n 71).

For the purposes of this chapter, I want to take a broader view of enclave deliberation to argue that internal forms of deliberation, problem solving and decision-making are practices some Aboriginal groups undertake *constantly* as part of the nation building process. That is to say, enclave deliberation by Aboriginal people is not a step in a well-designed, state-sanctioned public deliberative process, but is an ongoing process of internal deliberation to develop the capacity of Aboriginal people.

Indigenous nation building as a form of enclave deliberation is the process in which Aboriginal people develop their own ideas, opinions, and aspirations, in order to better deliberate with external parties in relation to matters of sovereignty and self-government.[1105] This is done usually 'On Country' away from government officials and others and is an essential feature of Indigenous self-government and nation building. It is neither state-sanctioned nor done only within a formally designed process or forum.

Through enclave deliberation and re-establishing the means for self-government, Aboriginal groups are able to develop political arguments and strategies away from the influence of government. Internally focused, capacity-building deliberation is a fundamental and important element of Indigenous nation building as Aboriginal people seek to transform themselves before seeking to transform Australian democracy. The aim of such enclave deliberation is to strengthen the deliberative capacity of the groups in order to bring about political change within a dominant, non-Indigenous society. Enclave deliberation is therefore not confined to a single event or forum but is simply part of the Aboriginal people's political struggles to rebuild our own institutions for self-government.

In this light, Indigenous nation building seeks to overcome differences in 'power and deliberative equality' by firstly clarifying internal group goals before entering the broader public sphere.[1106]

What these concepts of 'counterpublics' and 'enclaves' represent are spaces for the creation of 'counter discourses'.

> The point is that, in stratified societies, subaltern counterpublics have a dual character. On the one hand, they function as spaces of withdrawal and regroupment; on the other

[1105] Karpowitz, Raphael and Hammond (n 748) 582.

[1106] Ibid.

> hand, they also function as bases and training grounds for agitational activities directed toward wider publics.[1107]

In this sense, Aboriginal groups engaging in Indigenous nation building are forging competing public spheres in which the issues of sovereignty, self-government, Indigeneity, political rights, and empowerment are not only discussed but make room for forms of association that recognise Aboriginal sovereignty.

Yet there is also a very important message in nation building and turning away, which apart from the important work of governance capacity building in order to achieve greater autonomy, is the challenge to the Australian state's ongoing attempts to control the lands and lives of Aboriginal people. Indigenous nation building is both a space and a practice that questions that legitimacy of state rule over Aboriginal people. Collectively, Caring for Country, comprehensive settlements, and Indigenous nation building are activities that embody and exhibit features of deliberative and participatory democracy, but more importantly challenge the prevailing acceptance of the Australian state's sovereignty as ultimate and exclusive. These three activities attest to the ongoing political relevance of alternative Aboriginal claims to sovereignty and self-government that challenges this position.[1108]

Finally, while this chapter is concerned with analysing the effect of Indigenous nation building on deliberative and participatory democracy, the ideal of a counterpublic could be widened to include the native title system. As I discussed in Chapter 8, the native title system acts as a contestatory mechanism within Australian democracy. As Fraser explains, a key function of subaltern counterpublics is to contest laws and policies of the broader society. As Fraser explains, 'subaltern counterpublics stand in a contestatory relationship to dominant publics'.[1109]

As stated throughout this thesis, a key aim has been to describe and analyse the various actions and practices of Aboriginal people within the native title system through the lens of deliberative and participatory democracy. In this chapter I have discussed the intent of Indigenous nation building using the Indigenous political theories of 'refusal' and 'resurgence' and the strategic act

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[1107] Fraser (n 1009) 68.

[1108] Though Appleby, Levy and Whalan discuss the Uluru Statement and Voice to Parliament specifically in their paper, the notion of Aboriginal and Torres Strait Islander people challenging the exclusivity of Australian sovereignty is also applicable to the activities I have discussed: Caring or Country, negotiating comprehensive settlements, and the act of re-building Indigenous governance and nationhood. Appleby, Levy and Whalan (n 122) 5.

[1109] Fraser (n 1009) 70.

of ‘turning away’. I then overlaid the concepts of exit, silence and subaltern counterpublics to illustrate the overlap and connectedness between the actions of Aboriginal people seeking to reassert their nationhood and some of these lesser known and under theorised concepts of deliberative democracy.

## 11.6 Conclusion

While Caring for Country and comprehensive settlements clearly have deliberative and participatory democratic characteristics, in this chapter I have argued that Indigenous nation building is a form of internal deliberation and disengagement (or ‘exit’ as Warren and Rollo term it).

However, exiting has an effect on deliberation and democratisation to the extent that it communicates dissatisfaction with the nature of relations and circumstances in which deliberation is presently occurring. Also, and perhaps most importantly, Indigenous nation building is the effort of Aboriginal people to act sovereign regardless of any formal recognition by the Australian state of Aboriginal sovereignty and right to self-government. To undertake Indigenous nation building is to create a space for the formation of Indigenous nationhood and for developing political claims and needs.

Lastly, in this chapter I have argued that Indigenous nation building has the potential to greatly effect Australian democracy into the future. While the nation-state is an everyday reality for Aboriginal people, and the refusal to recognise Aboriginal sovereignty and self-government remains an impediment, nonetheless the practice of Indigenous nation building ensures that when the state engages with Aboriginal people it will do so within new political spaces occupied by Aboriginal nations and not merely stakeholders. Though these engagements continue to be far from equal, Indigenous nation building nonetheless is a practical example of trying to institute new political arrangements between Aboriginal people and the state. While Indigenous nation building may not result in the immediate transformation of Aboriginal–state relations, it does enable Aboriginal people to engage in collective problem solving and decision making.

It must be remembered that the recognition of native title has been a feature of Australian democracy for just over 30 years. After almost 250 years of colonisation, the process of rebuilding Indigenous nationhood and the institutions for internal and external forms of Indigenous self-governance will take time. It will also require financial resources from the state.

At the beginning of this thesis, I claimed the native title system had become an unintended deliberative democratic space. In conclusion, I consider the three examples discussed in Chapters 8, 9 and 10 seek to reimagine and deepen the role of Aboriginal people by way of deliberation and participation in decision-making processes in relation to the laws and policies that affect us in the absence of actual institutions and process that facilitate deliberative and participatory democracy between Aboriginal people and the state. They are what della Porta refers to as 'democratic innovations from below'.

In all three cases, native title has been a catalyst for Aboriginal people to innovatively use what many might consider ordinary tools of democratic governance such as policymaking, agreement making and the less traditional though no less democratic act of turning away in order to prioritise the strengthening internal capacity for deliberation, problem solving, and decision making through nationhood rebuilding. Within the context of a settler colonialism in which the state enjoys a dominant position to coerce and oppress Aboriginal people, not only are these democratic innovations from below, but *Indigenous democratic innovations.*

# 12 Conclusion and Future Research

As stated, the impetus for this thesis came from my observations over many years of the discussions between Aboriginal groups, government's representatives and others concerning native title. As I explained in Chapter 2, what I felt I was witnessing was two competing conceptualisations of what constituted native title. One held by government officials was a narrow interpretation informed by common law and legislation. That is, a *sui genris* or unique type of property right giving Aboriginal people a limited right to have their voices heard in relation to land use decisions. The other held by Aboriginal people, is a more expansive and holistic version of native title that includes Aboriginal sovereignty and the right to self-government. What David Ritter describes as the tension between jural and social conceptualisations of native title.

The question this thesis set out to answer was, 'Has the native title system become a deliberative and participatory democratic space for self-determination by Aboriginal people? Additionally, I also wanted to provide insights into questions such as 'How does native title facilitate public deliberation and political claim making for Aboriginal people', and 'What are the main deliberative and participatory democratic practices of Aboriginal people within the native title system?'

In addition to answering these key questions, in Chapter 2, I explained my methodological approach to this research project was an interpretive, socio-legal analysis of deliberative and participatory democracy. As a socio-legal study of native title, I wanted to illustrate how Aboriginal people understood native title and highlight our efforts to give it more meaning than what the law of native title can and does. In the words of Silbey, I have tried to present a study of native title as being negotiated through everyday transactions.

I also explained that the intention behind such an approach was to make visible what I believed to be the largely invisible and understudied world of deliberative and participatory democratic practice of Aboriginal people within the native title system. Aboriginal people do not speak of the work of native title as deliberative and participatory democracy. Indeed, a key objective of this thesis is to bring to the attention of deliberative and participatory democracy scholars and Indigenous people that Aboriginal people do indeed practice deliberative and participatory democracy in unstructured forums such as public policymaking and negotiating agreements.

In Chapter 3, I presented an overview of both deliberative and participatory democracy theories by way of background. More importantly, I challenged a prevailing line of thought held by some deliberative and participatory democracy scholars that the two theories should not be equated or applied in tandem. I argued that this belief is incompatible with the ideal of Indigenous self-government in which Aboriginal people demand the right to both deliberate *and* participate in decision-making processes. The ideal of Indigenous self-government is therefore closer in alignment with the ideal of 'participatory deliberative democracy' as espoused by scholars such as Christina Lafont and Antonio Floridia.

In Chapter 4, I presented a discussion of the history of law of colonisation to demonstrate how law was used to dispossess Aboriginal people from their lands. I also discussed how the Australian Constitution was developed without the participation of Aboriginal people and included two discriminatory parts that acted to exclude Aboriginal people from full participation in Australian democracy. Rather than be some historical event, settler colonialism affects present day political and legal relations of Aboriginal people. I concluded Chapter 4 with my argument that deliberative and participatory democracy under conditions of settler colonialism are both under theorised and under researched by deliberative and participatory democracy scholars. The fields of deliberative and participatory democracy have yet to engage seriously with settler colonialism.

In Chapter 5, I argued the *Mabo* decision and the recognition of native title within Australian law was a 'constitutional moment' in Australia democracy. Despite strong criticism of the shortcomings of *Mabo* by some Indigenous and legal scholars, for many Aboriginal leaders, *Mabo* and the recognition of native title was thought to be the start of a reformed relationship between Aboriginal and Torres Strait Islander people and the Australian state. One in which native title would form the basis of Indigenous self-government.

In Chapter 6, I elaborated on the ideals of differentiated and deliberative inclusion for Aboriginal people, which more often meets strong political resistance within Australia. In particular, during the Howard yaers of government he rejected the notion of aboriginal difference by strongly promoting a vision of a singular, homogenous Australian society. Formal inclusion and equality, which inherently disadvantages the agency of Aboriginal and Torres Strait Islander people as Pearson, Davis, Behrendt and many others have argued, remains the norm within Australia. Australian democracy is highly averse to providing – even if strongly justified – additional rights and rights protections to minority groups such as Aboriginal and

Torres Strait Islander people in the belief that it provides Indigenous people with rights that others do not have.

In Chapter 7 I identified what I believe to be both a feature of settler colonialism and a barrier to the ideals of deliberative and participatory democracy, listening. I drew on the work of Scudder and others to argue that what prevents Aboriginal people from engaging in genuine deliberative and participatory democracy is not our inability to speak, but the lack of deliberative uptake by institutions and politicians.

In Chapter 8, I framed native title as a contestatory mechanism. In the absence of a treaty or treaties, a recognised right to self-government, and a framework of Indigenous rights protection (UNDRIP) in Australia, native title must do a disproportionate amount of political leveraging for Aboriginal people.

I then presented in Chapters 9, 10, and 11 three empirical examples of deliberative and participatory democracy by Aboriginal people within the native title system. Rather than being abstract practices, all three are meaningful activities for the lives of Aboriginal people. I analysed the practice of Caring for Country (environmental management) as a form of governance driven democratisation as defined by Mark Warren. I argued comprehensive settlements were an example of what Jane Mansbridge and others defined as deliberative negotiation. Finally, I argued Indigenous nation building is a form of prefigurative politics as defined by Davina Cooper. I discussed the notion of turning away from engaging with the state to prioritise internal governance capacity as argued by Glen Sean Coulthard. Additionally, I framed the inward turn of Aboriginal people as reflective of a what Warren and Toby Rollo describe as a legitimate yet little studied aspect of deliberative democracy, when citizens choose to strategically 'exit' from deliberation.

To summarise my overall argument in the last three chapters of this thesis, I hold that these deliberative and participatory practices seek to forge a space for Aboriginal people within Australian democracy that is inclusive yet differentiated. With no formal institutions or body to facilitate deliberative democratic engagement between Aboriginal people and the Australian state, the ideal of differentiated inclusion for Aboriginal and Torres Strait Islander people is difficult. What I have suggested in this thesis is that in the absence of formal institutions to facilitate greater democratic deliberation and participation, Aboriginal people have used native title to contest forms of inclusion in policy making, negotiating agreements, and making space for Aboriginal sovereignty and self-government.

By way of outcomes, this thesis did not seek to make or prove that because deliberation and participation occurs within the native title system that it is producing better political outcomes for Aboriginal people. For many Aboriginal people and Indigenous rights advocates, *Mabo* and the recognition of native title was thought to be the start of a sweeping legal and political reforms.

However, as of 2023, the anticipated structural reform remains mostly unfulfilled. As the current Voice to Parliament campaign highlights, Aboriginal people still seek structural changes that enable us to participate in shared decision-making processes of government as part of realising the ideal of Indigenous self-government. And by doing so, enhance Australian democracy. And finally, I wanted to demonstrate that it is Aboriginal people who are capable of driving democratic innovation. In the face of resistance to institutional and structural changes at the national political level, Aboriginal people have injected greater deliberative and participatory democratic elements into policymaking and negotiating agreements. And what is notable is that these innovations occurs under the less than ideal conditions of settler colonialism.

I now turn to discuss future research possibilities.

## 12.1 Future Research

By way of limitations to this thesis, as stated in Chapter 2, the forced lockdowns due to COVID-19 during 2020-2021 meant that my original plan to undertake case studies and qualitative interviews could not proceed. Instead I have relied on published materials to support for my arguments in relation to the three empirical studies I discuss in this thesis; Caring for Country, comprehensive agreements, and Indigenous nation building. No doubt, this is a drawback for this particular thesis, but presents an opportunity for future research with Aboriginal groups concerning deliberative and participatory democracy.

Additionally, the examples cited in this thesis are few. Many Aboriginal groups dealing with native title and other matters are simply lack the resources to publish their efforts of self-determination and democratisation. More examples and case studies would help to strengthen my claims of the native title system being an innovative space for deliberative and participatory democracy by Aboriginal people.

In this thesis, I criticised the fields of deliberative and participatory democracy for paying too little attention to deliberative and participatory practices of Indigenous people in Indigenous and non-Indigenous spaces. I said that despite the self-proclaimed *emancipatory potential* of deliberative and participatory democracy by many of its adherents, there was very little empirical studies of deliberative and participatory democracy concerning Indigenous people.

This would appear to create a strong incentive for further study of Indigenous people's political struggles in settler-colonial contexts. The continuing efforts of Aboriginal people to create spaces, processes and institutions that allow greater deliberation and participation in decision making processes is a rich area of future research on deliberative and participatory democracy by Indigenous people.

I also criticised the tendency of some scholars to treat deliberative and participatory democracy as separate approaches to greater deliberative inclusion. I said this misunderstands the ideal of Indigenous self-government. In terms of future research, there is an opportunity to develop the notion of Indigenous self-government as a form of *participatory deliberative democracy by Indigenous people*.

As scholars such as Ercan, Hendriks, and Boswell have recognised, there is legitimate criticism directed towards deliberative democracy in particular for its heavy focus on 'micro deliberation' in forums such as citizens' juries and parliaments, at the expense of considering the broader challenge of deliberation in mass democracies. As they argue, this leaves the field with little empirical knowledge of how deliberation works outside of structured forums. The study of deliberation in unstructured settings may expand ideas about what public deliberation entails, where it occurs, as well as pose new questions for empirical studies of deliberative democracy.[1110]

This thesis is in some way, a response to this appeal. By adopting an interpretive approach, I have sought to highlight a hidden and little studied space in which Aboriginal people engage in forms of participatory deliberative democracy. It is my hope this thesis expands knowledge about deliberative and participatory democracy and its connection to the political struggles of Aboriginal people. Our struggle to negotiate space in which we can balances our desire for self-government within the settler state political and legal system is unavoidably deliberative.

[1110] Ercan, Hendriks and Boswell (n 114) 196-197.

As I have argued, native title and the native title system has emerged as an important contestatory mechanism for Aboriginal people to put forward a more deliberative and participatory conception of democracy. In the political struggles of Indigenous people, concepts such as sovereignty, self-government, self-determination, free prior and informed consent (FPIC), strengthening governance, and active participation in decision-making are fundamental and would appear to align with the ideals of deliberative and participatory democracy. As Indigenous people, we want greater decision-making powers and reformed institutional arrangements that guarantee our participation in in policy processes.

But as I have argued, the efforts of Aboriginal people to institutionalise deliberative and participatory forms of democratic engagement receives far too little attention from deliberative and participatory democracy scholars.

# 13 Bibliography

## 13.1 Articles, Books, Reports


Abdullah, Carolyne, Christopher F Karpowitz and Chad Raphael, 'Affinity Groups, Enclave Deliberation, and Equity' (2016) 12(2) *Journal of Deliberative Democracy*

Aboriginal and Torres Strait Islander Justice Commissioner, *Native Title Report 1998* (Australian Human Rights Commission, 1998)

Aboriginal and Torres Strait Islander Justice Commissioner, *Native Title Report 2007* (Australian Human Rights Commission, 2007)

Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006* (Australian Human Rights Commission, 2006)

Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2003* (Australian Human Rights Commission, 2003)

Ackerman, Bruce, *We the People, Volume 1: Foundations:* (Belknap Press, 1993)

Agius, Parry et al, 'Doing Native Title as Self Determination: Issues From Native Title Negotiations in South Australia' (2003)

Agius, Parry et al, '(Re)Asserting Indigenous Rights and Jurisdictions within a Politics of Place: Transformative Nature of Native Title Negotiations in South Australia' (2007) 45(2) *Geographical Research* 194

Agius, Parry and Richie Howitt, 'Different Visions, Different Ways: Lessons and Challenges from the Native Title Negotiations in South Australia'

*AIATSIS Annual Report 2020-21* (Australian Institute of Aboriginal & Torres Strait Islander Studies, 2021) 218

Alfonso Martínez, Miguel, Erica Irene A Daes and Ribot Hatano, *United Nations Special Rapportuer Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations* (No E/CN.4/Sub.2/1999/20, UN, 22 June 1999)

Alfonso Martínez, Miguel, Erica-Irene A Daes and Ribot Hatano, *Final Report of the Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations :* (No E/CN.4/Sub.2/1999/L.33, Commission on Human Rights, United Nations, 19 August 1999)

Altman, Jon, 'Indigenous Policy: Canberra Consensus on a Neoliberal Project of Improvement' in Chris Miller and Lionel Orchard (eds), *Australian Public Policy* (Bristol University Press, 1st ed, 2014) 115

Altman, Jon and Sean Kerins (eds), *People on Country: Vital Landscapes, Indigenous Futures* (The Federation Press, 2012)

Altman, Jon and Peter Whitehead, 'Caring for Country and Sustainable Indigenous Development: Opportunities, Constraints and Innovation' [2003] (20) *CAEPR Working Paper 20* 14

Anaya, S James, 'A Contemporary Definition of the International Norm of Self-Determination' [1993] (131) *Transnational Law & Contemporary Problems*

Anaya, S James, *Indigenous People in International Law* (Oxford University Press, 3rd ed, 2004)

Anderson, Ian, 'The End of Aboriginal Self-Determination?' (2007) 39 *Futures* 137

Anghie, Antony, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004)

Anker, Kirsten and Prakash Shah, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Taylor & Francis Group, 2014)

Anthony, Thalia, 'Criminal Justice and Transgression on Northern Australian Cattle Stations' in Ingereth Macfarlane and Mark Hannah (eds), *Transgressions: Critical Australian Indigenous Histories* (ANU Press, 1st ed, 2007)

Antrim, Lance N, 'The United Nations Conference on Environment and Development' in Allan E Goodman (ed), *The Diplomatic Record 1992-1993* (Routledge, 1st ed, 2019) 189

Appleby, Gabrielle and Megan Davis, 'The Uluru Statement and the Promises of Truth' (2018) 49(4) *Australian Historical Studies* 501

Appleby, Gabrielle J, Ron Levy and Helen Whalan, 'Voice versus Rights: The First Nations Voice and the Australian Constitutional Legitimacy Crisis' (2023) 46(3) *University of New South Wales Law Journal*

Appleby, Gabrielle, Alexander Reilly and Laura Grenfell, *Australian Public Law* (Oxford University Press, 2014)

Asch, Michael, John Borrows and James Tully, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (University of Toronto Press, 2018)

Attwood, Bain, 'Denial in a Settler Society: The Australian Case' (2017) 84 *History Workshop Journal* 24

Attwood, Bain, 'Law, History and Power: The British Treatment of Aboriginal Rights in Land in New South Wales' (2014) 42(1) *The Journal of Imperial and Commonwealth History* 171

Attwood, Bain, *Possession: Batman's Treaty and the Matter of History* (The Miegunyah Press, 2009)

Attwood, Bain, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2007)

Attwood, Bain, *William Cooper: An Aboriginal Life Story* (University Publishing, 1st ed., 2021)

Australian Broadcasting Corporation, 'Wakka Wakka People Win Native Title Battle for Traditional Land, Including Cherbourg - ABC News' (online, 13 April 2022) <https://www.abc.net.au/news/2022-04-13/wakka-wakka-native-title-federal-court-aboriginal-land-rights/100989260>

*Australian Government Administration - Report of Royal Commission (Coombs Report)* (Commonwealth of Australia, 1976)

Australian Law Reform Commission (ALRC), *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report* (Australian Law Reform Commission, 2015)

Australian Law Reform Commission (ALRC), *Recognition of Aboriginal Customary Laws* (No 31, Australian Law Reform Commission, 1986)

Bächtiger, André et al, 'The Deliberative Dimensions of Legislatures' (2005) 40(2) *Acta Politica* 225

Bächtiger, Andre et al (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press UK, 2018)

Bandler, Faith, *Turning the Tide: A Personal History of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders* (Aboriginal Studies Press, 1989)

Banerjee, Subhabrata Bobby, 'Decolonizing Deliberative Democracy: Perspectives from Below' [2021] *Journal of Business Ethics*

Banner, Stuart, 'Why Terra Nullius? Anthropology and Property Law in Early Australia' (2005) 23(1) *Law and History Review* 95

Baraggia, Antonia, 'Constitutional Moment' [2020] *Oxford Constitutional Law* <https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e674?rskey=XX6LSY&result=62&prd=OXCON>

Barelli, Mauro, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16(1) *The International Journal of Human Rights* 1

Bargu, Banu, Chiara Bottici, and ProQuest, *Feminism, Capitalism, and Critique: Essays in Honor of Nancy Fraser* (Palgrave Macmillan, 2017)

Barry, Janice and Libby Porter, 'Indigenous Recognition in State-Based Planning Systems: Understanding Textual Mediation in the Contact Zone' (2012) 11(2) *Planning Theory* 170

Bartlett, Richard, 'Case Comment: Mabo v. State of Queensland' (1992) Yearbook *Australian Mining and Petroleum Law Association* 15

Bartlett, Richard, 'Mabo: Another Triumph for the Common Law' (1993) 15(2) *Sydney Law Review* 178

Bartlett, Richard, *Native Title in Australia* (LexisNexis Butterworths, 4th ed, 2020)

Bartlett, Richard, *The Mabo Decision: Commentary and Full Text of the Decision in Mabo and Others v State of Queensland* (Butterworths, 1993)

Barvosa, Edwina, *Deliberative Democracy Now* (Cambridge University Press, 2018)

Bashir, Bashir, 'Reconciling Historical Injustices: Deliberative Democracy and the Politics of Reconciliation' (2012) 18(2) *Res Publica* 127

Bauböck, Rainer (ed), *Democratic Inclusion: Rainer Bauböck in Dialogue* (Manchester University Press, 2018)

Bauman, Toni, Claire Stacey and Gabrielle Lauder, *Joint Management of Protected Areas in Australia: Native Title and Other Pathways towards a Community of Practice Workshop Report* (Workshop Report, AIATSIS, 2012)

Bauman, Toni, Lisa Strelein and Jessica Weir (eds), *Living with Native Title: The Experiences of Registered Native Title Corporations* (Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS), 2013)

Behrendt, Larissa et al, *Aboriginal and Torres Strait Islander Legal Relations* (Oxford University Press, 2nd edition, 2018)

Behrendt, Larissa, *Achieving Social Justice: Indigenous Rights and Australia's Future* (The Federation Press, 2003)

Behrendt, Larissa, 'Our Institutions in a Reconciled Australia' [2004] (4) *Journal of Indigenous Policy*

Behrendt, Larissa, *The Abolition of ATSIC – Implications for Democracy* (Australian National University, November 2005)

Behrendt, Larissa, 'White Picket Fences: Recognizing Aboriginal Property Rights in Australia's Psychological Terra Nullius' (1998) 10(2) *Constitutional Forum* 50

Benhabib, Seyla (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996)

Benhabib, Seyla, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, 2002)

Bennett, Scott and Angela Pratt, *The End of ATSIC and the Future Administration of Indigenous Affairs* (Current Issues Brief No No. 4, Department of Parliamentary Services, 2005)

*Beyond Respect: A Central Role for Indigenous People in Australian Land and Sea Management* (NAILSMA, 2014)

Birch, Tony, '"On What Terms Can We Speak?" Refusal, Resurgence and Climate Justice' (2018) 24/25 *Coolabah*

Blaug, Ricardo, *Democracy: A Reader* (Columbia University Press, 2017)

Blue, Gregory, Martin Bunton and Ralph C Croizier (eds), *Colonialism and the Modern World: Selected Studies* (Routledge, 2015)

Bohman, James, *Public Deliberation* (MIT Press, 1996)

Borrows, John, 'Living between Water and Rocks: First Nations, Environmental Planning and Democracy' (1997) 47(4) *University of Toronto Law Journal* 417

Boswell, John, Carolyn Hendriks and Selen Ercan, 'Message Received? Examining Transmission in Deliberative Systems' (2016) 10(3) *Critical Policy Studies* 263

Bottomley, Stephen and Simon Bronitt, *Law in Context* (The Federation Press, 2012)

Bradfield, Dr Stuart, 'Agreeing to Terms: What Is a "Comprehensive" Agreement?' (2004) 2(26) *Land, Rights, Laws: Issues of Native Title* 17

Bramston, Troy, *Paul Keating: The Big Picture Leader* (Scribe Publications, First, 2016)

Brennan, Frank, *The Wik Debate: Its Impact on Aborigines, Pastoralists and Miners* (UNSW Press, 1998)

Brennan, Sean et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015)

Brennan, Sean, 'Reconciliation in Australia: The Relationship Between Indigenous Peoples and the Wider Community' (2004) 11(1) *The Brown Journal of World Affairs* 149

Brennan, Sean, Brenda Gunn and George Williams, '"Sovereignty" and Its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26(3) *Sydney Law Review* 46

Brigg, Morgan, 'Identity and Politics in Settler-Colonialism: Relational Analyses beyond Domination?' (2016) 19(3) *Postcolonial Studies* 342

Brundtland, Gro Harlem, *Report of the World Commission on Environment and Development: Our Common Future ('Brundtland Report')* (UN World Commission on Environment and Development, 1987)

Bueren, Martin van et al, *Working for Our Country: A Review of the Economic and Social Benefits of Indigenous Land and Sea Management* (Country Needs People, 2015)

Burbidge, Belinda et al, *Report on the 2019 Survey of Prescribed Bodies Corporate (PBCs)* (National Native Title Council, AIASTIS, CSIRO, 2021)

Burnside, Sarah, 'James Price Point: Victory or Loss?' (June 2013) (124) *Arena Magazine*

Burnside, Sarah, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title* 16

Calma, Tom, 'The Northern Territory Intervention - It's Not Our Dream' (2009) 27(2) *Law in Context: A Socio-Legal Journal* 14

Campbell, David, 'Aboriginal Involvement in Caring-for-Country: An Economic Case Study in Primary Preventative Health' (2015) 23(6) *Australasian Psychiatry* 623

Canadian Broadcasting Corporation, 'Pope Faces Calls to Renounce the Doctrine of Discovery at the Heart of Colonialism | CBC Radio' (online, 26 July 2022) <https://www.cbc.ca/radio/asithappens/as-it-happens-the-tuesday-edition-1.6532503/pope-faces-calls-to-renounce-the-doctrine-of-discovery-at-the-heart-of-colonialism-1.6532787>

Cane, Peter, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022)

Carson, Lyn and Stephen Elstub, *Comparing Participatory and Deliberative Democracy* (Research & Development, newDemocracy, 2019)

Cassidy, Julie, 'The Impact of the Conquered/Settled Distinction Regarding the Acquisition of Sovereignty in Australia' (2004) 8 *Southern Cross University Law Review* 50

Chambers, Simone, 'Deliberative Democratic Theory' (2003) 6(1) *Annual Review of Political Science* 307

Chilvers, Jason and Matthew Kearnes, *Remaking Participation: Science, Environment and Emergent Publics* (Routledge, 2016)

Choudhry, Sujit, 'Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?' (2008) 6(2) *International Journal of Constitutional Law*

Cichowski, Rachel A, 'Courts, Rights, and Democratic Participation' (2006) 39(1) *Comparative Political Studies* 50

Cini, Lorenzo and Andrea Felicetti, 'Participatory Deliberative Democracy: Toward a New Standard for Assessing Democracy? Some Insights into the Italian Case' (2018) 10(2) *Contemporary Italian Politics* 151

Cini, Lorenzo and Andrea Felicetti, 'Participatory Deliberative Democracy: Toward a New Standard for Assessing Democracy? Some Insights into the Italian Case' (2018) 10(2) *Contemporary Italian Politics* 151

Cleary, Paul, *In Good Hands: The People and Communities Behind Aboriginal-Led Solutions* (Oxfam Australia, 2019)

Cleary, Paul, *Title Fight - How the Yindjibarndi Battled and Defeated a Mining Giant* (Black Inc., 2021)

Cognetti, Giuseppe and Ferruccio Maltagliati, 'Biodiversity and Adaptive Mechanisms in Brackish Water Fauna' (2000) 40(1) *Marine Pollution Bulletin* 7

Connolly, Anthony J and Tom D Campbell, *Indigenous Rights* (Taylor & Francis Group, 2009)

Cooper, Davina, 'Prefiguring the State' (2017) 49(2) *Antipode* 335

Cooper, Davina, 'Towards an Adventurous Institutional Politics: The Prefigurative "as If" and the Reposing of What's Real' (2020) 68(5) *The Sociological Review* 893

Cooper, Davina, Nikita Dhawan and Janet Newman, *Reimagining the State: Theoretical Challenges and Transformative Possibilities* (Taylor & Francis Group, 2019)

Cornell, Stephen, 'Processes of Native Nationhood: The Indigenous Politics of Self-Government' (2015) 6(4) *International Indigenous Policy Journal*

Cornell, Stephen, '"Wolves Have A Constitution:" Continuities in Indigenous Self-Government' (2015) 6(1) *International Indigenous Policy Journal*

Cornell, Stephen and Miriam Jorgensen, 'Indigenous Nations in Postracial America: Rethinking Social Inclusion' [2020] *The Review of Black Political Economy*

Cornell, Stephen and Miriam Jorgensen, 'What Are the Limits of Social Inclusion? Indigenous Peoples and Indigenous Governance in Canada and the United States' (2019) 49(2) *American Review of Canadian Studies* 283

Cornell, Stephen and Joseph P Kalt, 'Sovereignty and Nation-Building: The Development Challenge in Indian Country Today' (1998) 22(3) *American Indian Culture and Research Journal* 187

Corntassel, Jeff, 'Life Beyond the State: Regenerating Indigenous International Relations and Everyday Challenges to Settler Colonialism' (2021) 2021(1) *Anarchist Developments in Cultural Studies* 71

Coulthard, Glen S, 'Subjects of Empire: Indigenous Peoples and the "Politics of Recognition" in Canada' (2007) 6(4) *Contemporary Political Theory* 437

Coulthard, Glen Sean, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 1st ed, 2014)

Creutzfeldt, Naomi, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge, 1st ed, 2019)

Curato, Nicole et al, *Deliberative Mini-Publics: Core Design Features* (Bristol University Press, 1st ed, 2021)

Curato, Nicole and Marit Böker, 'Linking Mini-Publics to the Deliberative System: A Research Agenda' (2016) 49(2) *Policy Sciences* 173

Dahl, Robert A, *On Democracy* (Yale University Press, 2nd ed, 2015)

Daley, Paul, 'Enduring Traditions of Aboriginal Protest: Truth-Telling amid the Dark Shadows of History' [2018] (60) *Griffith Review* 67

Davidson, Stewart and Stephen Elstub, 'Deliberative and Participatory Democracy in the UK' (2014) 16(3) *The British Journal of Politics and International Relations* 367

Davis, Megan, 'Australia's Reconciliation Process in Its International Context: Recognition and the Health & Wellbeing of Australia's Aboriginal and Torres Strait Islander Peoples' (2014) 18(2) *Australian Indigenous Law Review* 11

Davis, Megan, 'Civics Education and Human Rights' (2003) 9(1) *Australian Journal of Human Rights* 236

Davis, Megan, 'Indigenous Constitutional Recognition from the Point of View of Self-Determination and Its Exercise through Democratic Participation' (2015) Vol 8(No.19) *Indigenous Law Bulletin* 5

Davis, Megan, 'Listening but Not Hearing: When Process Trumps Substance' [2016] (51) *Griffith Review* 73

Davis, Megan, 'The Long Road to Uluru' [2018] (60) *Griffith Review*

Davis, Megan, 'Uluru Statement from the Heart: "And Remind Them That We Have Robbed Them?": The Henry Parkes Foundation 2018 Oration' in Mark Evans, Michelle Grattan and Brendan McCaffrie (eds), *From Turnbull to Morrison* (Melbourne University Publishing Ltd, 2019) 267

Davis, Megan and Marcia Langton (eds), *It's Our Country* (Melbourne University Press, 2016)

Davis, Megan and Dylan Lino, 'Constitutional Reform and Indigenous Peoples' (2010) 7(19) *Indigenous Law Bulletin* 5

Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* (Australian Government, 2013)

Deloria, Philip J and Neal Salisbury, *A Companion to American Indian History* (John Wiley & Sons, Incorporated, 2004)

Department of the Prime Minister and Cabinet, *Stories from Country...2015-2017: How Indigenous Rangers and Indigenous Protected Areas Are Strengthening Connections to Country, Culture and Community.* (2019)

Dillon, Michael, 'Emerging Strategic Issues in Native Title: Future Political and Policy Challenges' [2017] *CAEPR Discussion Paper No.292/2017* 24

Dillon, Michael, 'Systemic Innovation in Native Title' [2018] *CAEPR Discussion Paper No. 294/2018* 24

Doberstein, Carey, 'Venue Coupling and Actor Circulation in Deliberative Systems: Health Care Governance in Ontario' (2020) 15(3) *Journal of Deliberative Democracy*

Dodson, Mick, 'Citizenship in Australia: An Indigenous Perspective' [1997] (22) *Alternative Law Journal* 57

Dodson, Mick, 'From Lore to Law: Indigenous Rights and Australian Legal Systems Opinion' [1995] (1) *Alternative Law Journal* 2

Dodson, Mick and Lisa Strelein, 'Australia's Nation-Building: Renegotiating the Relationship between Indigenous Peoples and the State' (2001) 24(3) *UNSW Law Journal*

Dodson, Patrick, 'Beyond the Mourning Gate — Dealing with Unfinished Business' (at the The Wentworth Lecture, Canberra, A.C.T., 12 May 2000)

Dodson, Patrick, 'Challenge of Negotiation: Learning the Hard Way' [2018] (60) *Griffith REVIEW* 58

Dreher, Tanja and Anshuman A Mondal (eds), *Ethical Responsiveness and the Politics of Difference.* (Springer International Publishing AG, 2018)

Dryzek, John S, *Discursive Democracy* (Cambridge University Press, 1st ed, 1990)

Dryzek, John S, 'Legitimacy and Economy in Deliberative Democracy' (2001) 29(5) *Political Theory* 651

Dryzek, John S, 'Political Inclusion and the Dynamics of Democratization' (1996) 90(3) *American Political Science Review* 475

Dryzek, John S, *The Politics of the Earth* (Oxford University Press, 2021)

Dryzek, John S and Jonathan Pickering, *The Politics of the Anthropocene* (Oxford University Press, 2019)

Durham, Meenakshi Gigi and Douglas M Kellner (eds), *Media & Cultural Studies: Key Works* (Blackwell Publishing, 2006)

Dzur, Albert W, *Democracy Inside: Participatory Innovation in Unlikely Places* (Oxford University Press, 2018)

Elliott, Michael, 'Indigenous Resurgence: The Drive for Renewed Engagement and Reciprocity in the Turn Away from the State' (2018) 51(1) *Canadian Journal of Political Science* 61

Elstub, Stephen, 'The Third Generation of Deliberative Democracy' (2010) 8(3) *Political Studies Review* 291

Elstub, Stephen, Selen Ercan and Ricardo Fabrino Mendonça, 'Editorial Introduction: The Fourth Generation of Deliberative Democracy' (2016) 10(2) *Critical Policy Studies* 139

Elstub, Stephen and Oliver Escobar (eds), *Handbook of Democratic Innovation and Governance* (Edward Elgar Publishing, 2019)

Elstub, Stephen and Peter McLaverty (eds), *Deliberative Democracy: Issues and Cases* (Edinburgh University Press, 2014)

Environment & Communications References Committee, *National Landcare Program* (The Senate, 2015)

Ercan, Selen A and John S Dryzek, 'Conclusion: The Reach of Deliberative Democracy' (2015) 36(3) *Policy Studies* 359

Ercan, Selen A and John S Dryzek, 'The Reach of Deliberative Democracy' (2015) 36(3) *Policy Studies* 241

Ercan, Selen A, Carolyn M Hendriks and John Boswell, 'Studying Public Deliberation after the Systemic Turn: The Crucial Role for Interpretive Research' (2017) 45(2) *Policy & Politics* 195

Fians, Guilherme, *Prefigurative Politics*, ed Felix Stein et al (2022) <https://www.anthroencyclopedia.com/entry/prefigurative-politics>

Figgis, Penelope, James Fitzsimons and Jason Irving, *Innovation for 21st Century Conservation* (IUCN National Committee Australia, 2012) 217

*Final Report of the Referendum Council ('Uluru Statement from the Heart')* (Commonwealth of Australia, 18 September 2017)

Fischer, Frank, *Participatory Governance* (No Working Paper No.24, August 2010)

Fischer, Frank, *Reframing Public Policy: Discursive Politics and Deliberative Practices* (Oxford University Press, Incorporated, 2003)

Fischer, Frank and John Forester (eds), *The Argumentative Turn in Policy Analysis and Planning* (Duke University Press, 1993)

Fischer, Frank, Gerald Miller and Mara S Sidney (eds), *Handbook of Public Policy Analysis: Theory, Politics, and Methods* (CRC/Taylor & Francis, 2007)

Fishkin, James S and Peter Laslett (eds), *Debating Deliberative Democracy* (Blackwell Publishing, 2003)

Floridia, Antonio, *From Participation to Deliberation: A Critical Genealogy of Deliberative Democracy* (ECPR Press, 1st edition, 2017)

Foley, Gary, 'How Bob Hawke Killed Land Rights' [2013] *Tracker: be informed, be involved, be inspired*

Foley, Gary and Tim Anderson, 'Land Rights and Aboriginal Voices' (2006) 12(1) *Australian Journal of Human Rights* 83

Foley, Gary, Andrew Schaap and Edwina Howell (eds), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2014)

Fraser, Nancy, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (Routledge, 2014)

Fraser, Nancy, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' [1990] (25/26) *Social Text* 56

French, Robert, 'Native Title - A Constitutional Shift?' (at the JD Lecture Series, University of Melbourne Law School, 2009)

Friedmann, John, *Planning in the Public Domain: From Knowledge to Action* (Princeton University Press, 1987)

Fukuyama, Francis, *The Origins of Political Order; From Prehuman Times to the French Revolution* (Farrar, Straus and Giroux, 2011)

Fung, Archon, 'Deliberation before the Revolution: Toward an Ethics of Deliberative Democracy in an Unjust World' (2005) 33(3) *Political Theory* 397

Fung, Archon, 'Putting the Public Back into Governance: The Challenges of Citizen Participation and Its Future' (2015) 75(4) *Public Administration Review* 513

Fung, Archon and Erik Olin Wright, *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (Verso, 2003)

Gardiner-Garden, John, *From Dispossession to Reconciliation* (Department of Parliamentary Library, 1999) 68

Gardiner-Garden, John, *The Mabo Debate - a Chronology* (Background Paper No No.23, Commonwealth of Australia, 1993) 57

Gardiner-Garden, John, *The Origin of Commonwealth Involvement in Indigenous Affairs and the 1967 Referendum* (Background Paper No 11, Parliamentary Library, Parliament House, 1997)

Gardiner-Garden, John and Coral Dow, *Overview of Indigenous Affairs: Part 1: 1901 to 1991* (2011) 30

Gardiner-Garden, John and Coral Dow, *Overview of Indigenous Affairs: Part 2: 1992 to 2010* (Department of Parliamentary Services, 2011) 28

Gastil, John W, *Political Communication and Deliberation* (SAGE Publications, Incorporated, 2007)

Glaskin, Katie, 'Native Title and the "bundle of Rights' Model: Implications for the Recognition of Aboriginal Relations to Country' (2003) 13(1) *Anthropological Forum* 67

Godden, Lee, 'Wik: Feudalism, Capitalism and the State. A Revision of Land Law in Australia?' (1997) 5(2–3) *Australian Property Law Journal* 162

Godden, Lee Carol and Lily O'Neill, 'Agreements with Indigenous Communities: The Native Title Act in Australia' in *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (Oxford University Press)

Godden, Lee and Stuart Cowell, 'Conservation Planning and Indigenous Governance in Australia's Indigenous Protected Areas: Conservation Planning in Indigenous Protected Areas' (2016) 24(5) *Restoration Ecology* 692

Goodin, Robert E, 'Inclusion and Exclusion' (1996) 37(2) *European Journal of Sociology / Archives Européennes de Sociologie* 343

Goot, Murray and Tim Rowse, *Divided Nation?: Indigenous Affairs and the Imagined Public* (Melbourne Univ. Publishing, 2007)

Gover, Kirsty, 'Settler–State Political Theory, "CANZUS" and the UN Declaration on the Rights of Indigenous Peoples' (2015) 26(2) *European Journal of International Law* 345

Gover, Kirsty, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford University Press, 2010)

Grölund, Kimmo, André Bächtiger and Maija Setälä, *Deliberative Mini-Publics: Involving Citizens in the Democratic Process* (ECPS Press, 2014)

Guest, Krysti, *The Promise of Comprehensive Native Title Settlements: The Burrup, MG-Ord, and Wimmera Agreements* (Discussion Paper No 27, Australian Institute of Aboriginal & Torres Strait Islander Studies, 2009)

Gunstone, Andrew, '"These Blokes Are Re-Inventing the 19th Century": The Howard Government's Record on Indigenous Affairs 1996-2006' [2007] (7) *Journal of Indigenous Policy*

Gutmann, Amy and Dennis Thompson, *Democracy and Disagreement* (The Belknap Press of Harvard University Press, 1996)

Gutmann, Amy and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, First Edition, 2004)

Habermas, Jürgen, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society* (Polity, 1st edition, 1992)

Habermas, Jürgen, *The Theory of Communicative Action: Reason and the Rationalization of Society, Volume 1* (Polity Press, 1991)

Hajer, Maarten A and Hendrik Wagenaar, *Deliberative Policy Analysis: Understanding Governance in the Network Society* (Cambridge University Press, 2003)

Haughton, James, *An Unsettling Decision: A Legal and Social History of Native Title and the Mabo Decision,* (Department of Parliamentary Services, 5 December 2022)

Haughton, James and Apolline Kohen, *Aboriginal and Torres Strait Islander Treaties, Constitutional and Legal Recognition and Representation in Australia: A Chronology* (Department of Parliamentary Services, 31 March 2022)

Heath, Joseph, 'What Is a Validity Claim?' (1998) 24(4) *Philosophy & Social Criticism* 23

Heller, Patrick and Vijayendra Rao (eds), *Deliberation and Development: Rethinking the Role of Voice and Collective Action in Unequal Societies* (World Bank Group)

Hemming, Steve et al, 'A New Direction for Water Management? Indigenous Nation Building as a Strategy for River Health' (2017) 22(2) *Ecology and Society*

Hemming, Steve et al, 'Indigenous Nation Building for Environmental Futures: Murrundi Flows through Ngarrindjeri Country' (2019) 26(3) *Australasian Journal of Environmental Management* 216

Hemming, Steve and Daryle Rigney, 'Unsettling Sustainability: Ngarrindjeri Political Literacies, Strategies of Engagement and Transformation' (2008) 22(6) *Continuum* 757

Hendriks, Carolyn M, 'Coupling Citizens and Elites in Deliberative Systems: The Role of Institutional Design' (2016) 55(1) *European Journal of Political Research* 43

Hendriks, Carolyn M, 'Praxis Stories: Experiencing Interpretive Policy Research' (2007) 1(3) *Critical Policy Studies* 278

Hendriks, Carolyn M, 'The Field and Study of Deliberative Democracy in Australia' in *The Oxford Handbook of Australian Politics* (Oxford University Press, 2020) 472

Hendriks, Carolyn M, Selen A Ercan and John Boswell, *Mending Democracy: Democratic Repair in Disconnected Times* (Oxford University Press USA - OSO, 2020)

Hibbard, Michael, Marcus B Lane and Kathleen Rasmussen, 'The Split Personality of Planning: Indigenous Peoples and Planning for Land and Resource Management' (2008) 23(2) *Journal of Planning Literature* 136

Hill, Rosemary et al, 'A Typology of Indigenous Engagement in Australian Environmental Management: Implications for Knowledge Integration and Social-Ecological System Sustainability' (2012) 17(1) *Ecology and Society*

Hill, Rosemary et al (eds), *Culturally and Environmentally Appropriate Economies for Cape York Peninsula: Proceedings of an Appropriate Economies Roundtable, 5-6 November 2003, Cairns* (Rainforest CRC, 2004)

Hill, Rosemary et al, *Indigenous Land Management in Australia: Extent, Scope, Diversity, Barriers and Success Factors* (2013) 94

Hill, Rosemary et al, *Kimberley Appropriate Economies Roundtable Forum Proceedings* (Australian Conservation Foundation, 2005)

Hill, Rosemary, 'The Effectiveness of Agreements and Protocols to Bridge Between Indigenous and Non-Indigenous Toolboxes for Protected Area Management: A Case Study from the Wet Tropics of Queensland' (2006) 19 *Society & Natural Resources* 577

Hillier, Jean and Patsy Healey (eds), *The Ashgate Research Companion to Planning Theory: Conceptual Challenges for Spatial Planning* (Routledge, 2016)

Hobbs, Harry, 'Constitutional Recognition and Reform: Developing an Inclusive Australian Citizenship through Treaty' (2018) 53(2) *Australian Journal of Political Science* 176

Hobbs, Harry, 'Democratic Theory and Constitutional Design: Hearing Persistent Electoral Minorities' (2017) 24(4) *International Journal on Minority and Group Rights* 341

Hobbs, Harry, 'First Nations, Settler Parliaments, and the Question of Consultation: Reconciling Parliamentary Supremacy and Indigenous Peoples' Right to Self-Determination' (2021) 58(2) *Osgoode Hall Law Journal* 337

Hobbs, Harry, *Indigenous Aspirations and Structural Reform in Australia* (Hart Publishing, 2020)

Hobbs, Harry, 'Locating the Logic of Transitional Justice in Liberal Democracies: Native Title in Australia' (2016) 39(2) *University of New South Wales Law Journal*

Hobbs, Harry, 'Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia' (2019) 23(1–2) *The International Journal of Human Rights* 174

Hobbs, Harry and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 38

Hocking, Barbara Ann, *Unfinished Constitutional Business: Rethinking Indigenous Self-Determination* (Aboriginal Studies Press, 2005)

Hocking, Barbara Ann and Esther Stern, 'W(h)Ither the Human Rights of Indigenous Australians (From Wik to Wickedness?)' (1998) 67(4) *Nordic Journal of International Law* 393

Holdo, Markus, 'A Relational Perspective on Deliberative Systems: Combining Interpretive and Structural Analysis' (2020) 14(1) *Critical Policy Studies* 21

Horvath, Agnes, Bjørn Thomassen and Harald Wydra (eds), *Breaking Boundaries: Varieties of Liminality* (Berghahn Books, 1st ed, 2018)

Howard-Wagner, Deirdre, 'Governance of Indigenous Policy in the Neo-Liberal Age: Indigenous Disadvantage and the Intersecting of Paternalism and Neo-Liberalism as a Racial Project' (2018) 41(7) *Ethnic and Racial Studies* 1332

Howard-Wagner, Deirdre, 'Scrutinising ILUAs in the Context of Agreement Making as a Panacea for Poverty and Welfare Dependency in Indigenous Communities' (2010) 14(2) *Australian Indigenous Law Review* 15

Howard-Wagner, Deirdre, Maria Bargh and Isabel Altamirano-Jiménez (eds), *The Neoliberal State, Recognition and Indigenous Rights* (ANU Press, 1st ed, 2018)

Howard-Wagner, Deirdre and Amy Maguire, 'The Holy Grail or The Good, the Bad, and the Ugly?: A Qualitative Exploration of the ILUAs Agreement Making Process and the Relationship Between ILUAs and Native Title' (2010) 14(1) *Australian Indigenous Law Review* 71

Hunold, Christian, 'Deliberative Policy Making' in *International Encyclopedia of Political Science* (SAGE Publications, Inc., 2011)

Hunt, Janet et al (eds), *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (ANU E Press, 2008)

Isakhan, Benjamin and Stephen Stockwell (eds), *The Secret History of Democracy* (Palgrave Macmillan, 2011)

Ivison, Duncan, *Can Liberal States Accommodate Indigenous Peoples?* (Polity Press, 2020)

Ivison, Duncan, 'Decolonizing the Rule of Law: Mabo's Case and Postcolonial Constitutionalism' (1997) 17(2) *Oxford Journal of Legal Studies* 253

Ivison, Duncan, 'Justification, Not Recognition' (2016) 8(24) *Indigenous Law Bulletin* 9

Ivison, Duncan, 'Pluralising Political Legitimacy' (2017) 20(1) *Postcolonial Studies* 118

Ivison, Duncan, *Postcolonial Liberalism* (Cambridge University Press, 1st edition, 2002)

Ivison, Duncan, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2nd ed, 2000)

Jackson, Sue, Libby Porter and Louise C Johnson, *Planning in Indigenous Australia: From Imperial Foundations to Postcolonial Futures* (Taylor & Francis Group, 2017)

Jackson, Sue, Rene Woods and Fred Hooper, 'Empowering First Nations in the Governance and Management of the Murray–Darling Basin' in Barry T Hart et al (eds), *Murray-Darling Basin, Australia* (Elsevier, 2021) 313

Janke, Terri et al, *Australia State of the Environment 2021: Indigenous, Independent Report to the Australian Government* (Commonwealth of Australia, 2021)

Jarvis, Diane et al, 'Are Indigenous Land and Sea Management Programs a Pathway to Indigenous Economic Independence?' (2018) 40(4) *The Rangeland Journal* 415

Jeffrey, Craig and Jane Dyson, 'Geographies of the Future: Prefigurative Politics' (2021) 45(4) *Progress in Human Geography* 641

Johnson, Louise, Libby Porter and Sue Jackson, 'Reframing and Revising Australia's Planning History and Practice' (2017) 54(4) *Australian Planner* 225

Jonas, William, 'Native Title and the Treaty Dialogue' (at the Aboriginal and Torres Strait Islander Social Justice Commissioner and the International Law Association Seminar, Australian Human Rights Commission, September 2002)

Jonas, William, '"Unfinished Business" - the Recognition of Aboriginal and Torres Strait Islander Rights' (2001) 5(1) *The Newcastle Law Review*

Kahane, David et al (eds), *Deliberative Democracy in Practice* (University of British Columbia Press, New Edition, 2010)

Karpowitz, Christopher F, *Deliberation, Democracy, and Civic Forums: Improving Equality and Publicity* (Cambridge University Press, 2014)

Karpowitz, Christopher F, Chad Raphael and Allen S Hammond, 'Deliberative Democracy and Inequality: Two Cheers for Enclave Deliberation among the Disempowered' (2009) 37(4) *Politics & Society* 576

'"Keating Told the Truth": Stan Grant, Larissa Behrendt and Others Remember the Redfern Speech 30 Years On', *The Guardian* (online, 9 December 2022) <https://www.theguardian.com/australia-news/2022/dec/10/paul-keating-redfern-speech-30-year-anniverary>

Kelly, Cait, Natasha May and Natasha May (earlier), 'Advice on Voice a "Cynical Political Tactic" to Confuse Voters, Coalition Claims – as It Happened', *the Guardian* (online, 21 April 2023) <https://www.theguardian.com/australia-news/live/2023/apr/21/australia-news-live-renewables-superpower-clean-energy-summit-jim-chalmers-nsw-liberals-leadership-indigenous-voice-cost-of-living-interest-rates-drug-reform>

Kelly, Glen and Stuart Bradfield, 'Winning Native Title, Or Winning Out of Native Title?: The Noongar Native Title Settlement' (2012) 8(2) *Indigenous Law Bulletin* 14

Keon-Cohen, Bryan, *A Mabo Memoir: Islan Kustom to Native Title* (Zemvic Press, 2013)

Kercher, Bruce, 'R v Ballard, R v Murrell and R v Bonjon' (1998) 3(3) *Australian Indigenous Law Reporter*

Kidd, Rosalind, 'Hard Labour, Stolen Wages – National Report on Stolen Wages' (2007) 11(3) *Australian Indigenous Law Reporter* 2

Kilduff, Peter and Asmi Wood, 'Determining Sovereignty: Through Law? Or a Political Option?' (2021) 50(3) *Australian Bar Review* 23

Kirby, Michael, 'In Defence of Mabo' (1993) 65(4) *The Australian Quarterly* 66

Knafla, Louis A and Haijo Jan Westra (eds), *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (UBC Press, 2010)

Knappe, Henrike, 'Participatory and Deliberative Democracy: From Equality Norms to Argumentative Rationalities' in *Doing Democracy Differently* (Verlag Barbara Budrich, 1st ed, 2017) 45

Knops, Andrew, 'Delivering Deliberation's Emancipatory Potential' (2006) 34(5) *Political Theory* 594

van Krieken, Robert, 'Kumarangk (Hindmarsh Island) and the Politics of Natural Justice under Settler-Colonialism' (2011) 36(1) *Law & Social Inquiry* 125

Kymlicka, Will and Bashir Bashir (eds), *The Politics of Reconciliation in Multicultural Societies* (Oxford University Press, 2010)

Lafont, Cristina, *Democracy Without Shortcuts: A Participatory Conception of Deliberative Democracy* (Oxford University Press, Incorporated, 2020)

Lane, Marcus B, 'Participation, Decentralization, and Civil Society: Indigenous Rights and Democracy in Environmental Planning' (2003) 22(4) *Journal of Planning Education and Research* 360

Lane, Marcus B and Michael Hibbard, 'Doing It for Themselves: Transformative Planning by Indigenous Peoples' (2005) 25(2) *Journal of Planning Education and Research* 172

Langton, Marcia, 'A Treaty between Our Nations?' [2001] (No. 50) *Arena Magazine* 28

Langton, Marcia, *Boyer Lectures 2012: The Quiet Revolution: Indigenous People and the Resources Boom* (ABC Books, 2012)

Langton, Marcia et al, *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004)

Langton, Marcia, 'Joe Gumbula, the Inaugural Liya-Ŋärra'mirri Visiting Fellow' (2018) 47(3–4) *Preservation, Digital Technology & Culture* 91

Langton, Marcia and Tom Calma, *Indigenous Voice Discussion Paper* (National Indigenous Australians Agency (NIAA), 2021)

Langton, Marcia and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the "Resource Curse" and Australia's Mining Boom' (2008) 26(1) *Journal of Energy & Natural Resources Law* 31

Langton, Marcia, Zane Ma Rhea and Lisa Palmer, 'Community-Oriented Protected Areas for Indigenous Peoples and Local Communities' (2005) 12(1) *Journal of Political Ecology*

Lavery, Daniel, '"Not Purely of Law"– The Doctrine of Backward Peoples in Milirrpum' (2017) 23 *James Cook University Law Review* 36

Lawrence, David, *Managing Parks/Managing 'Country': Joint Management of Aboriginal Owned Protected Areas in Australia* (No Research Paper No.2, Department of the Parliamentary Library, 1997)

Levy, Ron, 'Rights and Deliberative Systems' (2022) 18(1) *Journal of Deliberative Democracy*

Levy, Ron et al (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018)

Levy, Ron, Ian O'Flynn and Hoi L Kong, *Deliberative Peace Referendums* (Oxford University Press, 1st ed, 2021)

Levy, Ron and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 1st ed, 2016)

Lewis, Jenny M and Anne Tiernan, *The Oxford Handbook of Australian Politics* (Oxford University Press, 2021)

Lista, Giovanni, '"No More Occasion for Puffendorf nor Hugo Grotius": The Spanish Rights of Possession in America and the Darien Venture (1698–1701)' (2021) 47(4) *History of European Ideas* 543

Lucashenko, Melissa, 'The First Australian Democracy' (27 September 2015) *Meanjin*

Macedo, Stephen (ed), *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, 1999)

Mackie, Kathleen and David Meacheam, 'Working on Country: A Case Study of Unusual Environmental Program Success' (2016) 23(2) *Australasian Journal of Environmental Management* 157

Macklem, Patrick, 'First Nations Self-Government and the Borders of the Canadian Legal Imagination' (1991) 36 *McGill Law Journal*

Maddison, Sarah, *Conflict Transformation and Reconciliation: Multi-Level Challenges in Deeply Divided Societies* (Routledge, 1st ed, 2015)

Maddison, Sarah, Tom Clark and Ravi de Costa, *The Limits of Settler Colonial Reconciliation: Non-Indigenous People and the Responsibility to Engage* (Springer, 2016)

Mansbridge, Jane, *Deliberative and Non-Deliberative Negotiations: HKS Faculty Research Working Paper Series RWP09-010* (Harvard Kennedy School, John F. Kennedy School of Government, 2009)

Mansbridge, Jane, 'Everyday Talk in the Deliberative System' in Stephen Macedo (ed), *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, 1999) 1

Mansbridge, Jane et al, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy' (2010) 18(1) *Journal of Political Philosophy* 64

Mansbridge, Jane and Cathie Jo Martin (eds), *Political Negotiation: A Handbook* (Brookings Institution Press, 2016)

Mansell, Michael, 'Australians and Aborigines and the Mabo Decision: Just Who Needs Whom the Most' (1993) 15(2) *Sydney Law Review* 168

Mansell, Michael, 'Mabo Perspectives: The Aboriginal Provisional Government - The Court Gives an Inch but Takes Another Mile' (1992) 2(57) *Aboriginal Law Bulletin*

Martin, Karen and Booran Mirraboopa, 'Ways of Knowing, Being and Doing: A Theoretical Framework and Methods for Indigenous and Indigenist Re-search' (2003) 27(76) *Journal of Australian Studies* 203

Mason, Anthony, 'The Rights of Indigenous Peoples in Lands Once Part of the Old Dominions of the Crown' (1997) 46(4) *International and Comparative Law Quarterly* 812

Matravers, Derek and Jonathan Pike, *Debates in Contemporary Political Philosophy: An Anthology* (Routledge in association with The Open University, 2003)

McCallum, Kerry and Lisa Waller, *The Dynamics of News and Indigenous Policy in Australia* (University of Chicago Press, 1st edition, 2017)

McCrae, Heather et al, *Indigenous Legal Issues: Commentary & Materials, 4th Edition* (Thompson Rueters, 2009)

McGlade, Hannah, '"Not Invited to the Negotiating Table": The Native Title Amendment Act 1998 (CTH) and Indigenous Peoples Right to Political Participation and Self Determination under International Law.' (2000) 1(1) *Balayi: Culture, Law and Colonialism* 97

McGregor, Russell, 'Protest and Progress: Aboriginal Activism in the 1930s' (1993) 25(101) *Australian Historical Studies* 555

McHugh, PG, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011)

McIntyre, Greg, 'Indigenous Equality: The Long Road' (2021) 8(2) *Griffith Journal of Law & Human Dignity*

McNeil, Kent, 'Envisaging Constitutional Space for Aboriginal Governments' (1993) 19(1) *Queen's Law Journal* 95

Mendes, Conrado Hübner, *Constitutional Courts and Deliberative Democracy* (Oxford University Press, 2013)

Mengden IV, Walter H, 'Indigenous People, Human Rights, and Consultation: The Dakota Access Pipeline' (2017) 41(2) *American Indian Law Review* 441

Miller, Robert J et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010)

Miller, Robert J, 'The Doctrine of Discovery: The International Law of Colonialism' (2019) 5(1) *The Indigenous Peoples' Journal of Law, Culture & Resistance*

Monticelli, Lara and Arturo Escobar, *The Future Is Now: An Introduction to Prefigurative Politics* (Bristol University Press, 2022)

Moodie, Nikki and Sarah Maddison (eds), *Public Policy and Indigenous Futures* (Springer, 2023)

Moorcroft, Heather et al, 'Conservation Planning in a Cross-Cultural Context: The Wunambal Gaambera Healthy Country Project in the Kimberley, Western Australia' (2012) 13(1) *Ecological Management & Restoration* 16

Moorcroft, Heather, 'Paradigms, Paradoxes and a Propitious Niche: Conservation and Indigenous Social Justice Policy in Australia' [2015] *Local Environment*

Moorcroft, Heather and Michael Adams, 'Emerging Geographies of Conservation and Indigenous Land in Australia' (2014) 45(4) *Australian Geographer* 485

Moran, Mark, *Serious Whitefella Stuff: When Solutions Became the Problem in Indigenous Affairs* (Melbourne University Press, 2016)

Moreton-Robinson, Aileen, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015)

Morphy, Frances and Benjamin R Smith (eds), *The Social Effects of Native Title* (ANU Press)

Morris, Shireen, *A First Nations Voice in the Australian Constitution* (Hart, 2020)

Morris, Shireen and Harry Hobbs, 'Imagining a Makarrata Commission' (2023) 48(3) *Monash University Law Review*

Morse, Dana, 'Albanese Promised Action on the Uluru Statement. What Does That Mean?', *ABC News* (online, 23 May 2022) <https://www.abc.net.au/news/2022-05-24/federal-election-anthony-albanese-indigenous-uluru-statement/101092816>

Murphy, Katharine, 'Tanya Plibersek Declares Environment "Is Back Front and Centre" in Australia at UN Ocean Conference', *The Guardian* (online, 27 June 2022) <https://www.theguardian.com/environment/2022/jun/27/tanya-plibersek-declares-environment-is-back-front-and-centre-in-australia-at-un-ocean-conference>

Nakata, Martin, 'Australian Indigenous Studies: A Question of Discipline' (2006) 17(3) *The Australian Journal of Anthropology* 265

Nakata, Sana and Sarah Maddison, 'New Collaborations in Old Institutional Spaces: Setting a New Research Agenda to Transform Indigenous-Settler Relations' (2019) 54(3) *Australian Journal of Political Science* 407

Native Title Social Justice Advisory Committee, *Recognition, Rights & Reform: Report to Government on Native Title Social Justice Measures.* (Aboriginal and Torres Strait Islander Commission, 1995)

Neale, Timothy et al, 'Walking Together: A Decolonising Experiment in Bushfire Management on Dja Dja Wurrung Country' (2019) 26(3) *Cultural Geographies* 341

Neale, Timothy, 'What Tradition Affords: Articulations of Indigeneity in Contemporary Bushfire Management' (2023) 64(1) *Current Anthropology* 72

Neale, Timothy, *Wild Articulations* (University of Hawai'i Press, 2017)

Nettheim, Garth, 'The Consent of the Natives: Mabo and Indigenous Political Rights' (1993) 15(2) *Sydney Law Review* 223

Newton, Kenneth and Brigitte Geissel, *Evaluating Democratic Innovations: Curing the Democratic Malaise?* (Taylor & Francis Group, 2012)

Ngarrindjeri Nation and Steve Hemming, 'Ngarrindjeri Nation Yarluwar-Ruwe Plan: Caring for Ngarrindjeri Country and Culture Kungun Ngarrindjeri Yunnan (Listen to Ngarrindjeri People Talking)' in Luke Mosley et al (eds), *Natural History of the Coorong, Lower Lakes, and Murray Mouth Region (Yarluwar-Ruwe). Royal Society of South Australia* (University of Adelaide Press, 2018)

Nichols, Josh et al, 'Who Owns Australia?', *The Guardian* (online, 17 May 2021) <http://www.theguardian.com/australia-news/ng-interactive/2021/may/17/who-owns-australia>

Nikolakis, William, Stephen Cornell and Harry Nelson (eds), *Reclaiming Indigenous Governance: Reflections and Insights from Australia, Canada, New Zealand, and the United States* (University of Arizona Press, 2019)

O'Faircheallaigh, Ciaran, 'Explaining Outcomes from Negotiated Agreements in Australia and Canada' (2021) 70 *Resources Policy*

O'Faircheallaigh, Ciaran, 'Resource Development and Inequality in Indigenous Societies' (1998) 26(3) *World Development* 381

O'Faircheallaigh, Ciaran and Tony Corbett, 'Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions.' [2006] *University of Western Australia Law Review*

O'Flynn, Ian, *Deliberative Democracy and Divided Societies* (Edinburgh University Press, 2006)

O'Neill, Lily, 'The Role of State Governments in Native Title Negotiations: A Tale of Two Agreements' (2014) 18(2) *Australian Indigenous Law Review* 29

O'Sullivan, Dominic, *Indigeneity: A Politics of Potential* (Policy Press, 2017)

O'Sullivan, Dominic, *Sharing the Sovereign: Indigenous Peoples, Recognition, Treaties and the State* (Palgrave Macmillan US, 2020)

Parkinson, John and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012)

Parlee, Brenda L, 'Avoiding the Resource Curse: Indigenous Communities and Canada's Oil Sands' (2015) 74 *World Development* 425

Pateman, Carole, 'Participatory Democracy Revisited' (2012) 10(1) *Perspectives on Politics* 7

Pearson, Noel, 'A Rightful Place' (2014) (55) *Quarterly Essay*

Pearson, Noel, 'From Remnant Title to Social Justice' (1995) 6(3) *The Australian Journal of Anthropology* 95

Pearson, Noel, 'Mabo Oration: People, Nations, and Peace' (at the National Native Title Conference, Brisbane, 3 June 2005)

Pearson, Noel, 'The Concept of Native Title at Common Law' [1997] (Issue 5) *Australian Humanities Review*

Pearson, Noel, 'The High Court's Abandonment of "the Time-Honoured Methodology of the Common Law" in Its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta: Sir Ninian Stephen Annual Lecture 2003' (2003) 8(2) *Australian Indigenous Law Reporter* 1

Pearson, Noel, *Up from the Mission: Selected Writings* (Black Inc., 2011)

Pedersen, Anne et al, 'Attitudes toward Aboriginal Australians in City and Country Settings' (2000) 35(2) *Australian Psychologist* 109

Pedersen, Anne et al, 'Attitudes toward Indigenous Australians: The Issue of "Special Treatment"' (2006) 41(2) *Australian Psychologist* 85

Persram, Nalini et al, *Postcolonialism and Political Theory* (Lexington Books, 2007)

Peters, Michael A and Carl T Mika, 'Aborigine, Indian, Indigenous or First Nations?' (2017) 49(13) *Educational Philosophy and Theory*

Petray, Theresa L and Janine Gertz, 'Building an Economy and Building a Nation: Gugu Badhun Self-Determination as Prefigurative Resistance' (2018) 12(1) *Global Media Journal* 12

Pickerill, Jenny, 'Black and Green: The Future of Indigenous–Environmentalist Relations in Australia' (2018) 27(6) *Environmental Politics* 1122

Pickering, Jonathan, Karin Bäckstrand and David Schlosberg, 'Between Environmental and Ecological Democracy: Theory and Practice at the Democracy-Environment Nexus' (2020) 22(1) *Journal of Environmental Policy & Planning* 1

Pineda, Baron, 'Indigenous Pan-Americanism: Contesting Settler Colonialism and the Doctrine of Discovery at the UN Permanent Forum on Indigenous Issues' (2017) 69(4) *American Quarterly* 823

Pleshet, Noah, 'Caring for Country: History and Alchemy in the Making and Management of Indigenous Australian Land' (2018) 88(2) *Oceania* 183

Pogrebinschi, Thamy, *Innovating Democracy?: The Means and Ends of Citizen Participation in Latin America* (Cambridge University Press, 1st ed, 2023)

Pommersheim, Frank, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (Oxford University Press, 2012)

della Porta, Donatella, *How Social Movements Can Save Democracy: Democratic Innovations from Below* (Polity, 2020)

Porter, Libby and Janice Barry, *Planning for Coexistence? Recognizing Indigenous Rights Through Land Use Planning in Canada and Australia* (Routledge, 2016)

Preuss, Karissa and Madeline Dixon, '"Looking after Country Two-Ways": Insights into Indigenous Community-Based Conservation from the Southern Tanami' (2012) 13(1) *Ecological Management & Restoration* 2

Pritchard, Sarah, 'The "Race" Power in Section 51(Xxvi) of the Constitution' (2011) 15(2) *Australian Indigenous Law Review* 14

Putnis, Andra et al, *Healthy Country, Healthy People: Supporting Indigenous Engagement in the Sustainable Management of Northern Territory Land and Seas: A Strategic Framework* (CSIRO Sustainable Ecosystems, 2008)

Putnis, Andra et al, *Strong on Country: Sustaining Success in Indigenous Land and Sea Management in Australia* (Country Needs People, 2021)

Rademaker, Laura and Tim Rowse (eds), *Indigenous Self-Determination in Australia* (ANU Press & Aboriginal History Inc., 2020)

Rawls, John, *A Theory of Justice* (Belknap Press, 2nd Edition, 1999)

'Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures' (1996) 1(1) *Australian Indigenous Law Reporter* 76

Referendum Council, *Final Report of the Referendum Council* (June 2017)

Reynolds, Henry, *Aboriginal Sovereignty: Reflections on Race, State, and Nation* (Allen & Unwin, 1996)

Reynolds, Henry, 'Action and Anxiety: The Long History of Settler Protest about the Nature of Australian Colonization' (2014) 4(4) *Settler Colonial Studies* 334

Reynolds, Henry, *The Law of the Land* (Penguin Books, 3rd ed, 2003)

Reynolds, Henry, 'The Mabo Judgement in the Light of Imperial Land Policy' (1993) 16(1) *UNSW Law Journal* 18

Rigney, Daryle et al, *Indigenous Nation Building and the Political Determinants of Health and Wellbeing* (Discussion Paper, Lowitja Institute & Jumbunna Institute for Indigenous Education and Research, 2022)

Rigney, Daryle, Simone Bignall and Steve Hemming, 'Negotiating Indigenous Modernity: Kungun Ngarrindjeri Yunnan—Listen to Ngarrindjeri Speak' (2015) 11(4) *AlterNative: An International Journal of Indigenous Peoples* 334

Rigney, Lester-Irabinna, 'Internationalization of an Indigenous Anticolonial Cultural Critique of Research Methodologies: A Guide to Indigenist Research Methodology and Its Principles' (1999) 14(2) *Wicazo Sa Review* 109

Ritter, David, *Contesting Native Title* (Allen & Unwin, 2009)

Ritter, David, *The Native Title Market* (University of Western Australia Press, 2009)

Ritter, David, 'The Rejection of Terra Nullius in Mabo: A Critical Analysis' (1996) 18(1) *Sydney Law Review*

Robertson, Lindsay G, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford University Press, Incorporated, 2005)

Rollo, Toby, 'Everyday Deeds: Enactive Protest, Exit, and Silence in Deliberative Systems' (2017) 45(5) *Political Theory* 587

Rose, Deborah Bird, *Country in Flames: Proceedings of the 1994 Symposium on Biodiversity and Fire in North Australia* (Biodiversity Unit, Department of the Environment, Sport and Territories, 1995)

Rose, Deborah Bird, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996)

Rowse, Tim, 'How We Got a Native Title Act' (1993) 65(4) *The Australian Quarterly* 110

Rowse, Tim, 'Tim Rowse Response to David Trigger' (2020) 31(1) *The Australian Journal of Anthropology* 34

Rubenstein, Kim, 'Power, Control and Citizenship: The Uluru Statement from the Heart as Active Citizenship' (2018) 30(1) *Bond Law Review* 14

Sanders, Will, *Engaging Indigenous Economy* (ANU Press, 2016)

Sanders, Will, *Journey Without End: Reconciliation between Australia's Indigenous and Settler Peoples Discussion Paper No. 237/2002* (Centre for Aboriginal Economic Policy & Research (CAEPR), 2004)

Sanders, Will, Australian National University, and Centre for Aboriginal Economic Policy Research, *Towards an Indigenous Order of Australian Government: Rethinking Self-Determination as Indigenous Affairs Policy* (Discussion Paper No No. 230/2002, Centre for Aboriginal Economic Policy & Research (CAEPR), 2002)

Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press UK, 1 edition, 2018)

Sawer, Geoffrey, 'The Australian Constitution and the Australian Aborigine' (1966) 2(1) *Federal Law Review* 17

Scally, Gabriel et al, 'The Application of "Elite Interviewing" Methodology in Transdisciplinary Research: A Record of Process and Lessons Learned during a 3-Year Pilot in Urban Planetary Health Research' (2021) 98(3) *Journal of Urban Health* 404

Schultz, Rosalie and Sheree Cairney, 'Caring for Country and the Health of Aboriginal and Torres Strait Islander Australians' (2017) 207(1) *The Medical Journal of Australia* 8

Schwartz-Shea, Peregrine and Dvora Yanow, *Interpretive Research Design: Concepts and Processes* (Taylor & Francis Group, 2011)

Scudder, Mary F, *Beyond Empathy and Inclusion: The Challenge of Listening in Democratic Deliberation* (Oxford University Press, Incorporated, 2020)

Scudder, Mary F, 'The Ideal of Uptake in Democratic Deliberation' (2020) 68(2) *Political Studies* 504

Scudder, Mary F, Selen A Ercan and Kerry McCallum, 'Institutional Listening in Deliberative Democracy: Towards a Deliberative Logic of Transmission' (2023) 43(1) *Politics* 38

Sheiner, Paul, Bevan Stott and Cathy Goonack, 'Managing Exclusive Possession, Conference Paper, National Native Title Conference, 6 June 2018, Broome, Western Australia' (2018)

Silbey, Susan S, 'Everyday Life and the Constitution of Legality' in *The Blackwell Companion to the Sociology of Culture* (John Wiley & Sons, Ltd, 2005) 332

Simone Chambers, *Reasonable Democracy: Jürgen Habermas and the Politics of Discourse* (Cornell University Press, 2018)

Simpson, Audra, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Duke University Press, 2014)

Simpson, Audra, 'The Ruse of Consent and the Anatomy of "Refusal": Cases from Indigenous North America and Australia' (2017) 20(1) *Postcolonial Studies* 18

Simpson, Gerry, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *Melbourne University Law Review* 16

Simpson, Leanne Betasamosake, 'Indigenous Resurgence and Co-Resistance' (2016) 2(2) *Critical Ethnic Studies* 19

*Sixteenth Report: Consistency of the Native Title Amendment Act 1998 with Australia's International Obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD)* (Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Australian Parliament, 28 June 2000)

Smith, Diane et al, *Developing Governance and Governing Development: International Case Studies of Indigenous Futures* (Rowman & Littlefield, 2021)

Smith, Kevin, 'Keynote Address "Re-Imaging Australia Through First Nations Leveraging Native Title and Broader Rights", Kevin Smith, Chief Executive Officer Queensland South Native Title Services' (at the National Native Title Summit 2022, Twin Waters Resort, Sunshine Coast Queensland (Kabi Kabi Country), 1 June 2022)

Smith, Linda Tuhiwai, *Decolonizing Methodologies: Research and Indigenous Peoples* (University of Otago Press, 1999)

Smyth, Dermot, 'Indigenous Protected Areas in Australia' (2006) 16(1) *Parks: International Journal for Protected Area Managers*

Sorial, Sarah, 'Deliberation and the Problems of Exclusion and Uptake: The Virtues of Actively Facilitating Equitable Deliberation and Testimonial Sensibility' (2022) 25(2) *Ethical Theory and Moral Practice* 215

Souza, Poppy de and Tanja Dreher, 'Dwelling in Discomfort: On the Conditions of Listening in Settler Colonial Australia' (2021) 20(2) *Borderlands Journal* 30

Steiner, Jürg, *The Foundations of Deliberative Democracy: Empirical Research and Normative Implications* (Cambridge University Press, 2012)

Storrs, Michael and Peter Cooke, 'Caring for Country: The Development of a Formalised Structure for Land Management on Aboriginal Lands within the Northern Land Council Region of the Northern Territory' [2001] *Journal of Australian Indigenous Issues* 7

Strakosch, Elizabeth, 'Beyond Colonial Completion: Arendt, Settler Colonialism and the End of Politics' in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation* (Springer Singapore, 2016) 15

Strakosch, Elizabeth, *Neoliberal Indigenous Policy: Settler Colonialism and the 'Post-Welfare' State* (Palgrave Macmillan UK, 2015)

Strakosch, Elizabeth, 'The Technical Is Political: Settler Colonialism and the Australian Indigenous Policy System' (2019) 54(1) *Australian Journal of Political Science* 114

Strelein, Lisa, 'Agreement without Compromise: Maintaining the Integrity of Indigenous Sovereignty in Negotiations with Governments' [2021] (2) *Australian Aboriginal Studies* 81

Strelein, Lisa, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed, 2009)

Strelein, Lisa, 'Conceptualising Native Title' (2001) 23(1) *Sydney Law Review* 95

Strelein, Lisa (ed), *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010)

Strelein, Lisa and Tran Tran, 'Building Indigenous Governance from Native Title: Moving Away from "fitting in" to Creating a Decolonized Space' (2013) 18(1) *Review of Constitutional Studies* 19+

Sullivan, Helen, *Collaboration and Public Policy: Agency in the Pursuit of Public Purpose* (Springer International Publishing AG, 2022)

Sullivan, Patrick, *Belonging Together: Dealing with the Politics of Disenchantment in Australian Indigenous Affairs Policy* (Aboriginal Studies Press, 2011)

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

Sunstein, Cass R, 'Incompletely Theorized Agreements Commentary' (1994) 108(7) *Harvard Law Review* 1733

Sunstein, Cass R, *Legal Reasoning and Political Conflict* (Oxford University Press, Second Edition, 2018)

Taylor, Bruce, Cathy Robinson and Marcus B Lane, *Contested Country: Local and Regional Natural Resources Management in Australia* (CSIRO Publishing, 2010)

Taylor, Charles et al, *Multiculturalism: The Politics of Recognition* (Princeton University Press, 1994)

Tran, Tran et al, *Comprehensive Settlement: Heads of Agreement* (Australian Institute of Aboriginal & Torres Strait Islander Studies (AIATSIS), 2021) 38

Tuck, Eve and K Wayne Yang, 'Decolonization Is Not a Metaphor' (2012) 1(1) *Decolonization: Indigeneity, Education and Society* 1

Tully, James, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995)

Uhr, John, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998)

Uhr, John and Ryan Walter, *Studies in Australian Political Rhetoric* (ANU Press, 2014)

Valadez, Jorge M, 'Deliberation, Cultural Difference, and Indigenous Self-Governance' (2010) 19(2) *The Good Society* 60

Valadez, Jorge M, *Deliberative Democracy, Political Legitimacy, and Self Determination in Multicultural Societies* (Westview Press, 2001)

Vincent, Eve and Timothy Neale, 'Unstable Relations: A Critical Appraisal of Indigeneity and Environmentalism in Contemporary Australia' (2017) 28(3) *The Australian Journal of Anthropology* 301

Vivian, Alison et al, 'Indigenous Self -Government in the Australian Federation' (2017) 20 *Australian Indigenous Law Review* 28

Vivian, Alison and Ben Schokman, 'The Northern Territory Intervention and the Fabrication of "Special Measures"' (2009) 13(1) *Australian Indigenous Law Review* 29

Wagenaar, Hendrik, 'Governance, Complexity, and Democratic Participation: How Citizens and Public Officials Harness the Complexities of Neighborhood Decline' (2007) 37(1) *The American Review of Public Administration* 17

Walker, Ryan, Ted Jojola and David Natcher, *Reclaiming Indigenous Planning* (McGill-Queen's University Press, 2013)

Warren, Mark E, 'Governance-Driven Democratization' (2009) 3(1) *Critical Policy Studies* 3

Warren, Mark E, 'Voting with Your Feet: Exit-Based Empowerment in Democratic Theory' (2011) 105(4) *The American Political Science Review* 683

Warren, Mark E, 'What Should We Expect from More Democracy?: Radically Democratic Responses to Politics' (1996) 24(2) *Political Theory* 241

Watson, Irene, 'Aboriginal Laws and Colonial Foundation' (2017) 26(4) *Griffith Law Review* 469

Watson, Irene, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015)

Watson, Irene, 'Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal Peoples' (2009) 108(1) *South Atlantic Quarterly* 27

Watson, Irene, 'There Is No Possibility of Rights without Law: So Until Then, Don't Thumb Print or Sign Anything!' (2000) 5(1) *Indigenous Law Bulletin* 4

Watson, Nicole, 'Howard's End: The Real Agenda behind the Proposed Review of Indigenous Land Titles' (2005) 9(4) *Australian Indigenous Law Reporter* 13

Webb, Raelene, 'The 2016 Sir Frank Kitto Lecture: Whither Native Title?' (2016) 19(2) *Australian Indigenous Law Review* 17

Webb, Raelene, 'The Birthplace of Native Title - from "Mabo to Akiba"' (2017) 23 *James Cook University Law Review* 31

Webber, Jeremy, 'Forms of Transitional Justice' (2012) 51 *NOMOS: American Society for Political and Legal Philosophy* 98

Webber, Jeremy, 'Native Title as Self-Government' (1999) 22(2) *UNSW Law Journal*

Weir, Jessica, Claire Stacey and Kara Youngetob, *The Benefits Associated with Caring for Country - Literature Review* (Australian Institute of Aboriginal & Torres Strait Islander Studies (AIATSIS), 2011) 26

Wels, Harry et al, 'Victor Turner and Liminality: An Introduction' (2011) 34 *Anthropology Southern Africa* 1

Wensing, Ed and Libby Porter, 'Unsettling Planning's Paradigms: Towards a Just Accommodation of Indigenous Rights and Interests in Australian Urban Planning?' (2016) 53(2) *Australian Planner* 91

Werther, Guntram FA, *Self-Determination in Western Democracies - Aboriginal Politics in Comparative Perspective* (Greenwood Press, 1992)

Westbury, Neil and Michael Dillon, 'Overcoming Indigenous Exclusion: Very Hard, Plenty Humbug'

Whyte, Kyle, 'The Dakota Access Pipeline, Environmental Injustice, and U.S. Colonialism' [2017] (19.1) *Red Ink: An International Journal of Indigenous Literature, Arts, & Humanities*

Wild, Rex and Pat Anderson, *Ampe Akelyernemane Meke Mekarle "Little Children Are Sacred"* (Northern Territory Government, 15 June 2007)

Wolfe, Patrick, 'Nation and MiscegeNation: Discursive Continuity in the Post-Mabo Era' [1994] (36) *Social Analysis: The International Journal of Social and Cultural Practice* 93

Wolfe, Patrick, *Settler Colonialism* (A&C Black, 1999)

Wolfe, Patrick, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387

Woodward, Emma et al, *Our Knowledge, Our Way in Caring for Country: Indigenous-Led Approaches to Strengthening and Sharing Our Knowledge for Land and Sea Management. Best Practice Guidelines from Australian Experiences.* (NAILSMA and CSIRO, 2020)

Wootten, Hal, 'Mabo and The Lawyers' (1995) 6(3) *The Australian Journal of Anthropology* 116

Yoorook Justice Commission, *Yoorook with Purpose: Interim Report* (Yoorook Justice Commission, 2022)

Youl, Rob, Sue Marriott and Theo Nabben, *Landcare in Australia: Founded on Local Action* (SILC and Rob Youl Consulting Pty. Limited, 2006)

Young, Elspeth et al, *Caring for Country: Aborigines and Land Management* (Australian National Parks and Wildlife Service, 1991)

Young, Iris Marion, 'Activist Challenges to Deliberative Democracy' in *Debating Deliberative Democracy* (Blackwell Publishers, 2003)

Young, Iris Marion, *Inclusion and Democracy* (Oxford University Press, 2nd ed, 2000)

Yu, Peter, 'Aboriginal Australians: Anything but Democratic, the Constitution Excluded My People', *The Sydney Morning Herald* (online, 10 June 2022) <https://www.smh.com.au/national/anything-but-democratic-the-constitution-excluded-my-people-20220608-p5asc1.html>

Yu, Peter, 'Aboriginal Issues in Perspective: Native Title Rights and Self-Determination' (1996) 31(2) *Community Development Journal* 164

## 13.2 Cases

### 13.2.1 Australian Cases

*Attorney-General v Brown [1847] 1 Legge 312.*

*Bell on behalf of the Wakka Wakka People #4 (No 2) v State of Queensland [2022] FCA 371.*

*Bennell v Western Australia [2006] FCA 1243.*

*Bodney v Bennell [2008] FCAFC 63.*

*Coe v Commonwealth [1979] HCA 68*.

*Coe v Commonwealth [1993] HCA 4.*

*Cooper v Stuart (1889) 14 App Cas 286.*

*Goonack v State of Western Australia [2011] FCA 516.*

*Love v Commonwealth of Australia; Thoms v Commonwealth of Australia [2020] HCA 3.*

*Mabo v Queensland (No 2)[1992] 175 CLR 1.*

*Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors (1998) FCA 1606.*

*Members of the Yorta Yorta Aboriginal Community v State of Victoria [2001] FCA 45.*

*Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58.*

*Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141.*

*Peurmora v State of Western Australia [2012] FCA 1334.*

*R v Ballard (or Barrett) [1829] NSW SupC 26.*

*R v Bonjon [1841] NSWSupC 92.*

*R v Murrell (1836) 1 Legge 72.*

*R v. Lowe [1827] NSWKR 4; [1827] NSWSupC 32.*

*Ross on behalf of the Cape York United #1 Claim Group v State of Queensland (No 3) (Uutaalnganu (Night Island) determination) [2021] FCA 1465.*

*Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors [1996] HCA 40.*

### 13.2.2 Other Cases

*Amodu Tijani v Secretary, Southern Nigeria [1921] 2 AC 399.*

*Delgamuukw v British Columbia [1997] 3 SCR 1010.*

*Guerin v The Queen [1984] 2 S.C.R. 335.*

## 13.3 Legislation/Bills

*Aboriginal and Torres Strait Islander Commission Act (1989)*

*Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act)*

*Native Title Act 1993*

*Native Title Amendment Act 1998*

*Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016*

*United Nations Declaration on the Rights of Indigenous Peoples Bill 2022*

## 13.4 Other

'Aboriginal Provisional Government' <http://apg.org.au/about.php>

Barnett, Premier Colin, 'Noongars Vote to Accept Historic Offer', *Government of Western Australia* (30 March 2015) <https://www.mediastatements.wa.gov.au/Pages/Barnett/2015/03/Noongars-vote-to-accept-historic-offer.aspx>

Department of Prime Minister & Cabinet, 'Indigenous Ranger Programs' (18 March 2016) <https://www.niaa.gov.au/indigenous-affairs/environment/indigenous-ranger-programs>

Dryzek, John, Ron Levy and Selen A Ercan, 'In a Voice Campaign Marked by Confusing, Competing Claims, There's a Better Way to Educate Voters', *The Conversation* (19 June 2023) <http://theconversation.com/in-a-voice-campaign-marked-by-confusing-competing-claims-theres-a-better-way-to-educate-voters-206193>

'Forum Speakers Say "Doctrine of Discovery" Shameful Root of Today's Indigenous Oppression, Remnants Still Evident in Many Constitutions Must Be Removed' <https://www.un.org/press/en/2012/hr5089.doc.htm>

Moorcroft, Heather, 'Coming to Terms with the Occupation of Nature: Engagements between Indigenous Australians and Conservation Organisations' PhD Thesis, (University of Wollongong, 2016)

'Polling – Voice to Parliament in the Constitution', *The Australia Institute* (31 July 2022) <https://australiainstitute.org.au/report/polling-voice-to-parliament-in-the-constitution/>

Rigney, Daryle, 'Building Nations, "Acting as Country"', *University of Technology Sydney* (29 October 2020) <https://www.uts.edu.au/research-and-teaching/research/explore/impact/building-nations-acting-country>

Sky News Australia, 'Voice to Parliament Could "Influence Every Decision of Government": Peter Dutton' <https://www.skynews.com.au/australia-news/voice-to-parliament/voice-to-parliament-could-influence-every-decision-of-government-peter-dutton/video/2db297df2bcd68f9c89c49aa7a9f9b3b>

'The Agreement', *Yamatji Southern Regional Corporation Ltd.* <https://www.yamatjicentral.com.au/the-agreement>

The Hon. Malcolm Turnbull MP, Prime Minister, Senator the Hon. George Brandis QC Attorney-General and Senator the Hon. Nigel Scullion Minister for Indigenous Affairs, 'Response to Referendum Council's Report on Constitutional Recognition, 26 October 2017, Joint Media Release' <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/5596294/upload_binary/5596294.pdf;fileType=application%2Fpdf#search=%22media/pressrel/5596294%22>

United Nations, (2007) 'United Nations Declaration on the Rights of Indigenous Peoples'

'Wunambal Gaambera Healthy Country Plan' <https://wunambalgaambera.org.au/wp-content/uploads/2020/06/Healthy-Country-Plan.pdf>

Young, Simon, 'From the Bike to the Bus: The Noongar Native Title Settlement', *The Conversation* (15 July 2013) <https://theconversation.com/from-the-bike-to-the-bus-the-noongar-native-title-settlement-1595>