INDIGENOUS SELF-GOVERNMENT IN THE AUSTRALIAN FEDERATION

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I INTRODUCTION

Aboriginal and Torres Strait Islander peoples of Australia face a curious conundrum. Their continued existence and continuing sovereign[1] obligations to Country, culture and community are self-evident. Yet the Australian national narrative is that Indigenous[2] sovereignty was extinguished at the time of the arrival of the British 'settlers'. Today Australian mainstream law suggests that

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****** John McMinn was Research Specialist, Native Nations Institute, The University of Arizona. We pay our respects to our Aboriginal collaborators on this project, the Gunditjmara People and the Ngarrindjeri Nation, and we pay our respects to their Elders, leaders and key personnel, past, present and emerging. We acknowledge the challenges faced by Aboriginal and Torres Strait Islander peoples to exercise their inherent right to self-determination. This article is a product of an Australian Research Council Discovery Project (DP1092654) titled, 'The Applicability of Research and Practice on Nation Rebuilding in North American Indigenous Communities to Australian Indigenous Communities'. We particularly thank Daryle Rigney, Damein Bell and Steve Hemming who contributed to our understanding of the Gunditjmara People's and Ngarrindjeri Nation's efforts to self-govern in Australia and, in particular, to our understanding of responsibility for Country as a foundational principle for sovereignty. We also thank Stephen Cornell for his ongoing contributions to our understanding of the nature of self-governing in Australia. Particular thanks to Yoko Akama, Amanda Porter, and Cedric Hassing for comments on an earlier draft of this article.

1 We acknowledge that the term 'sovereignty' does not have sufficient depth to encompass the obligations that Aboriginal and Torres Strait Islander peoples have to Country but it seems to be the closest Western approximation. We are grateful to our collaborator, Gunditjmara leader, Damein Bell for our many discussions on this issue.

2 In this article, we will use the terms 'Aboriginal and Torres Strait Islander' and 'Indigenous' interchangeably. We also use the term 'Indigenous' when referring to Indigenous peoples internationally. When referring to specific Aboriginal political collectives, we will use their preferred description such as Ngarrindjeri Nation and Gunditjmara People.

Aboriginal and Torres Strait Islander people exist as *peoples* only for purposes, and against criteria, determined by state and federal governments. In other words, apart from limited and highly circumscribed opportunities created through native title, cultural heritage laws and some states' land rights systems, the Australian state neither acknowledges Aboriginal and Torres Strait Islander peoples' status as distinct political collectives (nations, societies, communities, or however else they prefer to describe themselves) nor recognises their inherent rights to self-governance.[3] While they consistently have advocated for this recognition – through the Yirrkala bark petitions,[4] the Barunga Statement,[5] the Aboriginal Tent Embassy, and most recently in the Uluru Statement from the Heart[6] – nation-to-

3 By contrast, the self-governance authority of Indigenous nations is overtly recognised in other prominent settler states. In Canada, First Nations' inherent right to self-government is protected by s 35 of the Canadian Constitution and was recognised in federal government policy in 1993. Moreover, the negotiation of contemporary self-government agreements is rooted in existing treaties or in case law that notes that treaties *should* exist: see, eg, *R v Sparrow* (1990) 70 DLR (4th) 385 (SCC) 411; see also Kent McNeil 'Reduction by Definition: The Supreme Court's Treatment of Aboriginal Rights in 1996' (1997) 5 *Canada Watch* 60; Kent McNeil, 'How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified' (1997) 8 *Constitutional Forum* 33; Peter Grose, 'Developments in the Recognition of Indigenous Rights in Canada: Implications for Australia?' (1997) 4 *James Cook University Law Review* 68. In the United States, the commerce clause of the constitution recognises Indian tribes along with foreign powers, a recognition clarified in the so-called 'Marshall Trilogy', which explain that tribes are 'domestic dependent nations': see *Johnson v McIntosh* (1823) 21 US 543, 574; *Cherokee Nation v Georgia* (1831) 30 US 1, 16, 17, 20, 53; *Worcester v Georgia* (1832) 31 US 515, 544–5, 559. See especially *Cherokee Nation v Georgia* (1831) 30 US 1, 17 (Marshall CJ). See also *US v Percheman* (1833) 10 US 393, 396–7 (Marshall CJ). In Aotearoa New Zealand, the *Treaty of Waitangi* has provided the political impetus for socio-political and economic change. Dr Robert Joseph notes that 'in Aotearoa New Zealand, Māori may not have actual self-determination, self-government and autonomy in law, but they do have considerable political, economic and cultural influence in fact. There are guaranteed political seats in Parliament and some local government councils. Māori occupy key social service delivery roles. There is a central education system outside the mainstream from pre-school to tertiary levels. The Māori language has been revived as a living language and is a recognised official, economic and growing civic language. Māori culture is visible strongly in the public and private sectors of the country. There is a growing Māori economy. Māori do not have an ability to control the local legal framework in Aotearoa New Zealand like Indigenous peoples can in North America, but they do have strong political, educational, social, cultural and economic influence or a degree of self-determination in fact': Robert Joseph, 'Indigenous Peoples' Good Governance, Human Rights and Self-Determination in the Second Decade of the New Millennium – A Māori Perspective' (2014) *Maori Law Review* <http://maorilawreview.co.nz/2014/12/indigenous-peoples-good-governance-human-rights-and-self-determination-in-the-second-decade-of-the-new-millennium-a-maori-perspective/>.

4 In 1963, the Yirrkala bark petitions were sent to the Australian Parliament by members of Yolngu clans in the Yirrkala region of what is now the Northern Territory to protest excision of land from the Aboriginal Reserve to allow bauxite mining to proceed. Written in Yolngu Matha and English, the petitions were presented on bark boards that were painted with designs that declared Yolngu law and outlined their connection to Country.

5 The Barunga Statement was presented to former Prime Minister Bob Hawke in June 1988 during the bicentennial year. The Statement was effectively a log of claims calling for Aboriginal self-management, a national system of land rights, compensation for loss of lands, respect for Aboriginal identity, an end to discrimination, and the granting of full civil, economic, social and cultural rights. Bob Hawke responded that a treaty would be negotiated during the term of the Parliament but no treaty has ever been negotiated between the nation-state and Aboriginal and Torres Strait Islander peoples.

6 First Nations National Constitutional Convention, 'Uluru Statement from the Heart' (26 May 2017). The Uluru Statement from the Heart is the most recent call for Indigenous self-determination. The bipartisan Referendum Council convened the First Nations National Constitutional Convention at Uluru to discuss

nation and government-to-government relations have not become an aspect of Australian mainstream law. This lack of legal status for Aboriginal and Torres Strait Islander collectives results in serious constraints on their self-governing capacity, constraining the scope of their jurisdiction and limiting the potential of Indigenous governing institutions.

Nonetheless, some Indigenous collectives are establishing contemporary mechanisms of self-government. For example, in what is now South Australia, the governance strategies of the Ngarrindjeri Nation have resulted in numerous, mutually beneficial and highly successful inter-governmental relationships with state and local governments. The Gunditjmara People, in what is now Victoria, until recently had a governing mechanism that used deliberative democracy strategies to fulfil their obligations to Country, to negotiate agreements with the Victorian government and to pursue their native title, cultural heritage and traditional owner aspirations.[7] These bodies and mechanisms of self-government were designed by the Ngarrindjeri Nation and Gunditjmara People themselves. Their aim was to create institutions that were effective and had cultural legitimacy. They also sought to be strategic, building governing systems and growing relationships that laid the groundwork for increased Ngarrindjeri and Gunditjmara authority over the long term. Our sense is that the success and proliferation of such arrangements will generate discussions about the implications of Aboriginal governing institutions for the Australian federation (and its constituent jurisdictions). Australian politicians previously have argued that Aboriginal and Torres Strait Islander representative bodies, even in an advisory capacity, are unnecessary in Australia.[8] In fact, the Howard Government went further to contend that Indigenous self-determination in and of itself has the potential to undermine Australian democracy.[9]

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an approach to constitutional reform to recognise Aboriginal and Torres Strait Islander peoples. The Uluru Statement called on the federal government to establish a 'First Nations Voice', an Aboriginal and Torres Strait Islander advisory body that would be enshrined in the Constitution, and a 'Makarrata Commission' to supervise a process of 'agreement-making' and 'truth-telling' between governments and Aboriginal and Torres Strait Islander peoples. The Turnbull government rejected these proposals. See below n 8.

7 After 20 years of decision-making through a monthly community meeting, the Gunditjmara People are in the process of revising their decision-making structures to better fit their changing circumstances.

8 In response to the Uluru Statement from the Heart, the Prime Minister at the time of writing, Malcolm Turnbull, together with the Attorney-General and Minister for Indigenous Affairs, announced that 'such an addition to our national representative institutions was undesirable'. They stated that a 'constitutionally enshrined additional representative assembly for which only Indigenous Australians could vote for or serve in' would be inconsistent with the fundamental principle that Australian 'democracy is built on the foundation of all Australian citizens having equal civic rights'. See Malcolm Turnbull, George Brandis and Nigel Scullion, 'Response to Referendum Council's Report on Constitutional Recognition' (Media Release, 26 October 2017) <https://www.pm.gov.au/media/response-referendum-council%E2%80%99s-report-constitutional-recognition>.

9 Australia's opposition to the *United Nations Declaration on the Rights of Indigenous Peoples* (GA Res. 61/295, UNGAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007)) was predicated on concerns, among other things, that Indigenous rights to self-determination would potentially impair the 'territorial and political integrity of a State with a system of democratic representative government': Robert Hill, 'Explanation of Vote' (Speech delivered at the United Nations General Assembly, New York, United States, 13 September 2007), cited in Sarah Joseph, 'The Howard

In answer, we argue that Indigenous self-governing and expressions of self-determination are *not* antithetical to the Australian nation-state. The federal system has qualities that allow for the integration of Indigenous self-governing. Indeed, as the South Australian Government's Aboriginal Regional Authorities ('ARAs') initiative [10] demonstrates, this discussion is no longer theoretical. Inspired in part by the success of the Ngarrindjeri and Narungga Regional Authorities, [11] the policy has created a framework for the recognition of Aboriginal political collectives. Subsequently, the former South Australian Labor Government committed to entering into treaty negotiations with three Aboriginal nations: the Ngarrindjeri Nation; Narungga Nation; and Adnyamathanha Nation,[12] but it is unclear whether the current Coalition Government will continue the processes.[13] The Victorian government also has announced its commitment to self-determination as the primary driver of Aboriginal affairs policy.[14] More specifically, it has agreed to enter into treaty negotiations with the Aboriginal peoples of Victoria, recognise Indigenous self-government and develop options for a permanent Aboriginal representative body.[15]

Part I of this article explores Indigenous self-government in theory and in practice. Part II discusses implications of Indigenous self-government for the State. Part III considers the opportunities and challenges for accommodation of Indigenous self-government within Australia's federal Constitutional arrangements, and Part IV considers a range of ways that Indigenous governments might engage with the Australian state into the future.

Certainly, there is much to be said on these topics. We do not intend this article to be a definitive statement about the relationship of Indigenous governments to the Australian State. How and whether Indigenous polities seek recognition of their governments (within the current federal structure or a new federal structure) is a matter for Aboriginal and Torres Strait Islander collectives to decide. Here our focus is on the *possible* interactions between the governing institutions of Indigenous political collectives and local, state and federal governments within the Australian political framework – in other words, on 'inter-governmental relationships' – not on the much broader notion of Indigenous 'governance' per se.

Government's Record of Engagement with the International Human Rights System' (2008) 27 *Australian Yearbook of International Law* 45, 47–8.

10 Government of South Australia, 'South Australian Aboriginal Regional Authority Policy: A Regional Approach to Aboriginal Governance in South Australia' (March 2016) 4.

11 Government of South Australia, 'Aboriginal Regional Authorities: A Regional Approach to Governance in South Australia' (Consultation Paper, July 2013) 1.

12 Department of State Development (SA), *Treaty Discussions* (2018) <http://statedevelopment.sa.gov.au/aboriginal-affairs/aboriginal-affairs-and-reconciliation/initiatives/treaty-discussions>.

13 The Liberal National Coalition, led by Steven Marshall, won the South Australian election on 17 March 2018.

14 Aboriginal Victoria, *Self-Determination* (2018) Victorian Government <http://www.vic.gov.au/aboriginalvictoria/policy/self-determination.html>.

15 Sarah Maddison, Kirsty Gover and Coel Kirkby, 'Treaty Fact Sheet' (Aboriginal Victoria, 2016) <https://www.vic.gov.au/system/user_files/Documents/av/Aboriginal_Treaty_Fact_Sheet.pdf>.

II INDIGENOUS SELF-GOVERNMENT IN THEORY AND PRACTICE

A The Reality of Legal and Political Plurality

We contend that Indigenous governing structures and mechanisms, which Indigenous peoples rely on to organise themselves and to interact with other polities, continue to exist in Australia. This contention should be unremarkable. That numerous formal and informal legal systems can exist within the one society has been acknowledged by legal scholars for decades.[16] Likewise, the suggestion that numerous, co-existing communities within Australian society which have allegiances to laws other than those of mainstream law is widely accepted.[17] By extension, an understanding that Aboriginal and Torres Strait Islander peoples continue to have allegiances to laws and governing systems with origins that predate the invasion of Australia should also be commonplace.

Yet an acceptance by mainstream Australian society that distinct Aboriginal and Torres Strait Islander communities/collectives within the nation-state are entitled to their own laws and governing forms is not commonplace.[18] Australian case law holds that Indigenous sovereignty and self-governing power were superseded on the 'acquisition' of British sovereignty (and later, Australian sovereignty), precluding parallel law making.[19] Further, the existence of 'domestic dependent Indigenous nations entitled to self-government' also has been denied.[20] These contentions have given rise to a set of Australian legal and political institutions committed to legal centralism – the idea that there is and can be only one law for all of Australia and only one set of institutions to administer the law.[21] Australian policy similarly rejects notions of separate and distinct

16 See, eg, John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1. Native title case law makes the same point.

17 Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28 *Sydney Law Review* 403, 404.

18 Australian case law has long recognised that Indigenous peoples have their own laws according to which they live, but until the Mabo decision, Indigenous laws could not be enforced in the mainstream legal system. In *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 ('*Milirrpum*'), Blackburn J famously concluded that Aboriginal social rules and customs illustrated a 'subtle and elaborate system' that was 'highly adapted' and provided a 'stable order of society' that was 'remarkably free from the vagaries of personal whim and influence': at 267. They were not recognisable to the court however because of the doctrine of precedent. While *Milirrpum* was overturned by the decision in *Mabo v Queensland [No 1]* (1988) 166 CLR 186, the High Court qualified that recognition of Indigenous law by stating that recognition was possible so long as it did not fracture the skeleton of principle: *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J).

19 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 443 [44] (Gleeson CJ, Gummow and Hayne JJ).

20 *Coe v Commonwealth* (1979) 24 ALR 118, 128–9 (Gibbs J); *Coe (on behalf of the Wiradjuri tribe) v Commonwealth of Australia* (1993) 118 ALR 193, 200 (Mason J); *Walker v New South Wales* (1993) 182 CLR 45, 48 (Mason CJ); *The Wik Peoples v Queensland* (1996) 187 CLR 1, 214 (Kirby J); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 443 at [43]ff.

21 Griffiths contrasts the reality of 'legal pluralism' (the coexistence of a social group of legal orders which do not belong to a single 'system') to the ideology of 'legal centralism' (law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state

Indigenous polities (except in limited, government-defined areas), preferring instead to focus Aboriginal and Torres Strait Islander policy at the pan-Indigenous level and to assert a single citizenship held by all Australians.

At the same time, mounting evidence of Indigenous polities increasing their authority over their Country and citizens is impossible to ignore. A close examination of the actions taken by local, state and federal governments, industry and other non-Indigenous entities in relation to Aboriginal and Torres Straight Islanders reveals an accumulation of political, economic and legal agreements[22] that assume the existence of collectives with self-governing capacities and negotiating authority.[23] In some instances, implicit recognition of Indigenous political collectives as self-governing polities is transitioning to explicit acknowledgment.[24]

In making these agreements, Indigenous political collectives strive to enhance their institutional capacity to exercise their *jurisdiction* – a word we understand in the way that Dorsett and McVeigh use the term, as 'the practice of pronouncing the law' and declaring 'the existence of law and the authority to speak in the name of the law.'[25] Because the authorities speak to geographies, populations, issues and resources over which the Australian state also may exercises authority, we thus understand Indigenous and non-Indigenous realms of authority to encompass 'multiple and overlapping … types of governance and jurisdiction',[26] 'parallel sovereignty'[27] or as Tully describes,

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institutions), describing the former as 'fact' and the latter as 'myth, an ideal, a claim, an illusion'. See Griffiths, above n 16, 4.

22 Examples are numerous and include: (1) a multitude of agreements that Australian federal, state and local governments, industry, business entities, and the non-government sector have negotiated with Indigenous collectives: See Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004). See also the work of the Agreements, Treaties and Negotiated Settlements Project ('ATNS Project') that seeks to develop a comprehensive database illustrating the variety of agreements between Indigenous and non-Indigenous people: <http://www.atns.net.au/>. The ATNS Project began examining agreement-making with Indigenous Australians in 2002. In 2006, its focus expanded to agreement implementation. Around this time, research confirmed that agreements – particularly those with a focus on good practice, benefit maximisation and diversity of opportunity – were critical in fostering the socio-economic development of Indigenous and local communities: see ATNS, *Project Outline 2010: Poverty in the Midst of Plenty: Economic Empowerment, Wealth Creation and Institutional Reform for Sustainable Indigenous and Local Communities* (2011) <http://www.atns.net.au/page.asp?PageID=6>; (2) Indigenous decision-making bodies with delegated authority and quasi-judicial bodies: see, eg, the Victorian Aboriginal Heritage Council and the numerous circle sentencing courts throughout Australia; and (3) legislation enacted to create Indigenous corporations, land councils and local government councils.

23 Reilly, above n 17, 419.

24 See, eg, the Ngarrindjeri agreement making process (discussed in Part IV.B) that led to ministerial delegation of decision-making authority to the Ngarrindjeri Regional Authority.

25 Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012) 4.

26 Andrea Muehlebach, 'What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism' (2003) 10 *Identities: Global Studies in Culture and Power* 241, 258–9.

27 Siegfried Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' (2008) 41 *Vanderbilt Journal of Transnational Law* 1141, 1166–7.

> the recognition of indigenous peoples as free, equal and self-governing peoples under international law, with *shared* jurisdiction over lands and resources on the basis of mutual consent.[28]

B The Harvard Project and Native Nations Institute Principles Applied to Australia

Not only are Indigenous collectives demonstrating a preference for self-governing, but there also is credible and consistent evidence of the benefits of doing so. Research over a 30-year period by the Harvard Project on American Indian Economic Development ('Harvard Project') finds that the defining characteristic common to thriving North American Native nations is *collective self-determination*, manifest in Indigenous communities or nations having decision-making control over their internal affairs (a process that in Australia has been described as exercising 'political jurisdiction').[29] Indeed, Cornell and Kalt claim that they cannot find in the United States 'a single case of sustained economic development in which an entity other than the Native nation is making the major decisions about development strategy, resource use or internal organisation.'[30] They extend the argument to point out, however, that self-determination must be supported by effective and culturally legitimate institutions of self-government (whether newly created or reinvigorated) that help Indigenous collectives exercising self-determination get things done predictably and reliably; strategic direction; and community-spirited leadership.[31] Together these principles comprise Indigenous *nation (re)building*, or as Jorgensen describes it, 'the process by which [an Indigenous] nation enhances its own foundational capacity for effective self-governance and for self-determined community and economic development'.[32]

Despite differing Constitutional, historical, political and legal circumstances in the North American and Australian nation-states, Australian National University's Indigenous Community Governance Project reinforced the Harvard Project findings in Australia, concluding that '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 socio-

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28 James Tully, 'The Struggles of Indigenous Peoples for and of Freedom' in Duncan Ivison, Paul Patton and Will Sanders (eds) *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 36, 56.

29 Michael Dodson and Diane Smith, 'Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities' (Discussion Paper No 250, Centre for Aboriginal Economic Policy Research, Australian National University, 2003) 9.

30 Stephen Cornell and Joseph P Kalt, 'Two Approaches to the Development of Native Nations: One Works, the Other Doesn't' in Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007) 3, 22.

31 For an excellent overview of the research of the Harvard Project on American Indian Economic Development and the Native Nations Institute for Leadership, Management and Policy see Jorgensen, *Rebuilding Native Nations*, above n 30. See also Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions under US Policies of Self-determination* (Oxford University Press, 2008). For additional publications see <http://www.hks.harvard.edu/programs/hpaied>.

32 Miriam Jorgensen, 'Editor's Introduction' in Jorgensen, *Rebuilding Native Nations*, above n 30, xii.

economic development and resilience'.[33] More recently, our own Australian Research Council project, which was a collaboration among researchers from Jumbunna Indigenous House of Learning at University of Technology Sydney,[34] the Native Nations Institute ('NNI') at the University of Arizona and two Aboriginal organisations (Gunditj Mirring Traditional Owners Aboriginal Corporation and Ngarrindjeri Regional Authority), specifically tested the applicability of the Harvard Project and NNI principles by asking whether the Gunditjmara People of southwest Victoria and the Ngarrindjeri Nation were seeking to comprehensively self-govern, as understood in North America. The research concluded not only that they were, but also that self-governance increased the capacity for Australian Indigenous nations to self-define their priorities, strategically plan for and implement these priorities and enter into mutually beneficial partnerships with governments and other entities.

Relevant to this article, there are three elements of the North American research that we wish to highlight. First, the research emphasises that the 'fundamental challenge of economic development and social progress is a *political* challenge' where the 'ultimate focus is self-determination and governance.'[35] Translating this statement to the Australian context, we emphasise that the challenge referred to here is one faced by Indigenous collectives or polities rather than by the community organisations that Indigenous collectives use as tools to interact with Australian governments, corporations and service entities. To understand the nature of the political challenge it is essential to 'distinguish between management and governance' and to avoid conflating a developmental or service delivery organisation with an institution of self-government.[36]

Second, the research emphasises institution building. If they are to realise their aspirations, Indigenous nations need culturally legitimate institutions and processes that are capable of translating decisions into action. Self-determination requires both institutional capacity and quality decision-making.

Third, the governing institutions must resonate with community principles and beliefs about how authority should be exercised and also meet *current* needs.[37] 'Traditional' forms of governing were developed in dramatically different circumstances and may be inadequate for contemporary demands.[38] To reconcile community values and views about the appropriate form and organisation of governing institutions with the governing capabilities required in

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

34 Jumbunna Indigenous House of Learning is now the Jumbunna Institute for Indigenous Education and Research.

35 Jorgensen, 'Starting Points' in Jorgensen, *Rebuilding Native Nations*, above n 30, 1.

36 Patrick Sullivan, 'Indigenous Governance: The Harvard Project, Australian Aboriginal Organisations and Cultural Subsidiarity' (Working Paper No 4/2007, Desert Knowledge Cooperative Research Centre, 2007) 15.

37 Cornell and Kalt, 'Two Approaches', above n 30, 25.

38 Ibid; Janet Hunt and Diane Smith, 'Preliminary Research Findings' (Working Paper No 31/2006, Centre for Aboriginal Economic Policy Research, 2006) 16.

the modern world means that Indigenous self-governing varies markedly. Some Indigenous nations continue to abide by law and use institutions that have existed since before colonisation. Others are reconstituting ancient institutions or creating entirely new mechanisms of self-government. The common characteristic is the attempt to maximise autonomy in a colonised environment.

C Indigenous 'Government' or Indigenous 'Governance'?

Acknowledging the compelling evidence that self-determination is central to the achievement of Indigenous communities' cultural, economic, social and political goals, scholars have queried how this exercise of autonomy should be characterised; that is, whether the term 'governance' or 'government' is more appropriate.

Our preference is to describe the nation building tasks being undertaken by Indigenous political collectives in Australia as establishing effective and culturally legitimate Indigenous *governments* to exercise political jurisdiction. In doing so, we are at odds with other scholars who argue that the term 'government' invokes the centralised institutions of the nation-state. In an earlier article, Reilly made this explicit in his definition of 'government' as the 'official institutions established under the Constitution of the nation.'[39] Similarly, Smith argues that 'government' is 'usually predicated on some related concept of 'the state' and a degree of centralisation of power and decision making.'[40]

Instead, Reilly and Smith prefer the term 'governance' as better representing the complex relationships between Indigenous governing structures and mechanisms and the Australian state, which makes no formal provision for their existence. Reilly characterises Indigenous governance as 'the decisions Indigenous communities make individually or collectively about how they might govern themselves *regardless of their formal rights*',[41] and independent of any obligations they have under mainstream law.[42] He observes that governance is also about how Indigenous people negotiate the intersection of their own laws and the rights and obligations they have under the central legal system.[43] Similarly, Smith claims that 'governance' is more useful to describe the range of coordinating interactions within Indigenous communities because it shifts attention from a more formal realm of government to a wider set of actors and networks.[44] Smith notes that the concept of governance 'blurs the boundaries between and within the public and private sectors'.[45]

A factor underlying Reilly and Smith's preference seems to be that Indigenous governing systems or governments almost certainly will differ from

39 Reilly, above n 17, 405. As co-author of this article, Reilly's perspective has changed over time.

40 Diane Smith, 'Researching Australian Indigenous Governance: A Methodological and Conceptual Framework' (Working Paper No 29/2005, Centre for Aboriginal Economic Policy Research, Australian National University, 2005) 9.

41 Reilly, above n 17, 407 (emphasis added).

42 Ibid 407.

43 Ibid.

44 Smith, above n 40, 9. See also Hunt and Smith, 'Preliminary Research Findings', above n 38, 3–5.

45 Smith, above n 40, 9.

non-Indigenous governments and, on their face, may be significantly more complex. Such difference is unsurprising given the Harvard Project's research findings that Indigenous governments must match the political culture and values of the polity. Governing systems that are legitimate in the eyes of the citizenry mean that governing systems will vary from nation to nation and community to community. Therefore, Reilly and Smith find the breadth of 'governance' to better encompass the complexity of Indigenous jurisdiction in the contemporary environment.

In fact, one of the reasons we prefer the narrower conception of 'government' is precisely because 'governance' is so flexible and expansive. Governance 'can be applied to the regulation of a wide range of entities, including countries, organisations, communities and even individuals, as is evident in its use in 'self-governance', 'community governance', 'corporate governance' and 'global governance'' [46] and can take numerous forms. It is so widely used that its 'terminological uncertainty' [47] makes it enormously difficult to distil a broadly accepted definition of 'governance'.[48] Indeed, Bevir and Rhodes emphasise that the term has no 'general features or essential properties that are supposed to characterise it' [49] and Offe asks whether the term is merely an 'empty signifier'.[50] Ultimately, while governance is about 'power, jurisdiction, control and choice, … who makes the decisions, … who makes the rules, and how decision-makers are held accountable, both internally and externally',[51] it is a term employed in such a variety of ways that could mean 'anything or nothing' [52] that there is 'no consensus on its scope when employed to describe the political aspirations of Indigenous Australians.' [53]

In preferring the terminology of Indigenous *government*, we wish to draw attention to the institutions and mechanisms that Indigenous peoples are using to self-govern. According to Cornell, Curtis and Jorgensen, 'government' relates to a set of offices or positions that are charged with determining and enforcing the applicable rules, creating policy, making and implementing decisions, and resolving disputes. [54] As they describe 'government', it is the system and

46 Reilly, above n 17, 406.

47 R Jessop, 'Governance, Governance Failure, and Metagovernance' (Paper presented at a seminar held at Università della Calabria, 21–23 November 2003), cited in Jim Jose, 'Theorising 'Governance' and the Problem of Conceptual Boundary Setting (2014) 1(3) *British Journal of Interdisciplinary Studies* 1, 2.

48 H K Colebatch, 'Governance as a Conceptual Development in the Analysis of Policy' (2009) 3 *Critical Policy Studies* 58, 60.

49 M Bevir and R A W Rhodes, *The State as Cultural Practice* (Oxford University Press, 2010), cited in Jose, above n 47, 6.

50 C Offe, 'Goverance: "Empty Signifier" oder Sozialwissenschaftliches Forschungsprogramm?' in G F Schuppert and M Zurn (eds), *Governance in einer sich Wandelnden Welt* (V S Verlag fur Sozialwissenschaften, 2008) 61, cited in Colebatch, above n 48, 60.

51 Hunt and Smith, 'Preliminary Research Findings', above n 38, 18.

52 Jessop, above n 47, 2.

53 Reilly, above n 17, 407.

54 Stephen Cornell, Catherine Curtis, Miriam Jorgensen, 'The Concept of Governance and its Implications for First Nations' (Joint Occasional Papers on Native Affairs No. 2004-02, Harvard Project on American Indian Economic Development, 2004) 4.

mechanisms that bring 'governance' into effect.[55] In other words, we distinguish between the action of governing and the institutions of governing. In doing so, we reject Smith and Reilly's alignment of 'government' and the nation-state. We adopt Kjær's definition of government as 'the exercise of power by political leaders'[56] but consider that the definition applies to Indigenous leaders, offices, institutions and processes of an Indigenous political collective, rather than being narrowly constrained to that of the nation-state. We consider that constraining use of the term to the nation-state cedes far too much power to the coloniser. In limiting discussion of *the government* to local, state or federal governments, one always privileges non-Indigenous institutions, laws and values.

In our usage, 'Indigenous government' refers to overtly political institutions that represent Indigenous constituencies and not service delivery populations; that respond to a scope of activity set by the nation/governing body/citizens rather than by external parties; that are accountable to the nation/society/people/community instead of external funders or directors of policy and programs alone; and that seek to engage with non-Indigenous governments on a government-to-government basis rather than as stakeholders participating in a consultation. We describe these couplets as emblematic of the distinctions between conventional corporate governance of a community organisation and the governing of an Aboriginal polity.

Additionally, the language of Indigenous government allows non-Indigenous people, especially mainstream non-Indigenous governments, to comprehend the scope of authority that Indigenous self-governing peoples seek to exercise. In rejecting the Western notion of 'government' as necessarily invoking the nation-state, we call for a forward looking and transformative conversation that considers the place of Indigenous nations within the nation-state. In fact, we think that these conversations have commenced. Indigenous nations are appropriating the language of 'self-government', 'self-determination', 'nationhood' and 'sovereignty' and using these terms to affirm their authority over Country and community and to raise the question of new nation-to-nation or intergovernmental relationships. Behrendt, for example, comments on the extent to which Indigenous people and peoples are claiming terminologies and concepts, separate to their specific Western legal meanings, to be used for their own purposes.[57] In doing so, they have identified the term with the closest approximation to their obligations so as to be understood by non-Indigenous people.

While we have provided some conceptual reasons for preferring the term 'government', our preference owes as much to three localised factors which were relevant to (or which emerged in the context of) our research collaboration:

1. First, it is the language used by the Ngarrindjeri and Gunditjmara people with whom we work. One senior Ngarrindjeri Elder with a pivotal role in

55 Ibid 3–4.

56 Anne Kjær, *Governance* (2004, Polity Press) 1, cited in Reilly, above n 17, 405 n 5.

57 Larissa Behrendt, *Achieving Social Justice. Indigenous Rights and Australia's Future* (Federation Press, 2003) 102.

the creation of the Ngarrindjeri Regional Authority often stated his ambition to see Ngarrindjeri governing institutions recognised as the fourth tier of government in South Australia. This tier of Indigenous government would not be subordinate to other governments but would negotiate jurisdictional control over the issues that matter to Ngarrindjeri people as they exercise responsibility for Country and citizens. The Ngarrindjeri Regional Authority has begun to describe this exercise of jurisdictional control through the lens of *Yannarumi*: responsibility to 'Speak *as* Country'.[58]

2. Second, the language of Indigenous government invokes the political challenge of nation building that the evidence details and that we see in the work of the Gunditjmara People and Ngarrindjeri Nation. They are designing and creating governing systems and mechanisms, using their own processes and criteria for legitimacy.
3. Third, it invokes the nature of the inter-governmental relationship that the Ngarrindjeri Regional Authority and the Gunditjmara Full Group seek to embed in their partnerships with local, state and federal governments.

D Current Features of Indigenous Government in Australia

Indigenous peoples do not conceive of themselves as mere stakeholders or minority groups. Instead they expect to be acknowledged and respected as separate and distinct polities within the boundaries of the nation-state. As McHugh notes, political communities carry an awareness of themselves existing in time and space, a sense of coherence as a political body exercising authority that Western political thought has termed 'sovereignty'.[59] Despite cumulative policies of dispossession, assimilation, marginalisation and paternalism, Indigenous peoples around the world have 'retained a sense of their distinctiveness as a political community' and consider their 'claim to a separate autonomous status as all-pervasive and lying beneath nearly all their claims.'[60] Indigenous peoples throughout the world seek self-government to pursue their own social, economic, cultural and political goals.

The many Aboriginal nations and communities with which we have worked do not seek secession, nor do they seek to exercise general jurisdiction over non-Indigenous people. In the Australian context, they are at once citizens of Australia and citizens of their respective Indigenous nations or members of their

58 See Steve Hemming et al, 'Speaking As Country: A Ngarrindjeri Methodology of Transformative Engagement' (2017) *Ngiya: Talk the Law* 22. Perhaps the closest Western approximation to Yannarumi is 'sovereignty', although it has been made clear that sovereignty is not sufficient to describe the depth of responsibility as it encompasses land and waters, all living things, ancestors, law, ceremony, language and simultaneously is of the past, present and future. Ngarrindjeri people say that all things are connected, so that when the land is polluted or destroyed, then Ngarrindjeri people are made unwell and vice versa. Ngarrindjeri obligation to Country emerges from this connectedness.

59 See P G McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, 2004) 61–3.

60 Ibid.

respective Indigenous communities. We have heard many people describe themselves as 'dual citizens', which captures the nature of that non-singular allegiance.

Indigenous peoples *do* expect to be able to exercise Indigenous-specific jurisdiction, which has sources of authority that are distinct from that of mainstream legal and political systems. Such jurisdiction may relate to cultural heritage, natural resource management, Indigenous property claims, identity, citizenship, Indigenous law and lore, language, cultural and spiritual matters etc. In other jurisdictional areas related to the rights of all of a nation-state's citizens – health, education, child welfare, justice, employment – shared or overlapping jurisdiction and/or delegated authority may be appropriate.

In Australia, Indigenous polities have no legal personality in the dominant legal system. Instead, they must accomplish their goals using the tools that are at their disposal. Under current Australian policies, Indigenous political collectives typically use community organisations, either existing or newly created and that are incorporated under state or federal legislation, to enter into legally binding contracts with external parties, raise revenue, purchase land, acquire assets etc. For example, both the Gunditjmara Full Group and the Ngarrindjeri Regional Authority are developing their own Indigenous 'governments' but use incorporated organisations for 'foreign affairs'. Unfortunately, this accommodation to coloniser law can create confusion between the governance of Indigenous community organisations and the governance of Indigenous communities.[61] It follows that an aspect of the challenge for Indigenous collectives is to transition from 'corporate governance' (management of community organisations) to 'political governance' (governing of polities).[62] The shift might also be described as a transition from self-management to self-determination.

Finally, to conclude this list of the features of Indigenous government, we re-emphasise the fact that Indigenous peoples do not seek recognition by the nation-state for legitimacy. Indigenous jurisdiction and self-governing authority is distinct from and not reliant on authorisation or validation from Australian institutions. While recognition by the Australian legal system might make Indigenous political collectives less vulnerable to external interference, and make it possible to the nation-state to 'see' and acknowledge certain aspects of Indigenous law, recognition is not relevant to their continued existence. Rather, their source of lawful authority and responsibility predates the emergence of the nation-state by millennia.

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61 Put starkly, both Indigenous community representatives and the mainstream players with whom they interact often confuse the administration of an Indigenous community organisation with the governance of an Indigenous nation. An organisation can be a tool of the nation, but it typically is not the public government of an Indigenous nation.

62 Alison Vivian, Miriam Jorgensen and Larissa Behrendt, *Indigenous Nation Building in Australia: Promise and Prospects* (Federation Press, forthcoming).

III IMPLICATIONS OF INDIGENOUS SELF-GOVERNMENT FOR THE AUSTRALIAN STATE

While it might have been imagined at the time of invasion that Indigenous and non-Indigenous zones of authority could remain autonomous, today their realms of authority are inextricably linked. Within the current federal structure, Aboriginal and Torres Strait Islander people conceptually and literally move between Indigenous and non-Indigenous jurisdictions, determining which norms or law to apply according to the context. As more Indigenous polities re-establish and revitalise governments and as their governments expand jurisdictional authority, the implications of overlapping and shared jurisdiction and the questions of where and how Indigenous governments co-exist with and within the Australian state must be addressed.

It is crucial to note at the outset that conversations between Aboriginal peoples and the nation-state cannot be about whether Indigenous polities and their governments exist. Their continuing existence is a matter of fact.[63] In our many and varied dealings with Indigenous communities over many years, we have frequently heard testimonies to the resilience of Indigenous peoples and the refrain that Indigenous peoples have never ceded their sovereignty or right to self-determination. Properly, then, the relationship that predicates all conversations/negotiations between Aboriginal and Torres Strait Islander communities and the Australian nation-state is an inter-governmental relationship.

The most significant implication of the continued existence of Indigenous governments on the Australian continent is this: if Indigenous governments are not officially recognised, the nation-state's institutional structure is not aligned with the reality of its own political relationships, a slippage that could destabilise those institutions. In other words, there is a risk that Australia's failure to recognise Indigenous governments will lead Australian citizens to lose confidence in their own governing institutions – and that could lead to Constitutional malaise beyond the specific issue of Indigenous government. This argument suggests that recognising Indigenous government is *necessary* for the maintenance of the State.

Put somewhat differently, and perhaps more fundamentally, Indigenous peoples' assertions of self-determination inevitably raise 'challenges to the theory and practice of Western statehood'.[64] There are delicate and complex issues for resolution: how can nation-states accommodate Indigenous polities and their governments within their boundaries? How can the unavoidable conflict between the establishment and development of Western societies and the pre-existence and continuing resistance of Indigenous societies on the same territory be resolved? Are Indigenous political collectives implicitly creating

63 This is a point acknowledged throughout Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

64 Will Kymlicka, 'American Multiculturalism and the "Nations Within"' in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 216, 222.

'multinational federations',[65] 'multination states'[66] or 'non-state nations'[67] as a means to accommodate 'nations within'?[68] In reflecting on questions such as these, Kymlicka observes that, in fact:

> the problem of how states deal with 'nations within' is not a marginal issue: it is one of the key issues, perhaps even the central issue, for states in the 21st century.[69]

Attempting to reconcile colonial myth with reality is always complicated for colonial states. It is further complicated in Australia where the High Court has consistently denied the claims of Indigenous people to an inherent right of self-government. The absence of legal affirmation of Indigenous self-government suggests that any political conversation between Indigenous collectives and local, state and federal governments requires a reality check, and subsequent establishment of a framework through which their government-to-government interactions will occur. The rational response, as we have begun to see in Victoria, South Australia and, arguably, in New South Wales is for Australian governments to formally acknowledge the nation-to-nation and government-to-government relationships that have begun to emerge as a result of de facto sovereignty.

IV THE OPPORTUNITIES AND CHALLENGES FOR INDIGENOUS GOVERNMENT IN AUSTRALIA'S FEDERAL *CONSTITUTION*

A The Features of Federalism

By design, federal structures accommodate distinct orders of sovereign authority,[70] and provide for a 'union' of interests rather than the amalgamation of those interests into 'unity' with the state.[71] Although federalism is commonly associated with the hierarchy of governments within nation-states,[72] scholars have noted that some features of federalism also provide a promising framework for accommodating the self-governing aspirations of Indigenous peoples.[73]

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65 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995) 9.

66 Kymlicka, 'American Multiculturalism', above n 64, 227; David C Hawkes, 'Indigenous Peoples: Self-government and Intergovernmental Relations' (2001) 53 *International Social Science Journal* 153.

67 Jennifer McCormack, 'The Politics of Non-state Nations and Settler Societies: US, Israel, Palestine, and Gwich-in' (Working Paper, Department of Geography, University of Arizona, 2013).

68 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, 1995); Kymlicka, 'American Multiculturalism', above n 64; Vine Deloria Jr and Clifford M Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (University of Texas Press, 1984); Hawkes, above, n 66.

69 Kymlicka, 'American Multiculturalism', above n 64, 223.

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

71 Reilly, above n 17, 412.

72 Ibid

73 Ibid 403; Papillon, above n 70, 289; Kymlicka, above n 51, 216; Tully, 'The Struggles of Indigenous Peoples', above n 28, 36; Hawkes, above n 66, 153.

First, federalism is associated with a fundamental respect for diversity – perhaps even the 'deep diversity' which Canadian philosopher Charles Taylor describes as different ways that citizens belong to the State.[74] Federal structures have the capacity to incorporate diverse populations, cultures, identities and loyalties, as well as different 'levels' of government, multiple jurisdictional spaces,[75] differentiated governing mechanisms and even shared sovereignty,[76] into a single political system.

Second, the concepts of divided sovereignty and shared jurisdiction are fundamental to federalism. In federal systems, 'internal sovereignty' is divided between 'national' or 'central' governments and their constituent governments: each has a particular set of authorities. The 10th amendment to United States Constitution, for example, states 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' In Australia, this is the intent of section 51 of the Constitution, which specifies Commonwealth powers, leaving residual authorities for the several states. At the same time, federal systems' formal (written) Constitutional documents and/or common law often specify shared authorities. Native title is a case in point: the federal courts make consent determinations concerning the existence of native title, but state governments make agreements with native title holders for the implementation of native title rights.

A third key feature is evident in how federal systems achieve these ambitious aims: they display high levels of adaptability and innovation.[77] As negotiated distributions of jurisdiction, it follows that federations are able to review and reallocate jurisdictional power and have considerable capacity to evolve. In fact, such evolution points to a realpolitik corollary to the features of federalism: within federal structures, the allocation of jurisdiction is rooted not only in formal law but also in the pragmatic concerns of the united polities.

In Australia, are such features enough to accommodate Indigenous governments as part of a 21st century Australian federation? There are signs – arising from an examination of both the impediments to inclusion and the demonstrated flexibility and captiousness of the Australian federation – that the answer is a qualified 'yes'.

B Challenges to the Accommodation of Indigenous Government

While federations can accommodate diversity, the inclusion of Indigenous governments within the Australian system would require acceptance of substantial differences on several dimensions, differences that have the potential to put stress on the federation.

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74 Charles Taylor, 'Shared and Divergent Values' in R L Watts and D M Brown (eds), *Options for a New Canada* (University of Toronto Press, 1991) 75–6, cited in Hawkes, above n 66, 153.

75 Papillon, above n 70, 292.

76 Hawkes, above n 66, 154.

77 Ibid.

For one thing, the federation must accommodate wider ranges of ethno-cultural and socio-economic difference. At present, the distinction between the six states, and between the Commonwealth and the states, is not primarily ethno-cultural or socio-economic (though some commentators argue that federal homogeneity is overstated or irrelevant).[78] In any event, including Indigenous governments in the federation would immediately increase these differences. Mainstream Australians would no longer be able to pretend that there is only one 'race' of Aboriginal and Torres Strait Islander people as the expanded federal structure would acknowledge the existence of multiple Indigenous 'peoples'. These differences surely would influence political conversations and as a result, issues on which agreement already is proving elusive, such as the management of water in the Murray-Darling Basin,[79] could become even more intractable.

A more fundamental difference is that of Constitutional foundations. Consider that the Commonwealth and the states, although separate and distinct, owe their existence and power to the same source of authority, the Imperial Crown. By contrast, Indigenous governments exist and have power as a consequence of prior occupation (notwithstanding the Crown's assertion of terra nullius); as a result of covenants with creator beings; and through international law, particularly the *United Nations Declaration on the Rights of Indigenous Peoples*. The incorporation of Indigenous political and legal orders into the Australian federation (whether formally or informally) thus involves the incorporation of orders that have a different and independent source of authority, foreign to existing Australian institutions.

Whether a federal system truly can accommodate such differences in origins is an open question. The Constitution guarantees the continued existence of both the Commonwealth and the states. The Commonwealth's immunity from abolition is based on its superior status in the federation.[80] Having emerged from the process of federation, 'fully formed' through a legislative act of the Imperial Parliament, the states have no power to diminish the Commonwealth's status. On the other hand, except to the extent that their very existence is threatened, the states are vulnerable to the legislative influence of the Commonwealth.[81] This creates an anxiety at the heart of the relationship between the Australian states and the Commonwealth – the concern that, in a steadily centralising Constitutional order, the states may not have continued relevance.[82] By contrast, because Indigenous governing institutions derive from a different source of

78 See, eg, Michael Burgess, *In Search of the Federal Spirit: New Theoretical and Empirical Perspectives in Comparative Federalism* (Oxford University Press, 2012) 76.

79 At the time of writing, there is speculation that the Murray-Darling Basin plan may collapse after state governments could not agree about proposed changes to water allocations to irrigators. New South Wales has threatened to abandon the agreement and Victoria also suggested that it may follow.

80 *Commonwealth v Cigamatic* (1962) 108 CLR 372; *Re Residential Tenancies Tribunal (NSW): Ex parte Defence Housing Authority* (1997) 190 CLR 410.

81 See, eg, *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Austin v Commonwealth* (2003) 215 CLR 185.

82 Chief Justice Robert French, 'The Incredible Shrinking Federation: Voyage to a Singular State?' in Appleby et al, *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 39.

power and do not recognise Commonwealth and state parliaments as having any authority in relation to their existence and form, they are relatively immune from the application of Commonwealth and state parliament laws. Ultimately, these differences could exacerbate anxieties about the status of the states and jeopardise the possibility of an expanded federation.

With the continuing existence of Indigenous and non-Indigenous governing institutions clearly established, how to allocate jurisdiction over matters of joint interest within the federation also becomes a critical issue. Given the inclusion of Indigenous jurisdictions that have their sources of authority outside Western conceptions of sovereignty, what relationship between Indigenous and non-Indigenous governments within the federation is necessary to accommodate a new distribution of decision making authority? What should that distribution jurisdiction be, and how can the Commonwealth and the states adapt to variations in Indigenous community choices about the distribution?

The failure to recognise Indigenous government from the time of first settlement to the present inevitably complicates the process of parsing jurisdiction in the Australian state. The present Australian State asserts jurisdiction in some areas that generally would be considered natural areas of exclusive Indigenous jurisdiction. These include (1) citizenship of Indigenous nations, which currently is regulated by Australian states and territories through court-specified tests of Aboriginality, and (2) responsibility for Country, aspects of which are governed by Commonwealth and state native title and cultural heritage legislation.

C The Demonstrated Flexibility of the Australian Federal System

Despite the possible hurdles to the inclusion of Indigenous governments in the Australian federation, the history of Commonwealth and state/territory relations already demonstrate the federation's flexibility and offer lessons for how Indigenous jurisdiction might be accommodated within it.

Although on its face the *Constitution* demarcates state and Commonwealth responsibilities, in practice the relationship has taken a different course. For example, the Commonwealth quickly became the dominant legislature in the federation as a result of the High Court's expansive interpretation of section 51 of the *Constitution*, and it became the dominant executive body as a result of its disproportionate control of tax revenue. This power shift necessitated a range of strategies to maintain the place of the states. For example, concerns that the Commonwealth exerted too much influence over the states through tied grants[83] led to an alternative approach to federal financial relations. In particular, the Commonwealth returned Goods and Services Tax revenue directly to the states.[84] The imbalance also presented an opportunity for fiscal equalisation, which was achieved through a formula established by the Commonwealth Grants Commission to transfer tax revenues from wealthier to poorer states and thus

83 Specific purpose payments or 'tied grants' were instituted under s 96 of the *Constitution*. They are payments made by the Commonwealth to states, subject to conditions about how the money is spent.

84 *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

maintain a consistent level of infrastructure and service provision across the nation.

Since its establishment in 1992, the Council of Australian Governments ('COAG') has emerged as the central forum in which such matters of federal policy are negotiated.[85] As the peak intergovernmental forum in Australia, membership of COAG consists of the Prime Minister, state and territory Premiers and Chief Ministers, and the President of the Australian Local Government Association. Prime Minister Kevin Rudd tellingly described COAG as the 'engine room' of the federation, allowing Commonwealth and state leaders the opportunity to reach consensus on issues of joint significance.

What is striking about the evolution of Commonwealth and state relations is how it resulted in the creation of 'relationship management' mechanisms that are at once broad and comprehensive and without a Constitutional foundation. Absent Commonwealth power to require uniformity, equity or agreement on certain policy issues, member governments use the COAG to achieve these ends. These qualities naturally raise the question of whether there could be greater engagement with Indigenous governments as an extension of existing intergovernmental relations. COAG already has the capacity to discuss issues relating to Indigenous rights that arise under Commonwealth and state legislative power. It might be possible to increase membership of COAG to include a representative of Indigenous governments (similar to the inclusion of the President of the Australian Local Government Association). An alternative model (among others) would be to establish a completely separate 'COAG+' body with Commonwealth, state, local and broad Indigenous government representation, tasked with managing the intersection of non-Indigenous and Indigenous government interests. Although the diversity of Indigenous governing bodies in Australia likely implies that the constitution of any such COAG+ body would be complex, the flexibility of this type of arrangement might lead to more effective outcomes for Indigenous communities.

Still more lessons relevant to the inclusion of Indigenous governments in the Australian federation can be drawn from developments in the status of local government, which in 1901 was seen as purely a domestic responsibility of the states and as having no relevance to federal discussions.[86] The Australian Constitution does not refer to local governments at all, and the federal government has no independent relations with them.[87] It is state and territory Constitutions that provide for their creation via legislation.[88] Therefore by law, local governments exercise authority exclusively delegated from a state or

85 See generally Council of Australian Governments <https://www.coag.gov.au/>.

86 Lyndon Megarrity, 'Local Government and the Commonwealth: an Evolving Relationship' (Research Paper No 10 2010-11, Parliamentary Library, Parliament of Australia, 2011).

87 Ibid.

88 Anne Twomey, 'Local Government Funding and Constitutional Recognition' (Constitutional Reform Unit Report No 3, University of Sydney, January 2013) 6–8.

territory, operate under state or territory supervision and authority,[89] have no independent status or powers of their own and are not creations of the people.[90]

In practice, however, local governments have grown in autonomy and status and can be understood as products of popular franchise, elected to provide an extensive range of services and fulfil numerous governing responsibilities. These changes have led local governments to lobby for recognition in the Australian *Constitution*,[91] and the Gillard Government had planned a referendum for this recognition in 2012. In fact, relations between the Commonwealth and local government have developed to such an extent that Commonwealth funding of local government activities is sometimes interpreted by states as a federal attempt to bypass the states in areas where it does not have original jurisdiction.[92] Some legal scholars and commentators even have argued for the abolition of state governments altogether and for their replacement in the federation with local and regional governments.[93]

These examples – fiscal reorganisation, COAG decision making and the development of a new level of government – clearly demonstrate fluidity in the allocation and exercise of jurisdiction across the tiers of government. Rather than being characterised by well-ordered and fixed jurisdictional lines, the Australian federation is more akin to a 'marble cake'.[94] Kenneth Wiltshire explains that 'it is no longer possible to assign whole functions of government to just one level of government' but that 'functions of government swirl around, engulfing two or three levels.'[95] And, despite the legal frame of the federation that emphasises the autonomy of the constituent parts, it is clear that the current levels of government within the Australian federation are interdependent and permeable. They are capable of evolution and of redistributing jurisdiction as circumstances and community expectations change. Efficient governing apparently requires both negotiation of jurisdiction among the tiers and shared decision-making.

The ability of the Australian federation to evolve and even the particular way the federation has evolved strongly suggest that it has the capacity to recognise and accommodate Indigenous governments. In the final section of this article, we identify some of the government-to-government initiatives Indigenous polities have pursued with other tiers of government in the Australian State, and what

89 Ibid.

90 Anne Twomey, 'Always the Bridesmaid – Constitutional Recognition of Local Government' (2012) 38(2) *Monash University Law Review* 142, 144.

91 Lenny Roth, 'Constitutional Recognition of Local Government' (E-brief 5/2013, Parliamentary Library, New South Wales, 2013).

92 See, eg, David Mitchell, 'Why Local Government Should Not be Recognised in the Constitution' (2012) 56(4) *Quadrant* 46; Narelle Miragliotta, 'The Perils of Constitutional Recognition of Local Government' *The Conversation* (online), 24 May 2013 <https://theconversation.com/the-perils-of-constitutional-recognition-of-local-government-14471>.

93 Anne Twomey, 'Regionalism – A cure for Federal Ills?' (2008) 31 *University of New South Wales Law Journal* 467, 474–5.

94 K Wiltshire, 'Reforming Australian Governance: Old States, No States or New States?' in A J Brown and J Bellamy (eds), *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (Australian National University Press, 2007) 191, cited in Megarrity, above n 86.

95 Ibid.

lessons can be learned from these initiatives for future government-to-government interactions.

V INDIGENOUS GOVERNMENT IN THE AUSTRALIAN STATE

As Aboriginal and Torres Strait Islander peoples grow their capacity to engage with other Australian governments and enter into an increasing number of jurisdictional agreements, the issue of their recognition inevitably arises. Yet Indigenous communities' success in creating their own governments demonstrates that change to the Australian federation is not essential: Indigenous polities organising themselves to achieve their goals can be accommodated within the current framework of the Australian federation. Not only could the status quo be maintained, but there are reasoned grounds for doing so.

How and whether Indigenous polities seek recognition of their governments (within the current federal structure or a new federal structure) is a matter for Aboriginal and Torres Strait Islander collectives to decide. While the Australian State would benefit from regularising Indigenous governments within the Australian federation, whether including Indigenous governments is in the interests of Indigenous collectives is less straightforward. There are potential disadvantages for Indigenous peoples which they would need to consider before entering negotiations. Conceivably, such negotiations could lead to assimilation at one end of the spectrum and to extreme vulnerability at the other. *If* deemed desirable, the form of incorporation of Indigenous governments into Australia's federal structure is a matter for Indigenous polities and their governments to negotiate with the nation-state.

Our objective here is simply to observe that contemporary and evolving understandings of lawful authority and of the nature of federation can provide Indigenous peoples and the Australian state with a theoretical basis for Indigenous governments to be 'seen' by the Australian State. There are a range of possible approaches with varying degrees of adaptation of the Australian federal system and the Australian *Constitution*. We discuss three here.

A Accommodation of Indigenous Government without Change to the Federal Structure

Alterations to federal structures in a formal sense, such as through Constitutional reform, are both unlikely and arguably unnecessary in the face of evidence of existing legal and political adaptation through negotiation and evolution. As described above, Indigenous peoples are self-governing in a variety of circumstances and have 'intergovernmental relationships' with local, state and federal governments. Appreciating this fact leads to the further realisation that the institutions of the State already accommodate Indigenous governance in various forms, albeit implicitly, as Reilly argues.[96] This capacity of federalism to accommodate Indigenous governments without formal reform can be explained

96 Reilly, above n 17.

by understanding governing institutions as 'complex structuring entities rather than discrete arrangements' that are 'in dynamic interaction among themselves' as Galligan observes.[97] By this approach, institutions include 'defined rules, organised practices, prescribed behaviours, supporting and coercive enforcements that order collective behaviour'.[98]

According to Papillon, such accommodation is also seen in Canada and the United States. He suggests that in the face of relatively change-resistant federal institutions, Indigenous peoples' exercises of self-determination have resulted in 'multilevel governance'.[99] The term was initially used to describe the plurality of European Union governing mechanisms, which exist at subnational, national and supranational levels and emanate from the public, nongovernmental and private sectors.[100] Papillon argues that by operating in spaces within the 'existing division of power and intergovernmental relation systems', Indigenous governments are creating multilevel governance in North America as well.[101] This is not incorporation into the nation-state but interaction between Indigenous and non-Indigenous institutions, in line with Galligan's broad definition above.

Like Reilly and Galligan, Papillon highlights the plasticity of federal arrangements and invites us to 'shift our focus away from constitutional design to pay more attention to policy-level dynamics'.[102] Policy responses to Indigenous peoples' and leaders' calls for greater jurisdiction results in a layering of 'norms, rules, formal arrangements, and informal practices that structure the relations between indigenous governments and their federal and [state] counterparts',[103] which has the effect of causing institutional adaptation without altering the foundations of the federation.[104] That is, change occurs at the margins, rather than at the Constitutional level where entrenched interests will limit possibilities for change. Through this lens, the 'main spaces, or venues, for policy making and intergovernmental politics lie partly outside the formal rules and institutions of the existing federation without being completely separated from it.'[105]

In fact, we commonly see Australian Indigenous nations, communities and organisations seizing on inherent ambiguities and seeking out and exploiting jurisdictional gaps to insert their aspirations. Examples include the Ngarrindjeri Regional Authority's insistence on being written into the Murray Futures agreement between South Australia and the Commonwealth, creating a Ngarrindjeri archive as an alternative to the colonial archive; and Gunditj Mirring Traditional Owners Aboriginal Corporation drafting regional development plans for sustainable tourism and commercial eel fisheries for the benefit of

97 Brian Galligan, 'Processes for Reforming Australian Federalism' (2008) 31 *University of New South Wales Law Journal* 617, 620.
98 Ibid.
99 Papillon, above n 70, 304.
100 Liesbet Mooghe and Gary Marks are generally cited as the first to apply the concept of multilevel governance in the context of the European Union.
101 Papillon, above n 70.
102 Ibid 289.
103 Papillon, above n 70, 294.
104 Ibid 289.
105 Ibid 294.

Gunditjmara and non-Gunditjmara alike. Papillon relates a similar example from the United States, where a growing trend is for tribes to enter into intergovernmental agreements with states, in part because states have no constitutional authority over tribes.[106] The parties are able to bypass Congress and the federal judiciary and layer these agreements over existing institutional processes.[107]

Kymlicka likewise observes that Indigenous communities are achieving self-government outside the federal system and, in 'several countries, have been gaining (or more accurately, regaining) substantial powers over health, education, family law, policing, criminal justice and resource development'.[108] He claims that as Indigenous governments carve out power from federal and provincial jurisdictions, each nation-state becomes a kind of 'federacy' (a federation in which there are asymmetrical distributions of authority among otherwise similar governing actors).[109]

Papillon himself raises the criticism that, rather than reinforcing their sovereignty, multilevel governance as it exists in the United States and Canada today may make Indigenous peoples more vulnerable to diminutions of their authority and further assimilate them into the 'institutional, political, and cultural framework established by the dominant society.'[110]

Maintaining the status quo also reinforces the ambiguous nature of Indigenous governing authority. Within a multilevel governance framework, Indigenous governments may be invisible, and conversely, Indigenous community organisations that are not institutions of self-government can be mistaken for governments. For example, advisory boards, community organisations and even a body such as the former Aboriginal and Torres Strait Islander Commission arguably do not 'govern', but because Indigenous people and communities use them as vehicles of self-determination, they gain an ambiguous identity. Further, maintaining the status quo also potentially sidelines the development of diplomatic relations among Indigenous nations and local, state and federal governments that otherwise may occur through formal acknowledgment of Indigenous governments by the Australian State. Such diplomatic relations are an important affirmation of nationhood, as witnessed in international law. These are important considerations in toting up the cons of recognising Indigenous governments in Australia.

There is, however, one significant advantage to maintaining the status quo, namely that while Indigenous governments remain separate to the federation, they are protected from interference and can exercise internal jurisdiction as they choose.

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106 Ibid 297 (citation omitted).

107 Ibid 298.

108 Kymlicka, 'American Multiculturalism', above n 64, 225.

109 Federacies have important analogies with federalism – in particular, both involve a territorial division of powers, and both involve an ideal of shared sovereignty and a partnership of peoples. See Kymlicka, 'American Multiculturalism', above n 64, 225.

110 Papillon, above n 70, 306.

B Accommodation of Indigenous Government through Delegation of Authority

While Reilly and Papillon make compelling arguments that the current Constitutional arrangements can accommodate Indigenous self-governing aspirations, the history of staunch and ongoing advocacy for recognition by Aboriginal and Torres Strait Islander people suggests that the status quo may not provide the acknowledgment of self-determination and governing status desired by many Indigenous people.[111]

One possible, albeit contentious, solution to the conundrum would be to negotiate to have state jurisdiction delegated to Indigenous governments, in the same way that states now delegate authority to local governments. This would have the advantage of making Indigenous governments visible and potentially less vulnerable. In some places, this kind of delegation is already occurring and has been relatively simple to achieve.

One example is the process that the Ngarrindjeri Nation established to negotiate agreements with state and local governments in South Australia. Kungun Ngarrindjeri Yunnan (Listen to the Ngarrindjeri speaking) Agreements ('KNY Agreements') are legally binding contracts enacted in the spirit of the Ngarrindjeri Nation's call for treaties between Indigenous and non-Indigenous Australians.[112] The Ngarrindjeri adopted these agreements after cultural heritage legislation, ostensibly designed to protect Aboriginal interests, failed to do so in the Kumarangk (Hindmarsh Island) Bridge crisis.[113] KNY Agreements have the benefit of being flexible while at the same time resting on a full and comprehensive body of contract law, which gives them enforceability under mainstream Australian law.

Over time, as the Ngarrindjeri assert a position as Traditional Owners with rights, responsibilities and obligations (as opposed to a position as stakeholders with an interest in, but no differential authority over, outcomes), KNY Agreement negotiations have assumed an intergovernmental character.[114] Culminating in a statewide KNY Agreement in 2009, all issues affecting

111 See generally, Expert Panel on Constitutional Recognition of Indigenous Australians, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution' (Report, 15 January 2012) 177–89.

112 For an introduction to the principles of the KNY methodology, see Steve Hemming, Daryle Rigney and Shaun Berg, 'Ngarrindjeri Futures: Negotiation, Governance and Environmental Management' in Sarah Maddison and Morgan Brigg (eds), *Unsettling the Settler State: Creativity and Resistance in Indigenous Settler-State Governance* (Federation Press, 2011) 98; Daryle Rigney, Steve Hemming and Shaun Berg, 'Letters Patent, Native Title and the Crown in South Australia' in Elliott Johnston, Martin and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd ed, 2008) 161–3.

113 Hemming, Rigney and Berg, 'Ngarrindjeri Futures', above n 112, 105. While sufficiently flexible to deal with a range of subject matters and provide protections not available under Australian legislation, there are certain fundamentals that must underpin any agreement. These include acknowledgment of the Ngarrindjeri as Traditional Owners with rights, responsibilities and obligations for Ngarrindjeri Country and that only the Indigenous participants can speak for culture: Hemming, Rigney and Berg, 'Ngarrindjeri Futures', above n 112, 106.

114 Daryle Rigney and Steve Hemming, 'Is "Closing the Gap" Enough? Ngarrindjeri Ontologies, Reconciliation and Caring for Country' (2014) 46 *Educational Philosophy and Theory* 536, 542.

Ngarrindjeri Ruwe/Ruwar (lands and waters)[115] are now discussed in leader-to-leader meetings between the government of South Australia and the Ngarrindjeri Nation and implemented through the KNY Agreement Taskforce.[116] We are likely to witness a further strengthening of intergovernmental relationships in South Australia as the State government and Aboriginal Regional Authorities grapple with the Constitutional, legal, political, social and cultural considerations that must be resolved to negotiate service compacts and potentially, treaties.

The mutually beneficial nature of the relationship between the Ngarrindjeri Regional Authority and the State of South Australia led the Minister for Aboriginal Affairs and Reconciliation to delegate power to grant authorisations under section 23 of the *Aboriginal Heritage Act 1988* (SA) to the Ngarrindjeri Regional Authority. This was the first time in South Australia that an Aboriginal organisation was given statutory power to consider and make decisions on Aboriginal heritage.[117] Similarly, the Victorian Aboriginal Heritage Council determines which entities are the appropriate Registered Aboriginal Party ('RAP') for particular Country.[118] RAPs have the recognised role 'as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage'.[119] The Council also determines boundary disputes and offers conflict resolution.

The delegation of state or federal jurisdiction to existing Indigenous governments is contentious because it does not necessarily entail acknowledgment of Indigenous peoples as sovereign or even of Indigenous peoples' inherent right to self-government. For the purposes of the Australian mainstream legal system, the only jurisdiction being exercised is that of the nation-state in delegating statutory authority to an entity such as the Ngarrindjeri Regional Authority or the Victorian Aboriginal Heritage Council. For Aboriginal and Torres Strait Islander peoples to accept this model as an acceptable solution, they would need to pragmatically act as if the legal centralism that the Australian State asserts is valid.

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115 *Ruwar/Ruwe* describes the 'inseparable relation between lands, waters, body, spirit and all living things', including the spirits of Ngarrindjeri ancestors. This inseparable relationship generates the Ngarrindjeri People's responsibility to uphold Ngarrindjeri Law and respect and honour the lands, waters and all living things. See Steve Hemming, Daryle Rigney and Shaun Berg, 'Ngarrindjeri Futures', above n 112, 109; Steve Hemming, Daryle Rigney and Shaun Berg, 'Researching on Ngarrindjeri *Ruwe/Ruwar*: Methodologies for Positive Transformation' (2010) 2 *Australian Aboriginal Studies* 92, 93; Ngarrindjeri Tendi, Ngarrindjeri Heritage Committee and Ngarrindjeri Native Title Management Committee on behalf of the Ngarrindjeri Nation, 'Ngarrindjeri Nation Yarluwar-Ruwe Plan: Caring for Ngarrindjeri Sea Country and Culture' (Report, 2006) 8.

116 The KNYA Taskforce was established as an element of the 2009 statewide KNY Agreement. The Taskforce is composed of senior members of the Ngarrindjeri Regional Authority and senior departmental personnel from a number of key state agencies. The Taskforce meets monthly to ensure effective communication between the Ngarrindjeri Nation and South Australia; that Ngarrindjeri perspectives, cultural beliefs and traditions are considered in relation to any proposed activity on Ngarrindjeri Country; and to, as far as possible create a coordinated response from the South Australian Government.

117 Paul Caica, Minister for Aboriginal Affairs and Reconciliation, 'Historic Transfer of Aboriginal Heritage Powers' (Media Release, 29 March 2012).

118 *Aboriginal Heritage Act 2006* (Vic) ss 132, 151.

119 *Aboriginal Heritage Act 2006* (Vic) s 3(b).

C Recognition of Indigenous Government in the Australian *Constitution*

Although the existence of Indigenous governing bodies or governments can be accommodated within the current Australian federal structure, whether Indigenous peoples would be satisfied with de facto recognition in the federation as it exists today or through delegated jurisdiction, remains to be seen. Instead, there may be a preference for recognition of Indigenous self-government within the Australian *Constitution*. As we have outlined above, federal structures *could* be amenable to evolution and renegotiation. Further, it would be possible to introduce additional layers of governmental authority to the Australian *Constitution*, as the ongoing campaign for recognition of local government attests. Realistically, however, this third option is the least probable.

While the philosophy of shared jurisdiction underpinning federalism may seemingly accommodate Indigenous self-governing structures and institutions, federations are complex systems of interlocking and co-existing orders of government and jurisdictions and any formal change to the allocation of authority is exceedingly difficult.[120] The Constitutional framework of a federation is generally the product of complex negotiations between competing territorial interests, whose power and influence are reflected and reproduced in the federal bargain that becomes progressively institutionalised.[121] Negotiations about jurisdiction redistribution in Australia would be significantly more complex when renegotiated 120 years after Federation. For one thing, although consciousness that Indigenous communities had their own laws and government at the time of first settlement is now commonly understood, the acceptance of Indigenous government as a continuing presence is less certain.

Further, proponents of Constitutional reform face the exceedingly difficult challenge of satisfying Australia's demanding requirements that amendments be approved by the majority of people in the majority of states and an overall majority.[122] These requirements have resulted in only eight amendments through referenda in 44 attempts. Proposals to recognise local government failed in referenda in 1974 and 1988 and, despite bipartisan support, was not presented at a referendum in 2012 as initially planned.

Considering the hurdles facing Constitutional recognition of Indigenous peoples, a cause that has bipartisan support, a proposal for Indigenous government in the Australian *Constitution* arguably has an even higher likelihood of failure. Fears that 'recognition is acceptable as long as it has no effect or creates no legal rights'[123] and that such a low standard would be set that recognition could amount to 'a slap in the face for many Aboriginal Australians whose aspirations are for so much more',[124] may have been realised with the Turnbull Government's rejection of the advisory body proposed by the

120 Papillon, above n 70, 290.
121 Ibid.
122 *Australian Constitution*, s 128.
123 Megan Davis, 'Indigenous Rights and the Constitution: Making the Case for Constitutional Reform' (2008) 7(6) *Indigenous Law Bulletin* 6, 6.
124 Marcia Langton, 'Reading the Constitution Out Loud' (2011) 70(4) *Meanjin* 18.

Referendum Council in the Uluru Statement from the Heart.[125] Despite the unequivocal statements by Aboriginal leaders that reform needed to be substantive and that a minimalist approach was not acceptable, Davis argues that the 'political elite' opted for symbolism and a 'quick fix' in rejecting the establishment of an advisory body that was 'thrifty, conservative, modest.'[126]

Even if Constitutional recognition of Indigenous government were possible, there are potential dangers in cementing governing institutions within the Australian system and losing the flexibility to adapt and evolve. Hunt and Smith warn against institutions that become too quickly juridified by formal legal and technical mechanisms, such as Constitutions, regulations and statutes that require external permission to be changed.[127] On the other hand, continuing to exist entirely outside the Australian political and legal framework results in vulnerability. In particular, the entities that Indigenous peoples now create to interact with external parties are subject to regulation by federal and state legislation and, until economic independence can be achieved, are generally dependent on state and federal government funding.

VI CONCLUSION

If relationships between Aboriginal and Torres Strait Islander peoples and the Australian nation-state are to be transformed into a relationship between governments, the conversation must engage with the illegitimacy of a sole and exclusive settler State sovereignty and must encompass new formulations of shared jurisdiction. A genuine reframing necessarily envisions:

> free and equal peoples on the same continent [who] can mutually recognise the autonomy or sovereignty of each other in certain spheres and share jurisdictions in others without incorporation or subordination.[128]

We have argued that the implication of this renegotiation is not the destruction or undermining of the nation-state but its strengthening as it grapples with the reality of legal and political pluralism rather than the fiction of legal centralism. We also draw attention to those scholars who posit that incorporating Indigenous government into federal structures is conceptually possible. Divided

125 We note that there is no inconsistency between the Referendum Council's proposal of an advisory body and our discussion of an emerging preference for Indigenous self-government at a local level. Arts 3, 4, 5, 18, 19 and 20 of the *United Nations Declaration on the Rights of Indigenous Peoples* protect Indigenous peoples' rights to create their own political institutions and to participate in the political institutions of the nation-state.

126 Megan Davis, 'Bad Faith over Indigenous Voice', *The Saturday Paper* (online), 4 November 2017 <https://www.thesaturdaypaper.com.au/opinion/topic/2017/11/04/bad-faith-over-indigenous-voice/15097140005450>.

127 Hunt and Smith, 'Preliminary Research Findings', above n 38, 21. See also D F Martin, 'Rethinking the Design of Indigenous Organisations: The Need for Strategic Engagement' (Discussion Paper No. 248/2003, Centre for Aboriginal Economic Policy Research, Australian National University, 2003) 9–11; Sullivan, above n 36.

128 Tully, The Struggles of Indigenous Peoples, above n 28, 53.

sovereignty, shared jurisdiction and a capacity to evolve in response to changing community values are fundamental attributes of federations.

Finally, while acknowledging the extreme difficulties in transforming the federation (at least in a formal sense), it is also not fantastical. At the time of writing, early stages of discussion are taking place that may have the capacity to reframe, if not transform, relationships between Aboriginal and Torres Strait Islander peoples and mainstream Australia. Victoria and South Australia have begun to establish the infrastructure to fulfil their commitment to negotiate self-determination mechanisms (including treaties), and other states and territories indicate that they may follow. The potential for change is glimpsed in the language of treaty that puts concepts of sovereignty and the autonomy of collectives that have never surrendered their status as independent political entities at the centre of the conversation.