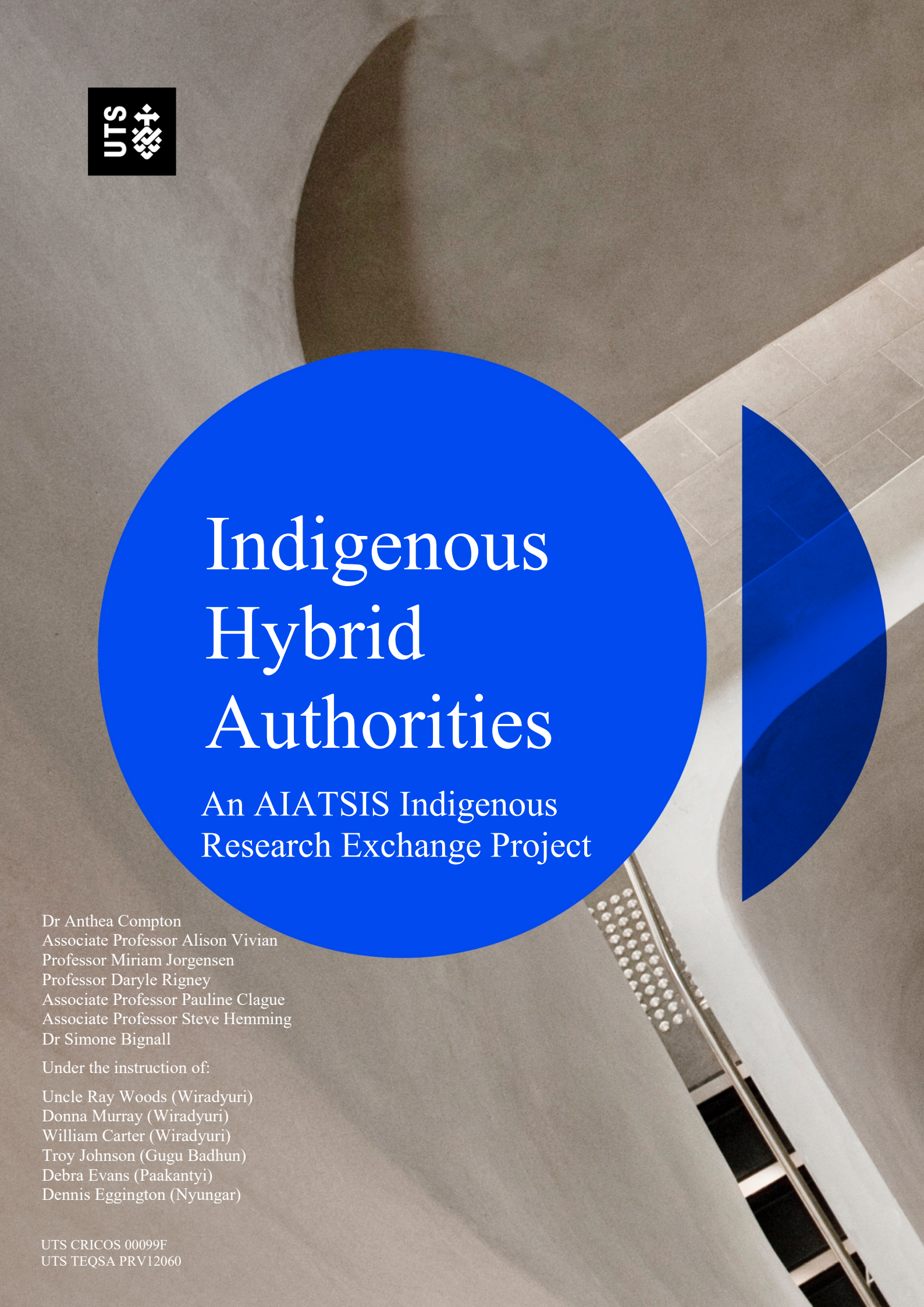

Indigenous Hybrid Authorities

An AIATSIS Indigenous Research Exchange Project

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We pay our respects to the Gadigal people, their Elders and their ancestors, on whose lands this research project was primarily conducted. Aboriginal and Torres Strait Islander nations have never ceded their sovereignty.

Contents

Figures

Tables

Executive Summary

This report is the major product of a project devised by a group of **Indigenous nation building (INB)**[1] practitioners and thinkers who are Traditional Owners from the Gugu Badhun, Gunditjmara, Nyungar and Wiradyuri nations **(Project Directors)**, in partnership with **Indigenous Nation Building and Governance research hub (INBG)** from the Jumbunna Institute for Indigenous Education & Research at the University of Technology Sydney; and the **Native Nations Institute (NNI)** at the University of Arizona. It complements INB research collaborations dating from 2010 among organisations and individuals from the Gugu Badhun, Gunditjmara, Ngarrindjeri, Nyungar and Wiradyuri nations and the INBG-NNI research team. These collaborations built on Australian and international evidence that self-government is a necessary precursor for First Nations' success in fulfilling their cultural, social, economic and political community development goals.[2]

A critical question emerging from these collaborations relates to the frameworks or structures that may prove the most effective for Aboriginal and Torres Strait Islander nations to fulfil their aspirations for self-determination. Within Australia, Indigenous Peoples' sovereign status has been rejected, and nations do not have legal personality to act collectively within the Australian settler system as of right.[3] To overcome this constraint, Aboriginal and Torres Strait Islander collectives have demonstrated enormous ingenuity in using available mechanisms (such as incorporated organisations and co-management agreements) to rebuild their governing foundations; strengthen their community governance; and, in so doing, advance collective goals.[4]

Regardless, Elders and leaders from many First Nations remain dissatisfied with current mechanisms, since they do not facilitate what Australian and international evidence suggests is the level of self-governing capacity required for comprehensive Indigenous nation self-determination.[5] Their experience demonstrates that having governing bodies able to exercise Indigenous *and* settler jurisdiction requires new, or at least different, models.

To address this concern, the **Indigenous Hybrid Authorities (IHA) project** sought to understand the potential of *hybrid* or multi-jurisdictional self-governance authorities to assist Aboriginal and Torres Strait Islander nations to fulfil their collective aspirations.

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[1] A description of Indigenous Nation Building is provided in Part 1 of this Report.

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

[3] Detailed in Part 3 of this report.

[4] See, for example, Miriam Jorgensen et al., 'Yes, The Time Is Now: Indigenous Nation Policy Making for Self-determined Futures', in *Public Policy and Indigenous Futures*, ed. Nikki Moodie, and Sarah Maddison (Melbourne: Springer), 129-147; Daryle Rigney et al, 'Gunditjmara and Ngarrindjeri: Case Studies of Indigenous Self-Government'. In (eds) *The Cambridge Legal History of Australia*, edited by Peter Cane, Lisa Ford and Mark McMillan, 204-224. Cambridge University Press, 2022.

[5] For an overview of the key findings of the Harvard Project, see Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, AZ: U of Arizona Press, 2007).

Fundamentally, the IHA project was *not* concerned with understanding or designing the mechanisms by which a First Nation's (self) government body could be established under settler law. Instead, the Project Directors sought to explore whether any governing structures exist in settler law through which First Nations could: extend their authority; exercise internal governance practices; provide a model for hybrid or bi-cultural governance systems; and enable further settler government recognition of Indigenous nation authority and law/lore. In short, the project sought to explore what institutions might allow First Nations to 'look both ways' and implement *their* law and settler law within the same structure. The Project Directors were particularly interested in whether statutory authorities – a loose term for bodies established in (settler) legislation – could be utilised in this way.

The IHA project was primarily undertaken through desktop research conducted by the project's Senior Research Associate (SRA), Dr Anthea Compton, under instruction from the Project Directors.[6] Key research activities undertaken included:

- Analysis of the particular limitations and opportunities provided by statutory authorities for First Nations **(Part 2)**;
- Analysis of Australian legal-political systems to better understand the operation of Australian settler-colonialism, and the blockages and opportunities for First Nations to exercise hybrid jurisdiction **(Part 3)**; and
- Six case studies of hybrid jurisdiction from different settler-colonial contexts (**Part 4)**.

These activities led to the theorisation of the requisite components of an 'ideal' First Nation hybrid statutory authority (FNHSA) and the potential policy areas in which one could be established **(Part 5)**. We detail key findings briefly within this Executive Summary.

Are statutory authorities useful tools for First Nations?

A fundamental premise underlying the IHA project is that nations are expert at utilising bodies established in settler law for their own ends (**Part 1**). To date, little analysis of statutory authorities[7] has been undertaken, particularly regarding their potential uses by First Nations. We contend in **Part 2** that there are multiple aspects to the existence and operation of statutory authorities that may make them interesting, useful and potentially powerful bodies for First Nations seeking to expand their authority within settler-colonial states.

As was illuminated by the Uluru Statement from the Heart's petition to enshrine an Indigenous Voice to Parliament in the Australian Constitution, many First Nations people are understandably wary of statutory authorities or other bodies established by settler governments. A key reason for the proposed constitutional amendment was to provide 'security and stability' for the proposed Voice, as opposed to previous representative structures established by settler governments that were rescinded or repealed.[8] As we discuss in **Part 5**, this is an ongoing concern associated with statutory authorities without simple resolution.

[6] A detailed account of our methodology is provided in Part 1.
[7] A statutory authority is 'A generic term for an Australian Government body established through legislation for a public purpose. This can include a body headed by, or comprising, an office holder, a commission or a governing board'. In Australia, statutory authorities are generally delegated authority over particular areas of jurisdiction by state and/or federal governments. See Department of Finance, 'Statutory Authority', https://www.finance.gov.au/about-us/glossary/governance/term-statutory-authority.
[8] Australian National University, 'Indigenous Voice to Parliament', 2022, https://www.anu.edu.au/about/strategic-planning/indigenous-voice-to-parliament.

However, we maintain that statutory authorities are an underutilised governance mechanism (potentially) available to Aboriginal and Torres Strait Islander people, and particularly for Aboriginal and Torres Strait Islander *nations*. Our analysis is based on two premises:

1. that the areas in which Australian governments have inefficiencies, or significant variations in governance arrangements, represent spaces of opportunity for First Nations to extend their authority; and

2. that to extend their authority and independence, First Nations' statutory authorities would need to operate highly effectively.

Several characteristics make statutory authorities of particular potential significance for First Nations **(pp. 28-30)**:

- Statutory authorities are an ongoing and widespread domain of Australian government that disrupt traditional theories of Australian governance and sovereignty;
- Statutory authorities can undertake a range of differing functions and activities;
- Statutory authorities generally have a high level of independence that can extend over time; and
- Statutory authorities are established for reasons that First Nations may be able to align to their aims.

To understand whether statutory authorities could work in an explicitly 'hybrid' space of shared jurisdiction, we analysed possible blockages and opportunities for hybrid governance within the context of ongoing settler-colonialism.

Hybrid jurisdiction and Australian settler-colonialism

As we describe in **Part 1**, INB is an ongoing, nation-led practice within many Aboriginal and Torres Strait Islander political collectives (nations). However, questions prevail about the institutions and instruments of First Nations decision-making and self-government within Australia – in other words, questions about *what* self-government looks like.

There is no Australian system analogous to that of 'Federally Recognised Tribes' in the United States, which carry particular forms of settler recognition of Native Nations' rights to self-government and formal nation-to-nation relations, despite the theoretical ease with which such recognition could occur.[9] Nor is there federal self-government policy or negotiated treaty-making with First Nations analogous to that within Canada.[10] Instead, in all but highly circumscribed instances around native title, land management and cultural heritage, Australia as a settler state has maintained its insistence on a single and indivisible settler-colonial sovereignty. While there is potential for treaty negotiations in Victoria, Queensland and the Northern Territory, there are also continued assurances that any negotiation of jurisdiction must not impact on settler sovereignty. A major challenge for Aboriginal and Torres Strait Islander

[9] For analysis of this, see Alison Vivian et al., 'Indigenous Self-Government in the Australian Federation', *Australian Indigenous Law Review* 20 (2017): 215-242.

[10] See, for example, the 1975 James Bay and Northern Quebec Agreement and its antecedents. A description is at Government of Canada, 'The James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement - Annual Reports 2008-2009 / 2009-2010', https://www.rcaanc-cirnac.gc.ca/eng/1407867973532/1542984538197. We, of course, acknowledge the multitude of negotiated agreements between Aboriginal and Torres Strait Islander Peoples and settler-colonial governments. For example, the Ngarrindjeri Nation's use of Kungun Ngarrindjeri Yunnan Agreements, which were explicitly designed as shared jurisdiction agreements between the Ngarrindjeri Nation, South Australian local governments and the South Australian government. These agreements explicitly acknowledged the sovereignty of the Ngarrindjeri Nation. See Part 5 for further description of these agreements.

nations is thus to assert jurisdiction within an overarching environment that insists settler governments have sole and exclusive jurisdiction over (nearly) all matters that affect Aboriginal and Torres Strait Islander Peoples and people.

Although *real politic* suggests that allocating jurisdiction among Aboriginal and Torres Strait Islander nations and the Australian settler state will be fraught with difficulty, it is in fact conceptually straightforward.[11] To elucidate this, we describe the parameters of what we term the 'Indigenous self-government landscape' in Australia **(Part 3)**, which separates the 'Indigenous Sector'[12] into three distinct and overlapping zones of 'exclusive' and 'shared' decision-making. These zones correspond to areas that either remain under exclusive First Nation jurisdiction, or are currently shared or overlapping between Indigenous and settler sovereigns. The landscape thus includes one zone that is not connected to settler law (Zone 1: Nation Decision-Making), and concurrent jurisdiction zones that include incorporated bodies that interact explicitly with settler-colonial law and institutions (including Zone 2: Hybrid Decision-Making and Zone 3: 'Indigenous' Sector Decision-Making).

These ideas are both concrete and conceptual. On the one hand, they are demonstrative of some of the structures that some First Nations already are utilising; and on the other, they are based on best INB research and practice. We also use the three-zone categorisation to explain why the Project Directors understand hybrid governance to be strongest when informed by nation governance that is separate from the settler state.

Hybrid jurisdiction case studies

Our findings about the 'self-government landscape' were directly influenced by our analysis of six different hybrid governance systems (**Part 4**). We analysed the characteristics common to bodies able to (at least partly) implement both Indigenous and settler law (as needed) from within the same structure. In particular, we were interested in the characteristics of bodies that are explicitly acknowledged to be exercising such dual jurisdiction.

To identify fruitful case studies likely to be the most relevant to Aboriginal and Torres Strait Islander peoples from the plethora of hybrid governing examples across settler-colonial contexts, we focused on those where the mechanism was:

1. First Nation controlled (whether nominally or actually);[13]

2. Related to an area of jurisdiction where settler society claims to have at least partial jurisdiction over the relevant area that is the purview of the body or organisation; and

3. Exercising (or seeking to exercise) both First Nations and settler jurisdiction in a manner that is explicitly acknowledged by both First Nations *and* settler decision-making authorities.

The key questions explored in the case studies were:

- How is First Nation law/lore incorporated into the authority?

[11] Vivian et al., 'Indigenous Self-Government'.
[12] Using the seminal phrasing of Tim Rowse, 'The Indigenous Sector', in *Culture, Economy and Governance in Australia: Proceedings of a Workshop held at the University of Sydney, 30 November – 1 December 2004*, ed. Diane Austin-Broos and Gaynor Macdonald (Sydney: Sydney University Press, 2005), 207-223. We discuss the components of the Indigenous Sector more fully in Part 3.
[13] We note that some of the case studies such as the First Nations Health Authority and the Leech Lake Wellness Court are not explicitly under the control of First Nations but could not exist without the exercise of First Nations jurisdictional authority under their own law.

- Is the authority able to create its own codes, laws or rules?
- What are the lines of accountability and authority?
- How was the authority established, and what is the role of legislation that created the authority?

The case studies

Given the differences in jurisdictional environments in Anglophone settler-colonial states, we did not explore the minutia of existing hybrid governance systems (e.g. the number of directors on a board). Instead, we analysed how the body or organisation came to be exercising area-specific dual jurisdiction and, in general terms, how that dual jurisdiction is exercised.

- Torres Strait Regional Authority **(Part 4.1, pp. 65-72)**

The Torres Strait is an area between the north-east of what is now known as Australia and Papua New Guinea, comprising 42,000 square kilometres and comprising a primarily First Nations population. The Torres Strait Islander Authority (TSRA) emerged from continuing advocacy by Torres Strait Islanders for self-government, and was established in 1994 under the *Aboriginal and Torres Strait Islander Commission Act*. Its first listed legislative function is to 'recognise and maintain' the 'Ailan Kastom' (culture and law) of Torres Strait Islander peoples.

The TSRA exists within a complicated and convoluted jurisdictional environment consisting of Queensland Shire Councils, the Queensland and federal governments, Island Councils, the Torres Strait Island Regional Council, Northern Peninsula Area Regional Council and Torres Shire Council and more recently, the Gur A Baradharaw Kod Torres Strait Sea and Land Council (the native title peak body for the region). In this environment, the TSRA acts primarily as a service-delivery peak body and provider. Unsurprisingly, the TSRA's initial aspiration to facilitate self-government for Torres Strait Islanders has been deeply challenging.

- Cree Regional Authority **(Part 4.2, pp. 73-79)**

The Cree Nation,[14] otherwise known as the Eeyou ('the People') have a population of more than 18,000 citizens, concentrated in eleven communities in the north of what is now known as Quebec. In 1975, Canada, Quebec, the Grand Council of the Cree and the Inuit Nation negotiated and signed the James Bay and Northern Quebec Agreement (the JBNQA), a highly complex settlement agreement in response to a proposed hydroelectric power project on Cree land.

The JBNQA led to the 1978 creation of the Cree Regional Authority (CRA) to administer the JBNQA's provisions about land use and land access, education boards and the limited recognition of Eeyou political and social organization. Ongoing advocacy from the Cree Nation regarding the terms of the JBNQA (including over 30 lawsuits) has led to multiple new relationship agreements, culminating in a 2017 agreement that authorizes the Cree Nation to enact their own law on certain lands.[15] Today, Eeyou self-government is enabled through the separate elements of the Cree Grand Council and Cree Nation Government (formerly CRA). While both bodies have the same membership, they have distinct roles and jurisdictional responsibilities: the Grand Council is the political authority for the Eeyou, and the Cree Nation Government is the administrative or executive authority.

- First Nations Health Authority **(Part 4.3, pp. 80-87)**

[14] Cree First Nations are the most populous and widely distributed First Nations in what is now known as Canada. The Eastern Cree (also called James Bay Cree) are today called the Cree Nation but call themselves the Eeyou (the People).
[15] Rather than the by-laws it had previously been authorised under the Indian Act to create. The complexities of these changes are discussed in Part 4 of this report.

The First Nations Health Authority (FNHA) is the self-determined effort of First Nations in what is now known as British Columbia (BC), Canada. In 2007, the First Nations Leadership Council developed the *Tripartite First Nations Health Plan* alongside the governments of Canada and BC, followed by multiple agreements. The Health Plan gave rise to a unique First Nations health governance structure comprised of the FNHA (a service delivery arm); the First Nations Health Council (a political, representative leadership body for First Nations); the First Nations Health Directors Association (a technical medical organisation); and the Tripartite Committee on First Nations Health (a communication mechanism between First Nations and settler governments).

In 2013, the core functions of Health Canada's First Nations and Inuit Health Branch Pacific Region were transferred to the FNHA, including children and young people programs; chronic disease; primary care; communicable disease; and mental health. The FNHA is underpinned by First Nations' law, knowledge and perspectives and, as of 2023, the FNHA has transitioned towards fully community-defined health aspirations and wellness indicators, which previously had been defined by Canada. 'Health' is now defined broadly in accordance with First Nations worldviews. The FNHA is a particularly useful model for how Aboriginal and Torres Strait Islander nations may be able to come together collectively in way that supports individual nations to build their own autonomy and authority.

- Criminal justice **(Part 4.4, pp. 88-94)**

First Nations criminal justice systems are useful sources of guidance regarding clarity in defining and negotiating jurisdictional responsibility between sovereigns. For this project, we investigated two hybrid court systems: the Tsuut'ina First Nation Court (FNA), Alberta, Canada and Leech Lake Band of Ojibwe (Joint Jurisdiction) Court, Minnesota, United States. We also considered a post-prison release program: the Muscogee (Creek) Nation (MCN) Reintegration Program, Oklahoma, United States.

  - The Tsuut'ina FNC is a dual jurisdiction court, merging a provincial court of Alberta and the Tsuut'ina peacemaker system. It commenced in 2000 as an initiative of the Tsuut'ina Chief and Council with support from the provincial government to address their common concern about the overrepresentation of First Nations people in the Alberta criminal justice system. Peacemakers use a variety of traditional and participatory dispute resolution mechanisms to resolve the matter. If agreement is reached on an action plan, the plan is referred to the prosecutor (who is an employee of the provincial court).
  - The Leech Lake Band of Ojibwe has developed joint jurisdiction wellness courts in partnership with the Minnesota County Courts. Joint jurisdiction wellness courts emphasise rehabilitation rather than punishment, and are open to qualifying volunteers (Indigenous and non-Indigenous) who have been sentenced in the state system and who opt to participate, rather than complete their sentence. This joint tribal-state court arrangement has been highly successful on a range of measures leading to an expanded jurisdiction including juvenile and family cases from 2010.
  - In 2005, the MCN enacted legislation creating a reintegration program for enrolled citizens, to reduce the likelihood of recidivism for incarcerated people following release from prison. The program provides intensive case management support through a comprehensive range of physical, mental health, substance abuse, financial, legal, and spiritual services, leading to dramatically lower rates of recidivism. The reintegration program is not a hybrid program per se since the program is offered solely by the MCN, but has hybrid elements in practice due to the high degree of cooperation between Oklahoma and the MCN that is integral to its success. The success of the program has led to the expansion of its facilities and its mandate.

Key common themes

The extent to which First Nations are able to prioritise and operate within their law and worldviews differs across the case studies. Not all examples saw an effective increase in First Nations' authority, or the achievement of collective aspirations, as we detail in **Part 5**. Regardless, key common themes became evident across the case studies:

- First Nation and settler-colonial interest convergence
- First Nation led initiatives
- Clear jurisdictional authority
- Time for evolution and growth

The 'Ideal' First Nation Hybrid Statutory Authority

Based on these international case studies, our analysis of the self-government landscape and the roles played by statutory authorities in the Australian context, and the Project Directors' experiences as INB experts, the research team conceptualised a generalised 'ideal' First Nations Hybrid Statutory Authority (FNHSA) for Aboriginal and Torres Strait Islander nations seeking to exercise hybrid jurisdiction and nation-build. As we explain in **Part 5**, an ideal FNHSA:

- Acknowledges that relations between First Nation and settler societies/Peoples/nations are nation-to-nation;
- Is explicitly established according to both the First Nation's and settler law;
- Clearly delineates functions and responsibilities to be exercised and accomplished under each party's (First Nation or settler government) jurisdiction;
- Functions according to both the First Nation's and settler law;
- Is accountable to both the First Nation and settler government(s);
- Sits above the various settler government or other interests in the relevant area of jurisdiction rather than simply occupies 'a seat at the table';
- Commences with authority/responsibility for a particular issue or area but has the ability to extend its jurisdiction/areas of responsibility over time;
- Has decision-making power over its areas of responsibility;
- Has a streamlined, singular reporting structure;
- Has economic independence;
- Can create the rules, codes and laws in its area of jurisdiction; and
- Is reinforced through regular agreement-making between the First Nation and relevant settler government/s.

Spaces of Opportunity for a FNHSA

The spaces for such a FNHSA are necessarily limited. As we analyse in **Part 2**, settler governments establish statutory authorities when there is sufficient need for greater *efficiency* or *independence*. In other words, when settler governments are unable – for a range of reasons – to meet the needs of citizens or to provide effective services within particular areas of jurisdiction. To enable hybrid jurisdiction from Aboriginal and Torres Strait Islander collectives, there is a further condition. There must be a need for:

- Aboriginal and Torres Strait Islander *nation*-specific input, decision-making or knowledge.

In other words, in spaces where generalised pan-Aboriginal or pan-Indigenous input or ownership is considered insufficient. As such, the issue is likely – or even must - have a connection to First Nations' sovereignty that is recognised by settler society. Based on our analysis of recent policy developments**,** particular spaces of current and future opportunity include **(pp 101-106)**:

- Treaty
- 'Local Decision Making' policy initiatives
- Country and 'environmental management'
- Cultural Heritage
- Repatriation
- Archives management
- Certain 'sector' issues including Health, Justice and culturally responsive education

Due to the nature of the self-government landscape, there may also be particular opportunities for (self-defined) Traditional Owner organisations to advocate for their Country and thus extend their autonomy in specific ways. Details of this are provided in **Part 5.**

For some First Nations, the type of thinking we advocate for in this report will be a hypothetical exercise. We regardless maintain that such hypothetical thinking is required for the sorts of collective aspirations many nations articulate. In a post-Voice Referendum Australia, it is unclear whether any promised treaty negotiations will commence with the settler state.[16] In their absence, First Nation Hybrid Statutory Authorities may be a beneficial starting point.

[16] The future of treaty negotiations in both NSW and Queensland have been cast into doubt, while the Victorian Opposition have withdrawn their support for negotiations in Victoria. See, for example: Dan Butler, 'Queensland opposition vows to scrap state's treaty body if elected'. *NITV*, 10 January 2024. https://www.sbs.com.au/nitv/article/queensland-opposition-vows-to-scrap-states-treaty-body/udpib03sm; Michael McGowan, 'Upset Minns wary of Indigenous treaty after Voice rejection', *Sydney Morning Herald*, 16 October 2023, https://www.smh.com.au/politics/nsw/upset-minns-wary-of-indigenous-treaty-after-voice-rejection-20231016-p5eco8.html; and Benita Kolovos and Adeshola Ore, 'Treaty could make people 'feel more divided', Victorian opposition leader says, as Coalition withdraws support', *The Guardian*, 22 January 2024, https://www.theguardian.com/australia-news/2024/jan/22/victoria-opposition-drops-support-for-indigenous-treaty.

1 Background

Project Aims

The IHA project was led by Professor Daryle Rigney, a citizen of the Ngarrindjeri Nation of the Lower River Murray, Coorong, Lakes and southern Fleurieu Peninsula, South Australia. Professor Rigney is a world-renowned theorist about INB in Aboriginal and Torres Strait Islander contexts and is the Director of INBG. Professor Rigney is also an INB practitioner and for many years was a senior advisor to Ngarrindjeri leaders, alongside lead negotiator for the Ngarrindjeri Nation in its treaty negotiations with South Australia.

Under the guidance of Professor Rigney, the IHA project sought to explore the potential of hybrid or multi-jurisdictional self-governance authorities to assist Aboriginal and Torres Strait Islander nations to achieve their collective aspirations, and the principles underlying successful models. The Project Directors sought to establish a research platform upon which Aboriginal and Torres Strait Islander nations and communities could work towards creating their own hybrid self-governing institutions and mechanisms. The IHA project thus aimed to be inherently practical, but based on critical theoretical and intellectual questions regarding legal and political pluralism within Australia.[17]

The overarching objectives of the IHA project were:

- Increased knowledge about Indigenous self-governing structures for Aboriginal and Torres Strait Islander Peoples seeking to strengthen their decision-making processes.
- Improved strategic planning for Aboriginal and Torres Strait Islander nations seeking to self-govern, in relation to frameworks or structures for self-governance.
- Relevant evidence about building institutions supporting Aboriginal and Torres Strait Islander peoples to govern according to their own lore/law and settler-colonial law.
- The potential for better targeted settler government policy and more effective service delivery informed by relevant evidence about models and frameworks that may be applicable in Australia.
- Insights into implementation of Australia's obligations under the United Nations Declaration on the Rights of Indigenous Peoples, especially the right to Indigenous self-determination.

To realise these goals, two key research aims were designed:

- Investigate 'hybrid' governance models (Australian and international) that share jurisdiction between First Nations and non-First Nations polities; and
- Investigate settler-colonial legal-political environments across Australia to identify opportunities for the exercise of Aboriginal and Torres Strait Islander jurisdiction.

The Project Directors were also specifically interested in whether bodies established in settler law (statutory authorities) could serve these ends and act within the hybrid space. Because of

[17] For example, see Judith Binney, *Encircled lands: Te Urewera, 1820-1921* (Wellington: Bridget Williams Books, 2009); Will Kymlicka, 'American Multiculturalism and the 'Nations Within' in *Political Theory and the Rights of Indigenous Peoples*, ed. Duncan Ivison, Paul Patton and Will Sanders (Cambridge University Press, 2000); and James Tully, 'The Struggles of Indigenous Peoples for and of Freedom' in *Political Theory*.

this, we provide a significant overview of the functions, objectives and prevalence of statutory authorities within Australia in this report, assessing their utility for First Nations seeking to exercise jurisdiction, fuilfil responsibilities to Country and manage relations with settler-colonial governments utilising both their lore/law and settler-colonial law.

Methodology and ethics

In line with AIATSIS Indigenous Research Exchange funding requirements, this project was approved by the AIATSIS Research Ethics Committee (REC) in August 2022.

Originally, the IHA project was also going to investigate:

- the legal-political environments of the Gunditjmara, Ngarrindjeri, Gugu Badhun, Wiradjuri and Nyungar nations to identify their jurisdictional and accountability requirements for self-governance.

However, the scope of IHA project was renegotiated with the Project Directors following initial feedback from the REC. As the Project Directors had joined the project as INB experts, rather than as representatives of their respective nations, the Project Directors agreed that the research needed to be broadly relevant for Aboriginal and Torres Strait Islander peoples, rather than focused on the individual circumstances of their respective nations.

To achieve its aims, the project underwent 5 stages.

Table 1: Research Stages

Stage 1 – Co-design	Stage 2 – Desktop Research	Stage 3 – Interviews	Stage 4 – Final Project Summit	Stage 5 – Research Outputs
October 2022 – February 2024	*January 2023 – February 2024*	*October 2023 – December 2023*	*December 2023*	*June 2023 – May 2024*
Instructions provided to Senior Research Associate (SRA); Feedback and design of First Nation Hybrid Statutory Authority (FNHSA)	SRA researched and wrote 5 case studies of hybrid governance; SRA undertook legal-political environmental scan	SRA and Chief Investigator (CI) undertook 6 interviews	Project meeting held on Ngarrindjeri Country in South Australia; Findings presented to multi-disciplinary team of Australian First Nations governance experts	Two journal articles drafted and submitted to relevant journals; IHA Report drafted and submitted to Yumi Sabe;

- Stage 1 – Co-Design

The Jumbunna-NNI research team utilises a specific methodology to undertake nation building research. Developed by the research team, the INB methodology aims to implement best practice in Indigenous research methodologies through hierarchically placing self-determination as the determining research priority. Aboriginal nations and academic researchers partner in research projects for distinct, interrelated purposes: so that nations can utilise academic knowledge to assist their nation building, and so that academics can learn more fully about the nature of INB.[18] A fulsome account of this methodology provided by Vivian et al.[19]

[18] The researchers' focus is on the processes used by Aboriginal nations and not their cultural knowledges, which is owned by these nations.
[19] Alison Vivian et al, 'Implementing a project within the Indigenous research paradigm: The example of nation building research,' *Ngiya: Talk the Law* 5 (2017): 47-74.

The IHA project is not a traditional INB research project, as it did not seek partnerships between the research team and Aboriginal and Torres Strait Islander *nations*. Instead, the IHA project saw particular Aboriginal and Torres Strait Islander INB experts taking on an advisory role, overseeing the research being undertaken. Regardless, the INB methodology underlined the project, as the Project Directors offered particular directions to the researchers, guiding each stage of the project. This 'co-design' process ensured the extensive experience of the Project Directors (and the variability of their respective nation's aspirations and different stages of engagement in nation building) was fundamental to the research, helping to make the project broadly applicable to a range of First Nations.

- Stage 2 – Desktop Research

The IHA project was primarily conducted through desktop research undertaken by the SRA, the results of which are detailed in this report. During project meetings, the SRA updated the Project Directors on key findings.

- Stage 3 – Interviews

A number of semi-structured interviews were undertaken by the SRA and CIs to provide complementary information to the desktop research, and to test ideas around the nature of hybrid governance and their application in practice. The interviews were semi-structured to allow for flexibility to respond to evolving narratives.

Six interviews were undertaken with Project Directors. Topics included governing structures; the limitations and/or specific benefits of settler government policy and legislation; recent histories of self-governing efforts in Australia; and current challenges and opportunities. Under instruction from the Project Directors, these interviews are not explicitly quoted within this report because of the sometimes-confidential information and opinions shared.

- Stage 4 – Final Project Summit

On December 5-7 2023, the IHA project held a final project summit consisting of the research team, Project Directors and a number of invited guests. The summit was held on Ngarrindjeri Country, the site of the Ngarrindjeri Regional Authority, a highly effective hybrid governance body utilised by the Ngarrindjeri Nation over many years (briefly discussed in Part 5).

The summit saw key project findings discussed and disseminated, with a number of presentations given by Project Directors and members of the research team, on topics including 'ex-colonialism', case studies of hybrid governance, nation-led economic development enterprises, and the spaces for change within settler policymaking. Key findings from this meeting are disseminated throughout this report, and discussed in detail in Part 5 of this report.

Figure 1. IHA Project Meeting on Ngarrindjeri Country

- Stage 5 – Research Outputs

Outside generating conversations and knowledge between Project Directors around hybrid governance, a further aim of the IHA project was to disseminate project findings in resources for community and scholarly audiences. Research outputs created included:

- Compton, Anthea, Donna Murray and Alison Vivian, 'The Indigenous Self-Government Landscape: A Conceptual and Descriptive Model', submitted to *The Australian Journal of Indigenous Issues*.
- Compton, Anthea, 'Statutory Authorities: An underutilised tool for expanding Indigenous nation authority?' This article is in the final stages of drafting. We anticipate submitting this manuscript to the *Australian Journal of Public Administration*.
- IHA project report.
- Community research outputs to be disseminated during INB workshops and teachings and by the Project Directors, including Figure 2: Jurisdictional Relations (see Part 3) and 'the Ideal Indigenous Nation Hybrid Statutory Authority' (see Part 5). These have already been successfully utilised in teaching within the Graduate Certificate in Wiradjuri Culture and Language at Charles Start University.

Theoretical Frameworks

Indigenous Nation Building

The Harvard Project on American Indian Economic Development (HPAIED)

The term 'Indigenous nation building', while widely used and with a range of meanings, firstly emerged from research produced by the Harvard Project and its later sister institution, the Native Nations Institute for Leadership, Management and Policy (NNI).[20] These institutions

[20] For example, by the Victorian Government regarding their INB funds (see Part 3). For further analysis of the term's usage and history, see Jorgensen et al. 'Yes, the Time is Now'.

were established by Joseph Kalt and Steve Cornell in 1987 and 2001 respectively following research into economic development in Native Nations throughout North America.

The central finding of Harvard Project and NNI research over a 30-year period has been that economic 'success' is not the most significant factor to thriving North American Native Nations. Instead, Cornell, Kalt, Miriam Jorgensen and others[21] have identified that the most significant factors include stable political governance, manifest in decision-making control over a nation's affairs; effective and culturally legitimate institutions of self-government (whether newly created or reinvigorated); long-term strategic direction and planning; and community-spirited leadership.[22] While economic factors matter, they tend to pay off *after* a nation has been able to bring community-relevant decision-making under local control and to structure capable, culturally legitimate institutions of nation self-government that can make and manage those decisions. Likewise, while the input of settler-colonial governments can assist nations, this is not the root cause of development within nations. Instead, such opportunities are more likely to yield lasting benefits when self-determined and self-governing Native nations put them to effective and strategic use.

These findings have profound significance. They challenge prevailing – arguably, foundational – settler-colonial approaches to 'success' and 'development' in Indigenous communities. Further, they suggest that it is Indigenous *nation* action, rather than settler state action, that precedes the futures many nations aspire to.

Table 2: 5 Principles of INB

Self-determination: ability to make and implement decisions
Effective governing bodies/institutions
Cultural match between governing bodies and the nation
Long-term, strategic mindset
Community-spirited leadership

The Harvard Project and NNI use the term 'Indigenous nation building' – or Indigenous nation *re*-building – to describe the process by which an Indigenous nation undertakes this work and strengthens its own institutional capacity for effective self-government and self-determined community development.[23] This understanding, and the principles that emerge from it, underline INB research and practice undertaken in North America and Australia to date, including this project.

Identify, Organise, Act (IOA) framework

As a result of evidence garnered from Indigenous nations in Australia and North America, the Jumbunna-NNI research team has produced a descriptive model of Indigenous nation building consisting of the iterative processes *Identify as a nation* → *Organise as a nation* → *Act as a nation* (IOA).[24] These processes are not necessarily consecutive, and may take place concurrently dependant on the context of the nation in question (both internal and external). They may also repeat, dependant on changing policy landscapes and other factors; including, for example, if a nation seeks to strengthen or shift their governing structure/s. Nonetheless, INB research attests that initiating successful self-government mechanisms requires firstly that nations *identify* as a nation in explicitly political, collective ways. According to Cornell, a pre-requisite to exercising collective self-determination is conscious reflection on collective

[21] Significantly, there is no single 'Harvard study' or 'NNI study' about Indigenous nation building. The Harvard Project and NNI have conducted multiple studies and research projects and have produced hundreds of papers, reports and advisory documents for Native nations, Native-serving organisations and the general public that address various aspects of INB.
[22] See Stephen Cornell, Stephen and Joseph P Kalt, 'Two Approaches to the Development of Native Nations: One Works, the Other Doesn't'', in *Rebuilding Native Nations*, 3-33.
[23] Miriam Jorgensen, 'Editor's Introduction', in *Rebuilding Native Nations*, xii.
[24] Stephen Cornell, 'Processes of Native Nationhood: The Indigenous Politics of Self-Government', *International Indigenous Policy Journal* 6(4) (2015): Article 4.

identity; in essence, ascertaining the 'self' in self-determination.[25] As we discuss in this report, such processes of identification are particularly significant for Aboriginal and Torres Strait Islander nations, whose self-government systems are rarely recognised as of right or supported by the settler state.

INB in Australia

It is now well settled that INB processes are being undertaken by Aboriginal and Torres Strait Islander nations. Many nations are undertaking self-determined work to build their autonomy and authority within highly contested social, legal and political frameworks. The significance of INB for collective empowerment and wellbeing has also been recognised by some Aboriginal peak bodies and even in some settler government spaces.[26] As we suggest in Parts 2 and 5 of this report, this focus *may* offer new potential opportunities for Aboriginal and Torres Strait Islander nations to leverage from to pursue their own, self-determined goals.

Although terminology and research about INB initially emerged from the practices of Native Nations in North America, INB research within Australia is expanding as a First Nations-led field that reflects the specific concerns of Aboriginal and Torres Strait Islander nations.[27] Among other findings, what our research and that of others has found is that some Indigenous nations are: creating institutions and processes for self-governance, so as to increase their capacity to define their priorities; strategically plan for and implement these priorities; and enter into mutually beneficial partnerships with governments (state and local in particular) and other entities. In essence, the inability of Australian legal-political systems to recognise sovereignty has not stopped Aboriginal and Torres Strait Islander nations from continuing to enact their inherent rights to live as self-determining collectives, undertaking 'stealth governance'.[28] Many Indigenous nations in Australia working to rebuild their governing foundations, strengthen their community governance and, in so doing, advance *collective* goals.

This research has also emphasised key differences between INB for Aboriginal and Torres Strait Islander peoples and First Nations in other settler colonies, largely related to the operation of Australian settler-colonialism. As First Nations 'have no legal personality' as of right in settler Australia, they are expert at using 'tools that are at their disposal'.[29] Such tools include structures formed under settler law such as peak bodies, or native title representative bodies, to pursue their INB ends.[30] Whether or not these organisations are being used as a nation's self-government body, First Nations are regardless utilising such structures more generally to interact with settler political and legal systems, frequently for uses beyond their legislated remit,

[25] See, for example, Stephen Cornell, 'That's the Story of Our Life', in *We are a People: Narrative and Multiplicity in Constructing Ethnic Identity*, ed. Paul Spickard and WJ Burroughs (Philadelphia: Temple University Press, 2000), 41-51, and Stephen Cornell, 'Reconstituting Native Nations: Colonial Boundaries and Institutional Innovation in Canada, Australia, and the United States', in *Reclaiming Indigenous Planning,* edited by Ryan Walker, ed. Jojola and David Natcher (Montreal: McGill-Queens University Press, 2013), 35-59.
[26] For example, see Daryle Rigney, et al., *Indigenous Nation Building and the Political Determinants of Health and Wellbeing*, Discussion Paper (Melbourne: Lowitja Institute); Australian Government, *National Aboriginal and Torres Strait Islander Health Plan 2021-2031* (Canberra: Commonwealth of Australia, 2021); and Victorian Government, 'Traditional Owner Nation-Building Package', *First Peoples – State Relations*, 2023 https://www.firstpeoplesrelations.vic.gov.au/nation-building.
[27] For example, see Rigney, et al., *Indigenous Nation Building*; and Janine Gertz, 'Gugu Badhun Sovereignty, Self-Determination and Nationhood', PhD diss. (Townsville: James Cook University, 2022).
[28] Cornell, 'Processes of Native Nationhood'.
[29] Vivian et al., 'Indigenous Self-Government', 227.
[30] Anthea Compton et al, 'Native title and Indigenous Nation Building: Strategic Uses of a Fraught Settler-Colonial Regime', *Settler Colonial Studies* (2023): https://doi.org/10.1080/2201473X.2023.2267409.
and Heidi Norman et al, 'Mapping Local and Regional Governance: Reimagining the New South Wales Aboriginal Sector', *Cosmopolitan Civil Societies* 13(1) (2021): n. pag.

or to 'act' as a nation.[31] First Nations are expert at using settler policies and bodies for their own self-determined purposes.[32] We explore the 'self-government landscape' more fully in Part 3, including its impacts on the possibility of a 'hybrid' Indigenous nation statutory authority.

Ex-colonialism

Nation building research and practice is increasingly informed by the work of post-humanist philosopher and INBG colleague Simone Bignall around 'exiting from colonialism', or 'ex-colonialism'. Introduced by Bignall in 2014, ex-colonialism provides a hopeful framework for the conceptualisation of new and just relationships between Aboriginal and Torres Strait Islander peoples and non-Indigenous people. Unlike 'post-colonialism' that is represented by the passage of time after invasion, exiting from colonialism requires that competing, disputing, or unaligned parties enter into 'collaborative struggle' across cultural and political differences, while maintaining cultural and political integrity. Bignall conceptualises different parties as 'spiky bodies', joining at particular sites and remaining untouched at others.[33]

Bignall explains that collaborative politics between spiky bodies does not seek to eliminate opposition for the sake of forced unity (e.g., some reconciliation discourses in Australia).[34] Instead, this new type of relationship acknowledges that there will be issues that the parties cannot resolve and spaces where they cannot coexist and '*should not be coerced into doing so'*.[35] Fundamental to this new relationship is open and equitable negotiation practices requiring settlers to re-imagine their narratives myths about Aboriginal and Torres Strait Islander peoples and societies.

The significance of Bignall's approach for INB is that it challenges the perceived incommensurability of sovereignties seen to be competing. Bignall posits an alternative vision, where shared sovereignty, layered jurisdiction and co-existence are beneficial to all Australians. In an ex-colonial future, Aboriginal and Torres Strait Islander peoples and the settler nation state exist in equilibrium, mindful that some degree of tension will always be present. Sovereignty and jurisdiction are negotiated issue by issue, area by area.[36] This type of thinking is deeply helpful for envisaging a transformative future that challenges the hegemony posited by the settler state. In the IHA project, the framework was also particularly helpful for conceptualising negotiated possibilities for power-sharing in hybrid models.

Terminology

In this report, we are fundamentally concerned with the actions and requirements of Aboriginal and Torres Strait Islander *nations*. That is, we are focused on the needs identified by the Project Directors in regards to self-identified Aboriginal collectives with distinct boundaries and inherent rights to self-determination. We use the terms First Nations, Aboriginal and Torres Strait Islander nations and Indigenous Peoples interchangeably to refer to these collectives. In

[31] See Daryle Rigney et al., 'Treating Treaty as a Technology for Indigenous Nation Building', In *Developing Governance and Governing Development International Case Studies of Indigenous Futures*, ed. Diane Smith, Alice Wighton, Stephen Cornell and Adam Vai Delaney (London: Rowman and Littlefield International), 119-140; Cornell, 'Processes of Native Nationhood'; Jorgensen et al. 'Yes, the Time is Now'; and Compton et al, 'Native title'.
[32] Jorgensen et al. 'Yes, the Time is Now'; Rigney et al., 'Treating Treaty'; Compton et al, 'Native title'.
[33] Simone Bignall, 'The collaborative struggle for excolonialism', *Settler Colonial Studies* 4:4 (2014): 340.
[34] Damein Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (London: Routledge, 2008).
[35] Bignall, 'The collaborative struggle', 351, original emphasis.
[36] See Steve Hemming, Daryle Rigney and Shaun Berg, *Ngarrindjeri Futures: Negotiation, Governance and Environmental Management*, in Sarah Maddison & Morgan Bragg (Eds), Unsettling the Settler State: Creativity and Resistance in Indigenous Settler-State Governance (Sydney: the Federation Press, 2011:8) Ngarrindjeri - South Australian Government KNYA agreement acknowledging disagreement, harms done and remedy compromise in building of a regulator at Clayton in the Goolwa channel.

doing so, and as we describe in Part 3 of this report, we take it for a given that Australia is already inherently a pluralist society. Whether or not such pluralism is recognised or acknowledged, throughout the continent, settler governments, businesses and other actors enter into a myriad of agreements with Aboriginal and Torres Strait Islander nations and people that implicitly (and sometimes explicitly) acknowledge their sovereignty and rights to self-government.[37]

While utilising the language of 'First Nations government' and 'First Nations nationhood', we also recognise that this terminology is not relevant to or utilised by all Aboriginal and Torres Strait Islander collectives. A further 'risk', as Gugu Badhun nation builder and scholar Janine Gertz has suggested, in suggesting that First Nations governments and settler governments are alike, is 'perpetuating the same practices and procedures whose purpose is to colonise and assimilate' First Nations within settler nation-state.[38] In continuing to use this language, we seek to make visible the 'scope of authority that Indigenous self-governing peoples seek to exercise'.[39] Following Gertz, we do not wish to place First Nations worldviews and politics into settler frames. As Hemming et al have shown, what First Nations collectives may assert or aspire to – for example, to Speak as Country – can involve significant epistemological differences to Western understandings of 'nation' and 'government'.[40] While using this language, we thus maintain that First Nations can (and do) re-authorise and re-imagine these frameworks from their own cultural worldviews and practices in ways that exceed settler understandings.

We also recognise that making generalised claims about First Nations and the possibilities of generalised hybrid governance systems is inherently problematic. The point of INB is that it is local, nation-based praxis, responsive to specific contexts (including both specific opportunities and specific settler-colonial oppressions).[41] In line with this, we do not attempt to, nor would we be able to, define the components of individual First Nations' sovereignties. We also note the inadequacies of this term inadequacies in articulating Aboriginal and Torres Strait Islander worldviews and the connection of people, Country, kin and ancestors. We use it as an imperfect but helpful shorthand that enables us to place settler and First Nations sovereignties into the same analytic frame.

[37] For a detailed discussion of this, see Marcia Langton et al. (eds), *Honour Among Nations? Treaties and Agreements with Indigenous Peoples* (Melbourne: Melbourne University Press).
[38] Gertz, 'Gugu Badhun Sovereignty', 181.
[39] Vivian et al., 'Indigenous Self-Government', 225.
[40] Steve Hemming et al., 'Speaking as Country: A Ngarrindjeri Methodology of Transformative Engagement', *Ngiya: Talk the Law* 5: (2016): 22-46.
[41] Cornell, 'Processes of Native Nationhood'.

2 Statutory Authorities and Hybrid Governing

Statutory Authorities

Statutory authorities are a common component of governments globally. Within the United States, statutory authorities effectively operate as 'narrow', issue-specific governments. While the creation of new municipalities in the United States is rare, the creation of 'special districts' – e.g. sewer districts – with their own governing structures and Boards is commonplace.[42]

Statutory authorities are similarly widespread within Australia, with over 169 established at the Commonwealth level, and around 100 each in Western Australia and Queensland.[43] However, little research has been undertaken into the prevalence, nature or effective functioning of statutory authorities in Australia. Existing literature primarily originates from government reviews, and is mostly concerned with authorities established at the Commonwealth level, most notably including the 2003 Commonwealth *Review of the Corporate Governance of Statutory Authorities and Office Holders* (the Uhrig Report). [44] In line with this, there is no singular definition or uniform terminology related to such bodies. Terms such as statutory body, statutory authority, statutorily entity and Commonwealth entity or authority are often used interchangeably. The Commonwealth Department of Finance, whose Minister is responsible for the overall policy related to Commonwealth authorities, defines statutory authority as a 'generic term for an Australian Government body established through legislation for a public purpose. This can include a body headed by, or comprising, an office holder, a commission or a governing board'.[45]

Generally, statutory authorities are established in legislation by state and/or federal departments to perform specific functions on behalf of the relevant (settler) government, the range of which varies greatly (e.g. providing public services, managing natural resources, conducting research, or regulating industry). They are delegated authority over particular areas of jurisdiction by state and/or federal governments, and are granted a degree of autonomy to carry out their roles (discussed further below). The establishing legislation outlines the authority's functions, powers and reporting requirements, though there may be additional legislation and regulations (e.g. at the Commonwealth level within Australia, the *Public Governance, Performance and Accountability Act 2013* applies to all statutory authorities).

[42] The rise of 'special districts' in the United Sates is detailed by Nancy Burns in the seminal text *The Formation of American Local Governments: Private Values in Public Institutions* (London: Oxford University Press, 1994).
[43] 169 statutory authorities and 18 government corporations, in addition to 14 departments. for commonwealth stats see: Department of Finance, 'Flipchart of PGPA Act Commonwealth Entities and Companies', https://www.finance.gov.au/government/managing-commonwealth-resources/structure-australian-government-public-sector/pgpa-act-flipchart-and-list. As at 2023, WA had 98 smaller statutory authorities, and QLD 102. See: Australia & New Zealand School of Government, *The Governance and Operation of Smaller Statutory Agencies* (Perth: ANZSOG, 2023).
[44] The review was an initiative of the Howard Government, intended to improve performance of statutory authorities without 'compromising their statutory duties'. For details of the review and the government's immediate response, see: Parliamentary Library, 'The Uhrig Review and the future of statutory authorities,' *Research Note* 50 (2005): https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/AS6G6/upload_binary/as6g616.pdf;fileType=application%2Fpdf#search=%22library/prspub/AS6G6%22.
[45] Department of Finance, 'Statutory Authority', 2019, https://www.finance.gov.au/about-us/glossary/governance/term-statutory-authority.

Table 3: Example Statutory Authorities[46]

ACT Human Rights Commission: responsible for promoting and protecting human rights within the Australian Capital Territory. It handles complaints related to discrimination, advocates for human rights, and provides education and awareness programs. Enabled by the *Human Rights Commission Act 2004 (ACT)*.	**Kadaltilla/Adelaide Park Lands Authority (SA)**: responsible for the management, preservation, and development of the park lands surrounding the city of Adelaide. It aims to maintain the park lands' natural and cultural heritage while providing recreational opportunities for the community. Established under the *Adelaide Park Lands Act 2005 (SA)*.
NSW SES: provides emergency assistance and response during natural disasters, severe weather events, and other emergencies. Operates under the authority of the *State Emergency and Rescue Management Act 1989 (NSW)*, which outlines the functions, powers, and responsibilities of the SES in coordinating and responding to emergencies.	**Australian Securities and Investments Commission:** responsible for regulating the financial services industry, including companies that provide financial advice, insurance, and banking services. Established under the *Australian Securities and Investments Commission Act 2001 (Cth)*.
Office of the Information Commissioner (QLD): promotes and regulates access to government-held information in Queensland. It handles complaints, provides advice on right to information and privacy matters, and conducts reviews and investigations. Established under the *Right to Information Act 2009* (Qld) and the *Information Privacy Act 2009* (Qld) to promote access to government-held information, and to protect people's personal information held by the public sector.	**Northern Territory Environment Protection Act**: promotes ecologically and environmentally sustainable development. Established under the *Northern Territory Environment Protection Act 2012*, its functions include assessing environmental impacts of proposed developments, providing advice on environmental protection matters, and enforcing environmental regulations.
Victorian Gambling and Casino Control Commission: regulates the gaming industry, including overseeing gambling licensing, undertaking compliance activities and fostering responsible gambling. Established under the *Victorian Gambling and Casino Control Commission Act 2011*.	**Australian Broadcasting Corporation (Federal):** provides independent and diverse broadcasting across Australia, established under the *Australian Broadcasting Corporation Act 1983 (Cth)*.

Form

Despite different purposes, functions and legislative requirements, there are similarities across the structure of most statutory authorities in Australia. As Saunders has analysed, most have a corporate governance structure, or 'adopt concepts' from 'private sector notions of corporate governance'.[47] While the specific mechanism of such governance structures (e.g. whether the role of a Chief Executive Officer exists), in all jurisdictions, 'governance duties, modelled on the duties applicable to company directors, apply to officials of public sector entities.'[48]

While the generally corporate structure of statutory authorities is similar, there are significant differences between how such bodies are conceptualised across Australia (with effects on the authorities' function and powers). In particular, the specific powers afforded to bodies differs. South Australia, for example, conceptualises statutory authorities as body corporates:

> A statutory authority typically has the power to sue and be sued, hold land and property, and enter into contracts and expend moneys from its own accounts without the need for further appropriation authority. There are a number of variations of the characteristics of statutory authorities, which depend on its functions. The entity's function will

[46] This graph includes the enabling/establishing legislation of the relevant authority. Each of these authorities also have statutory obligations under other legislation.
[47] Benjamin Saunders, 'Ministers, Statutory Authorities and Government Corporations: The Agency Problem in Public Sector Governance,' *Melbourne University Law Review* 45:2 (2022): 696.
[48] Saunders, 'Ministers,' 697.

> generally influence the level of independence, the level of ministerial direction or control and the legal form of the entity. Its staff are generally public sector employees under the Public Sector Act 2009 unless expressly excluded.[49]

The Commonwealth similarly defines 'Commonwealth authorities' as:

a. a body corporate established for a public purpose by or under a law of the Commonwealth; or

b. a body corporate:

   i. incorporated under a law of the Commonwealth or a State or a Territory; and

   ii. in which the Commonwealth has a controlling interest.

The Commonwealth also distinguishes between 'corporate Commonwealth entities' and 'Commonwealth companies' (both of which are Commonwealth authorities).[50] The Minister for Finance (administered by the Department of Finance) has responsibility for the general policy guidelines for all statutory authorities, as all statutory authorities have responsibilities under the PGPA Act as well as their establishing legislation and any other relevant legislation.[51] While some elements of the PGPA Act can be overruled by other legislation for particular authorities, such as the recently established Northern Territory Aboriginal Investment Corporation, this is uncommon, particularly in relation to the power of authorities to make financial investments or to sue and be sued.[52]

Queensland, on the other hand, distinguishes between a 'statutory body' and a 'statutory authority', with bodies having control over their own funds (and authorities without such control). As such, governance arrangements for these entities differ. [53] However, some entities are considered both statutory bodies and entities, such as the Queensland Rail Authority.[54]

Establishment

Established in legislation, the process for creating statutory authorities generally follows regular governmental and parliamentary processes. This includes both the parliament and the executive branch of the relevant government (i.e., policymaking; legislation drafting and passage through Parliament). While statutory authorities are established by legislation in one jurisdiction, they will regardless necessarily interact with the legislative requirements of other jurisdictions (e.g. the Tasmanian Parks and Wildlife Service). As such, statutory authorities often operate in a jurisdictional 'maze'. Further, while the purpose of statutory authorities is usually for highly specific areas, determined by government, in operation this can shift. As Uhrig has shown, the

[49] Premier and Cabinet Circular, *PC 022 – Establishment and Governance Requirements for Government Boards and Committees*, https://www.dpc.sa.gov.au/resources-and-publications/premier-and-cabinet-circulars/PC022-Establishment-and-governance-requirements-for-government-boards-and-committees.pdf.
[50] A non-corporate Commonwealth entity is a Commonwealth entity that is not a body corporate. A Corporate Commonwealth entity is a Commonwealth entity that is a body corporate.
[51] Minister for Finance, 'Ministerial Responsibilities', https://www.financeminister.gov.au/ministerial-responsibilities.
[52] See the Northern Territory Aboriginal Investment Corporation, 'Our Governance Framework', https://www.ntaic.org.au/.
[53] Queensland Treasury, *Statutory Body Handbook: A practical guide to establishment and management of statutory bodies* (Brisbane: The State of Queensland, 2021), https://s3.treasury.qld.gov.au/files/Statutory-Body-Handbook-V1.pdf.
[54] Queensland Rail is a statutory authority established under the Queensland Rail Transit Authority Act 2013 (Qld) (QRTA Act) and is a statutory body for the purposes of the Financial Accountability Act 2009 (Qld) and the Statutory Bodies Financial Arrangements Act 1982 (Qld). See Queensland Rail, 'About Us', https://www.queenslandrail.com.au/about%20us/Right%20to%20Information/Pages/AboutUs.aspx

purpose of a particular authority can be affected by the involvement of the relevant Minister, and extent to which the authority is independent.[55]

The decision to establish statutory authorities is largely connected to a perceived inability of government to undertake a particular role, whether due to the particular subject matter or the need for a level of independence from government itself. Put differently, statutory authorities are largely created due to a need for either 'efficiency', where it is 'considered beneficial to undertake functions outside the portfolio department'; or, for 'independence', where the 'functions require a level of separation from government to ensure objectivity'.[56]

The Commonwealth Government's 2004 list of reasons why some statutory agencies were created reflects these core needs:

- 'where impartiality and expertise is required, e.g.: CSIRO (1949), Civil Aviation Safety Authority (1975)
- where independence is needed and close association with any political party undesirable, e.g.: Reserve Bank of Australia (1960), Australian Electoral Commission (1983)
- where the role of the agency is to monitor the other government bodies, e.g.: Australian National Audit Office (1902, 1990), Inspector General of Taxation (2003)
- where an organisation must be seen to be controlled by non-government interests, e.g.: Aboriginal and Torres Strait Islander Commission (1990–2005)
- to enforce regulation and competition policy, e.g.: the Australian Securities Commission (1991), Austel7 (1989– 1997), the National Competition Council (1995), and
- where central government delegates activities to concentrate on policy development, e.g.: Australian National Training Authority (1992).'[57]

The establishment of statutory authorities, and their role in broader government, is a long-debated policy question across Australian jurisdictions.[58] The Australian Government, writing in 2019, makes some of the considerations clear:

> It is important to ensure that the activities and functions of the Government are allocated to the type of Commonwealth government body best suited to deliver them effectively. That is, deciding whether an activity — such as providing a payment, regulating an industry, delivering projects or programs or advising on policy — is best undertaken by a department, statutory agency, executive agency or another type of government body. This is particularly relevant in a world where the functions of

[55] As analysed by John Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders* (Canberra: Commonwealth of Australia, 2003).
[56] Uhrig, *Review of the Corporate Governance*, 7. Or – as put more simply by ANZSOG – 'a key reason for establishing a statutory agency as being the need to attain independence from the minister.' See ANZSOG, *The Governance and Operation of Smaller Statutory Agencies*, 11.
[57] Parliamentary Library, 'The Uhrig Review.'
[58] The 1975 *Royal Commission on Australian Government Administration* was an early proponent of the view that the amount of new authorities should be limited, largely based on the analysis of Roger Wettenhall. Other early academic analysis included John Goldring, 'Accountability of Commonwealth Statutory Authorities and 'Responsible Government',' *Federal Law Review* 11 (1980): 353-385. Goldring assessed whether establishing statutory authorities was lawful within the constitution, arguing that 'responsibility' was not clear for the activities of statutory authorities established in Commonwealth legislation. NB that some of these bodies are now repealed.

> government are frequently more cross-cutting and complex, and increasingly delivered across multiple portfolios or multiple entities within portfolios.'[59]

This is a continuation of views established in 2003, in the only comprehensive review of Commonwealth statutory authorities undertaken to date. As the Urhig Report put it, statutory authorities should be created only where there is 'sufficient need' for particular efficiency or independence. [60] Other jurisdictions also hold these concerns. As was put in the 2008 Queensland Government's *Good Governance Framework*, public servants are asked to consider: '(1) why have a (non-departmental) government body? (2) if justified, what form should it take? (3) how should it govern and be governed?'[61]

As suggested by the Australian and New Zealand School of Government, in their study of small statutory authorities, while there is an expectation that such entities are 'more likely to achieve a policy and/or operational outcome', governments also believe that 'such an entity would likely also be less efficient primarily because infrastructure and key personnel would need to be replicated in each agency.'[62] Government decisions to establish statutory authorities can thus best be understood as a balancing act. As the influence of neoliberal orthodoxy regarding 'small government' is ongoing, as put by Blondal et al., there remains a 'policy preference to curb the growth of new bodies, to have new functions conferred on existing bodies, to merge agencies where possible, and to rely more on 'branded' functions within ministries.'[63]

Despite the existence of ongoing debates and disagreements surrounding their establishment, statutory authorities persist as a significant and enduring feature within the Australian socio-political landscape. Their prevalence serves as evidence of their continued relevance in governing and regulating various 'public' aspects of Australian society.

Independence and Governance

The responsibilities and level of independence of statutory authorities vary based on the jurisdiction they operate in and the specific boundaries defined by their legislation. In some cases, Parliament and the government may limit the authority granted to statutory authorities, specifying a narrow range of outcomes they are expected to achieve. [64]

In any case, statutory authorities are primarily accountable to the relevant minister connected to the legislation. The role of the minister overseeing a statutory authority is established by its legislative framework, which determines whether the authority is a separate corporate entity from the government.[65] As such, the 'opportunity for ministerial involvement in the governance arrangements of statutory authorities varies greatly.' [66] As such, there is a potential for statutory authorities to have significant power and independence, as statutory authorities can operate with a higher degree of separation from ministers and their respective departments than other parts of

[59] Department of Prime Minister and Cabinet, *Our Public Service, Our Future: Independent Review of the Australian Public Service* (Canberra: Commonwealth of Australia, 2019), 244, https://www.pmc.gov.au/sites/default/files/resource/download/independent-review-aps.pdf.
[60] Uhrig, *Review of the Corporate Governance*, 7.
[61] Queensland Government, *Good Governance Framework*.
[62] ANZSOG, *The Governance and Operation of Smaller Statutory Agencies*, 6.
[63] Blöndal et al., 'Budgeting in Australia', *OECD Journal on Budgeting* 8:2 (2008): 42.
[64] Uhrig, *Review of the Corporate Governance*, 4.
[65] In any case, however, the minister is able to 'require authorities to provide them with the information necessary for them to meet their accountabilities and to fulfil their duties to uphold the laws' of the relevant jurisdiction. See Uhrig, *Review of the Corporate Governance*, 4.
[66] Uhrig, *Review of the Corporate Governance*, 4.

government.[67] As the Urhig Report suggested, 'the need for governance increases when independence is combined with power.' [68]

Underlining the governance of statutory authorities is the theory of 'responsible government'. In essence, this sees safeguards in place for the delegation of power and authority outside of the Parliament. Under this model, statutory authorities are accountable to government departments and ministers, who in turn are accountable to Parliament, which ultimately represents the Australian public.[69] There is considerable legal-philosophical literature on such delegation of power.[70] In turn, this means that if statutory authorities fail to perform adequately, 'the electorate will expect governments to act.' [71] As First Nations are well aware, authorities created in legislation can be repealed or dissolved. While statutory authorities may hold significant power, they are subject to potential legislative change and/or modification.

In practice, the accountability of statutory authorities to the public remains uncertain, as there can be disparities between the intended function of statutory authorities and their actual operation. In any case, statutory authorities remain a powerful, necessary and widespread element of current government structures in Australia. They are unlikely to be repealed entirely.

The delegation of jurisdiction to statutory authority raises questions about the legitimacy of the Australian governmental system and, moreover, Australian sovereignty. As Cheryl Saunders put it to Parliament in 1990:

> Where do these bodies fit within the traditional theories, to which we still cling, of ministerial responsibility to Parliament for the business of government? What relationship do they have to the departments of state, particularly for the purposes of resource allocation and management?[72]

Funding

Statutory authorities can have different access to funding depending on their governing legislation and the functions and responsibilities assigned to them. Within Australia, statutory authorities are mainly funded through direct government funding, largely allocated via annual budgets.[73] Other sources of funding include user fees and charges (e.g. Parks Victoria)[74] when public services are provided, including, for example, licensing, registration, or certification. Such fees for service can then be used to fund other operations of the authority.[75] Some

[67] Uhrig, *Review of the Corporate Governance*, 7.
[68] Uhrig, *Review of the Corporate Governance*, 7.
[69] For analysis of the relevance of this this theory in relation to statutory authorities, see Benjamin Saunders, 'Responsible Government, Statutory Authorities and the *Australian Constitution*,' *Federal Law Review* 48:1 (2020): 4-29. Saunders argues that these entities are not a 'derogation from the principles of responsible government', as this is an 'evolutionary system'.
[70] See, for example, Australian Law Reform Commission, 'Delegating Legislative Power', *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Report 129)* (Sydney: ALRC, 2015), https://www.alrc.gov.au/wp-content/uploads/2019/08/fr_129ch_17._delegating_legislative_power.pdf
https://www.ags.gov.au/publications/legal-briefing/lb-20220616
[71] Uhrig, *Review of the Corporate Governance*, 4.
[72] Cheryl Saunders, 'The Role and Independence of Statutory Office-Holders: The Particular Case of Advisory Bodies,' *Papers on Parliament* 7 (1990): https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop07/c03
[73] Department of Finance, 'Australian Government Organisations Register – Types of Bodies', https://www.finance.gov.au/government/managing-commonwealth-resources/structure-australian-government-public-sector/australian-government-organisations-register/australian-government-organisations-register-types-bodies
[74] Parks Victoria, 'About Us', https://www.parks.vic.gov.au/about-us/fees-and-charges
[75] However, receiving such fees may mean that governments then provide less funding for budget items. See, example, NIAA, 'Changes to how we treat fee-for-service-income', 9 March 2022, https://www.niaa.gov.au/resource-centre/indigenous-affairs/changes-how-we-treat-fee-service-income-under-indigenous-rangers-program.

particular authorities may be able to generate revenue through investment, sales, subsidiaries, partnerships, or debt financing; however, these are largely for authorities whose purpose and functions require such powers.

Challenges

Statutory authorities face a range of challenges that can impede their abilities to carry out their functions or meet their purpose (excluding those specific to First Nations, which we discuss later). This can include challenges around independence. If funding is reliant on government budget allocation, the political independence of the authority can be undermined (as governments and government policy changes). Further, whether or not the relevant minister 'chooses' to exercise their power or not can be detrimental to statutory authorities.[76] Saunders goes as far to refer to the role of the Minister as an 'intractable problem'. This tension is created by the fact that 'Ministers exercise power analogous to the functions performed by boards of directors and shareholders in relation to private sector companies' and yet are also bound by 'constitutional overlay of responsible government'. In essence, this ensures the role is both as 'responsible Minister and shareholder'.[77] In particular, it can undermine the ability of ministers to accurately judge and analyse the performance of statutory authorities. It can also shift the intended 'purpose' of the statutory authority. As the Urhig Report assessed, statutory authorities 'develop an understanding of their purpose through both their legislative framework and interactions with the relevant Minister'. However, this 'does not always provide sufficient clarity for all parties'.[78] It also points to the ability of ministers to shift the intended purpose of such authorities.

Compounding the issue of varying ministerial involvement is that the delegations afforded to statutory authorities are not always clear. As put in the Urhig Report, governments may take a '"hands off" attitude' towards statutory authorities; while at the same time not delegating enough or appropriate power to the Board or other structure in place to actually undertake its work. [79] Shifts in the organisational structure of statutory authorities can further exacerbate these challenges. As Blondal et. al report, governments are increasingly reluctant to establish broad structures, and in some instances have abolished them. They assert that this shift has 'fact served to blur the lines between statutory/prescribed agencies and statutory authorities', as single Chief Executive Officer roles are now more frequently utilised. [80] This again may undermine the independence of the statutory authority. As ANZSOG has found, smaller statutory authorities can also struggle to 'deploy mandatory governance frameworks', impeding upon their ability to undertake core business.[81]

While many of these issues faced are largely issues of 'corporate governance', they are compounded by the fact that statutory authorities are not primarily driven by corporate objectives rather by serving a 'public' purpose. The distinction between corporate governance and governance for public purposes adds complexity to the independence and governance arrangements of statutory authorities.

While some policy shifts that have occurred since the Uhrig Report, [82] many of the recommendations put forth in the review continue to be relevant in the current policy landscape. Relevant recommendations that partly inform the 'ideal' First Nations Hybrid Authority

[76] ANZSOG, *The Governance and Operation of Smaller Statutory Agencies*, 20.
[77] Saunders, 'Ministers,' 697-8.
[78] Uhrig, *Review of the Corporate Governance*, 6.
[79] Uhrig, *Review of the Corporate Governance*, 5.
[80] Blöndal et al., 'Budgeting,' 42.
[81] ANZSOG, *The Governance and Operation of Smaller Statutory Agencies*, 12.
[82] For critical analysis of the Government's relative lack of action in response, see Roger Wetenhall, 'Statutory Authorities, The Uhrig Report, and the Trouble with Internal Inquiries', *Public Administration Today* 5 (2004): 63-76.

discussed in Part 5 include clear expectations between parties, and enabling Boards to act with full power.[83]

An opportunity for stealth governance?

There are multiple aspects to the existence and operation of statutory authorities that may make them interesting and useful bodies for First Nations seeking to expand their self-governing.

The below aspects are based only on the above general information related to statutory authorities within Australia, and not on analysis of the possibility of statutory authorities to incorporate or practise Indigenous law/lore, which we turn to in Part 4.

We base this analysis on two premises:

1. that the areas in which Australian governments have inefficiencies, or significant variations in governance arrangements, can represent spaces of opportunity for First Nations to extend their authority; and

2. that to extend their authority and independence, First Nations statutory authorities would need to operate highly effectively.

Ongoing domain of Australian government

Statutory authorities are a well-established form of Australian government. While authorities can be and are repealed and replaced (particularly in Indigenous spaces), the breadth of statutory authorities and the range of functions undertaken across jurisdictions suggests it is unlikely that the model itself will be entirely withdrawn. There are two effects of this:

1. The range of existing statutory authorities across jurisdictions in Australia is suggestive as to the scope of activities that could be undertaken by First Nations authorities. There are significant differences in purpose (e.g. some authorities are single issue, whilst others are broader); powers (dependent not only on the relevant jurisdiction, but on the establishing legislation); size; and levels of independence (discussed below).

2. Statutory authorities may be conceptually useful to First Nations. Connected to theories of responsible government, as a delegated form of governing, statutory authorities may also point to the fragility of 'Australian' sovereignty.

Lack of definitional clarity

Despite the general desire of Australian governments for 'small' government, and interest in 'bettering' the regulation of statutory authorities since at least the 1970s, there is very little research into the prevalence and/or function of statutory authorities across Australia. Existing literature primarily originates from government reviews, and is mostly concerned with authorities established at the Commonwealth level (most notably including the 2003 Uhrig Report). There is also little shared definition around such bodies. Terms such as statutory body, statutory authority, statutorily entity, Commonwealth entity or authority, are often used interchangeably within and across Australian jurisdictions.

An arguable effect of this lack of understanding is the relative range and independence of statutory authorities within Australia. This lack of uniformity can enable ministers and parliaments to either have close oversight of the relevant authority, or to take a more removed

[83] Uhrig, *Review of the Corporate Governance*, 11.

approach. While this does not necessarily aid potential First Nations statutory authorities, it may enable such authorities to undertake stealth governance, working in and around regular settler government processes.

Reasons for establishment

As noted above, settler governments generally establish statutory authorities for reasons of efficiency (where the government department in question would struggle to provide the function or service itself) or independence (when there is a need to be independent of the relevant parliament or government more broadly). This reasoning may provide opportunities for First Nations to make logical and convincing arguments about the need for statutory authorities. There are many areas in which settler governments struggle to provide appropriate or adequate services to First Nations (and particularly those that are acknowledged as residing under First Nations jurisdiction, for example Country, language, heritage. See Part 5). There are also strong arguments about the need for such bodies to be independent from settler governments.

Independence

The potential for statutory authorities to hold significant independence from settler governments may also make them useful vehicles for First Nations. While being established in legislation means such bodies can be repealed by governments, the Australian Prime Minister routinely tells the public that he has no power over the Reserve Bank of Australia as it makes decisions that impact all mortgage holders.[84] While some statutory authorities face more government intervention than others (e.g. the Australian Human Rights Commission, whose Commissioners are appointed by the government of the day), other authorities have been able to operate without ministers exercising the extent of their powers. Further, while the purpose of a statutory authority is determined by the relevant government and parliament (and is usually to undertake a specific set of functions), in operation, the purpose of an authority can change, in conjunction with the level of involvement of the relevant minister.

State museums are an example of statutory authorities that have significant independence in their decision-making.[85] Much has been written about state museums engagement with Indigenous law and the creation of Indigenous bodies as part of museums' governance structures. The cultural/arts sector may thus also provide useful guidance on issues of hybrid authority.

While problematic, the generally corporate structure of statutory authorities can also provide significant autonomy. Dependant on jurisdiction and the powers given in legislation, many are able to charge fees for services, and use that revenue to act within their purpose (or to expand their purpose over time).

These elements suggest the potential of these bodies to be used by First Nations for broader purposes than their legislated remit, and to potentially broader effect.

Considering the above, to utilise statutory authorities as a potential vehicle for expansion of authority, we argue that the authority would need to be:

- Operated (if not controlled) by a single First Nation;

[84] Tom Lowry, 'As interest rates bite and recession warnings grow, Australia's PM says he is 'optimistic' about the economy', *ABC*, June 8, 2023, https://www.abc.net.au/news/2023-06-08/pm-economy-optimism-as-interest-rates-rise-recession-warning/102455906.
[85] For example, the Koori Heritage Trust and Tandanya National Aboriginal Cultural Institute are statutory bodies.

- Small in size;
- Single issue;
- Broad purpose;
- Powers including the ability to charge fees for service; hold property etc;
- Established under state-legislation, to avoid the PGPA (though, if an area 'under' federal jurisdiction, it is possible to override elements of the PGPA);
- Operate highly effectively, to avoid chances of being repealed;
- To emerge from a pre-existing body, which is then established in legislation (to enable greatest alignment with the relevant nation's aspirations/designs).

Aboriginal and Torres Strait Islander statutory authorities

As it stands, there are currently several Commonwealth statutory authorities pertaining to Aboriginal and Torres Strait Islander people. These include, for example, the Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS), Indigenous Business Australia, the Indigenous Land and Sea Corporation (ILSC). As Moran et. al have suggested, the Wreck Bay Aboriginal Community Corporation (WBACC) and the Torres Strait Islander Regional Authority (TSRA) are of particular 'interest' to First Nations governance concerns, as 'each are elected Indigenous organisations with clear jurisdictions'.[86] Arguably, the four Northern Territory Land Councils (including Central, Northern, Tiwi and Anindilyakwa) also relate to First Nations' governance concerns.[87]

As was illuminated by the Voice Referendum, many First Nations people are understandably wary of statutory authorities or other bodies established by governments. A key reason for the proposed constitutional amendment was to provide 'security and stability' for the body, as opposed to the previous representative bodies established by settler governments that have been rescinded or repealed.[88] The longest-lasting representative statutory authority for Aboriginal and Torres Strait Islander people, ATSIC, was unceremoniously disbanded by the Howard Government in 2005. As we discuss in Part 5, this possibility an ongoing concern associated with statutory authorities without simple resolution.

However, we maintain that statutory authorities are a relatively underused form of government in regards to Aboriginal and Torres Strait Islander people, and particularly in regards to *nations*. In particular, the Project Directors argue that there are elements of statutory authorities that may make them particularly helpful. As put by Damein Bell, in regards to the Budj Bim Cultural Landscape:

> Currently there are many different advisory committees and governance and management frameworks. There are also a lot of Aboriginal committees and organisations in place who are vulnerable to the settler state. It is a lot of work, and if you lose track, suddenly outsiders end up with a veto or the power to change things. A statutory authority could harmonise that, and help prevent errors. What is diffuse could become more organised, independent – an actually representative, community model of

[86] Mark Moran et al., 'Funding Indigenous Organisations: Improving Governance Performance Through Innovations in Public Finance Management in Remote Australia', *Closing the Gap Clearinghouse* 11 (2014): 61.
[87] The 4 NT Land Councils are established under the 1976 ALRA (see Part 3).
[88] Australian National University, 'Indigenous Voice to Parliament', 2022, https://www.anu.edu.au/about/strategic-planning/indigenous-voice-to-parliament.

> authority. Local decision-making could be consolidated, and it would be much harder for the settler state to overturn our decision-making.[89]

We now turn to the more fundamental issues at play regarding Aboriginal and Torres Strait Islander jurisdiction, including the operation of Australian settler-colonialism. The complex realities of the 'self-government landscape', as we term it, has significant impacts on the ways in which an Indigenous nation statutory authority could operate. This affects the criteria outlined above, which we expand on in Part 5.

[89] Damein Bell, pers. comm.

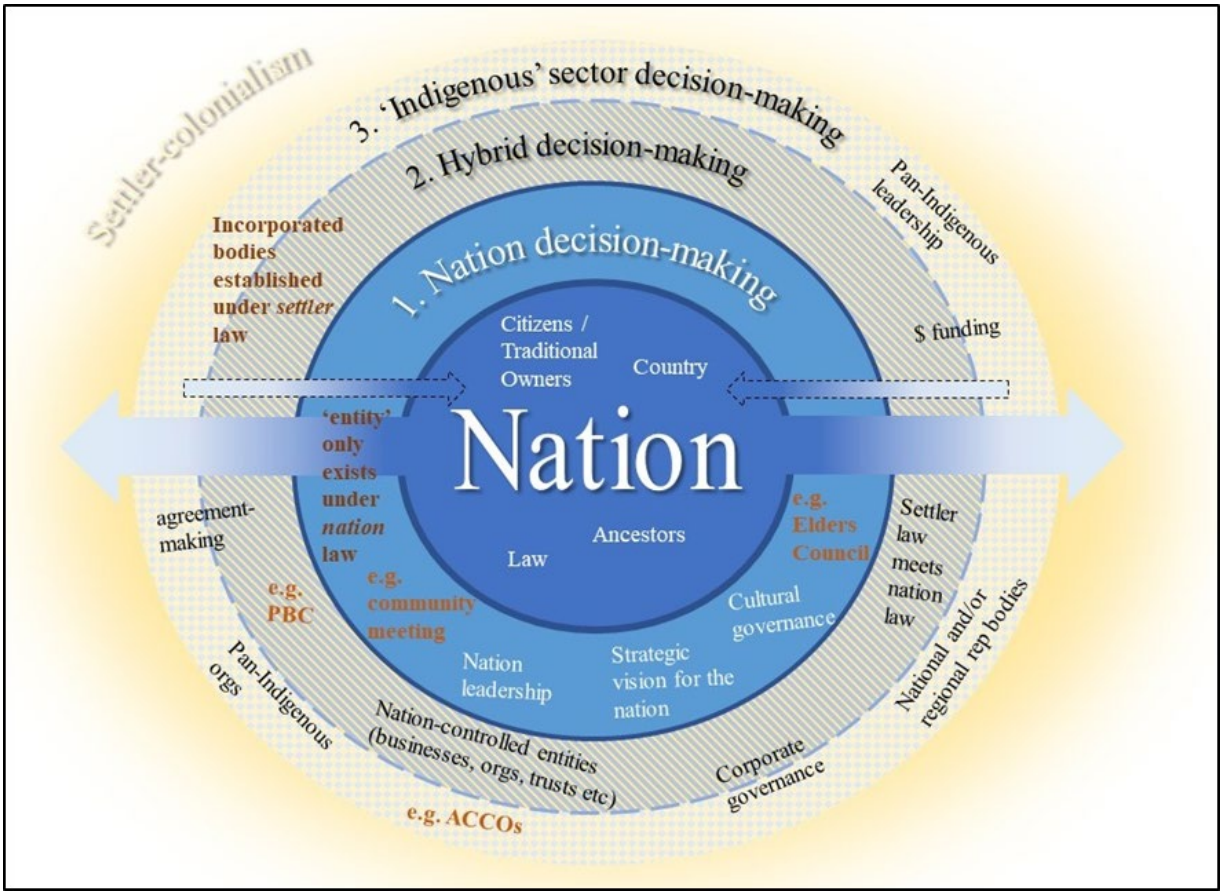
3 Australian legal-political contexts

As we describe in Part 1, INB is an ongoing, nation-led practice within many Aboriginal and Torres Strait Islander collectives. However, ongoing questions prevail about the institutions of First Nations decision-making and self-government within Australia: in other words, about *what* self-government looks like.

A fundamental premise underlying this project is that nations are expert at utilizing bodies established in settler law for their own ends. Thus, in order to discern possible blockages and opportunities for *further* bodies (Indigenous nation statutory authorities), we sought to address a series of fundamental questions around the impacts of settler-colonialism on Indigenous self-government within Australia. These questions are:

- What is the operating environment? Where does the nation sit, alongside other bodies that may be exercising authority in areas of jurisdiction of interest to First Nations? What are these areas of jurisdiction, and how might these change over time?
- How do we conceptualise the different roles that various First Nations organisations and individuals undertake as vehicles for self-determination? What is the relationship between such bodies, and their differing approaches to self-determination?
- (A huge question) Can bodies created under settler-colonial law operate as First Nation governing bodies, even if they are established by First Nations?
- And, in the instances and at the times that First Nations wish to be visible, how do you make outsiders *see* Aboriginal self-government?

Figure 2. Jurisdictional Relations



The Indigenous Self-Government Landscape

To answer these questions, we theorised the parameters of what we term the 'Indigenous self-government landscape' in Australia, which Figure 2 on the previous page describes.

Figure 2 divides the Indigenous Sector into three distinct and overlapping zones of 'exclusive' and 'shared' decision-making that corresponds to areas that either remain under exclusive First Nations nation jurisdiction (both conceptually and in practice), or, due to settler-colonialism, are (whether assumed or in practice) currently shared or overlapping between First Nation and settler sovereigns. This includes one zone that is not connected to settler law (Zone 1: Nation Decision-Making), and the 'hybrid' zones that include incorporated bodies that interact explicitly with settler-colonial law and institutions (including Zone 2: Hybrid Decision-Making and Zone 3: 'Indigenous' Sector Decision-Making).

Figure 2 is both conceptual and concrete: demonstrative of some of the structures that some First Nations are already utilising: and theoretical, based on INB research and practice.

Two realities of the self-government landscape

Before analysing the three zones, we firstly discuss two constant realities of the self-government space. The first is collective First Nations persistence, described in the diagram in the middle circle as 'nation'. The thick line surrounding this circle (and Zone 1, discussed below), indicates that this space is not subject to settler-colonial authority, as First Nations law emerges from its own source of authority, separate from the settler state.[90]

As in Part 1, the terms we use in this report are not intended to be prescriptive about the 'content' of First Nations nationhood or sovereignty. Rather, INB literature emphasise the significance of *self-defined* and *self-determined* polities (that may or may not have been 'recognised' as 'Traditional Owners' or other categories in settler courts). In line with this, 'who' the nation is may evolve:

> Nation building is broader than looking at traditional pre-settlement nation groupings, but rather accounts for historic connections between people and place forged up until today. It differs from notions of 'self-determination' or 'self-management' which refer to the right or authority of Indigenous peoples to determine their own future. Instead, it refers to the doing of self-governance.[91]

The active, responsive nature of First Nations is represented in Figure 2 through the arrows emerging from each Zone back into the nation. The arrows emerging from the nation similarly indicate the ways in which First Nations share jurisdiction with settler governments through the Indigenous sector, with varying degrees of ability to enforce their own decision-making and advance aspirations, and push outwards against settler-colonialism.[92]

As Gertz writes, the existence and strengthening of the nation is the most significant balm against the effects of invasion and settler-colonialism on collective identity. The difficulties of

[90] See, for example, Christine Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (London: Routledge, 2011); Mary Graham, 'Some thoughts about the philosophical Underpinnings of Aboriginal Worldviews', *Worldviews: Environment, Culture, Religion* 3:2 (1999): 105-118, and Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minneapolis: University of Minnesota Press, 2015).
[91] Norman et al., 'Mapping Local and Regional Governance', 10.
[92] Following Norman et al., 'Mapping Local and Regional Governance'; Behrendt et al. forthcoming)

such work are immense.[93] Nations must necessarily confront the 'embedded' legacies of invasion and ongoing settler-colonial policy, including a pervasive 'deficit view' of First Nations.[94] As Murray and Evans have argued, key to processes of *nation* identification are community engagement with 'a deeper cultural meaning and understanding' and a 'deeper cultural way of doing things' – 'learning the Wiradjuri way from our elders'.[95] Most nations we work with assert that the central circle of Figure 2 – the space of being, of identity, of culture, and law – is their most significant resource, requiring constant effort and protection. This aligns with 'identifying' necessarily preceding 'organising and 'acting' as a nation.[96]

Of course, prior to invasion, all areas of interest to First Nations would have been under exclusive nation jurisdiction (correspondingly, this diagram would have only included the blue circles). However, the second reality of the self-government landscape is settler-colonialism, an ongoing and responsive process to First Nations existence and persistence. Following a pattern replicated by settler colonies globally, the Australian state has acted to achieve the effective disappearance of First Nations as distinct collectives with inherent sovereign rights.[97] Initially through violence and dispossession, sanitised and justified in colonial courts, followed by policies of assimilation, forced removal of children, relocation and most recently through policies of normalisation, settler-colonialism seeks to concretise the institutional subordination and suppression of First Nations.[98] The essential aspiration is that autonomous First Nations are 'incorporated' or 'domesticated' into settler society and can be treated as minorities, stakeholders, or interest groups within a broader democratic society.[99] Efforts to suppress Aboriginal and Torres Strait Islander nationhood remain 'parasitically enmeshed' throughout settler institutions and social, political and cultural systems.[100]

Settler-colonialism is represented in yellow in Figure 2, corresponding to the areas that settler governments have sought to exercise jurisdiction and authority in areas of interest to First Nations (zones 2 and 3; which in turn comprise the Indigenous Sector). Even though First Nations have never ceded such authority – this assumption and exercise of jurisdiction has very real and ongoing impacts on First Nations self-government. As we describe in Part 1, INB research, theory and practice is therefore underlined by an understanding of the inherent difficulties in identifying, acting and organising as a nation within a settler colony.

We turn now to this interplay of jurisdiction within the three zones, and the vehicles nations may (presently) strategically utilise to action self-government. In analysing the different 'zones' of decision-making, we do not seek to categorise all of the different types of bodies that currently exist within the Indigenous Sector. The examples we have included in Figure 2 are fixtures of the Australian socio-legal landscape, and are relevant to many of the nations with which we work. However, how First Nations see and utilise different bodies – and, for example, which zone a body sits within – may differ from one nation to the next. Further, like INB processes more generally, nations' uses of such will inevitably change and shift over time,

[93] Gertz, 'Gugu Badhun Sovereignty'.
[94] Murray & Evans, 'Culturally Centred, Community Led', 171.
[95] Murray & Evans, 'Culturally Centred, Community Led', 176.
[96] See Part 1, above, for description of the IOA framework.
[97] For an overview, see Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (London: Palgrave McMillan, 2010); and Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999).
[98] Alison Vivian and Michael Halloran, 'Dynamics of the policy environment and trauma in relations between Aboriginal and Torres Strait Islander peoples and the settler-colonial state', *Critical Social Policy* 42:4 (2022): 626-647; and Elizabeth Strakosch, 'The Technical is Political: Settler Colonialism and the Australian Indigenous Policy System', *Australian Journal of Political Science* 54:1 (2019): 114-130.
[99] See Tully, 'The Struggles of Indigenous Peoples for and of Freedom'.
[100] Alison Whittaker, 'Not My Problem: On The Colonial Fantasy', *Sydney Review of Books*, 8 November 2019, https://sydneyreviewofbooks.com/review/maddison-colonial-fantasy/. See also Strakosch, 'The Technical is Political'.

corresponding to new circumstances.[101] The examples we have suggested in each zone are therefore not prescriptive, but designed to describe the ways such bodies can be conceptualised and utilised from an INB perspective.

Zone 3: 'Indigenous' sector decision-making

This Zone refers to the decision-making shared between Aboriginal and Torres Strait Islander peoples and the settler state over areas of jurisdiction that are likely to affect both First Nations and non- First Nations populations in Australia (if in crucially different ways). 'Indigenous' organisations established at this level address a diverse range of issues broadly affecting Aboriginal and Torres Strait Islander individuals and communities, including, for example, health, disability, housing, education and schooling, teaching, employment, legal aid and generalised economic development.[102] They provide services that are invaluable to Aboriginal and Torres Strait Islander communities' wellbeing (of which Tim Rowse classifies across four categories of 'representation', 'title-holding', 'service-delivery' and 'profit-making').[103]

Bodies at this zone (including, for example, Aboriginal Legal Services, or region-based Land Councils) largely make decisions within these specific sectors. Settler governments currently frame these issues as part of their own jurisdictional responsibilities and, in so doing, position Aboriginal and Torres Strait Islander peoples as a singular *Australian* 'population' group.[104] As Sullivan notes, the sector thus 'delivers services that normally are the province of government agencies'.[105] However, in delivering services to Aboriginal and Torres Strait Islander people in culturally safe and specific ways, pan-Indigenous bodies at this level see some 'norms' of Indigenous governance meet settler governance.[106] Thus, such organisations cannot be simply understood as a component of settler government.

Within the self-government landscape, such bodies can play a significant role, providing advocacy and services in areas that – at least in the short term – nations may not seek specific jurisdiction over. This is a highly significant role. Many of the nations we work with report that engaging in INB is deeply difficult due to the ongoing and pressing socio-economic concerns of nation citizens. Organisations that work to meet these needs make it easier for nations to then undertake such important work.

Sector-wide decision-making also necessarily requires pan-Indigenous political leadership and advocacy, which can then assist settler policy development that assists nation-level self-determination.[107] In fact, it is within the 'representative' pan-Indigenous bodies established at this zone that we hear many stories of collaborative work that ultimately assists nations to

[101] Cornell, 'Processes of Native Nationhood'.
[102] we recognise the somewhat problematic distinction we've made in repeating the assumption that 'health' or 'legal' services, for example, as issues (partly) shared with non-Indigenous Australians. The community-controlled sector is clear that such issues do not affect Aboriginal peoples in the same as non-Indigenous people, and require culturally safe and responsive practice. Recent research has also highlighted that Indigenous health and wellbeing has specific political determinants, and thus INB both strengthens, and is informed by, nation health (see Rigney, et al., *Indigenous Nation Building*.)
[103] Tim Rowse, *Rethinking Social Justice: From 'Peoples' to 'Populations'* (Canberra: Aboriginal Studies Press, 2012), 102-3.
Rowse 2012, 102-3.
[104] Following Rowse, *Rethinking Social Justice*.
[105] Patrick Sullivan, *The Aboriginal Community Sector and the Effective Delivery of Services: Acknowledging the Role of Indigenous Sector Organisations*, Working Paper 73 (Alice Springs: Desert Knowledge CRC, 2010), 5; see also Diedre Howard-Wagner et al., *Looking Beyond Indigenous Service Delivery: The Societal Purpose of Urban First Nations Organisations*, Discussion Paper No. 301/2022 (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University, 2022).
[106] Rowse, *Rethinking Social Justice*, 102.
[107] Australian Government, *National Aboriginal and Torres Strait Islander Health Plan*; and Rigney, et al., *Indigenous Nation Building*.

nation-build. This can be as simple as such bodies providing more flexible grants to nation-specific entities to enable disparate nation citizens to come together strategically for their own, self-determined purposes.[108] This zone can thus also provide a crucial space for pan-Indigenous and inter-nation dialogue between First Nations, where strategies for successful INB can be exchanged.[109] There is currently research being undertaken into the national bodies established under settler policy that can best support sovereignty and self-determination, using the case study of ATSIC.[110] It is for this reason that we also include pan-Indigenous peak bodies such as the Coalition of Peaks at this zone, which was the self-determined creation of a number of community-controlled service delivery organisations.[111]

Zone 2: Hybrid decision-making

Beyond assuming particular areas of responsibility for First Nations 'populations', settler law has also enforced its own social-political systems, worldviews and forms of organising into areas that it (partly) acknowledges remain under the jurisdiction of First Nations, such as native title, 'land rights' and 'heritage'.[112] These are the moments in which Aboriginal populations are conceptualised, for particular purposes, as 'peoples'.[113] We discuss particular areas that we could see emerging as spaces for hybrid *nation* authorities in Part 5.

If Zone 3 sees settler law meeting some 'norms' of pan-Indigenous cultural governance, Zone 2 can thus be conceptualised as the zone in which settler law and policy first meets *nation* law. The key difference between decision-making at Zone 2 and Zone 3 is that the decisions made at Zone 2 are relevant only to the specific nation, rather than relating to a broader local, regional or pan-Indigenous constituency. This includes areas more obviously under specific First Nations jurisdiction, such as management of Country and 'heritage', and the areas in which nations have established nation-specific organisations (e.g. nation-specific health services). As such, outsiders are likely to directly engage with these bodies when attempting to engage with specific nations (particularly including native title representative bodies), as the bodies are recognised – if implicitly – as having authority for certain areas.[114]

More broadly, if First Nations are utilising Zone 1 (discussed below), Zone 2 can be conceptualised as including the vehicles that nations can use to exercise their decisions and jurisdiction, whilst also responding to the requirements of settler law and policy. In this way, these vehicles can be conceptualised *not* as a quasi-settler government department, but an arm of the First Nations government. These bodies deliver nation-specific services and also undertake foreign affairs roles, dealing directly with outsiders. The decision-making at this level is therefore necessarily hybrid, as entities have political (and social, cultural and legal) responsibilities to the First Nation as well as corporate and legal requirements to settler governments and other institutions.

[108] See, for example, Behrendt et al., *Indigenous Nation Building*.
[109] Our experience with Aboriginal and Torres Strait Islander nations is that dialogue and information exchange between nations can be crucial to INB development. Some members of the IHA Project team have been involved with 'inter-nation summits' held between First Nations in Australia. At these summits, held in 2012, 2015 and 2017 First Nations swapped strategies and stories for INB success and developed protocols for cross-nation collaboration and engagement. Nations involved reported that these conversations were highly significant to their later INB work.
[110] Led by Larissa Behrendt, the ARC Discovery Project 'Policy for Self-Determination: the Case Study of ATSIC' (DP230100714) explores ATSIC to inform Indigenous policy-making and governance into the future.
[111] Coalition of Peaks, 'Our Story', 2023, https://www.coalitionofpeaks.org.au/our-story.
[112] See Elizabeth Povinelli, *Geontologies: A Requiem for Late Liberalism* (Durham: Duke University Press, 2016).
[113] Following Rowse, *Rethinking Social Justice*.
[114] See Compton et al, 'Native title'.

Zone 1: Nation decision-making

This zone describes nation decision-making when it is undertaken solely by the First Nation, without 'hybrid' input. This includes the continuing practices of lawmaking – socially, culturally and politically regulated existences – that exist amongst First Nations across the continent, and are likely rarely seen or understood by settler Australia.[115] It also describes the instruments of self-government that nations may (re)establish in order to achieve collective aspirations, whether these are continuations of traditional governance structures, revitalised, or newly established. Such bodies again may or may not be visible to settler law, dependant on the priorities of the collective. In line with Vivian et al:

> 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.[116]

This Zone is therefore *not* about the 'representative bodies' that settler governments may establish with (or force upon) First Nations, particularly in relation to Zone 2 areas of jurisdiction such as Country and heritage. Instead, Zone 1 is authorised by the nation itself – further suggesting the significance of bolstering nation identity and law.[117] While, as we indicate in Figure 2, Zone 1 is connected to and necessarily influenced by zones 2 and 3, it is not controlled by the bodies established at these zones. Rather, nation-decision making informs the actions of bodies established at Zones 2 and 3. Thus Zone 1 sits between the nation – and identity, culture, epistemology – and the bodies that interact with, and to some degree must conform with, the realities of Australian settler-colonialism.

As we indicate in Figure 2, the structure or content of this Zone is not prescriptive. For some nations, such decision-making may happen through a community meeting; for others, through a more formal coalition or committee; or again, through Elders Councils that sit above the bodies in other Zones, providing guidance and cultural governance. For other nations, there may even be multiple bodies operating with each other at this Zone. The content and structure of this Zone may need to change, in response to changing external or internal circumstances.[118]

Unlike Zones 2 and 3, we do not include money or funding at this level. Of course, traditional economies are ongoing within and amongst some First Nations across Australia, even as the encroachment of neoliberalism sees some shifts take place.[119] Further, economic development can be crucial prefigurative INB work,[120] while evidence from North America is clear that long-term, First Nations self-government must be self-funded. However, we suggest that incorporating, for example, the delivery of programs and acceptance of funding, in Zones 2 and 3 rather than Zone 1 stresses that Zone 1 is primarily concerned with *political* responsibilities to

[115] Black, *The Land is the Source of the Law*; Moreton-Robinson, *The White Possessive*; and Povinelli, *Geontologies*.
[116] Vivian et al., 'Indigenous Self-Government', 225.
[117] Following Murray & Evans, 'Culturally Centred, Community Led'.
[118] Cornell, 'Processes of Native Nationhood'.
[119] Jon Altman, 'Alleviating poverty in remote Indigenous Australia: The role of the hybrid economy', *Development Bulletin* 72 (2007): 47-51; and Jon Altman, 'What future for remote Indigenous Australia? Economic hybridity and the neoliberal turn', In *Culture Crisis: Anthropology and Politics in Aboriginal Australia*, ed. Jon Altman and Melinda Hinkson (Sydney: University of New South Wales Press, 2010), 259-280.
[120] See Norman et al., 'Mapping Local and Regional Governance'; Theresa Petray and Janine Gertz, 'Building an Economy and Building a Nation: Gugu Badhun Self-determination as Prefigurative Resistance', *Global Media Journal* 12(1) (2019): https://www.hca.westernsydney.edu.au/gmjau/wp-content/uploads/2018/10/GMJAU-Building-an-economy-and-buildin...ermination-as-prefigurative-resistance.pdf.pdf.

the First Nation, rather than *corporate* responsibilities to external funders or other outside bodies. This leaves the bodies at Zones 2 and 3 to interact directly with settler law and economies, under instruction from Zone 1.

Why separate nation decision-making from the 'Indigenous Sector'?

The Indigenous Sector is a 'program and funding maze'.[121] The organisations and bodies that comprise the Indigenous Sector are highly variegated, with often overlapping jurisdiction.[122] Within the Indigenous Sector, there are also often very different priorities and accountabilities (particularly between the First Nations communities the organisation serves and the settler government funder they respond to).[123]

The Indigenous Sector emerged from the self-determined efforts of First Nations people, becoming entrenched in the settler legal-political landscape from the 1970s.[124] As it stands, the Sector is, as Rowse puts it, 'essential to the representation and satisfaction of Indigenous wishes'. Without it:

> Indigenous Australians would lack public policy recognition of their needs and aspirations; they would be invisible, as Indigenous people, within Australian society and they would be unable to make any demands, as Indigenous Australians, on Australian institutions.[125]

In line with the breadth of political advocacy undertaken by organisations within the Sector since the 1960s, Aboriginal community-controlled organisations have always seen themselves as both 'expressions' and agents of self-determination.[126] Furthermore, as Heidi Norman et al. have analysed, those involved in such organisations are often working for their communities across multiple organisations, and in sometimes voluntary capacities, in ways that appear to correspond to some INB processes.[127]

Of course, a fundamental premise of this project is that there are crucial roles for the myriad of bodies established in the Sector within First Nations' INB work. Considering Australia's policy history (particularly including the long-standing relationships between settler-colonial governments and service delivery organisations), we maintain that it is inevitable that bodies that undertake hybrid decision-making (that are also meeting the everyday and pressing needs of Aboriginal people) may become a typical configuration for First Nations government, at least in the short- to medium-term. We are aware of many stories of nations coming together through bodies established at Zone 2.[128] In fact, some authors of this report have suggested elsewhere that Prescribed Body Corporates – a key Zone 2 body for many nations – are a likely initial vehicle for collective decision-making, after nations have gone through the arduous process of receiving a native title determination (that so happens to correspond to many fundamental nation-building processes).[129] However, in terms of Figure 2, we would classify the actual native

[121] Sara Hudson, 'Mapping the Indigenous Program and Funding Maze', *Research Report Snapshot* 18 (Centre for Independent Studies, 2016), https://www.cis.org.au/wp-content/uploads/2016/08/rr18-Full-Report.pdf
[122] Howard-Wagner et al., *Looking Beyond Indigenous Service Delivery*; Sullivan, *The Aboriginal Community Sector*; Rowse, *Rethinking Social Justice*; Norman et al., 'Mapping Local and Regional Governance',
[123] Howard-Wagner et al., *Looking Beyond Indigenous Service Delivery*.
[124] Sullivan, *The Aboriginal Community Sector*, 1-2; and Diedre Howard-Wagner et al., 'First Nations Organisations and Strategies of Disruption and Resistance to Settler-Colonial Governance in Australia', in *Social Suffering in the Neoliberal Age: State Power, Logics and Resistance*, ed. Karen Soldatic and Louise St Guillaume (London: Routledge Taylor & Francis Group, 2022), 211-225.
[125] Rowse, 'The Indigenous Sector', 39.
[126] Howard-Wagner et al., *Looking Beyond Indigenous Service Delivery*, 2.
[127] Norman et al., 'Mapping Local and Regional Governance'.
[128] Jorgensen et al. 'Yes, the Time is Now'.
[129] Compton et al, 'Native title'.

title rights and interests determined by a settler court as sitting at the nation itself (alongside the rights and interests *not* recognised). It is the nation itself that has responsibility for and obligations to Country. The PBC, on the other hand, we would classify as sitting at Zone 2 (as the nation is *not* the PBC, even if outsiders and sometimes insiders conflate the two.[130] Finally, we would classify the nation decision-making to ensure the PBC is used strategically and, where possible, for INB ends, as existing at Zone 1. The Gugu Badhun Nation, for example, are currently utilising their PBC to implement decisions made by Gugu Badhun leadership. They have adapted their PBC to suit nation cultural protocols.[131] However, ultimately, Gugu Badhun Nation are working towards an institution of self-government that exists entirely outside of the remit of settler-colonialism.[132]

The reasons for separating Zone 1 from Zones 2 and 3 are both practical and theoretical. As we indicate in Figure 2, settler-colonialism is inescapable within the Indigenous Sector. Since the 1980s under 'New Public Management' frameworks, the Sector has been 'paradoxically overregulated'.[133] Deficit narratives are critical to its operation, where First Nations are positioned as 'lacking agency and political capacity' and 'thus requiring significant governmental intervention'.[134] This has continued under even refreshed Closing the Gap Agreements, as organisations 'remain situated' by settler governments 'within a service mentality'.[135] First Nations organisations are pitted against each other, and against non-Indigenous organisations, for the same pools of funding.[136] As Gertz puts it, rather than radical acceptance or supporting of self-government, the 'government's preferred version of self-determination is a model where Indigenous organisations implement government policy through service delivery contracts under the premise of being self-managed'.[137]

Bodies within the Sector therefore exist in a deeply 'precarious' position.[138] The stories common to nearly all Aboriginal and Torres Strait Islander bodies, whether established at Zone 2 or Zone 3, include the external institution attempting to: set the agenda; undermine nation or cultural authority; create arduous requirements that make self-determined priorities difficult to achieve; or quickly change their own priorities.[139] This is regardless of the underlying intention of the funding institution, which may have been acting in good faith.[140] The logic of settler-

[130] See Vivian et al., 'Indigenous Self-Government'.
[131] Petray and Gertz, 'Building an Economy and Building a Nation'; and Gertz, 'Gugu Badhun Sovereignty'.
[132] Gertz, 'Gugu Badhun Sovereignty'.
[133] Sullivan, *The Aboriginal Community Sector*, 7; Howard-Wagner et al., 'First Nations Organisations'; Janet Hunt, 'Between a Rock and a Hard Place: Self-determination, Mainstreaming and Indigenous Community Governance', In *Contested Governance: Culture, Power and Institutions in Indigenous Australia*, ed. Janet Hunt and Diane Smith (Canberra: Australian National University Press, 2008), 27-53.
[134] Alexander Page, 'Fragile Positions in the New Paternalism: Indigenous Community Organisations During the 'Advancement' Era in Australia', In *The Neoliberal State, Recognition and Indigenous Rights: New Paternalism to New Imaginings*, ed. Diedre Howard-Wagner, Maria Bargh, and Isabel Altamirano-Jiménez (Canberra: Australian University Press, 2018), 191.
[135] Howard-Wagner et al., *Looking Beyond Indigenous Service Delivery*, 1.
[136] Sullivan, *The Aboriginal Community Sector*, 5; Page, 'Fragile Positions in the New Paternalism', 189.
[137] Gertz, 'Gugu Badhun Sovereignty', 190. This can be considered in line with initial Federal Government support for 'self-determination' under the Whitlam administration. Such shifts in policy were not intended to bolster Indigenous self-government. Rather, and in line with previous assimilationist discourses, such policy envisaged greater Aboriginal participation within settler legal and political systems. For a fulsome discussion see Johanna Perheentupa, 'Aboriginal Organisations and Self-Determination in Redfern in the 1970s', in *Indigenous Self-Determination in Australia: Histories and Historiography*, ed. Laura Rademaker and Tim Rowse (Canberra: Australian University Press, 2020), 189-208.
[138] Howard-Wagner et al., 'First Nations Organisations', 224.
[139] Cornell & Kalt, 'Two Approaches'; and Behrendt et al., *Indigenous Nation Building*.
[140] Povinelli's analysis of liberalism and the way it chooses to 'recognise' particular components of (imagined) Aboriginality is useful here. See Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 200).

colonialism fundamentally permeates settler institutions, and thus shapes their encounters with First Nations in mercurial ways.[141]

As we indicate in Figure 2, Zone 3 arguably sits most directly at the interface between settler-colonialism and First Nations peoples; even as Zone 3 bodies have also seen some of the most significant advocacy against settler-colonialism. Bodies sitting at this zone are also unlikely to play a specific decision-making or self-governing role related for a singular First Nation. Due to the nature of their remit and relevant 'service populations', the priorities of bodies established at Zone 3 are necessarily broader than the specific aspirations of a First Nation, speaking to concerns or priorities that Aboriginal people may hold more broadly (or, are specifically for pan-Aboriginal land holdings).[142] We are not aware of any First Nation using a pan-Indigenous, sector organisation as the primary vehicle for their INB work.

We maintain that Zone 2 organisations are unlikely in the long term to be the most effective vehicle for First Nations self-government (in turn, this has crucial ramifications on the potential for hybrid statutory authorities, which we detail in Part 5). Although Zone 2 organisations are working in nation-specific areas, critical questions remain about *who* such organisations are responsible to, and *where* they are receiving their mandates and instructions from. Having responsibilities to both settler law and First Nations law means there is often 'tension between their objectives' of fulfilling obligations to community and to funding arrangements.[143] Beyond this, INB thinking asserts the necessity of separating nation decision-making from implementation, and political from corporate governance. INB research further asserts the significance of Indigenous governments having accountability firstly to their nation itself.[144] Such distinctions cannot be easily by Zone 2 organisations with vast corporate governance requirements under settler law.

Similarly, the 'foreign affairs' role – or the mechanism through which First Nations primarily engage with the settler state – is not straightforward for Zone 2 bodies. As Norman et al. have argued, the 'extent of engagement' between community-controlled organisations and settler governments is varied, and is sometimes limited only to the 'provision of grant funding'.[145] Further, and as we suggest above, this role risks conflating the community organisation with the nation itself. As Gertz puts it, this can compromise the 'political *voice of a nation* as opposed to a voice of a … corporation'.[146]

Finally, as both zone 2 and 3 bodies are incorporated under settler law, they are generally not the product of First Nations choice over institutional form. As Cornell & Kalt have argued, for self-government systems to be effective, they must have 'cultural match' and legitimacy within the nation.[147] Gertz takes this idea further, arguing that ultimately:

> If Gugu Badhun do not deliberately design our own political apparatus, rationalities, and techniques of Gugu Badhun Government we risk perpetuating the same practices and procedures whose purpose is to colonise and assimilate Gugu Badhun into the

[141] Vivian and Halloran, 'Dynamics of the policy environment'; and Strakosch, 'The Technical is Political'.
[142] This is not to suggest that region-based Lands Councils, such as the Northern Territory Land Councils or the NSW Land Councils, cannot support INB, but rather that they may not be the strongest apparatus for advancing a nation's specific collective interests. As Norman et al. have discussed, within NSW, 'LALCs are member based and therefore have some claim as representatives of Aboriginal voices. However, the interests and roles of LALCs do not always coincide with understandings of traditional connections to place, nor do they define connections to Country (other than in relation to joint management of National Parks)': Norman et al., 'Mapping Local and Regional Governance', 8-9.
[143] Howard-Wagner et al., 'First Nations Organisations', 223.
[144] Cornell & Kalt, 'Two Approaches', 9-11.
[145] Norman et al., 'Mapping Local and Regional Governance', 10.
[146] Gertz, 'Gugu Badhun Sovereignty', ix.
[147] Cornell & Kalt, 'Two Approaches'.

> australian state. Gugu Badhun also have a cultural, moral, and ethical responsibility not to imitate the governmentality of the australian state in our relationships with other Indigenous Nations.[148]

Thus, for nations to be able to strategically plan for their citizens and futures, and to act first for the nation itself in ways that are culturally legitimate and do not replicate 'neoliberal power arrangements',[149] we argue that Zone 1 nation decision-making is strongest when removed from organisations that also have obligations to settler law and funders. As we describe above, those Zone 2 and 3 bodies then become the 'tools' that First Nations then use to engage outwards.[150]

To reiterate, the content of the decision-making institution nations (re)establish at Zone 1 is not prescriptive. We are aware of instances where the membership between hybrid bodies at Zone 2 and nation self-government bodies at Zone 1 are identical (which, in respect of 'stealth governance', we do not name). The significance of this separation – even if it is, at times, a nominal distinction – is to ensure that nation decision-making is less affected when settler policy inevitably changes, impacting the bodies established at Zones 2 and 3. Separating Zone 1 from Zones 2 and 3 is thus deeply practical. It enables nations to more easily ask themselves: leaving aside what settler governments are doing, what are our goals? What are our strategies? And how do we best utilise the opportunities that are available to us for our *own* ends?[151]

3.1 Recent policy developments

In order to discern possible opportunities and blockages for potential Indigenous nation hybrid statutory authorities, we also undertook an environmental scan of the state and federal settler legal and policy environments in Australia. In particular, we investigated the relevant legislation and policy frameworks of the state, territory and federal governments, analysing the circumstances that may be able to support First Nations' collective aspirations.

The significant changes that have occurred within the landscape over the past 50+ years are a direct response to First Nations individuals and collectives' continued advocacy.[152] Regardless, many of the particular developments and changes in settler policy have not led to the desired outcomes (or the outcomes that settler governments insist they aspire to). Further, while settler governments may maintain that they have particular intentions, it is not always clear how their actions align with their stated objectives and strategic plans.

There are also significant differences in the range of and types of policy-making undertaken in different settler jurisdictions. Alongside this, the changeability and malleability of settler government policy – both between elected governments and within the term of particular governments – suggests that the particular details of settler policy are less significant than larger shifts in settler discourse. We discuss these in Part 5.

As such, we do not focus here on the potential opportunities offered by pan-Indigenous advocacy that were not taken on as policy by settler governments (e.g. the recommendations of the 1982 National Aboriginal Council regarding treaty and makarrata). Instead, we briefly note the policy developments that continue to impact current settler conceptions of Aboriginal governance and self-determination within different (settler) jurisdictions.

[148] Gertz, 'Gugu Badhun Sovereignty', 181.
[149] Gertz, 'Gugu Badhun Sovereignty', 179.
[150] Vivian et al., 'Indigenous Self-Government', 227.
[151] Jorgensen et al. 'Yes, the Time is Now'.
[152] We do not include substantial advocacy that was not realised in policy or legislation, for example the NAC and treaty discussions in the early 1980s.

Australia (Federal)

Key (historical) policy developments

- *1967 Referendum*: As a result of continued advocacy from the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI) and others, the 1967 Referendum saw two sections of the Australian Constitution changed. The Referendum enabled the Commonwealth to make laws 'with respect' to Aboriginal and Torres Strait Islander peoples.[153]
- *'Self-determination' era*: Federal 'self-determination'[154] policy under the Whitlam Government largely involved government funding for community-controlled services, and led to the entrenching of the Indigenous Sector described above. As Perheentupa has argued, the intention of government policies of self-determination was to encourage an assimilatory form of engagement of Aboriginal and Torres Strait Islander people within settler legal and political systems (not to support First Nations self-government).[155] Other key developments in this era included the *Aboriginal Councils and Associations Act 1976* (later replaced); the *Aboriginal Land Rights (Northern Territory) Act 1976* (discussed below), which was partly in line with 'land rights' legislation passed in other state jurisdictions; and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, which allowed 'groups' to petition the Minister for protection of particular sites. We discuss 'heritage' further below.
- *Royal Commission into Aboriginal Deaths in Custody*: established in 1987 in response to growing public concern about the levels of Aboriginal deaths in settler custody. The report released in 1991. Little has changed since its release, with First Nations people remaining over-represented at every point in the criminal justice system'.[156] Current policy measures around justice reinvestment are discussed below.
- *ATSIC*: The Hawke-Keating Government did not follow through on their espoused commitment to treaty following the 1988 Barunga Statement. Instead, the Aboriginal and Torres Strait Islander Commission (ATSIC) was established in 1990,[157] and was operational till it was disbanded by the Howard administration in 2004. ATSIC was an elected body consisting of regional councils and a national council, and had representative and administrative functions. Arguably, it is the most significant Australia-wide policy enabling (a version of) self-determination.[158] The Project Directors are aware of many stories of INB being enabled by the ATSIC model.
- *Native title*: The 1992 Mabo decision saw the High Court overturned the doctrine of terra nullius to recognise certain 'traditional' rights of the Meriam people to their Country. The 1993 *Native Title Act* that followed established a system for nations to make claims to have their native title recognised. It has been condemned by many as a reductive, slow and costly regime that sees many nations' claims denied or reduced.[159] However, despite being an ultimately repressive system, there are many First Nations who have utilised native title

[153] For a discussion of the referendum and FCAATSI's campaign, see Sue Taffe, *Black and white together FCAATSI : the Federal Council for the Advancement of Aborigines and Torres Strait Islanders, 1958-1973* (St Lucia: University of Queensland, 2005).
[154] There is ongoing disagreement over the meaning and content of self-determination. For an overview of the varied meanings the concept has held, see Laura Rademaker and Tim Rowse (eds), *Indigenous Self-Determination in Australia: Histories and Historiography* (Canberra: Australian University Press, 2020).
[155] See Perheentupa, 'Aboriginal Organisations and Self-Determination'.
[156] Attorney General's Department, 'The Australian Government's justice reinvestment commitments', https://www.ag.gov.au/legal-system/justice-reinvestment.
[157] The Torres Strait Regional Authority (TSRA) was established concurrently to ATSIC. It is analysed in Part 4 of this report.
[158] As we note above, there is currently research analysing ATSIC as a model for self-determination.
[159] See, for example, Ivan Ingram, 'Indigenous Governance and Native Title in Australia', in Developing Governance and Governing Development, 29-46.

as a tool to pursue their own, self-determined ends.[160] Native title has ultimately had unexpected impacts, with some nations able to pursue significant economic and other aspirations through the system.

- *Bringing Them Home*: the 1997 Bringing Them Home report saw settler government recognition of the Stolen Generations and the ongoing trauma and harm caused by the (ongoing) removal of Aboriginal children from their families. It significantly affected settler discourse, prompting new understandings of Indigeneity to spread much more widely. As we note later, the rates of removal of Aboriginal children continue to be disproportionately high.
- *Corporations (Aboriginal and Torres Strait Islander Act) 2006*: legislation introduced to 'modernise' corporative governance requirements for Aboriginal organisations. The CATSI Act requires First Nations organisations (PBCs and those receiving service delivery funding) to incorporate under the Act, with special administration provided by the Office of Registrar of Indigenous Corporations (ORIC). As Brigg et al. have commented, the regulation 'enacted through the CATSI Act and ORIC is necessarily a political exercise rather than the neutral pursuit of good governance or administrative practice'.[161] The CATSI Act was updated in 2022. The experience of many nations with which we work is that the CATSI Act offers a deeply insufficient framework for the types of collective aspirations that they hold.
- *2007 Northern Territory Intervention*: In the wake of (false and unsubstantiated) allegations of child sexual abuse in remote Aboriginal communities in the Northern Territory, the Howard Government introduced the *Northern Territory Emergency Response Act 2007*. Amongst other impacts, the legislation fundamentally shifted the way that Aboriginal people in designated areas were able to spend their money; work; and access their Country and land under the ALRA. The Intervention has been condemned by many as deeply racist and destructive, aimed at 'normalising' Aboriginal communities through curtailing self-determination and self-government. A version of the Intervention was continued by the Rudd Government. [162]
- *'Closing the Gap'*: In 2008, the Rudd Government introduced the National Indigenous Reform Agreement, which established six targets to 'close the gap' between First Nations individuals and Australian citizens. The framework has been largely a failure, with most targets showing little to no improvement.[163] Recent First Nations-led efforts to 'refresh' the framework are described below.

Recent and current policy initiatives

- The Uluru Statement

The Uluru Statement was released in 2017 by the Referendum Council.[164] The Statement called for an Indigenous Voice to Parliament to be enshrined in the Australian Constitution; an agreement-making process; and a truth-telling process; shortened in much of political discourse to 'Voice, Treaty, Truth'. In May 2022, the Albanese Labor Government committed to the

[160] See Compton et al., 'Native title'.
[161] Brigg et al., *Supporting Corporations Beyond Compliance: Advancing ORIC's Governance Approach* (St Lucia: University of Queensland, 2022), 27.
[162] For an overview of the NT Intervention and the discourses preceding it, see Jon Altman and Melinda Hinkson (eds), *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (Sydney: University of New South Wales Press, 2007).
[163] Australian Government, *Closing the Gap Retrospective Review* (Canberra: Commonwealth of Australia, 2018), https://www.niaa.gov.au/sites/default/files/publications/closing-gap-retrospective-review-accessible.pdf.
[164] In 2017, 12 Regional Dialogues were held between Indigenous leaders across the continent, leading to a National Constitutional Convention in 2017. The purpose of these dialogues was to explore the possibility of reform to the Australian Constitution, an ongoing debate across Australia.

Uluru Statement 'in full'.[165] In October 2023, a Referendum held to alter the Australian Constitution to 'recognise' the 'First Peoples' of Australia and enshrine a Voice to Parliament failed. It is now unclear whether the 'Treaty' and 'Truth' elements of the Government's commitment to the Uluru Statement will be fulfilled. In any case, the failure of the Referendum suggests that settler policy and legislative mechanisms to support First Nations self-government within Australia are unlikely. If settler Australia is unable to accept an Indigenous advisory body to the Australian Parliament, they are unlikely to welcome the sorts of self-government mechanisms that many First Nations aspire to.

- Service delivery

In 2020 the National Agreement on Closing the Gap was signed between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all (settler) Australian governments. The Agreement sees decision-making 'shared' between Aboriginal people and governments. It is considered to be an 'unprecedented shift in the way governments have previously worked to close the gap'.[166] However, as suggested by Howard-Wagner et al., under the new arrangement, Aboriginal community-controlled organisations remain 'situated' within a service-delivery 'mindset'.[167] Regardless, as we note above, the entrenchment of ACCOs in the self-government landscape means they are likely starting place for settler-government engagement in treaty or in other engagements with First Nations collectives. Service delivery remains a highly significant area of engagement between the settler-state and First Nations. Further, and in line with increasing recognition of INB to First Nations, the National Aboriginal and Torres Strait Islander Health Plan 2021-2031 now includes INB as a foundational principle.[168]

- Heritage

There is currently a complex Commonwealth legislative framework related to 'cultural heritage' 'protection'. As we discuss above, 'heritage' can be conceptualised as a Zone 2 area of hybrid jurisdiction, even if such jurisdiction is largely assumed to be under the remit of settler governments. Relevant legislation includes:

- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*
- *Environment Protection and Biodiversity Conservation Act 1999*
- *Native Title Act 1993*
- *Protection of Movable Cultural Heritage Act 1986*
- *Underwater Cultural Heritage Act 2018*
- *Aboriginal Land Rights (Northern Territory) Act 1976*

In the wake of the destruction of Juukan Gorge in May 2020, the Federal Government is seeking to alter heritage laws. This is a result of the Joint Standing Committee on Northern Australia Inquiry into the destruction of the Juukan Gorge, who released its final report in October 2021. *A Way Forward* found 'serious deficiencies' in state and federal legislation pertaining to First Nations heritage.[169] Such deficiencies, include, for example, insufficient 'negotiation' powers

[165] Emma Lee, 'Prime Minister Albanese's victory speech brings hope for First Nations Peoples' role in democracy', *The Conversation*, 22 May 2022, https://theconversation.com/prime-minister-albaneses-victory-speech-brings-hope-for-first-nations-peoples-role-in-democracy-183454.
[166] Australian Government, 'A New Way of Working Together', https://www.closingthegap.gov.au/.
[167] Howard-Wagner et al, *Looking Beyond Indigenous Service Delivery*, 2.
[168] Australian Government, *National Aboriginal and Torres Strait Islander Health Plan*, 23.
[169] Joint Standing Committee on Northern Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Canberra: Commonwealth of Australia, 2021), 147.

for PBCs; the requirement for the Minister to make rulings under the ATSIHP; and the fact the EPBC relates only to general sites of 'national' significance (and covers very few sites considered to be First Nations heritage). Following the release of *A Way Forward*, the Coalition and then Labor governments have announced partnerships with First Nations people to reform Federal legislation. Shifts in federal legislation are likely to be introduced over 2024 and 2025. Changes to WA legislation are discussed later.

- Empowered Communities

Emerging from a group of First Nations leaders in 2013, 'Empowered Communities' was intended to represent a 'transformational reform to the decision-making process' within Indigenous Affairs based on a principle of 'empowerment'.[170] There are currently 10 Empowered Community (EC) regions across Australia, each with 'place-based priorities' and specific priorities. The EC works as an 'interface' between the region and the Government, but usually only involves the Federal Government.[171] Largely, this is through a subsidiary funding model, where program delivery can be more targeted based on priorities of the EC region. While the model aims to 'increase First Nations ownership and give First Nations people greater influence over decisions that affect them',[172] it is unclear the extent to which the current framework is able to enable to this. No comprehensive evaluations in regards to self-determination have been undertaken.

- Justice Reinvestment

Since 2022-23, the Federal Government has committed funding to support a national Justice Reinvestment program. Justice reinvestment is a 'long-term' approach to prevent crime, focused on 'shifting people's interactions away from the justice system by investing in preventative and rehabilitation measures, informed by local stories, evidence and data'.[173] Funding is used to support place-based initiatives 'led and implemented by First Nations communities and organisations'.[174] We are aware of such funding being used to support explicitly INB activities.

New South Wales

Key (historical) policy developments

- *Aboriginal Land Rights Act 1983*

The NSW ALRA is arguably the most significant policy development in Aboriginal Affairs in NSW. It continues to directly impact the self-government landscape for First Nations in NSW. The rights to land 'recognised' in the ALRA are not based on traditional ownership or Country but on historical connection and current location. The NSW ALRA establishes the NSW Aboriginal Land Council (ALC) and Local Aboriginal Council (LALC) network, in which the land is vested. There are 121 LALCs in NSW, the boundaries of which are often related to local government boundaries. All Aboriginal people aged 18 years or over who live within an area covered by a LALC are entitled to apply for membership of the LALC, as are Aboriginal people who do not live within the LALC area but have historical or cultural association with the LALC's area. That is, Traditional Owners do not have a standalone right to claim land under the

[170] Yothu Yindu Foundation, 'Empowered Communities', https://yyf.com.au/advocacy/empowered-communities/. Noel Pearson was a key advocator of the scheme.
[171] PwC, *Who is Speaking, Who is Listening?* (2023), 8, https://www.pwc.com.au/indigenous-consulting/PIC-who-is-speaking-who-is-listening-voice-architecture-feb2023.pdf.
[172] National Indigenous Australians Agency, 'Empowered Communities', https://www.niaa.gov.au/indigenous-affairs/empowered-communities.
[173] Attorney General's Department, 'The Australian Government's justice reinvestment commitments'.
[174] Attorney General's Department, 'The Australian Government's justice reinvestment commitments'.

ALRA. Instead, they can only make claims to land through a LALC and have no standalone recognised right to Country.

As the NSW ALRA is not based on Traditional Ownership, there are in some areas 'competing authorities about who speaks for country, how your interests are represented, how you advocate your interests' between the LALC and Traditional Owner group (whether native title has been recognised or not).[175] As Heidi Norman puts it, there is 'understandable tension' between the ALRA and the NTA that 'speaks to issues of connection to Country, cultural authority and governance'.[176]

This is compounded by the (current) lack of standalone cultural heritage legislation in NSW. Currently, where there are no 'registered' Traditional Owners, the ALRA requires LALCs to act to protect cultural heritage in the area. However, there is no legal requirement to 'prioritise the voices of people with a traditional connection to the area when exercising the protection power.'[177]

Recent and current policy initiatives

- Local Decision-Making

In 2015, 'Local Decision-Making' was introduced as a way to implement place-based decision-making by Aboriginal people. Under the scheme, 'Aboriginal Regional Alliances' enter into agreements with the NSW Government over funding and other commitments. The aim is that such alliances are 'progressively delegated greater powers and budgetary control once capacity is demonstrated.'[178] There are currently 9 ARAs operating in NSW, however the LDM policy is currently under review. The interactions between ARAs (which largely consist of service delivery organisations), LALCs and Traditional Owners are unclear.

- Language

The *NSW Aboriginal Languages Act 2017* was passed in 2017, the first language legislation passed in Australia. It aims to 'support the continued practice of Aboriginal language, as the primary form of protection', acknowledging language as 'intangible cultural heritage'.[179] The Act also establishes the Aboriginal Languages Trust NSW to support this aim. The ALT is an Aboriginal-led NSW Government Agency provides funding for specific Aboriginal communities to undertake language activities, in an attempt to provide coordinated language growth across the state. In doing so, the ALT 'aims to support the aspirations of Aboriginal Language Custodians across NSW'.[180]

- Aboriginal Land Rights Amendment Act 2022

There have been numerous proposals from the NSW Government and Aboriginal people to amend the ALRA over many years. Alongside ongoing concerns regarding the structure of the

[175] Heidi Norman, 'Land rights and native title aren't the same — and the two systems could spark Indigenous conflict', *ABC RN*, 18 November 2018, https://www.abc.net.au/news/2018-11-16/heidi-norman-ticking-timebomb-for-indigenous-conflict-in-nsw/10376778.
[176] Heidi Norman, *Aboriginal land recovery in New South Wales: Historical legacies and opportunities for change* (Sydney: Aboriginal Affairs NSW, 2017), 14. See also, Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond.* NSW. Federation Press. 2008.
[177] Laurie Perry and Kylie Lingard, 'Submission on the NSW Draft Aboriginal Cultural Heritage Bill 2018', https://ro.uow.edu.au/cgi/viewcontent.cgi?referer=&httpsredir=1&article=4526&context=lhapapers.
[178] Aboriginal Affairs NSW, 'About Local Decision Making', https://www.aboriginalaffairs.nsw.gov.au/working-differently/local-decision-making/about-local-decision-making/.
[179] ATNS, 'Aboriginal Languages Act (2017)', https://database.atns.net.au/agreement.asp?EntityID=8401.
[180] Aboriginal Languages Trust, 'Research Guides and Other Information', https://www.alt.nsw.gov.au/resources/research-guides-other-information/.

LALC system, there is a significant backlog of land claims that remain unprocessed.[181] Some changes were made in 2022 to address these issues, including amendments to: make the purchasing of land easier; 'assist LALCs to register as charities';[182] enable the NSW ALC to advise the Minister on matters generally relating to the 'interests of Aboriginal persons' rather than just land rights;[183] and enable the NSW ALC to create its own policies and procedures, rather than the Minister for Aboriginal Affairs. The full effects of these amendments are yet to be realised, however they are likely to further strengthen the ALC system. We are aware that some Traditional Owners are concerned that the amendments will further adversely impact their rights and cultural authority over matters of Country, culture and heritage. Further reforms have been suggested, including 'improving options' for Land Councils to utilise land for 'social, cultural and economic purposes' and also 'broader aspirational reforms'.[184] Related developments include the unsuccessful *Aboriginal Cultural Heritage (Culture Is Identity) Bill 2022*, supported by the NSW ALC.[185]

- Strategic Plan and Treaty

The *Aboriginal Affairs NSW Strategic Plan 2023-27* sets out the NSW Government's priorities over 2023-27. Priority 1 is around 'Community and Culture', 2 on 'Government Accountability & Collaboration' and 3 around 'Transformation & Influence'. The goals linked to these priorities include a 'Community Voice' to 'guide' research and policy; deliver on Treaty; 'Reform' to 'embed self-determination' and 'healing' to embed truth-telling'.[186]

While the NSW Premier had previously indicated support for treaty negotiations, as of 2023, NSW was the only state not to 'have begun a treaty process or engaged in comprehensive land settlement deals'.[187] Across Australia, the contentious question of how Aboriginal and Torres Strait Islander sovereign polities with the authority to negotiate treaties will be identified is yet to be finally resolved. For the reasons described above in relation to tension between the ALRA and NTA, it is anticipated that designing a process to respect the interests of all Aboriginal and Torres Strait Islander people in NSW will be complex and fraught. While early work is underway, with NSW Government undertaking a year-long consultation process, the Premier has suggested that the failure of the Voice Referendum may impact treaty timelines.[188]

Queensland

Key (historical) policy developments

- Land

Following 'violent opposition to land rights',[189] Queensland experienced a significant period of legislative change relating to Aboriginal and Torres Strait Islander peoples from the 1980s

[181] According to the NSW ALC, more than 38,000 claims have not been fully determined.
[182] NSW ALC, *Guide for Local Aboriginal Land Councils: Aboriginal Land Rights Amendment Act 2022* (Parramatta: NSW ALC, 2022), 8, https://alc.org.au/wp-content/uploads/2023/02/NSWALC_ALRA-Amendments_Web.pdf.
[183] NSW ALC, *Guide for Local Aboriginal Land Councils*, 11.
[184] NSW ALC, *Guide for Local Aboriginal Land Councils*, 5.
[185] The amendments had been supported by the NSW ALC.
[186] Aboriginal Affairs NSW, *AANSW Strategic Plan 2023-2027* (NSW Government), 16, https://www.aboriginalaffairs.nsw.gov.au/media/website_pages/AANSW-Strategic-Plan-2023_2027.pdf.
[187] Tamsin Rose, 'Chris Minns open to a NSW voice to parliament regardless of referral referendum outcome', *The Guardian,* 16 September 2023, https://www.theguardian.com/australia-news/2023/sep/16/chris-minns-open-to-a-nsw-voice-to-parliament-regardless-of-federal-referendum-outcome.
[188] Rose, 'Chris Minns open'.
[189] Fred Chaney, 'The Indigenous policy experience 1960 to 2012', *in Better Indigenous Policies: The Role of Evaluation*, (Canberra: Productivity Commission 2013), 55, https://www.pc.gov.au/research/supporting/better-indigenous-policies/05-better-indigenous-policies-chapter3.pdf.

onwards. Legislative change included, for example, the *Aboriginal and Torres Strait Islander (Queensland Reserves and Communities Self-Management) Act 1978* and the *Local Government (Aboriginal Lands) Act 1978*, which provided some communities (e.g. Auurukun and Mornington Island) with some local government self-management status; the *Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982*, which enabled the Queensland Government to grant land in trust to communities; the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984*; and *Aboriginal Land Act 1991* and *Torres Strait Islander Act 1991*.[190] Since 2015, some new rules were legislated enabling communities to choose to convert some of their 'communal lands to freehold', providing different rights. [191]

- Heritage

The *Aboriginal Cultural Heritage Act 2003* marked a significant development for heritage controls in Queensland. Rather than 'continuing the centralised, government controlled, heritage management process endemic throughout Australia, the Act established Aboriginal parties as cultural heritage experts within their traditional country'.[192] Thus, the Act 'returned statutory authority to Aboriginal people for the management of their cultural heritage', which 'has resulted in mostly positive outcomes for Aboriginal people, heritage and project delivery in Queensland'.[193] The Act provides for Cultural Heritage Management Plans (CHMP), which include agreements between Traditional Owners and 'land users'. Where a CHMP is required, activities on relevant land cannot proceed if one is not agreed.[194]

Recent and current policy initiatives

- Treaty

In 2019, the Queensland Government signed the 'Tracks to Treaty' accord, which 'seeks to give effect to the commitment to a reframed relationship with First Nations Queenslanders'.[195] In line with this, the *Path to Treaty Act* was passed in 2023. The legislation was co-designed with the Interim Truth and Treaty Body, and provided for a:

- First Nations Treaty Institute to support Aboriginal and Torres Strait Islander peoples to prepare for treaty negotiations; and a
- Truth-telling and Healing Inquiry to hear and record the historical and ongoing impacts of colonisation on Aboriginal and Torres Strait Islander Queenslanders.

Upcoming commitments include establishing the Truth-Telling and Healing Inquiry and the First Nations Treaty Institute. The Inquiry is slated to be held for 3 years, with the possibility of extension.

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[190] For an overview, see Kathy Frankland, 'A Brief History of Government Administration of Aboriginal and Torres Strait Islander Peoples in Queensland', in *Records Guide Volume 1: A Guide to Queensland Government Records Relating to Aboriginal and Torres Strait Islander People* (Queensland State Archives and Department of Family Services and Aboriginal and Islander Affairs, 1994), https://www.qld.gov.au/__data/assets/pdf_file/0034/429937/brief-history-aboriginal-islanders-qld.pdf.
[191] Queensland Productivity Commission, *Service Delivery in Remote and Discrete Aboriginal and Torres Strait Islander Communities* (Brisbane: Queensland Productivity Commission, 2017), 14, https://s3.treasury.qld.gov.au/files/Service-delivery-Final-Report.pdf.
[192] Mark O'Neil, '"A completely new approach" to Indigenous Cultural Heritage: Evaluating the Queensland Aboriginal Cultural Heritage Act', *International Indigenous Policy Journal* 9:1 (2018): 1.
[193] O'Neil, '"A completely new approach"', 1.
[194] Environmental Defenders Office, 'Cultural Heritage Management in Queensland', factsheet, 2021, https://www.edo.org.au/wp-content/uploads/2021/03/Cultural-Heritage-Protection-in-Queensland.pdf.
[195] Queensland Government, *Queensland Government Response to the Treaty Advancement Committee Report* (Brisbane: Queensland Government, 2018), 1, https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/work/atsip/reform-tracks-treaty/path-treaty/ptt-response-tac-report.pdf.

- Local Thriving Communities

Alongside *Path to Treaty*, the Local Thriving Communities (LTC) policy is intended to operate in accordance with the 'reframed' relationship between the Queensland Government and Aboriginal and Torres Strait Islander peoples. It is a 'long-term', co-designed approach to place-based decision-making in order to 'better meet the needs of each community', [196] and is aligned with the Queensland Productivity Commission 2017 *Inquiry into Service Delivery in Remote and Discrete Aboriginal and Torres Strait Islander Communities*. A key component of LTC includes the establishment of independent local decision-making bodies. The current goal is that by the end of 2024, such bodies would be operational, 'sharing decisions with government about the design, delivery, and effectiveness of Queensland Government-funded services in remote and discrete communities'.[197] It is unclear how such bodies will interact with PBCs or other relevant bodies that are currently utilised by First Nations for their sovereignty work.

- Heritage

A review of the *Aboriginal Cultural Heritage Act 2003* is currently underway.[198] Proposals being considered by the Queensland Government include establishing a First Nations-led entity to 'work with existing or future local Aboriginal and Torres Strait Islander groups who manage cultural heritage matters within their respective areas', or to create an independent First Nations decision-making entity to 'explore the most culturally appropriate approaches for recognising historical connection to an area for the purposes of cultural heritage management'.[199]

The Queensland *Human Rights Act 2019* also has particular protections relating to Aboriginal peoples.[200] Wray-Jones and Bell-James argue that the 'environmental right' in the Act 'may provide significant protection' for Aboriginal people. This extra right is not included in comparable Victorian and Act legislation, but is yet to be fully tested in the Queensland legal system.[201]

Western Australia

Key (historical) policy developments

- Land

Prior to the 1993 *Native Title Act*, which the WA Government strongly opposed, there was no statutory provision for land claims in Western Australia. The 1972 *Aboriginal Affairs Planning Authority Act* saw the establishment of Aboriginal Lands Trust and Aboriginal Advisory Council. The Trust now holds around 24 million hectares of 'reserved land',[202] however title remained with the Crown.[203] As at 2019, this includes 155 regional and remote Aboriginal

[196] Queensland Government, *Local Thriving Communities Action Plan: Building capacity through existing service delivery mechanisms* (Brisbane: Queensland Government, 2022), 6, https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/work/atsip/reform-tracks-treaty/local-thriving-communities/ltc-action-plan.pdf.
[197] Queensland Government, *Local Thriving Communities Action Plan*, 9.
[198] Queensland Government, 'Reshaping Queensland's Cultural Heritage Law's, https://qchub.dsdsatsip.qld.gov.au/cultural-heritage-acts-review/news/summary-of-proposed-changes.
[199] Queensland Government, 'Reshaping Queensland's Cultural Heritage Law's'.
[200] Queensland Human Rights Commission, *Human Rights and Discrimination: A Guide for Mob* (Brisbane: Queensland Human Rights Commission, 2020), https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0019/26722/QHRC_guide_humanrightsanddiscriminaton_aguideforourmob.pdf.
[201] Nick Wray-Jones and Justine Bell-James, Justine, 'The Promises and Potential of Queensland's Human Rights Act for Indigenous Peoples: Interpreting the "Environmental Right",' *Monash University Law Review* 49:1 (2023): 1.
[202] As at 2019. ATNS, 'Land Rights Legislation', https://www.atns.net.au/land-rights-legislation-1.
[203] Australian Law Reform Commission, 'Land rights and native title in the states and territories', *Connection to Country: Review of the Native Title Act 1993 (Cth)*, ALRC Report 126 (Sydney: Commonwealth of Australia), 2015),

communities and 28 ‘town-based reserves’,[204] who are considered leaseholders from the Trust.[205]

- Heritage

The *Aboriginal Heritage Act 1972* was legislated to ‘protect and manage’ Aboriginal sites of significance by ‘requiring approval for activities that may impact or cause harm’.[206] However, the onus is on land users, as ‘no approval is required’ if there is ‘no risk of harm’.[207] In the wake of the destruction of Juukan Gorge, the *Aboriginal Cultural Heritage Act 2021* was introduced. It provided for the creation of new Local Aboriginal Cultural Heritage Services, and contained much broader understanding of ‘heritage’ than the 1972 legislation.[208] The amended Act may have provided new opportunities and potentials for expansion of authority, however following significant public (settler) backlash, the law was repealed within 5 weeks of passing. The 1972 Act, with some amendments, is now again in force. As put by Lynch and Doyle, reverting to the 1972 Act ensures there is a ‘significant gap between domestic cultural heritage protection laws in WA and best practice cultural heritage standards’.[209]

Recent and current policy initiatives

- Native title settlements

The 2021 South West Native Title Settlement saw the extinguishment of the Noongar Nation’s native title rights in exchange for a land and monetary package, including the transfer of service delivery responsibilities from the Western Australian (WA) Government, totally over $1 billion and covering around 200,000 square kilometres of Noongar Country. Noongar Traditional Owners are also now recognised under settler law through *Noongar Recognition Act 2016*. The Settlement offers new challenges and new opportunities for the nation.[210] Its passage was not ‘smooth’, and was not ‘unanimously’ agreed by the nation.[211] While some academics have argued the Settlement represents ‘Australia’s First Treaty’,[212] the longer-term practical effects are unclear. In particular, we do not presume the transfer of service delivery responsibilities to Noongar people will necessarily increase Noongar authority and self-determination. Regardless, the Noongar Boodja Trust and expected rise of Noongar corporations may offer opportunities for the nation to undertake long-term strategic planning and economic development work. The South West Aboriginal Land and Sea Council has also held a long-term interest in INB.

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https://www.alrc.gov.au/publication/connection-to-country-review-of-the-native-title-act-1993-cth-alrc-report-126/3-context-for-reform/land-rights-and-native-title-in-the-states-and-territories/.

[204] The *Aboriginal Communities Act* 1979 also legislated that ‘Aboriginal communities defined under AAPA given authority to control their own affairs on community land.’ See SWALSC, ‘List of WA Legislation’, https://www.noongarculture.org.au/list-of-wa-legislation/.

[205] ATNS, ‘Land Rights Legislation’.

[206] WA Government, ‘Aboriginal Heritage Act in Western Australia’, https://www.wa.gov.au/organisation/department-of-planning-lands-and-heritage/aboriginal-heritage-act-western-australia#:~:text=The%20Act%20recognises%20that%20some,that%20may%20harm%20Aboriginal%20heritage.

[207] WA Government, ‘Aboriginal Heritage Act’.

[208] Eve Lynch et al, ‘1972 is calling: repeal of the Aboriginal Cultural Heritage Act 2021 (WA)’, *Allens*, 16 August 2023, https://www.allens.com.au/insights-news/insights/2023/08/Repeal-of-the-Aboriginal-Cultural-Heritage-Act-2021/.

[209] Lynch et al, ‘1972 is calling’.

[210] The Settlement has been controversial and divisive within Nyungar nation. Some prominent Nyungar individuals rejected potential ILUAs and were taken to the High Court, while significant debate occurred across the nation in community meetings. See Hannah McGlade, ‘The McGlade Case: A Noongar History of Land, Social Justice and Activism’, *Australian Feminist Law Journal*, 43:2 (2017): 185-210.

[211] ATNS, ‘Comprehensive Settlements’, https://www.atns.net.au/comprehensive-settlements.

[212] For example, Harry Hobbs and George Williams, ‘The Noongar Settlement: Australia’s First Treaty’, *Sydney Law Review* 40:1 (2018): https://ssrn.com/abstract=3158856.

The 2020 Yamatji settlement consists of a negotiated Indigenous Land Use Agreement between the Yamatji Nation[213] and the WA Government. It resolves native claims in the Midwest region in exchange for a package of $442 million over 15 years; the transfer of approximately 14,500 hectares of land; co-management agreements over 134,000 hectares of land held in reserve; and rental income from mining activities for 10 years.[214]

- Aboriginal Empowerment Strategy

The WA Government's 2021-2029 strategy for Aboriginal Affairs between aims that 'Aboriginal people, families and communities are empowered to live good lives and choose their own futures from a secure foundation'.[215] The strategy aligns with the Government's commitment under the Partnership Agreement on Closing the Gap. One component includes amending the *Aboriginal Affairs Planning Authority Act 1972* to divest land from the Aboriginal Land Trust. The aim is to 'remove the legislative barriers to divestment will maximise opportunities for direct Aboriginal land ownership and management, economic activity and improved outcomes for Aboriginal communities'.[216] Work around these amendments is currently underway.

Tasmania

Key (historical) policy developments

- Land

The *Aboriginal Lands Act 1995* provides for the return of Aboriginal land of cultural or historic significance and established the Aboriginal Land Council of Tasmania (ALCT). Aligning with ongoing myths about Aboriginal people in Tasmania, the Tasmanian Governments assert that the Act was passed 'to facilitate the return of Crown land to Tasmania's traditional owners in a legal environment where, due to Tasmania's unique and tragic history, native title is unable to be established'.[217] Land is held 'in perpetuity' by the ALCT for 'all Tasmanian Aboriginal people.'[218] Proposed amendments to the Act are discussed below.

Recent and current policy initiatives

- Truth Telling and Treaty

The former Tasmanian Premier Peter Gutwein committed to a truth-telling and treaty process.[219] The recommended 'pathway' includes the creation of a Truth-Telling Commission; treaty and truth-telling advancement legislation; and the creation of Aboriginal Protected Areas with 'local management and access'.[220] The 2021 *Pathway to Truth-Telling and Treaty* notes the 'difficulty

[213] The settlement amalgamated and concluded four separate native title claims over 48,000km2 of land and waters in the Geraldton region, including the Southern Yamatji, Hutt River, Widi Mob and Mullewa Wadjari.
[214] Government of Western Australia, 'Agreement Overview: Yamatji Nation Indigenous Land Use Agreement', https://www.wa.gov.au/system/files/2020-03/07.Agreement%20Overview_final.pdf.
[215] Government of Western Australia, *The Aboriginal Empowerment Strategy: Western Australia 2021-2029* (Perth: Government of Western Australia), 6.
[216] Government of Western Australia, 'Aboriginal Affairs Planning Authority Act 1972', https://www.wa.gov.au/government/document-collections/aboriginal-affairs-planning-authority-act-1972.
[217] Department of Natural Resources and Environment Tasmania, *An improved model for returning land to Tasmania's Aboriginal people*: *Consultation Paper on Proposals for Change* (Hobart: State of Tasmania, 2022), 6, https://www.aboriginalheritage.tas.gov.au/Documents/Returning%20Land%20to%20Tasmanias%20Aboriginal%20People%20-%20Consultation%20Paper%20on%20Proposals%20For%20Change.pdf.
[218] Department of Natural Resources and Environment Tasmania, *An improved model for returning land*, 6.
[219] Constitutional recognition of Tasmanian Aboriginal people occurred in 2016.
[220] Kate Warner et al., *Pathway to Truth-Telling and Treaty: Report to Premier Peter Gutwein* (Hobart: Department of Premier and Cabinet, 2021), 11,

of determining who should negotiate treaty on the Aboriginal side (they must be representatives freely chosen by Aboriginal people through their own representative structures)'.[221] No significant progress has been made since the release of this report. According to its website, the Tasmanian Government is 'working with Aboriginal people on options for the next steps.'[222]

- Land

Tasmanian Aboriginal people have been advocating for changes to the *Aboriginal Lands Act 1995* for some time. Key concerns are around the: lack of public land returned to Aboriginal ownership since 2005; continued involvement of the Minister; that waters are not covered in the Act; and particular aspects of the elections and functions of the ALCT. [223] There is now legislation making its way through the Tasmanian Parliament to amend the Act, in what the Government has termed a 'process for improving the model for returning land to the Aboriginal people of Tasmania'.[224] However, the *Aboriginal Lands Amendment Bill 2023* is strongly opposed by some Tasmanian Aboriginal People, including the Tasmanian Aboriginal Centre. [225]

- Heritage

The *Aboriginal Heritage Act 1975* establishes penalties for the damaging of Aboriginal 'relics' (including objects, places and sites) administered by the relevant Minister. As put by the Tasmanian Government, the Act 'remains amongst the most outdated in Australia'.[226] It is considered a matter of 'urgency' that this be reformed,[227] particularly in relation to the conception of Aboriginal heritage as 'relics', and the ongoing lack of engagement with Traditional Owners.[228] Analysis of the Act occurred over 2019-2021, with the Tasmanian Government affirming its commitment to repeal the Act and replace with more appropriate legislation in December 2023.[229]

Australian Capital Territory

Key (historical) policy developments

The Australian Capital Territory (ACT) does not have a comparable policy history regarding Aboriginal people as other settler jurisdictions, with 'Indigenous affairs' first discussed by the Legislative Assembly in 1989.[230] Key policy moments have included the 2001 joint management agreement regarding Namadgi National Park between the ACT Government and

https://www.dpac.tas.gov.au/__data/assets/pdf_file/0029/228881/Pathway_to_Truth-Telling_and_Treaty_251121.pdf.

[221] Warner et al., *Pathway to Truth-Telling and Treaty*, 9.

[222] Tasmanian Government, 'Truth Telling and Treaty', https://www.dpac.tas.gov.au/divisions/cpp/aboriginal-partnerships/truth-telling-and-treaty.

[223] Warner et al., *Pathway to Truth-Telling and Treaty*, 11.

[224] Tasmanian Government, 'Amending the Aboriginal Lands Act', https://www.aboriginalheritage.tas.gov.au/legislation/aboriginal-legislative-reform/aboriginal-lands-act.

[225] Callan Morse, 'Tasmanian Aboriginal community rally in opposition to proposed Aboriginal Lands Act amendments', *National Indigenous Times*, 15 September 2023, https://nit.com.au/15-09-2023/7706/tasmanian-aboriginal-community-rally-in-opposition-to-proposed-aboriginal-lands-act-amendments.

[226] Department of Primary Industries, *Review of the Aboriginal Heritage Act*: *Review Report 2021* (Hobart: Tasmanian Government, 2021), 4, https://www.parliament.tas.gov.au/house-of-assembly/tabled-papers/2021/HATP9.1_01_07_2021.pdf

[227] Warner et al., *Pathway to Truth-Telling and Treaty*, 12.

[228] For example, see Tasmanian Aboriginal Centre, 'The Aboriginal Heritage Protection Bill: Why it should be defeated immediately', https://tacinc.com.au/aboriginal-heritage-protection-bill-why-it-should-be-defeated-immediately/ The TAC is strongly against the proposed bill.

[229] Premier of Tasmania, 'New Aboriginal Heritage Legislation updated', media release, 18 December 2023, https://www.premier.tas.gov.au/site_resources_2015/additional_releases/new-aboriginal-heritage-legislation-updated.

[230] Legislative Assembly for the Australian Capital Territory, 'First Australians and the Assembly', https://www.parliament.act.gov.au/visit-and-learn/resources/factsheets/first-australians-and-the-assembly.

the Ngunnawal People.[231] The *Aboriginal and Torres Strait Islander Elected Body Act 2008* also established a 7-member elected representative Aboriginal body to be a 'voice to the ACT Government'.[232] Currently, the Body is supporting the ACT Government in regards to the *ACT Aboriginal and Torres Strait Islander Agreement 2019–2028*. It is a member of the Coalition of Peaks.

Recent and current policy initiatives

- *ACT Aboriginal and Torres Strait Islander Agreement 2019-2028*

The ACT Government's current strategic plan, co-designed with the Aboriginal and Torres Strait Islander Elected Body and aligned with the ACT Government's commitments under the new Agreement on Closing the Gap focuses on four core areas (Children and young people; cultural integrity; inclusive community; and community leadership).[233] Agreed priorities include, for example, strengthening 'Traditional Custodians rights and responsibilities to care for Country and to maintain their distinctive cultural, spiritual, physical and economic relationship with their land and waters will be embedded in legislation and formal agreements'. Related goals include that 'access and use of natural and cultural resources for Aboriginal and Torres Strait Islander peoples will be available and controlled by Traditional Custodians' and that 'the ACT will establish a co-design process to work towards formal co-management of lands and waters with the Traditional Custodians'.[234]

As a result of advocacy from the Aboriginal and Torres Strait Islander Elected Body, the ACT Government has agreed an Outcomes Framework to measure success against the Agreement. This was finalised in 2021.[235] The first Impact Statement reports 'measurable progress' in 2021 some key areas (including, for example, the establishment of two new ACCOs).[236] No Impact Statement has been released for 2022 or 2023, meaning it is difficult to discern whether other areas have seen progress (e.g. Joint Management Agreements with Ngunnawal Traditional Owners regarding decision-making on parks and reserves in the ACT). However, the espoused goals are meaningful and, if fulfilled, could see significant shifts in the ACT policy landscape for Aboriginal peoples.

Northern Territory

Key (historical) policy developments

- ALRA

The *Aboriginal Land Rights (Northern Territory) Act 1976* is a piece of Federal legislation providing for inalienable freehold rights to land for Traditional Owners in the Northern Territory. To this day, it is considered the most significant legislation relating to land rights in Australia. The ALRA establishes the four Northern Territory (NT) Land Councils (Central, Northern, Tiwi and Anindilyakwa) which enable a significant form of organising within and

[231] Known as the Agreement Between the Australian Capital Territory and then-ACT Native Title Claim Groups. Australian Law Reform Commission, 'Land rights and native title'.
[232] ATSIEB, 'ACT Aboriginal and Torres Strait Islander Elected Body (ATSIEB)', https://atsieb.com.au/.
[233] The Agreement builds the previous Agreement (2015—2018), which focused the ACT Government 'being accountable to ACT Aboriginal and Torres Strait Islander communities'. See ACT Government and ATSIEB, *ACT Aboriginal and Torres Strait Islander Agreement 2019-2028* (Canberra: ACT Government, 2019), https://www.communityservices.act.gov.au/__data/assets/pdf_file/0015/1323132/ACT-Aboriginal-and-Torres-Strait-Islander-Agreement-2019-2028.pdf.
[234] ACT Government and ATSIEB, *ACT Aboriginal and Torres Strait Islander Agreement 2019-2028*, Phase Two Focus Area Action Plan.
[235] ACT Government, *ACT Impact Statement 2021* (Canberra: ACT Government, 2022), 2, https://www.communityservices.act.gov.au/__data/assets/pdf_file/0005/1987808/ACT-Impact-Statement-2021.pdf.
[236] ACT Government, *ACT Impact Statement 2021*, 3.

between Aboriginal nations in the Territory. Largely because of the ALRA, jurisdiction regarding 'Aboriginal Affairs' is overlapping between the Federal and NT Government in more ways than other jurisdictions. Through the ALRA, the Federal Government retains a significant policy interest on ALRA land, which covers around 50% of the total NT. [237] The ALRA was amended in 2022 to establish the NT Aboriginal Investment Corporation, which will utilise funds from the Aboriginals Benefit Account to invest around $500 million for Aboriginal people in the NT.[238] The NTAIC is currently creating their first strategic plan, which could see significant changes in the NT policy landscape and a new economic base that builds on the power of the Land Councils.

Recent and current policy initiatives

- Treaty

The NT Government has committed 'to undertaking discussions on developing a Treaty (or Treaties) with First Nations peoples'. In 2018, the NT Government and four NT Land Councils signed the Barunga Agreement committing to treaty discussions. This led to the establishment of the Treaty Commission, which operated from 2019 to June 2022 and delivered a series of reports on the possibilities for treaty-making. [239] Progress has stalled since 2022, with the NT Government 'reviving' work towards treaty in early 2024.[240]

- Local Decision Making

As part of the *Aboriginal Affairs Strategy 2019-2029* (discussed below), the NT Government has implemented a 'policy framework' of Local Decision Making (LDM). LDM envisages a 'new working relationship' between Aboriginal communities and government, and 'sets out a pathway for communities to have control over service delivery and programs'. [241] As at June 2022, seven LDM Agreements had been made with First Nations communities (for example, with the Jawoyn Association). The LDM strategy has been well received, overall, by the communities involved (discussed further in Part 5). [242]

- Aboriginal Affairs Strategy 2019-2029

The NT Government's overarching policy strategy for 2019-2029 covers 10 focus areas and incorporates aspirations around Treaty and LDM. It is underlined by three principles of Healing, Respect and Engagement. Like other jurisdictions, a key espoused commitment is to 'Establish and maintain respectful place-based engagement with Aboriginal Territorians in decision-

[237] For an overview of the ALRA, including its historical introduction and effects on First Nations in the NT since, see Jon Altman, 'Self-Determination's Land Rights', in *Indigenous Self-Determination in Australia*, 227-246.
[238] The Board of the NTAIC is comprised by a majority of NT Land Council members. The intention of the NTAIC is for better use of, and Aboriginal control of, royalty mining equivalents from mining on Aboriginal land collected in the ABA. Historically these funds have been underutilised.
[239] Northern Territory Government, 'Treaty', https://aboriginalaffairs.nt.gov.au/our-priorities/treaty.
[240] Matt Garrick, 'NT Government to revive plans for treaty, six years after it was first promised by Territory Labor', *ABC,* 19 January 2024, https://www.abc.net.au/news/2024-01-19/nt-government-revive-plans-treaty-voice-referendum/103364638.
[241] Northern Territory Government, *Everyone Together: Aboriginal Affairs Strategy Progress Report 2022* (Darwin: Northern Territory Government, 2022), 12, https://aboriginalaffairs.nt.gov.au/__data/assets/pdf_file/0005/1182218/aboriginal-affairs-strategy-progress-report-2022.pdf.
[242] Michaela Spencer et al. *NTG Local Decision Making: Ground Up Monitoring and Evaluation - Final Report* (Darwin: Charles Darwin University, 2022), 9.

making'.[243] Also similar to other jurisdictions, progress on targets demonstrates 'mixed results'.[244]

South Australia

Key (historical) policy developments

- Land

The *Aboriginal Lands Trust Act 1966* was the first legislation related to Aboriginal land rights in Australia. It established the Aboriginal Lands Trust (ALT) to hold titles of existing Aboriginal Reserves on behalf of Aboriginal people in South Australia. Under the Act, land is then leased to Aboriginal communities. According to the ALT, since 1966, it has 'provided land management advice, advocacy, capacity building and financial support to Aboriginal Communities', holding 65 properties encompassing approximately 500,000 hectares.[245] The *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* was later established 'to provide for and subsequently acknowledge Anangu ownership of the lands', also creating the APY body corporate.[246]

Recent and current policy initiatives

- Aboriginal Regional Authorities

In 2009, the State of South Australia (SA) entered into a legally binding contract law agreement with the Ngarrindjeri Nation, known as a Kungun Ngarrindjeri Yunnan (Listen to Ngarrindjeri Speaking) agreement.[247] This similarly acknowledged ownership; established a 'consultation and negotiation framework' and was a precursor to treaty negotiations. The Agreement was signed with the Ngarrindjeri Regional Authority (NRA), the peak decision-making body for the Ngarrindjeri Nation, which functioned in an explicitly hybrid space, able to 'speak to' and be 'seen' by both Ngarrindjeri citizens and settler governments. Due to success of the NRA and its interactions with the SA Government, in 2016, the SA Government established an Aboriginal Regional Authority Policy, and was considering introducing legislation to 'give the authorities a legal backing'.[248] ARAs included the Far West Coast Aboriginal Corporation, Ngarrindjeri Regional Authority and Adnyamathanha Traditional Lands Association. [249]

- Treaty

Following the ARA policy, SA then became the 'first State in Australia to commence Treaty negotiations with Aboriginal Nations'.[250] The Ngarrindjeri Nation led the push for a treaty in South Australia and was the first nation in Australia to begin formal negotiations with the Crown. This included the development of a full draft treaty document and a formal agreement by the Crown stating this it 'desires' to enter into a treaty with the Ngarrindjeri Nation. A

[243] Northern Territory Government, *Everyone Together: Aboriginal Affairs Strategy 2019-2029* (Darwin: Northern Territory Government, 2019), 6.
[244] Northern Territory Government, *Everyone Together*, 9.
[245] Aboriginal Lands Trust, 'Strategy', https://alt.sa.gov.au/wp/index.php/strategy/.
[246] Section 4A (1) (a).
[247] Government of South Australia, 'First Nations Agreements and Protocols', https://www.environment.sa.gov.au/about-us/first-nations-partnerships/agreements-and-protocols#:~:text=Narungga%20Buthera%20Agreement&text=The%20agreement%20sets%20out%20to,cultural%2C%20social%20and%20economic%20wellbeing.
[248] Nicola Gage, 'NAIDOC Week: Aboriginal groups to be given more say over South Australian policy decisions', *ABC*, 4 July 2016, https://www.abc.net.au/news/2016-07-04/aboriginal-groups-given-more-say-over-sa-policy-decisions/7566808.
[249] 'SA Treaty talks underway', *Aboriginal Way* 66 (2017): 1.
[250] Government of South Australia, 'Kyam Maher MLC', https://www.premier.sa.gov.au/the-team/kyam-maher-mlc.

Treaty Commissioner was appointed in 2017, leading to initial discussions with three Aboriginal nations. In 2018, South Australia signed the *Buthera Agreement* with the Narungga Nation (through the Narungga Nation Aboriginal Corporation), which acknowledged Narungga ownership and agreed to negotiations towards co-management of Dhilba Guuranda-Innes National Park[251] and the drafting of a Traditional Fishing Strategy and language programs.[252] South Australia also agreed to consider divesting Narungga land from the ALT directly to the nation.[253] However, following the 2018 state election, treaty negotiations stalled. Little work has been undertaken by the SA Government since this time.

- Voice to Parliament

In 2022, the newly elected Labor Government committed to a state-based Voice, Treaty and Truth-telling process.[254] Despite the failure of the Voice Referendum, South Australia passed the *First Nations Voice Act 2023*. The Voice will include 6 local First Nations Voices (that has seen the state divided into 6 corresponding regions), with 2 elected members of each local Voice comprising the state Voice. [255] Elections for the Voice are slated to be held in March 2024. The proposed regions do not correspond to Aboriginal nation boundaries, and we aware of at least one nation opposing the legislated structure.

Victoria

Key (historical) policy developments

- Heritage

The Victorian *Aboriginal Heritage Act 2006* aims to 'provide for the protection of Aboriginal cultural heritage'.[256] It establishes the Victorian Aboriginal Heritage Council to 'provide a state-wide voice' and establishes Registered Aboriginal Parties (RAPs) to enable Traditional Owners 'to be involved' in decision-making.[257] Currently 11 RAPs cover approximately 75% of Victorian landmass. The Act also provides for the creation of CHMPs, which assess potential impact and provide steps to manage impact. [258]

- TOSA

Alongside the Victorian *Aboriginal Heritage Act 2006* and through the *Native Title Act*, Victoria established the *Traditional Owner Settlement Act 2010* to 'recognise' Traditional Owners and in the Victorian legal system and provide land rights while resolving native title claims.[259] This was a response to the relative lack of native title determinations in Victoria.[260] Agreements made under the TOSA may provide particular rights and land use agreements, and include monetary compensation. The TOSA is significant in Australia. The Dja Dja Wurrung entered into an agreement under the TOSA in 2013. Benefits included the handback of

[251] Government of South Australia, 'First Nations Agreements and Protocols'.
[252] Government of South Australia, 'First Nations Agreements and Protocols'.
[253] ATNS, 'Buthera Agreement', https://database.atns.net.au/agreement.asp?EntityID=8337.
[254] ANTaR, *Treaty in South Australia 2022*, 5.
[255] Government of South Australia, 'Local First Nations Voices', https://www.agd.sa.gov.au/first-nations-voice/local-first-nations-voices.
[256] First Peoples – State Relations, 'Aboriginal Heritage Legislation', https://www.firstpeoplesrelations.vic.gov.au/aboriginal-heritage-legislation.
[257] To, apply to become a RAP, groups must apply to the Victorian Aboriginal heritage Council, a statutory body composed of Victorian Traditional Owners established under the Heritage Act.
[258] Alongside the *Aboriginal Heritage Regulations 2018*.
[259] ATNS, 'Comprehensive Settlements'.
[260] Toni Bauman et al, 'Traditional Owner Agreement-Making in Victoria: The Right People For Country Program', *Australian Indigenous Law Review* 18:1 (2014): 78.

significant parcels of land and provides for some land rights usage in other areas comparable to native title rights. [261]

Recent and current policy initiatives

- Right People for Country

Right People for Country (RPC) is a Traditional Owner-led policy to enable people to come together to make agreements under the TOSA, become a RAP or pursue native title.[262] RPC provides support to Traditional Owner Groups to 'prepare for and make agreements' 'between' and 'within' groups around membership, representation, and the boundaries of Country. [263] This can include providing support for activities such as facilitation; training; mapping of Country; and resources to hold meetings etc.[264] It aims to ensure that it is not 'governments and courts making decisions' for Traditional Owners about their Country and identity. [265]

Connected to both RPFC and the broader program of treaty readiness, in 2019 Victorian Government provided a funding pool for 'formally recognised' Traditional Owner Groups. Activities will be undertaken until June 2024.[266] The package includes streams of 'Foundation', 'Formation' and 'Nation' essentially for Traditional Owners to 'prepare for future treaty negotiations' and come together in ways formally recognised by the Victorian Government.[267] This type of policymaking is both unique and highly significant (discussed further in Part 5).

- Treaty

The Treaty Advancement Committee was created in 2018 to establish the First Peoples' Assembly of Victoria. The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* passed the first treaty-related legislation in Australia, committing the Victorian Government to a treaty process.[268] To lead towards treaty negotiations, the Assembly and Victorian Government agreed to a Treaty Negotiation Framework and Self-Determination Fund. The Framework sets out 'ground rules for negotiation treaties to ensures a fair Treaty process' while the Self-Determination Fund is a resource to enable 'equitable treaty negotiations'.[269] Its explicit purpose is to enable 'First Peoples to have equal standing with the State in Treaty negotiations.'[270] As we discuss in Part 5, this may provide particular opportunities for Traditional Owners, as the funding can be used to become a Traditional Owner group as a RAP, NTRB or under the TOSA, whilst further enabling groups to 'form First Peoples' Treaty Delegations'.[271] An independent Treaty Authority was established in June 2022 to oversee negotiations, and there is a view for negotiations to commence in 2024. Evidence from the Assembly suggests that both a

[261] PBC, 'Alternative Settlements', https://nativetitle.org.au/learn/native-title-and-pbcs/alternative-settlements.
[262] For detailed history including pilots from 2011 see Toni Bauman et al, 'Traditional Owner Agreement-Making in Victoria'.
[263] First Peoples - State Relations, 'Traditional Owner Agreement Making', https://www.firstpeoplesrelations.vic.gov.au/right-people-country-program#traditional-owner-agreement-making.
[264] First Peoples - State Relations, 'Traditional Owner Agreement Making'.
[265] First Peoples - State Relations, 'Traditional Owner Agreement Making'.
[266] Support outside of the three streams is provided for Traditional Owner Groups that are not recognised.
[267] First Peoples – State Relations, 'Traditional Owner Nation-building and Treaty Readiness Support', https://www.firstpeoplesrelations.vic.gov.au/nation-building.
[268] ANTaR, 'The Treaty Process in Victoria', https://antarvictoria.org.au/treaty-process.
[269] First Peoples – State Relations, 'Establishment of the Treaty Negotiation Framework and Self-Determination Fund', https://www.firstpeoplesrelations.vic.gov.au/establishment-treaty-negotiation-framework-and-self-determination-fund.
[270] First Peoples Assembly of Victoria and the State of Victoria, *Self-Determination Fund Agreement* (Melbourne: Victorian Government, 2022), 8, https://www.firstpeoplesrelations.vic.gov.au/sites/default/files/2022-10/Self-Determination-Fund-Agreement.pdf.
[271] First Peoples Assembly of Victoria and the State of Victoria, *Self-Determination Fund Agreement*, 7.

state-wide and individual Traditional Owner treaties are likely.[272] Notably, in early 2024, the Victorian Opposition withdrew their support for treaty processes.

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

4 Hybrid Jurisdiction Case Studies

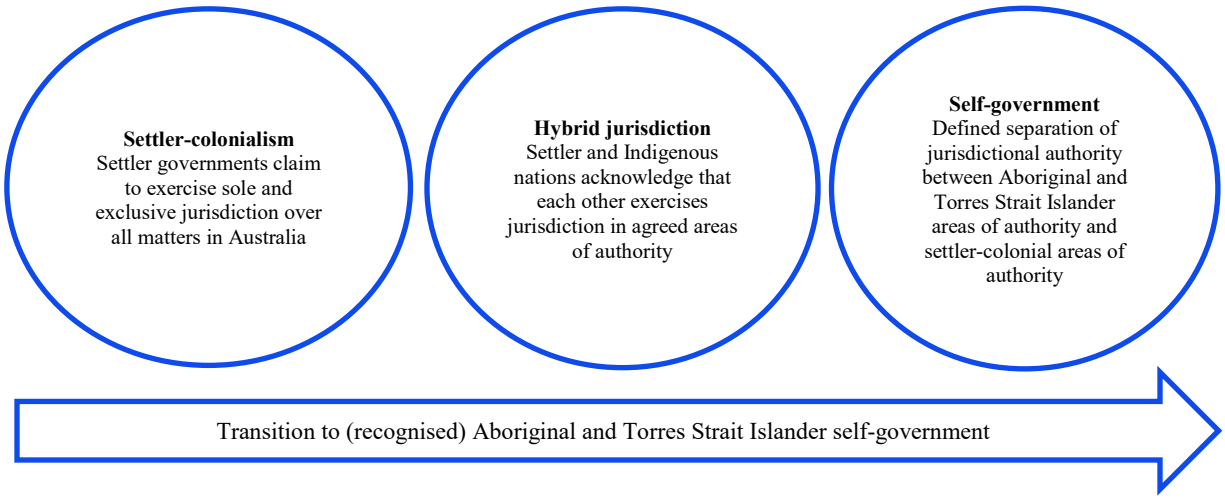
What is hybrid jurisdiction?

As we describe in Part 3, the nature of Australian settler-colonialism means that the concept of discrete, self-governing First Nations is foreign to Australian governments and the Australian population at large. Further, and especially in light of the 2023 Referendum failure, we maintain that Aboriginal and Torres Strait Islander self-government as it is understood in North America is unlikely to garner broad public support (at least until initial settler fears are allayed).

That is, unlike the United States and Canada, there is no delineation in Australia between First Nations and settler jurisdiction so far as settler governments are concerned. Settler governments claim to hold at least some form of jurisdiction over all matters that affect Aboriginal and Torres Strait Islander Peoples and people. Thus, the Project Directors hypothesise that a stepwise approach with incrementally expanding jurisdiction will be necessary in order for settler governments to 'see' and engage with Indigenous self-government. In other words, transition to self-government will require a period of time where First Nations share jurisdiction with settler-colonial governments until settler governments accept that First Nations can rightfully exercise jurisdiction in their own right.

As we describe above, such engagement is already occurring in Zone 2 spaces of 'hybrid' decision-making.

Figure 3. Hybrid Jurisdiction



Some explanatory notes

- As we describe in the previous section, prior to invasion, Aboriginal and Torres Strait Islander nations had complete jurisdiction over every aspect of their existence by virtue of their sovereign status. Aboriginal and Torres Strait Islander nations in Australia have never ceded their sovereignty and continue to assert their inherent rights as distinct, sovereign Indigenous Peoples (as understood in the United Nations Declaration of the Rights of Indigenous Peoples).
- While Aboriginal and Torres Strait Islander nations continue to assert their sovereignty and exercise their inherent rights to self-government and self-determination, settler-colonialism has adversely impacted Aboriginal and Torres Strait Islander nations' capacity to be self-governing and to exercise jurisdiction over *all* the areas of importance to nations.

Nonetheless, Aboriginal and Torres Strait Islander nations are continuing to increase jurisdictional capacity over time. Due to the ongoing nature of settler-colonialism, it is unlikely that nations will achieve the jurisdictional scope they had before invasion. Some areas of jurisdiction are, by necessity, likely to remain overlapping.

- The settler state does not 'grant' jurisdiction (although it may claim exactly that). Rather, as Aboriginal and Torres Strait Islander nations maintain and increase jurisdictional capacity over time, the settler state is forced to respond to the exercise of jurisdiction and accommodate its existence within structures and institutions. It is this space that is fundamentally 'transitioning'.
- Our interest in such 'hybrid' jurisdiction is again based on the experiences of the Project Directors and the nations with which we work. The Ngarrindjeri Nation, Gunditjmara People and the Gugu Badhun Nation have all utilised structures established under settler law (such as PBCs, or in the case of the Ngarrindjeri Nation, a regional authority), to 'identity, organise and act' as nations, expanding their authority and jurisdictional scope. In this way, these nations have already been operating in the hybrid or multi-jurisdictional space. However, due to the continued 'reality' of Australian settler-colonialism and its infringements on their collectives, these nations regardless seek to understand whether there are fruitful statutory models that will enable greater ability to undertake their own law whilst and increase their (recognised) jurisdictional authority.

Case study criteria

To identify fruitful case studies likely to be the most relevant to Aboriginal and Torres Strait Islander Peoples from the plethora of hybrid governing examples across settler-colonies, we identified a number of key criteria for inclusion and considerations for exclusion:

1. Firstly, the body or organisation is First Nations controlled (whether nominally or actually);

2. Secondly, the body or organisation must exist within an environment where settler society asserts at least some level of jurisdiction over the relevant area that is the purview of the body or organisation; and

3. Finally, the body or organisation exercises (or is seeking to exercise) both First Nations and settler jurisdiction.

While these criteria exclude a range of organisations and bodies on which fruitful analysis can be undertaken, we chose them on the basis that they represent the kinds of organisations and bodies from which a transition to First Nations self-governance is plausible. For this reason, we exclude First Nations bodies and organisations that only exercise First Nations jurisdiction (for e.g. Native Nations governments in the United States that operate through nation-controlled bureaucracy, run businesses and deliver a range of services for their respective constituencies).

For the same reasoning, we also exclude First Nations bodies and organisations that exist to primarily exercise settler-colonial jurisdiction, such as those bodies and organisations that deliver government programs and services (Zone 3 Indigenous 'sector' organisations). While we are aware of the many First Nations that use community-controlled organisations as a vehicle for self-determination and to achieve nation aspirations, for the purposes of this study, we are interested in those bodies that are recognised by nations and settler-colonial governments as exercising both forms of jurisdiction.

Lines of inquiry

The key questions explored in the case studies include:

- How is First Nations law/lore is incorporated into the authority?
- Is the authority able to create its own codes, laws or rules?
- What are the lines of accountability and authority?
- How was the authority established, and what is the role of legislation? Are there examples as to how an authority could be legislated under both settler-colonial law and a First Nation's law?

In order to ensure the case studies were applicable, the Research Directors were interested in understanding the principles that underline effective, hybrid governance mechanisms. Given the differences in jurisdictional environments in the Anglophone settler-colonies, we have not explored the minutia of existing hybrid governance systems (e.g. the number of directors on a board). Instead, we focussed on how the body or organisation came to be exercising dual jurisdiction and, in general terms, how that dual jurisdiction is exercised.

In order to best appreciate the applicability of the case studies, we briefly describe the jurisdictional environment of the relevant Anglophone settler-colonial nations from which the case studies were taken.

- **Canada**

The sovereignty of Indigenous Peoples in North America was acknowledged initially through treaties with European colonial states for trade and military alliance.[273] Particularly during the 'Encounter era' of the seventeenth and eighteenth century in north-eastern North America, European colonisers in small isolated communities surrounded by large Indigenous populations found that their very survival depended on cooperative relationships.[274] As political, military and economic equals, Indigenous nations were courted as military and trading partners, especially in the lucrative fur trade.[275] Canada continues the treaty making tradition in negotiating eleven numbered treaties were negotiated between 1871 and 1921 that opened up Canada for expansion to the north and west. Canada continues to negotiate with Indigenous Peoples through the modern treaty and self-government processes.

The Canadian Federal Government purports to hold exclusive jurisdiction over the Aboriginal Peoples within its borders. In effect, this means that provincial governments cannot make laws that specifically apply to Aboriginal people. Provincial law only applies to Aboriginal people through laws of general application (that is, laws that apply to everyone).[276] The *Indian Act* administers whether First Nations (also called Indian bands) people have 'status' as Indian; the form and jurisdiction of local First Nations governments; and the management of reserve land and communal monies but does not apply to the Métis or Inuit.

First Nations are generally governed by band councils that are chaired by an elected chief (Chief & Council). Some First Nations also have hereditary chiefs. In addition, several bands may join together to form a Tribal Council. The *Indian Act* delegates limited jurisdiction to First Nations

[273] See Robert A Williams Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (Routledge, 1999).
[274] Ibid 20ff.
[275] Ibid 21-23.
[276] Under s 91(4) of the *British North America Act* 1867 (*Constitution Act* 1867) the Parliament of Canada has exclusive authority to legislate for 'all matters' pertaining to 'Indians and Lands reserved for the Indians'. Section 88 of the *Indian Act* provides that only provincial laws of general application apply to Aboriginal people in Canada.

governments mainly in municipal or local government responsibilities. Under the *Indian Act*, Band councils may make by-laws in relation to listed jurisdictional issues.[277]

- **United States**

Native Nations within the boundaries of what is now known as the United States hold a unique position with regard to their relationship with the settler state. From the outset, the relationship between Native Nations and European countries and later the United States was one of nation-to-nation. As in Canada, treaties were first negotiated in relation to trade and military allegiance (the peace and friendship treaties), and later as their power waned, in relation to cession of certain lands with 'guaranteed' rights in return.[278] Although these treaties are enforceable legal documents (unlike the Treaty of Waitangi for instance), they were not honoured from the outset and rights contained within them have been continuously whittled away.

The continued sovereignty of Native Nations governments was recognised by the US Supreme Court in a series of three cases called the Marshall Trilogy in the mid-1800s, although in a modified form.[279] Native Nations have retained powers of law making and self-government as 'domestic dependent nations' and continue to be ruled by their own laws but are subject to federal government jurisdiction. Civil and criminal jurisdiction of First Nations is highly complex. Whether First Nations have jurisdiction varies according to where the matter arose or offence occurred, whether the parties are members of the nation, are Native American or non-Native American and, if a criminal matter, whether the crime is defined as a major crime. If a major crime, the federal government has jurisdiction.[280]

In general, states have no jurisdiction on reservations unless the state is a Public-Law 280 (PL-280) state. PL-280 is a federal law that transfers civil and criminal jurisdiction from the federal government to the relevant state government.[281]

- **Aotearoa New Zealand**

Unlike Australia, the United States and Canada, Aotearoa New Zealand does not have state or provinces and has only federal and local tiers of government. Without a written constitution, the Federal Government has jurisdiction over Māori under an inherent plenary power said to arise through the acquisition of British sovereignty. Māori rights are enshrined in the Treaty of Waitangi and are recognised in various statutes and given force through the Waitangi Tribunal. These rights recognised at common law are afforded additional protection through fiduciary obligations.

As in Australia, there are no courts that formally apply Māori law or are hybrid courts. Instead, courts such as the Rangatahi Youth Courts use Māori protocols to provide more culturally appropriate responses to wrongdoing. The Māori Land Court and Māori Appellate Court deal with Māori land matters. Because of the specific context of Māori governance within Aotearoa, we have not included any case studies from this context in this report.

[277] Section 81 of the *Indian Act*.
[278] Williams, *Linking Arms Together*.
[279] In a series of three cases referred to as the Marshall trilogy between 1823 and 1832, Chief Justice Marshall held that British sovereignty had diminished tribal sovereignty but had not extinguished it: Johnson v M'Intosh 21 US 543 (1823); Cherokee Nation v Georgia 30 US 1 (1831) and Worcester v Georgia 31 US 515 (1832).
[280] Changes to laws surrounding violence against Native American women are ongoing. The *Violence Against Women Act 2009* enables a form of special jurisdiction for Native Nations to prosecute certain violent crimes. These laws were strengthened in 2022.
[281] The Honorable Korey Wahwassuck observes that Congress had at least three purposes in passing Public Law 280: (1) the reduction of lawlessness on federal Indian reservations, (2) the reduction of federal expenditures on Indian reservations, and (3) the furtherance of the then popular policy of assimilation. See The Hon Korey Wahwassuck, 'The New Face of Justice: Joint Tribal-State Jurisdiction' *Washburn Law Journal* 47 (2008).

Examples of hybrid jurisdiction

As we discuss in Part 3, there are many instances in which First Nations appear to be operating only in accordance with settler-colonial law, while are in fact using such structures as 'tools' to identify, organise or act as nations.[282] In utilising settler-colonial structures and meeting *enough* settler requirements, some nations have regardless been able to incorporate, and operate within, their own cultural traditions. Beyond this, however, there are instances in which settler governments and First Nations are engaged in identifiable partnerships across their social-legal systems around particular issues, including around criminal justice, health and land.

Initial potential examples identified by the Project Directors included:

- 'Issue' authorities controlled by Native Nations, sharing jurisdiction with settler governments within the United States. These include, for example, Native Nation gaming authorities, which can have similar (if contested and constrained) authority to settler-state gaming commissions.[283] Some are able to create their own rules and codes whilst complying with 'federal, tribal and state laws and regulations' (e.g. the Chickasaw Nation Office of the Gaming Commissioner).[284] Other examples include the San Carlos Apache Utility Telecommunications Authority; or housing authorities (or nation departments) engaged in 'integrated' work such as the Penobscot Housing Authority, the Salt River Pima-Maricopa Indian Community Tribal Housing Program, and the Lac Du Flambeau Chippewa Housing Authority.[285]
- Land management authorities that see jurisdiction shared between First Nations and settler governments (including, for example, Tribal Land Trusts within North America).
- Particular pieces of settler legislation, including the United States (US) Public Law 102-477 Program: Indian Employment, Training and Related Services.[286]
- The Sámi Parliament. The Sámi are a First Nation that crosses parts of what are now known as Sweden, Finland and Norway, and their Parliament 'is an expression of recognition that the Sámi are one of two peoples in Norway.' Significantly, the Parliament 'identifies its own priorities and develops its own policies, based on its mandate from the Sámi People and dialogue with our communities', and cannot be instructed to by other governments.[287]

The following case studies were selected due to their potential relevance to Aboriginal and Torres Strait Islander nations, according to the criteria outlined above. As this project consisted primarily of a desktop study, it proved difficult to discern how First Nations leadership made

[282] See also Vivian et al., 'Indigenous Self-Government'.
[283] For analysis, see Kathryn Land, 'Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming', *Marquette Law Review* 90:4 (2007): 971-1008.
[284] The Chickasaw Nation, 'Chickasaw Nation Office of The Gaming Commissioner', https://www.chickasaw.net/Our-Nation/Government/Chickasaw-Nation-Office-of-the-Gaming-Commissioner.aspx#:~:text=The%20CNOGC%20is%20the%20primary,and%20state%20laws%20and%20regulations.
[285] Such housing authorities are often responsible for developing and maintaining housing on Native Nation land. The Chippewa Housing Authority, for example, is currently working to renovate and build new homes alongside a community centre in order that citizens 'will not have to move off the reservation to find other housing'. See Jadelle Miralles, 'Chippewa Tribe receives $15 million to build homes in Lac de Flambeau', *WJFW*, 11 October 2023, https://www.wjfw.com/news/chippewa-tribe-receives-15-million-to-build-homes-in-lac-du-flambeau/article_71ad156e-6873-11ee-88bc-7395aac4ba6a.html.
[286] 102-477 allows Native Nations in the US to integrate employment, training and related services into a single budget stream, rather than being awarded by multiple federal departments. In turn, this singular stream ensures that there is only one reporting process for Native Nations. This de-siloing of funding is particularly significant as it allows for greater authority over usage of money; greater ability to plan and to undertake strategic, self-determined and long-term decision making; and further ability to 'do' the work (assuming less compliance burdens).
[287] Sámediggi, 'About the Sámi Parliament', https://sametinget.no/about-the-sami-parliament/.

decisions about, or engaged with, the relevant hybrid governance model. Public sources exist about how these hybrid bodies operate but there is little detail on the circumstances that lead to their creation or operation from the perspective of the involved First Nation/s. As such, the majority of sources about hybrid governance mechanisms emerge from the relevant settler government/s. We thus selected case studies where we could gain (partial) insight into the opinions of First Nations about the authority.

The TSRA

While research on Aboriginal and Torres Strait Islander nation's self-government through statutory authorities is nascent, to date, most research has been conducted on the Torres Strait Regional Authority (TSRA). We therefore describe the history of the TSRA and its relationship to self-government and hybrid governing below. The TSRA offers particular insights into the ways in which settler governments within Australia have attempted to position First Nations statutory authorities and areas of shared jurisdiction, and the particular challenges such authorities face.

The Cree Regional Authority

The Cree Regional Authority (CRA) is a particularly relevant case study to Aboriginal and Torres Strait Islander nations. As we describe below, the CRA was established due to settler encroachment on Cree nation Country, and processes of agreement-making between Cree and Canadian governments. It highlights the particular importance of INB strategies to effective hybrid governance authorities, and the ways such authorities can act as the vehicle to enact a new relationship with the settler state.

The First Nations Health Authority

The First Nations Health Authority (FNHA) offers a model for increasing nation self-determination through inter-nation collaboration. It is particularly relevant for Aboriginal and Torres Strait Islander nations considering the significance of the service delivery sector to the efforts of Aboriginal and Torres Strait Islander nations to be self-determining, the fact that small Aboriginal and Torres Strait Islander nations may benefit from combining forces to provide economies of scale and the long history of First Nations collaboration within Australia.

Criminal Justice – multiple examples

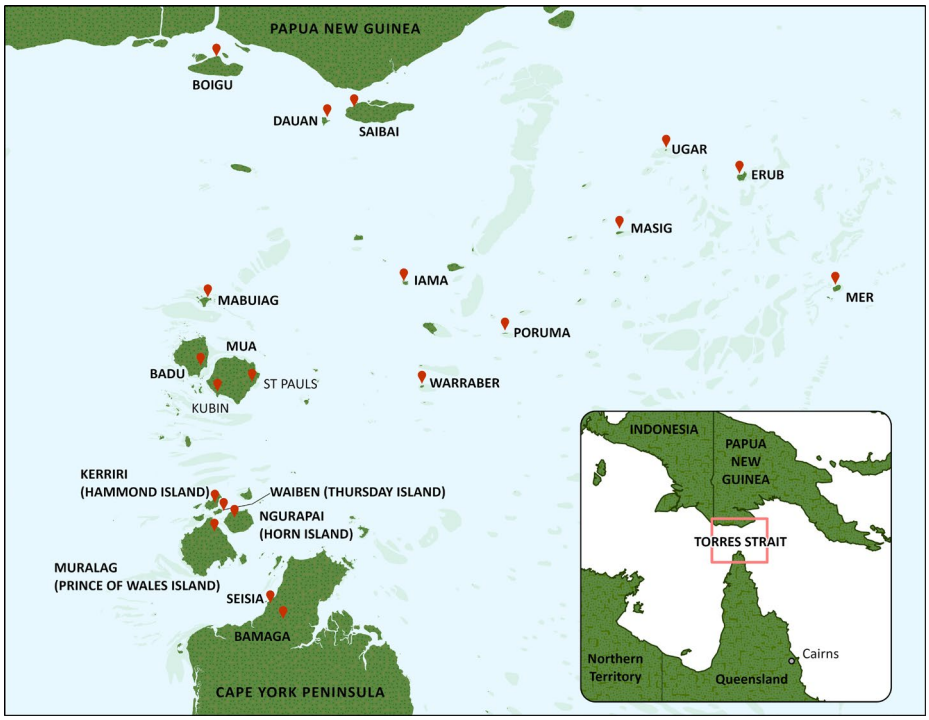
As we discuss in Part 5, criminal justice was identified by the Project Directors as a potentially relevant area of jurisdiction for hybrid governance. We detail two examples of hybrid jurisdiction between Native Nations and settler governments within the United States and one between Native Nations and settler governments in Canada.

4.1 The Torres Strait Regional Authority

History and Establishment of Authority

The Torres Strait area covers around 42,000 square kilometres between North East Australia and Papua New Guinea, closest to Cape York Peninsula. The region includes the Torres Strait Protected Zone, established under the Australia-Papua New Guinea Torres Strait Treaty that prescribes free movement for Torres Strait Islanders and the coastal people of Papua New Guinea for traditional activities. The area includes significant marine environments, with commercial fishing managed by the Torres Strait Protected Zone Joint Authority.[288] The region has a predominantly First Nations population, with '18 island communities in the Torres Strait and five Torres Strait Islander and Aboriginal communities in the Northern Peninsula Area of Cape York.'[289]

Figure 4. TSRA Region[290]



The Torres Strait region has had a continuous history of First Nations self-government preceding invasion and settler-colonial incursions. The area has long had transnational connections, with pearling from the mid-19th century, and the arrival of the London Missionary Society in 1871.[291] Following the state of Queensland's 'annexation' of the Torres Strait Islands in 1879, in 1899 the state attempted to replace customary island governance systems with island councils. However, in such Councils, Islander self-government and autonomy were significantly maintained, as 'Torres Strait Islanders were responsible for their own councils, police and courts and empowered to deal with minor crimes.'[292]

During the 20th century, further settler incursions into the Torres Strait and greater settler-government intervention saw Queensland attempt to 'greatly restrict' the power of the island

[288] Torres Strait Protected Zone Joint Authority, 'Who We Are', 2023, https://www.pzja.gov.au/who-we-are.
[289] TSRA, *Torres Strait Development Plan 2019-2022* (Commonwealth of Australia, 2019), 3.
[290] TSRA, 'Regional Map', https://www.tsra.gov.au/the-torres-strait/regional-map.
[291] TSIRC, 'Torres Strait History', https://www.tsirc.qld.gov.au/our-communities/torres-strait-history.
[292] TSIRC, 'Governance History', https://www.tsirc.qld.gov.au/our-communities/governance-history

councils.[293] Following persistent Islander advocacy, the Queensland Government passed various pieces of legislation in the early-mid 20th century relating to Islanders that had mixed effects (both recognising Islanders' status as distinct peoples, but with some incursions on island council autonomy).[294]

The next major shift occurred in 1984, in the context of native title litigation commenced by Koiki (Eddie) Mabo in 1982. In 1984, the Queensland Government passed the *Community Services (Torres Strait) Act 1984*, which established the Island Coordinating Council (ICC) and further formalised arrangements for island councils (including, for example, control/administration over former reserve land granted in trust). The ICC acted as the coordinating body for the (then) seventeen Island Councils, and in effect worked as a relatively effective 'a regional representative body for Islanders'.[295]

The TSRA ultimately can be considered the Commonwealth's response to this continuing history of self-determination, self-government and shared jurisdiction in the Torres Strait, and persistent Islander advocacy.[296] The 1980s was a particularly active period for Aboriginal and Torres Strait Islander Peoples' ambitions, including the possibility of a treaty between Aboriginal people and the state, and the creation of the Aboriginal and Torres Strait Islander Commission (ATSIC). The TSRA was initially established in 1994[297] through ATSIC's enabling legislation, the *Aboriginal and Torres Strait Islander Commission Act 1989*, and then later reaffirmed in the *Aboriginal and Torres Strait Islander Act 2005.* In 1988, the Torres Strait Leaders Forum saw Islander leaders engaging in dialogue about new forms of possible self-government in the region, and calling on the Commonwealth Authority to respect their aspirations.

Significantly, the TSRA 'built upon' but did not wholly replace pre-existing local governance structures.[298] According to Scott and Mullrennan, Islanders wanted to retain the structure of the ICC, which was eventually partly blended into the structure of the TSRA.[299] However, from the start, settler governance regimes were convoluted, as the Federal Government, Queensland Government and Islander governments were all in operation. The ICC itself remained (under Queensland legislation), as did the Island Councils.

To outsiders, the TSRA is symbolic of Islander sovereignty, and the possibility for 'successful' settler-government structures that support self-determination. As Staines and Scott put it in 2020, the TSRA 'continues to symbolise the distinct level of autonomy held by Torres Strait Islanders.'[300] It has long been held up for its potential in other parts of Australia as the 'main legislative regional governance model in Australia for Indigenous peoples'.[301] Korson et al. have theorised that it represents a 'particular kind of Islandian sovereignty', where particular contexts can 'gai[n] exceptional domestic and international autonomy while retaining the benefits of association'. [302]

[293] TSIRC, 'Governance History', https://www.tsirc.qld.gov.au/our-communities/governance-history
[294] Firstly in 1939 and then again in 1965. See TSIRC, 'Governance History', https://www.tsirc.qld.gov.au/our-communities/governance-history.
[295] Edwina MacDonald, 'The Torres Strait Regional Authority: Is it the Answer for Regional Governance for Indigenous Peoples?', *Australian Indigenous Law Review* 11:3 (2007): 45.
[296] Islander is preferred terminology to refer to Torres Strait Islander people.
[297] TSRA, *Torres Strait Development Plan 2019-2022*, 17.
[298] MacDonald, 'The Torres Strait Regional Authority', 44.
[299] Colin Scott and Monica Mullrennan, 'Land and sea tenure at Erub, Torres Strait: Property, sovereignty and the adjudication of cultural continuity', *Oceania* 70:2 (1999): 153.
[300] Zoe Staines and John Scott, 'Crime and Colonisation in Australia's Torres Strait Islands', *Australian and New Zealand Journal of Audiology* 53:1 (2020): 11.
[301] MacDonald, 'The Torres Strait Regional Authority', 43.
[302] Cadey Korson et al. 'Triangular negotiations of island sovereignty: Indigenous and customary authorities - metropolitan states - local metropolitan authorities', *Island Studies Journal* 15:1 (2020): 68.

It appears that the TSRA itself had such aspirations. For example, the TSRA corporate plan from 1994-95 suggests that it saw itself as a transitional body towards greater self-government, which was its long-term 'aspiration'. As it put it:

> More broadly, the Torres Strait Regional Authority sees its long term aspirations being met through achieving, by an act of self-determination, a form of First Nations self-government to be negotiated with the Commonwealth and Queensland Governments and the people of the Torres Strait. In achieving this goal, the people of the Torres Strait see the Torres Strait as an integral part of Australia and Queensland, with unique and distinct features.[303]

However, within the Torres Strait, however, whether Islanders or settler-colonial governments saw the TSRA as the desired long-term model for (a form of) self-government is less clear. Since at least 1997, Islanders have also been concerned with the entrusting of native title rights to the TSRA. As recounted by Scott and Mullrennan, it is a live question whether it is 'appropriate' to 'entrust' what is seen as a 'statutory arm of central government' with 'hard-won Mabo rights.'[304]

Ongoing concerns regarding overlapping jurisdiction also saw a Commonwealth inquiry into governance in the Torres Strait was conducted in 1996, leading to the report *Torres Strait Islanders: A New Deal - A Report on Greater Autonomy for Torres Strait Islanders*. According to McDonald 'The Committee's core recommendations were the creation of a Torres Strait Regional Assembly to represent all residents of the Torres Strait area and replace the ICC, TSRA and TSC, and a Cultural Council to advise the Assembly on how to promote and maintain the Ailan Kastom of Torres Strait Islanders.'[305]

Following this, in 2001 the TSRA proposed a new Torres Strait Government consisting of the key elements of both the ICC and the TSRA. It was unanimously agreed by the TSRA, whose long-term vision was a 'Territory style of government'.[306] This was implemented by the Federal Government. Further legislative changes made governance and jurisdiction more complex. The Queensland *Local Government (Community Government Areas) 2004* saw powers relegated for Queensland Shire Councils extended to the Island Councils.

The TSRA survived the closure of ATSIC in 2004, re-established under the *Aboriginal and Torres Strait Islander Act* 2005. According to McDonald, 'The Government's stated reason for retaining the TSRA in the ATSI Act was that, unlike ATSIC, it was working effectively in meeting the needs of its community.'[307]

Further attempts at bringing governance together were made in the early-mid 2000s, including the Greater Autonomy Taskforce established by representatives of the different governance bodies, leading to the 2002 Bamaga Accord, [308] and then the Greater Autonomy Steering Committee. As put by McDonald in 2007, there was 'considerable dissatisfaction with the

[303] ATSIC, *Recognition, Rights, Reform: A Report to Government on Native Title Social Justice Measures* (ATSIC: Canberra, 1995), n. pag., https://www.ilc.unsw.edu.au/sites/ilc.unsw.edu.au/files/ATSIC%20Rights%20reform%20and%20recognition%20%282%29_2.pdf
[304] Scott and Mullrennan, 'Land and sea tenure at Erub', 169.
[305] MacDonald, 'The Torres Strait Regional Authority', 49.
[306] For a description of the proposed structure, see 'A Torres Strait Territory Government', *Australian Indigenous Law Reporter* 6:3 (2001): 98-103.
[307] MacDonald, 'The Torres Strait Regional Authority', 49. This is largely agreed to have been a significant misconception about ATSIC's performance.
[308] Aaron Smith, 'Torres Strait push for regional autonomy echos sentiment across nation', *NITV*, 20 May 2019, https://www.sbs.com.au/nitv/article/torres-strait-push-for-regional-autonomy-echos-sentiment-across-nation/iln0v4b4n.

existing structure [the TSRA] and a desire to establish a new governance model in the region'.[309] Significantly, in 2003 the ICC was replaced by the Torres Strait Island Regional Council (TSIRC) under Queensland legislation.

Islanders have continued their efforts to come together to reach their aspirations for the region. The Torres Strait and Northern Peninsula Area Regional Plan 2009-2029 (Regional Plan) was developed by the TSRA, the TSIRC, the TSC and the Northern Peninsula Area Regional Council (NPARC), 'with support from the Queensland Government, following a comprehensive community engagement process.'[310] Alongside goals around economic development and other issues, the Plan specifically includes a goal of 'effective and transparent self-government, with strong leadership'. [311] In line with this, following the 2013 High Court victory regarding sea and water rights, the TSIRC, TSRA and NPARC 'unanimously passed a joint resolution to progress the remodelling of the Torres Strait governance model into a plan they called the 'One Boat.'[312]

More recently, however, further Islander action around self-government has been undertaken through the native title space. In 2002, Gur A Baradharaw Kod Torres Strait Sea and Land Council (GBK), the peak body for Prescribed Body Corporates (PBCs) across the Torres region, took over native title functions from the TSRA. GBK was formed (and registered with ORIC) in 2012, and consistently advocated for the removal of traditional owner business from the TSRA's function. GBK sees this as shifting authority from the 'Commonwealth' (through the TSRA) to a 'community-based organisation', leading to greater 'self-determination'.[313] The challenges this has posed for the TSRA are discussed below. A Joint Media Release regarding possible economic development in the region suggests that governance in the region is layered and shared: the 'Regional Leadership' listed contains the TSRA, GBK, TSC and TSIRC.[314]

As of 2023, the TSRA performs a number of roles for Torres Strait Islander people. The current focus of the TSRA seems to be on three interrelated streams Economic Development, Fisheries, and Environmental Management.[315] Activities under these streams include a Home Ownership Program providing affordable home rate loans; loans for small business; assisting with the regulation of fishing in the area, including contributing to the Protected Zone Joint Authority alongside the Australian Fisheries Management Authority, the Department of Agriculture, Fisheries and Forestry, and Queensland Department of Agriculture and Fisheries;[316] undertaking significant advocacy related to the effects of climate change; managing Sea Country; and providing funding for and overseeing ranger programs.

Functions, responsibilities and accountabilities

The TSRA has the following functions:

(a) to recognise and maintain the special and unique Ailan Kastom of Torres Strait Islanders living in the Torres Strait area;

[309] MacDonald, 'The Torres Strait Regional Authority', 50.
[310] TSRA, *Torres Strait Development Plan 2019-2022*, 12.
[311] TSRA, *Torres Strait Development Plan 2019-2022*, 12.
[312] Smith, 'Torres Strait push for regional autonomy'.
[313] GBK, 'Native Title, https://www.gbk.org.au/native-title/.
[314] TSIRC, 'Joint Media Release: Regional Leadership Calls for Meeting with the Foreign Affairs Minsiter regarding ongoing Foreign Infrastructure Concerns Bordering the Torres Strait', 11 February 2021, https://www.tsirc.qld.gov.au/sites/default/files/Joint%20Media%20Release%20-%20Regional%20Leadership%20Call%20For%20Meeting.pdf.
[315] Other streams of work, such as Culture Art and Heritage and Healthy Communities and Safe Communities (including, for example, delivering roads and sewerage, or providing operational funding for local based community organisations to undertake work) appear to not be of current primary focus.
[316] PZJA, 'Who We Are', 2023, https://www.pzja.gov.au/who-we-are.

(b) to formulate and implement programs for Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area;

(c) to monitor the effectiveness of programs for Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area, including programs conducted by other bodies;

(d) to develop policy proposals to meet national, State and regional needs and priorities of Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area;

(e) to assist, advise and co-operate with Torres Strait Islander and Aboriginal communities, organisations and individuals at national, State, Territory and regional levels;

(f) to advise the Minister;

(h) to take such reasonable action as it considers necessary to protect Torres Strait Islander and Aboriginal cultural material and information relating to the Torres Strait area if the material or information is considered sacred or otherwise significant by Torres Strait Islanders or Aboriginal persons.[317]

Also established in legislation, 'The TSRA has power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions.' This includes, for example, being a body corporate that can be sued and can buy and hold property.

The structure of the TSRA includes a Board consisting of 20 elected members from different council regions (mapping the Island Council regions). [318] In this way, the Board corresponds to Islander chosen-areas. McDonald goes so far to suggest that this ensures the TSRA is 'Both a Commonwealth statutory authority and a form of Indigenous authority'. [319] Elections are held every four years in council regions, with those voting and those elected having to be Aboriginal or Torres Strait Islander people living in the region.

As put by the TSRA, the Board 'determines TSRA's strategic vision, policies and budget allocations, and is the political arm of the TSRA'.[320] In this way, there is separation of policy-making power of Board from financial management, to avoid conflict of interests and ensure independence (i.e. a separation of administration from decision-making).[321]

The TSRA manages a considerable budget. In the year ending June 2022, its 'own source revenue' was around 18 million per annum. This included around 660k from goods and services, $242,000 from interest; $600,000 from contracts with non-government entities; and, most significantly, $12.6 million from 'grant revenues'.[322] It also receives around $36 million per year from the Commonwealth Government to cover the services it provides, while its costs total around $53 million (including grants, employments, services, supplier costs etc). Finally, its financial and non-financial assets total around $100 million. [323]

Is First Nations law incorporated into the TSRA?

Yes, nominally.

It is established in the ATSI Act that the first purpose of the TSRA is to 'recognise and maintain the special and unique Ailan Kastom' of Islanders.[324] The legislation defines Ailan Kastom as

[317] See *Aboriginal and Torres Strait Islander Act 2005*, https://www.legislation.gov.au/Details/C2012C00258.
[318] MacDonald, 'The Torres Strait Regional Authority', 47.
[319] Korson et al. 'Triangular negotiations of island sovereignty', 73.
[320] TSRA, 'TSRA Board', https://www.tsra.gov.au/the-tsra/tsra-structure#tsra-board.
[321] MacDonald, 'The Torres Strait Regional Authority', 50.
[322] TSRA, *Annual Report 2021-22* (Canberra: Commonwealth Government: 2022), 76.
[323] TSRA, *Annual Report 2021-22*, 77.
[324] Significantly, the ATSI Act also states that '(2) The express mention in paragraph (1)(a) of the Ailan Kastom of Torres Strait Islanders living in the Torres Strait area does not imply that the TSRA may disregard Aboriginal tradition and custom'.

'body of customs, traditions, observances and beliefs of some or all of the Torres Strait Islanders living in the Torres Strait area, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships'.[325] According to Whitehouse et al., Ailan Kastom has 'universal acceptance amongst Torres Strait Islanders for describing and maintaining ways of knowing and being', and underpins relations to Country, family and broader community.[326]

The TSRA articulates the importance of Ailan Kastom to their work. At various points they refer to Ailan Kastom as the 'source of unity and strength' underpinning Islanders to 'determine their own affairs'. In articulating how it 'aims to improve the lifestyle and wellbeing' of Islanders, the TSRA states that 'it aims to achieve this by:

- gaining recognition of our rights, customs and identity as indigenous peoples;
- achieving a better quality of life for all people living in the Torres Strait region;
- developing a sustainable economic base;
- achieving better health and community services;
- ensuring protection of our environment; and
- asserting our native title over the lands and waters of the Torres Strait region.'[327]

They also state the importance of 'maintaining and strengthening Ailan Kastom … to sustainably manage land and sea resources into the future.'[328]

It is highly likely Ailan Kastom informs decision-making about Country. The TSRA also indicate that Ailan Kastom has informed agreement making between Traditional Owners and the TSRA around Working on Country, with a focus on 'protecting Indigenous Cultural and Intellectual Property (ICIP) rights'. As the TSRA states, 'All these plans incorporate goals and strategies for managing cultural as well as natural values, and are underpinned by, and reinforce, *Ailan Kastom*'.[329] However, it is unclear the extent to which Ailan Kastom underpins or informs other parts of the TSRA's decision-making.

Governance challenges

Despite ostensible settler government support for Islander self-government and autonomy, there remains 'too much government' in the Torres Strait, as GBK put it. The roles of the TSRA, Torres Strait Island Regional Council, Torres Shire Council, Commonwealth and Queensland governments are 'expansive and sometimes overlapping'.[330] Allocating jurisdiction to address overlapping roles is assumedly difficult, as each body understands its role to be significant. The TSIRC (previously ICC), for example, represents the 15 'outer' island communities[331] and sees itself as being key to Islander autonomy.

These bodies have a long history of coming together as a strong voice for Islanders, for example in creating the aforementioned 2009-2029 *Torres Strait and Northern Peninsula Area Regional*

[325] *ATSI Act 2005*.
[326] Hilary Whitehouse et al., 'Sea Country: navigating Indigenous and colonial ontologies in Australian environmental education', *Environmental Education Research* 20:1 (2014): 59.
[327] TSRA, 'About the Torres Strait Regional Authority', https://www.tsra.gov.au/the-tsra.
[328] TSRA, 'Ailan Kastom', https://torresstraitsoe.org.au/people/ailan-kastom/.
[329] TSRA, 'Ailan Kastom', https://torresstraitsoe.org.au/people/ailan-kastom/.
[330] GBK, 'Submission to the Joint Standing Committee on Northern Development inquiry into the opportunities and challenges of the engagement of Traditional Owners in the economic development of northern Australia', 4 March 2019, https://www.aph.gov.au/DocumentStore.ashx?id=50e37c84-cab4-4ad9-aebd-692c270176c9&subId=669979.
[331] TSIRC, 'Your Council – Who We Are', https://www.tsirc.qld.gov.au/your-council/who-we-are.

Plan, which outlines a long-term whole-of-government strategic approach to development in the area, with goals largely aligned to Closing the Gap targets.[332]

Whether or not the TSRA has ever envisaged itself as *the* self-governance body for Islanders is uncertain. Regardless of any such ambitions, there are a number of reasons that the TSRA has regardless been unable to undertake this role (beyond overlapping and complex jurisdictions with other bodies). At some points, according to McDonald TSRA was acting as a 'funding conduit' to the ICC and Island Councils rather than a body that directly implements its own policies.'[333] This may have been a result of the different Federal Governments, which have understood the TSRA's role and Islanders' desire for autonomy in the region very differently to that of the TSRA. For example, the Howard Government's interpreted aspirations for autonomy as 'aspirations for greater control over government service delivery in the region' (i.e., interpreted as an aspiration for self-management rather than self-determination). [334]

The TSRA, by its own account, has also been hampered by governance problems common to many Aboriginal-controlled bodies undertaking service delivery. Governance issues identified by the TSRA in 2019 included 'Communication between all levels of government and communities requires strengthening'; 'Few young people show interest in leadership'; Gender imbalance in leadership roles'; 'Increased participation is required for inclusive decision-making in the region;' 'Lack of coordination and integration of government services across the region'; and 'Regional views not adequately represented in government policy.'[335]

Most significantly however is that the TSRA appears to be understood by many Islanders as representing, or being, 'the Commonwealth'. In particular, GBK, the peak body for PBCs and thus Traditional Owners, sees itself as more representative than the TSRA. GBK describes itself as 'the collective voice of all the First Nations groups in the region'[336] and has hosted a number of forums on Islander autonomy.[337] GBK refers to the need for settler governments to negotiate treaties with PBCs rather than with the TSRA. According to Chair Ned David:

> They can't negotiate with our people in the Commonwealth body the Torres Strait Regional Authority (TSRA) or Shire Councils. They are mechanisms of the State. It would be like them making a Treaty with the Commonwealth Government or Local Government, basically with themselves.[338]

GBK also sees its operations and governance as being more aligned with Ailan Kastom than the TSRA, as providing 'an authentic and authoritative voice for traditional owners and the laws of the peoples of the region'.[339] It has long argued that as PBCs are Traditional Owner organisations, they have the 'cultural authority to make sustainable decisions'. [340]

This has recently been acknowledged by both the TSRA and Federal Government, as NTRB responsibilities for native title were transferred to GBK in 2022. As put by David, 'the transition

[332] See Australian Government et al., *Torres Strait and Northern Peninsula Area Regional Plan: Planning for our future 2009 to 2029* (Thursday Island: TSRA: 2009), https://www.tsra.gov.au/__data/assets/pdf_file/0018/1773/ts-npa-rp-09-29.pdf. For other joint funding programs, see, for example, 'Co-funded pilot program creates improved health infrastructure in the Torres Strait', *One PNG*, 29 January 2016, https://www.onepng.com/2016/01/co-funded-pilot-program-creates.html.
[333] MacDonald, 'The Torres Strait Regional Authority', 51.
[334] Australian Government, *Government Response to Torres Strait Islanders: A New Deal: A Report of the House of Representative Standing Committee on Aboriginal and Torres Strait Islander Affairs on Greater Autonomy for Torres Strait Islanders* (Canberra: Commonwealth Government, 1998), 2.
[335] TSRA, *Torres Strait Development Plan 2019-2022* (Canberra: Australian Government: 2019), 83.
[336] Paul Gregoire, 'Towards Torres Strait Autonomy: An Interview with GBK's Ned David', *Sydney Criminal Lawyers*, 6 July 2019, https://www.sydneycriminallawyers.com.au/blog/towards-torres-strait-autonomy-an-interview-with-gbks-ned-david/.
[337] Smith, 'Torres Strait push.'
[338] 'Government needs to do more than consult – GBK', *The Torres News*, 6 April 2023, https://issuu.com/tsimatorresnews/docs/2023-04-06_torres_news_ed075_16p_lo_res/s/22130877.
[339] GBK, 'Our Story', https://www.gbk.org.au/our-story/.
[340] GBK, 'Submission'.

to GBK acknowledges the level of cultural authority GBK has as the peak body for all local PBCs, under both Aboriginal lore and Ailan Kastom'.[341] The TSRA has also acknowledged this as a 'milestone step towards self-determination', noting how significant the fact that it is 100% Torres Strait controlled not-for-profit.[342] However, TSRA maintains it will 'always have a role to ensure that our culture and rights are reflected at a national level and to advocate with our partners, such as GBK.'[343]

Potential implications for Aboriginal and Torres Strait Islander nations

The benefits of the TSRA region's resolve to be self-determining is demonstrably beneficial. As put in a 2017 report into service delivery by the Queensland Productivity Commission, 'Indicators for the Torres Strait are significantly better than for other remote and discrete Aboriginal and Torres Strait Islander communities'.[344] The Commission states that a 'possible factor' is that there is 'strong governance', including a 'degree of control over service delivery … consistent with the experience of Indigenous communities in northern America'.[345] There is little doubt that the establishment and current uses of the TSRA show some alignment with INB.

It is unclear, however, whether other First Nations would aspire or be able to replicate the TSRA as a statutory authority for their own regions. The TSRA emerges from a specific context which mean that 'a similar model of governance may not work as effectively in other regions'. These include, for example, the history and population of the area; the different history of settler-colonial infringements on Country; the geography of the area and the 'interest' from the settler state in 'maintaining stability' regarding its border.[346]

Further, while Ailan Kastom is explicitly discussed in settler law, and of primary significance to the TSRA's legislated functions, it is unclear to the extent with which the TSRA is actually able to govern according to Islander law. Accordingly, whether or not the TSRA has cultural authority for Islanders is deeply contested in the region. Highlighting beliefs that the TSRA is synonymous with the settler state, as put by David, if treaty negotiations were undertaken with the TSRA, 'It would be like [the Queensland Government] making a Treaty with the Commonwealth Government or Local Government, basically with themselves.'[347]

However, the fact that it survived the abolishment of ATSIC, and is one of the longest-standing statutory authorities regarding Aboriginal and Torres Strait Islander people, is significant. In essence, if the TSRA is conceptualised not as a self-government body, but as an authority that can hold property and funnel funding into other more appropriate bodies, it seems clear that it can aid Torres Strait Islanders' aspirations. This aligns with the longstanding ways in which Torres Strait Islander people have long been conceptualising and enacting their own authority, including particular uses of the TSRA in moments in its history. From a superficial analysis, we therefore maintain that a regional body such as the TSRA may be considered as a useful transitionary decision-making body, if is being used as such.

[341] Australian Government, 'GBK new native title service provider for the Torres Strait', 20 July 2022, https://www.indigenous.gov.au/news-and-media/announcements/gbk-new-native-title-service-provider-torres-strait.
[342] TSRA, 'GBK new native title service provider for the Torres Strait', 6 July 2022, https://www.tsra.gov.au/news-and-resources/news/gbk-new-native-title-service-provider-for-the-torres-strait.
[343] TSRA, *Annual Report*, 2.
[344] Queensland Productivity Commission, *Service Delivery in Remote and Discrete Aboriginal and Torres Strait Islander Communities* (Brisbane: Queensland Productivity Commission, 2017), 52, https://s3.treasury.qld.gov.au/files/Service-delivery-Final-Report.pdf.
[345] Queensland Productivity Commission, *Service Delivery*, 52.
[346] MacDonald, 'The Torres Strait Regional Authority', 50.
[347] 'Government needs to do more than consult – GBK', *The Torres News*, 6 April 2023.

The fact that GBK is seeking to – and potentially already undertaking – key self-government roles around Country and heritage, with support of the TSRA, is also telling. It both confirms INB evidence that PBCs offer particular opportunities for First Nations to nation-build; and that, being intimately connected with First Nations' own law, they hold particular cultural authority that is seen to sit at least partly outsider of settler structures.[348] It is possible that the transfer of Traditional Owner activities to GBK from the TSRA, combined with GBK's own stated intentions, will see it emerge as (at least an interim) important decision-making body for Torres Strait Islander people.

4.2 The Cree Regional Authority

History and establishment of authority

Cree First Nations are the most populous and most widely distributed First Nations people in Canada. Their traditional territory is in the subarctic and plains regions of what are now known as Alberta, Saskatchewan, Manitoba, Ontario and Quebec.[349] The Cree language belongs to the Algonquian language family but dialects among Cree First Nations vary widely and may not be understood by other Cree speakers.[350] The Cree Nation (also called the James Bay Cree or Eastern Cree) call themselves Eeyou ('the People'), [351] and have a population of more than 18,000, consisting of eleven communities and over 300 'traplines' or traditional family hunting and trapping grounds.[352] Their traditional territory covers more than 400,000 square kilometres primarily in northern Quebec, including lands on the eastern shores of James Bay and the south-eastern Hudson Bay.[353]

The 1978 creation of the Cree Regional Authority (CRA) was a direct consequence of the 1975 *James Bay and Northern Quebec Agreement* (JBNQA), signed by the Cree Nation, the governments of Canada and Quebec, and Hydro-Quebec. The JBNQA is considered a significant turning point in both Cree nation-building and relations between the Cree Nation and outsiders.

Figure 5. Cree Nation[354]

In 1971, a series of hydroelectric power stations were slated for construction in James Bay, on Eeyou Istchee ('the People's Land'). The Nation recalls that many citizens were 'apprehensive' about 'changes to their

[348] Compton et al, 'Native title'.
[349] Richard J Preston, 'Cree', *The Canadian Encyclopedia*, 7 December 2023, https://www.thecanadianencyclopedia.ca/en/article/cree>
[350] Preston, 'Cree'.
[351] The term 'Cree' comes from the French approximation of an Ojibwe term and is not how Cree people describe themselves. In this report, we refer to both Eeyou and Cree to refer to the nation.
[352] Cree Nation Government (CNG), 'The Eeyou of Eeyou Istchee', https://www.cngov.ca/community-culture/communities.
[353] CNG, 'The Eeyou of Eeyou Istchee'.
[354] 'Cree', *Canada History Project,* https://www.canadahistoryproject.ca/1500/1500-04-cree.html.

way of life' and to their Country. [355] Thus in 1971, Eeyou leaders came together – 'the first time in their history the Eeyou leaders from other Eeyou communities ever met together to discuss their rights, interests and future'.[356] Over a two-day meeting, leaders 'decided to act together, as one nation, and speak with one voice.'[357]

In subsequent negotiations between 1973-5, Cree leaders had a 'vision': 'changing the Eeyou world and making it a better world for Eeyou of Eeyou Istchee through nation-building.' [358] This included changing the prior state of play, where 'Eeyou local governments were more responsive to external agencies than to community members'. [359] The nation sought to 'maintain and protect' way of life and way of doing things, and 'control of their of affairs, institutions, communities and governments'.[360] As Richard Saunders, Chairman of the Cree-Naskapi Commission,[361] put it in 2015 alongside two other commissioners:

> This vision united the Eeyou people as one nation with one voice. This unity enabled nation-building and strengthened and empowered the Eeyou Nation. But Eeyou had to wait with patience until the time and circumstances were right to make these changes happen.[362]

It was within this context of demonstrably *acting* as nation within these negotiations that the Eastern Cree formed the Grand Council of the Crees (Eeyou Istchee) (GCC) in 1974, to act as the formal political body for the nation. The GCC was created to continue negotiations around a treaty. The GCC sought to agree to a smaller hydroelectric project alongside 'secur[ing] Eeyou rights such as self-governance and redefine relationships with Canada and Quebec'. [363]

The resultant JBNQA is a 'complex legal and political document which redefines the organization of the James Bay and Northern Quebec territories between the Quebecois state and the Cree and Inuit nations'.[364] Signed in November 1975,[365] the JBNQA including resolutions around land use and land access provisions (including division of Cree land into 'categories' which define Cree and Inuit land use rights);[366] the creation of education Boards; (some) state recognition of Cree political and social organisation, including 'participating in the governance and administration of JBNQA Territory';[367] and $225 million to be paid to the Cree over 20

[355] Cree Nation Government (CNG), 'External relations', https://www.cngov.ca/governance-structure/grand-council-of-the-crees/external-relations/.
[356] Richard Saunders et al., 'Eeyou Governance in Eeyou Istchee', in *2014 Report of the Cree-Naskapi Commission*, ed. Richard Saunders and Philip Awashish (Ottawa: Cree-Naskapi Commission, 2015), 2.
[357] Saunders et al., 'Eeyou Governance', 2.
[358] Saunders et al., 'Eeyou Governance', 7.
[359] Saunders et al., 'Eeyou Governance', 6.
[360] Saunders et al., 'Eeyou Governance', 7.
[361] The Cree-Naskapi Commission is an independent, non-governmental body established to monitor the implementation of the 1984 *Cree-Naskapi (of Quebec) Act*. The Act implements the JBANQA.
[362] Saunders et al., 'Eeyou Governance', 7.
[363] Saunders et al., 'Eeyou Governance', 7.
[364] Yannick Turcote, 'James Bay and Northern Quebec Agreement', *The Canadian Encyclopedia*, 3 July 2019, https://www.thecanadianencyclopedia.ca/en/article/james-bay-and-northern-quebec-agreement.
[365] This was followed by the 1978 *Northeastern Quebec Agreement* (NEQA) between the Naskapi, Canada and Quebec. This amended the *JBNQA*.
[366] The traditional lands of the signatories are divided into three categories. Category I is land 'reserved exclusively for the use of Inuit and Cree' people; Category II includes land 'owned by the Crown', but where certain rights are 'reserved' for Indigenous peoples, and 'over which forestry, mining and tourism development authority is shared'; and Category III is where particular rights are 'reserved' for Indigenous peoples, but 'all other rights are shared subject to a joint regulatory scheme'. NB that Section 7 of the JBNQA also acknowledges 'Inuit' land, similarly dividing this into 3 categories of land.
[367] BC Treaty, 'Eeyou (Cree) Governance: A Brief Account', 10 March 2015, https://bctreaty.ca/wp-content/uploads/2015/09/Eeyou-Governance-February-2015.pdf.

years. For Category IA lands, the JBNQA also committed to the introduction of local government authorities. [368] The JBNQA currently includes 9 of the 11 Cree communities.[369]

The JBNQA has been considered 'a modern-day treaty',[370] and the Cree believe that it 'provided a means for achieving, to some extent, the Eeyou vision for the enhancement and advancement of Eeyou governance'.[371] Pursuant to the JBNQA, the Cree Regional Authority (CRA) was established in 1978, to administer the JBNQA. However, the signing of the JBNQA:

> did not mark the end of conflicts, disputes and negotiations. Rather it signalled the beginning of continued interaction between the Cree of Eeyou Istchee and the Government of Quebec, Government of Canada…. over the implementation of the letter, intent and spirit' of the Agreement. [372]

One key issue was the lack of a clear implementation plan and dispute resolution mechanisms within the JBNQA. [373] As such, the Cree maintain that 'the governments stalled the implementation of the Agreement from 1975 to 2002 in the case of Quebec and until 2007 by Canada'.[374] Between 1975 and 2002, the nation introduced around 30 lawsuits against the province of Quebec and state of Canada for 'serious breaches' of the JBNQA.[375] The Cree maintained that Quebec in particular had not satisfied its commitments in the Agreement.[376]

A series of other developments are also highly pertinent both to the operation of the CRA since its creation in 1978, and to the development of Cree Nation self-government around and through the CRA. Particularly key moments include:

- 1984: *Cree-Naskapi (of Quebec) Act* was passed, in keeping with the terms of the JBNQA.
  - This Act suspended the *Indian Act,* and included provisions for local government in Cree-Naskapi communities. As put by Turcote, in doing this, 'the Canadian parliament held its promise for First Nations self-government', with the Act being 'the first of its kind nationwide'.[377] Another way of understanding this is the nation's inherent jurisdiction over certain matters being finally recognised by the settler state.
  - The by-law making power of these local governments was recognised over Category IA lands in 'administrative matters; regulation of buildings for public safety; health and hygiene; public order and safety; environmental protection; pollution prevention; taxation for local purposes; a broad range of local services; roads and transportation; operation of businesses; and parks and recreation.' [378]
- 2002: Agreement Concerning a New Relationship Between the Government of Quebec and the Cree of Quebec, signed by the Cree Nation (GCC/CRA) and Government of Quebec.
  - This Agreement established a 'nation-to-nation' relationship, including the expansion of Cree responsibilities over their Country and economic development. [379] To facilitate

[368] Mary Hurley, 'Legislative Summary of Bill C-28: An Act to amend the Cree-Naskapi (of Quebec) Act', *Research Publications,* 15 June 2009, Library of Parliament, Parliament of Canada, https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/402LS642E#:~:text=It%20involves%20(1)%20defining%20the,legislation%2C%20as%20well%20as%20possible.
[369] CNG, 'The Eeyou of Eeyou Istchee', https://www.cngov.ca/community-culture/communities/.
[370] Saunders et al., 'Eeyou Governance', 3.
[371] Saunders et al., 'Eeyou Governance', 8.
[372] Saunders et al., 'Eeyou Governance', 8.
[373] Hurley, 'Legislative Summary'.
[374] CNG, 'External Relations', https://www.cngov.ca/governance-structure/grand-council-of-the-crees/external-relations/.
[375] BC Treaty, 'Eeyou (Cree) Governance'.
[376] Turcote, 'James Bay'.
[377] Turcote, 'James Bay'.
[378] Hurley, 'Legislative Summary'.
[379] See Cree-Naskapi Commission, *Summary of the Agreement Concerning a New Relationship Between the Government of Quebec and the Crees of Quebec* (Cree-Naskapi Commission, 2013),

these responsibilities, it also provided for approximately $70 million of funding per year for 50 years, and included a provision for sharing of royalties and revenues derived from mining, forestry and hydro development on their lands. [380] The Agreement included the general provision that: 'The Cree Nation and the Quebec Nation agree to place emphasis in their relations on those aspects that unite them as well as their common desire to continue the development of Northern Quebec and the self-fulfilment of the Cree Nation.' [381] It was used to 'settle disputes' regarding implementation of the JBNQA.[382]

- As put by BC Treaty Commission, the Agreement marked 'an important stage in a new nation-to-nation relationship based on openness, mutual respect and a greater responsibility of the Cree Nation for its own development within the context of a greater autonomy.' [383]

- 2007/2008: in 2008, the Cree Nation and Government of Canada sign the Agreement Concerning a New Relationship between the Government of Canada and the Crees of Eeyou Istchee. [384]
  - Similarly to the 2002 Agreement with Quebec, the 2008 Agreement was also used as a way of 'implementing' the JBNQA and settle ongoing disputes. [385]
  - Under this Agreement, the Cree Nation assumed further responsibility for Cree economic and community development, whilst providing for 'negotiations and subsequent legislation concerning a Cree Nation Government.' [386] To facilitate the responsibilities assumed by the Cree pursuant to the JBNQA, it included $70million per year for 20 years.[387]
  - Following this Agreement, the *Cree-Naskapi (of Quebec) Act* was amended to 'empower the Cree Regional Authority to carry out the assumed federal responsibilities and to equip the CRA with certain by-law-making powers.' [388] This included defining the CRA's by-law-making authority. [389]

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https://www.creenaskapicommission.net/Discussion/Summary%20of%20agreement%20governance%20quebec%20and%20eeyou.htm.

[380] BC Treaty, 'Eeyou (Cree) Governance'.

[381] Cree-Naskapi Commission, *Summary of the Agreement*.

[382] CNG, 'Timeline: The Crees of Yesterday and Today', https://www.cngov.ca/community-culture/timeline/.

[383] BC Treaty, 'Eeyou (Cree) Governance'.

[384] See Cree-Naskapi Commission, *Layman Version of The Agreement Concerning A New Relationship Between The Government Of Canada And The Cree Of Eeyou Istchee*, https://www.creenaskapicommission.net/LAYMAN%20VERSION%20OF%20THE%20AGREEMENT%20%20CONCERNING%20A%20NEW%20RELATIONSHIP%20BETWEEN%20THE%20GOVERNMENT%20OF%20CANADA%20AND%20THE%20CREE%20OF%20EEYOU%20ISTCHEE.htm.

[385] BC Treaty, 'Eeyou (Cree) Governance'.

[386] BC Treaty, 'Eeyou (Cree) Governance'.

[387] BC Treaty, 'Eeyou (Cree) Governance'.

[388] BC Treaty, 'Eeyou (Cree) Governance'.

[389] '**62.02** For greater certainty, the Cree Regional Authority may assume any federal responsibilities agreed on by that Authority and the Government of Canada that are set out in the James Bay and Northern Quebec Agreement or any other agreement or in any federal Act or that are in relation to any program of the Government of Canada.
By-laws respecting regional government
62.03 (1) The Council of the Cree Regional Authority may make by-laws respecting
(a) the regulation — for the protection of public health and safety — of buildings used for housing or for regional governance, including their construction, maintenance, repair and demolition;
(b) essential sanitation services — including water and sewer services, drainage and solid waste management — and health and hygiene in relation to those services and housing;
(c) the establishment, maintenance and operation of fire departments; and
(d) the protection of the environment, including natural resources, and the prevention of pollution.'
For analysis, see Hurley, 'Legislative Summary'.

- 2012: Agreement on Governance in the Eeyou Istchee James Bay Territory, signed by the Quebec Government and the GCC.
  - The Agreement 'modernized' governance regimes on Cree land, including 'greater autonomy and responsibility for governance of Category II lands' and 'Cree participation in governance of Category III lands in partnership with other residences of the territory'.[390] It also provided for the creation of a joint Regional Government including both Cree and Jamesiens. In 2013, the Eeyou Istchee James Bay Regional Government came into force as the governing body for Category III lands. This ensured Cree participation in Category III land 'for the first time'.[391]
- 2013: The CRA was renamed the 'Cree Nation Government'.[392]
- 2017: Agreement on Cree Nation Governance signed between the Cree Nation and Government of Canada (following on from the 2008 Agreement Concerning a New Relationship).[393]
  - The Agreement strengthen Cree self-governance Category IA lands (those that were still subject to Federal law). It also works to 'provide long-term stability for the Cree First Nations and Cree Nation Government in financial arrangements with Canada', including ongoing committed funding from Canada.[394]
  - The Cree Nation Constitution was also agreed, a 'companion' to the Agreement. [395]
- 2018: The Agreement came into force. It recognises that Cree Nation has jurisdiction on Category IA land and ensures that the nation can make its own law (instead of by-laws) on those lands.
- 2019: Cree Nation Government passes and enacts first Bill, the *Cree Language Act*.
- 2020: *Grand Alliance* between Cree Nation and the Quebec Government.

Pursuant to the terms of the JBNQA, the CRA was established in 1978 under Quebec law (the Act Respecting the Cree Regional Authority). Section 11 of the JBNQA defined the CRA's membership and administrative powers, including that it be a public corporation, a legal person 'established in the public interest', and a 'non-profit association'. It was established primarily to administer programs, services, and compensation funds outlined in the JBNQA.

Importantly, the GCC was also 'incorporated pursuant to federal legislation.' However, significantly, as posited by Saunders et al., the GCC (unlike the CRA), 'was established pursuant to the expressed will of Eeyou and did not emanate' from JBNQA. They also maintain that since the creation of the GCC, 'Eeyou have become a stronger nation with advancements and achievements that have benefited Eeyou'. In the early 1980s, the Cree Nation decided to ensure that the CRA and the GCC were the same. The differing functions of these bodies are described below.

[390] CNG, 'Timeline'.
[391] Grand Council of the Crees (Eeyou Istchee), *40 Years of Modern Cree Nation-Building: Annual Report 2013-14* (CNG: 2014), https://www.cngov.ca/wp-content/uploads/2018/03/gcc-cra-annual-report-2013-2014.pdf.
[392] GCC, *40 Years*.
[393] This was initially promised in 2008, however it took until early 2015 for 'negotiations' to 'become constructive'. See Secretariat of Cree Nation Abitibi-Témiscamingue Economic Alliance, 'Evolution and Structure of the Cree Nation Government', *Looking Ahead Together Conference*, 1 June 2016, https://www.creenation-at.com/intranet/_files/files/evenements/conference2016/9h45%20Bill%20Namagoose%20Evolution%20and%20Structure%20of%20the%20Cree%20Nation%20Government%20-%20June%201%202016.pdf.
[394] Government of Canada, 'Summary of the Agreement on the Cree Nation Governance', https://www.rcaanc-cirnac.gc.ca/eng/1500394750433/1542989760073.
[395] Government of Canada, 'Summary'.

Finally, in 2014, the CRA became the Cree Nation Government, as a direct result of the Cree-Quebec and Canada New Relationship and Governance Agreements. It is the same legal entity, with the same structure and composition (discussed below).

Functions, responsibilities and accountabilities

Under the *Act Respecting the Cree Regional Authority* pursuant to the JBNQA, the CRA as codified in Quebec law originally intended to establish, administer and coordinate programs on Category I land; appoint representatives to other Cree bodies; receive and use compensation; promote economic development; exercise rights; making of corporate by-laws; and preserve the Cree way of life. Significantly, the JBNQA 'did not provide for the exercise of regional government authority by the CRA equivalent to that exercised locally by individual bands.'[396]

The CRA operated as a Council including 20 members. This included a Chairman and Vice-Chairman elected by all Cree eligible voters, and a Chief and one representative from each of the 9 Cree communities elected by Cree electors from respective communities.[397]

The Cree Nation was highly strategic in the way they utilised the CRA. The nation did not dispose of the GCC following the establishment of the CRA. Rather, they considered the CRA as the 'administrative authority', with the GCC remaining the nation's political authority.[398] Thus the CRA has operated as the 'executive' arm of the nation's government.[399]

However, since the 1980s, while the CNG and the GCC 'are two distinct legal entities', they have identical membership, board of directors, governing structures and 'are de facto managed and operated as one organization by the Cree Nation'.[400] This suggests deeply strategic thinking around the continued separation of the entities, even if such a separation is largely nominal, particularly considering the significant responsibilities the CRA has to outside governments and the terms of the JBNQA.

At the same time, the Cree Nation has maintained further levels of nation governance. This includes the local Eeyou government and the Eeyou Tapaytachesou, which includes traditional governance systems and laws over hunting territory and land (Category IA and IB lands).[401] Beyond the Cree Nation Government (the GCC/CRA), since 2013 the Eeyou Istchee James Bay Regional Government has seen significant Eeyou participation in decision making over shared lands and resources. [402] This is in addition to the Cree institutions such as the Cree School Board, Cree Health Board, and the co-management agreements regarding environmental protection and hunting. [403]

Thus, the CRA (now CNG) is only one part of the Cree Nation's governance regime. However, the nation has also been highly strategic in the ways it has utilised the CRA, eventually expanding its role over time. The most significant of these was a long-term result of the 2008 Canada-Cree Agreement. Amendments were introduced 'equip' the CRA with additional powers, allowing it 'to receive and carry out certain responsibilities that had been previously assumed by the federal government under the JBNQA'.[404] As a further result of this Agreement, from 2014, the CNG (formerly CRA) had 'authority and jurisdiction within Category II lands

[396] Hurley, 'Legislative Summary'.
[397] Secretariat, 'Evolution'.
[398] Saunders et al., 'Eeyou Governance', 3.
[399] CNG, 'Governance and Structure', https://www.cngov.ca/governance-structure/.
[400] CNG, 'Governance and Structure'.
[401] Saunders et al., 'Eeyou Governance', 17.
[402] BC Treaty, 'Eeyou (Cree) Governance'.
[403] BC Treaty, 'Eeyou (Cree) Governance'.
[404] Government of Canada, 'The James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement - Annual Reports 2008-2009 / 2009-2010', https://www.rcaanc-cirnac.gc.ca/eng/1407867973532/1542984538197.

and jurisdiction over certain matters within Category IA lands of Eeyou/Eenou'.[405] The CNG is now able to pass its own laws, as opposed to by-laws.

Is First Nations law incorporated into the CRA?

Yes.

Throughout the varied system of Cree governance, the nation has 'established and continues to establish customary law and other Eeyou laws which may evolve and take modern form'.[406] As put by Saunders et al., 'while the Grand Council exercises board governance under contemporary law, it exercises nation governance under Eeyou law.'[407] As expressed in 2015 by Saunders et al.:

> Eeyou vision of self-government embraces two distinct but related goals. The first involves greater authority over Eeyou Istchee and its inhabitants, whether this territory be exclusive Eeyou or shared with others. The second involves great control over matters that affect Eeyou in question: its culture, identity and collective wellbeing.[408]

In 2017, the CNG agreed the Cree Constitution, which 'starts with a statement of key Cree Values and principles' and 'has the force of law'.[409] Since 2018, the CNG has been able to pass its own laws on Category IA lands (in line with the Cree Constitution and the 2017 Agreement on Cree Nation Governance). In doing so, there is careful managing of settler and Eeyou law. In 2019, the first Bill was passed by the CNG, *An Act respecting the Cree language of Eeyou Istchee*, which intends to 'support and promote the use of Cree language', including 'efforts to reclaim, revitalise, maintain and strengthen' the language.[410]

Potential implications for Aboriginal and Torres Strait Islander nations

The story of the CRA has potentially significant implications for Aboriginal and Torres Strait Islander nations. This is less concerned with the particularities of the CRA itself, as the original legislation providing for the CRA is not dissimilar to the TSRA or other legislation seen in Australia. Instead, the primary implications arise from *how* the Cree Nation was able to use these tools (including the JBNQA and the CRA) to nation-build and expand its authority and autonomy. These can be roughly summarised in accordance with the descriptive INB framework, where nations *identify*, *organise* and *act* as nations to achieve their collective aspirations.[411]

Identifying as a Nation:

- The Cree Nation used a moment of significant crisis (the 1971 hydroelectric scheme) to bring nation leaders together in order to act collectively. Following this moment, the nation has worked to continually reinforce their law and values, continuing to live according to Eeyou law. [412]

Organising as a Nation:

- The nation's decision to keep the GCC ensured that the CRA – the body established under settler law to engage with outsiders – did not become synonymous with the nation or nation decision-making. In essence, political decision-making and administration were kept (at

[405] BC Treaty, 'Eeyou (Cree) Governance'.
[406] Saunders et al., 'Eeyou Governance', 20.
[407] Saunders et al., 'Eeyou Governance', 18.
[408] Saunders et al., 'Eeyou Governance', 38.
[409] Government of Canada, *Cree Nation of Eeyou Istchee Governance Agreement Act*, https://laws-lois.justice.gc.ca/eng/acts/c-45.75/page-1.html.
[410] CNG, 'Timeline'.
[411] Cornell, 'Processes of Native Nationhood'. Described in Part 1.
[412] Saunders et al., 'Eeyou Governance', 18.

least nominally) separate. However, the membership and leadership structure of the two entities were identical, ensuring efficiency and effectiveness while keeping Cree political authority at some distance from outside interference.

- Crucially, the nation has supported the role of the CRA (CNG) to evolve over time, in line with changing internal and external contexts. The Cree are open to further changes in their governance and decision-making bodies.[413]

Acting as a Nation:

- The Cree Nation's current successes can only be partly attributed to the JBNQA. The much more difficult journey was to change the nature of the nation's interactions with Quebec and Canada. More significant, then, is the long-term, strategic vision and sovereign approach consistently utilised by the Cree Nation to develop nation-to-nation relationships with outside governments over time.
- As put by Saunders et al., 'in their relations with non-Eeyou governments', the Eeyou 'have developed and implemented a 'just do it' approach in the evolution of governance.'[414] In line with this, the Cree Nation have used agreement-making as a way to hold outsiders to account and achieve self-determined goals. Significantly, this includes entirely changing the scope of the CRA (to the now CNG) from how the Quebec and Canadian Governments had originally envisaged.

4.3 First Nations Health Authority

History and establishment of authority

Multiple intertwined histories led First Nations in British Columbia (BC), Canada to establish the 2013 First Nations Health Authority (FNHA), a pan-Indigenous health authority. As put by then FNHA CEO Joe Gallagher et al., 'The FNHA was created by and for First Nations in British Columbia (BC) with a dynamic mandate to elevate the health and wellness outcomes for First Nations peoples in the province'.[415] Since 2013, the FNHA has been responsible for creating, funding and administering a range of health programs and services for First Nations within BC that were previously under the jurisdiction of Health Canada.[416]

There are over 203 First Nations communities in BC, with diverse cultures, traditions and social and political norms.[417] BC is often described as having been 'settled' on a foundation of *terra nullius*, providing a similar (fallacious) jurisdictional foundation to that of Australia. As put by the FNHA, the subsequent 'lack of treaties' is a 'key feature of BC First Nations political life'.[418] As has been noted by multiple sources, First Nations were 'absent from the design and delivery' of health services.[419] Under the *Indian Act*, there was a 'jurisdictional mix of responsibility and accountability' that ensured First Nations were 'lost in the middle of distant partners', particularly in regards to health.[420] This was particularly because of the mix of provincial boundaries versus reserve boundaries, ultimately resulting in 'inefficient and fragmented services, lacking a population health focus, and not informed by any engagement

[413] Saunders et al., 'Eeyou Governance'.
[414] Saunders et al., 'Eeyou Governance', 2.
[415] Joe Gallagher et al., 'The First Nations Health Authority: A transformation in healthcare for BC First Nations', *Healthcare Management Forum* 28:6 (2015): 255.
[416] First Nations Health Authority (FNHA), 'FNHA Overview', https://www.fnha.ca/about/fnha-overview.
[417] FNHA, Assembly of First Nations, *Our Story: The Made-in-BC Tripartite Health Transformation Journey* (Coast Salish Territory: FNHA, 2013), 8.
[418] FNHA, Assembly of First Nations, *Our Story*, 8.
[419] John O'Neil et al., 'Transforming First Nations' health governance in British Columbia', *International Journal of Health Governance* 21:4 (2016): 230.
[420] Gallagher et al., 'The First Nations Health Authority', 255.

with the communities served'.[421] In particular, there was a significant 'lack' of services actually being delivered on First Nations reserves, with only a 'limited complement of services' focused on remote communities.[422] The results for First Nations have included, according to Lavoie et al., 'confusion, frustration, delays, increased morbidity and premature mortality, not only related to health funding, but also in areas that impact the determinants of health, such as housing and education'.[423] It also ensured a significant administration burden on First Nations who were 'delivering varying levels of health services through almost as many [203] agreements with the federal government'.[424]

In 2005, BC First Nations came together and 'agreed to work cooperatively', to transform the lives of their citizens across a range of issues.[425] The three key Indigenous political organisations in BC – the BC Assembly of First Nations, First Nations Summit, and Union of BC Indian Chiefs – formed the First Nations Leadership Council, entering into the 2005 *Leadership Accord*.[426]

The *Leadership Accord* was quickly followed by the 2005 *Transformative Change Accord* signed by the Province of BC, the Government of Canada and the First Nations Leadership Council and then the 2006 *Transformative Change Accord: First Nations Health Plan*. The *Transformative Change Accord* 'committed the signatories to establish a new relationship based on mutual respect and recognition and to close the social and economic gaps between First Nations and other British Columbians in several areas including: relationships, education, health, housing & infrastructure, and economic opportunities' including an agreement to take the social determinants of health into account.[427] This developed into the 2007 *Tripartite First Nations Health Plan (*Tripartite Plan), which called for the development of a First Nations health governing structure, the structure of which is discussed below. The 2007 Tripartite Plan made explicit that the actions of all parties were to be 'based on reciprocal accountability' and also on 'growth, knowledge and skill transfer'. A corresponding stated objective was that Canada would 'evolve its role from that of a designer and deliverer of First Nations health services to that of funder and governance partner'.[428]

Referred to as 'milestone agreements' by O'Neil et al.,[429] and 'visionary documents' by Gallagher et al., these agreements were essential to the eventual FNHA.[430] However, progress stalled until 2010, when First Nations came together again 'to speak with one voice and by consensus made the largest self-determining decision made in this country: to take control over their own health and wellness.'[431] First Nations decided to reorganise the First Nations Health Council, 'to ensures that [it] was directly accountable to the communities that they served'.[432] According to Gallagher, this decision 'enabled a one-of-a-kind health governance partnership with the federal and provincial government that recognizes the role of BC First Nations to make

[421] O'Neil et al., 'Transforming First Nations' health governance', 230.
[422] J.G. Lavoie et al., 'Responding to health inequities: Indigenous health system innovations', *Global Health, Epidemiology and Genomics* 1: e14 (2016): 7.
[423] Lavoie et al., 'Responding to health inequities', 8.
[424] Gallagher et al., 'The First Nations Health Authority', 255.
[425] FNHA, 'Timeline', https://www.fnha.ca/about/transition-and-transformation/timeline. The *Leadership Accord* specified that each nation 'respect and recognise each other's Aboriginal title, rights and interests and treaty rights'. The purpose was to 'formalize a cooperative working relationship' and to 'focus on a range of agreed upon issues and initiatives'. See British Columbia Assembly of First Nations, *Leadership Accord* (2005), https://www.bcafn.ca/sites/default/files/docs/LeadershipAccord.pdf.
[426] FNHA, 'Timeline', https://www.fnha.ca/about/transition-and-transformation/timeline.
[427] First Nations Health Council (FNHC), *Implementing the Vision: BC First Nations Health Governance* (Vancouver: FNHC, 2011), 24, https://www.fnha.ca/Documents/FNHC_Health_Governance_Book.pdf.
[428] The First Nations Leadership Council, Government of Canada and Government of British Columbia, *Tripartite First Nations Health Plan* (2007), https://www.fnha.ca/Documents/TripartiteFNHealthPlan.pdf.
[429] O'Neil et al., 'Transforming First Nations' health governance', 232.
[430] Gallagher et al., 'The First Nations Health Authority', 257.
[431] Joe Gallagher, 'Indigenous approaches to health and wellness leadership: A BC First Nations perspective', *Healthcare Management Forum* 32:1 (2019): 5.
[432] FNHC, *Implementing the Vision*, 25.

decisions over health and wellness services for First Nations people'.[433] This was a 'collective exercise of … self-determination', emerging from 'a foundation laid by generations of Indigenous leaders'.[434] The FNHC signed the 2011 *Tripartite Framework Agreement on First Nations Health Governance* alongside the Government of Canada, agreeing to the establishing of the FNHA. According to Jorgensen, for First Nations, the primary motivations behind the FNHA were to address historical disparities in health outcomes; to incorporate and recognise First Nations health values; and to increase their individual nation's self-determination alongside collective, pan-Indigenous self-determination. [435] First Nations were careful to ensure both that the Agreements 'do not affect Aboriginal title and rights or the Crown's fiduciary duty to First Nations'[436] and that they:

> [would] not displace the role of individual First Nations in delivering health services. Through the transfer in administration to First Nations control, these agreements will give First Nations the ability to shape health services to better meet their needs, and shift the focus from a sickness system to a wellness system.[437]

In 2011, the Tripartite health network also developed the 'Seven Directives' to underline the new health governance system (discussed below). This was always informed by INB thinking. As put by a participant in a 2015 roundtable on the FNHA:

> There has been an emphasis [...] on nation building because it's really about largely bringing our nations to the table to nurture their creative spirit and how they're going to embrace this change and in fact, to draw on the metaphor, becoming the driver of that change. The relationship that we're developing I think has made some improvements over the last year and has helped to facilitate a stronger connection to the nations that are involved to facilitate the change in the communities.[438]

Finally, in 2012, the *Health Partnership Accord* was also signed, confirming the 'foundation of partnership' between Canada, BC and the First Nations Health Council, supported by FNHA.[439]

In line with the *Tripartite Framework Agreement on First Nations Health Governance*, in October 2013 a 'new era' in 'health governance' began.[440] The core functions of Health Canada's First Nations and Inuit Health Branch Pacific Region were transferred to the FNHA. This was, in the words of O'Neil, 'an historical first in Canada'.[441] The programs taken on, included, for example, children and young people programs; chronic disease; primary care; communicable disease; and mental health. Health Canada committed $4.7 billion to the FNHA over 10 years for the *Tripartite Framework Agreement*. The *Agreement* covered approximately 150,000 First Nations people and over 200 'communities'.[442]

In 2017, Health Canada reported that effects of the *Agreement* include '[a] reduce[d]…reporting burden'; 'streamline[d] reporting processes' and a 'certain level of flexibility' to ensure effective delivery of services.[443] According to Jorgensen, for First Nations, the Agreement has further supported First Nations to self-determine wellbeing and service delivery; ensuring accountability from First Nations to their citizens for community-desired outcomes, and fiscal

[433] Gallagher, 'Indigenous approaches', 5.
[434] Gallagher, 'Indigenous approaches', 6.
[435] Jorgensen, presentation, August 2023.
[436] FNHC, *Implementing the Vision*, 32.
[437] FNHC, *Implementing the Vision*, 32.
[438] Quoted in O'Neil et al., 'Transforming First Nations' health governance', 236.
[439] FNHC and BC Ministry of Health, *Health Partnership Accord* (Vancouver: Health Canada, 2012), 2, https://www.fnha.ca/documents/health_partnership_accord_publication.pdf.
[440] Jorgensen, presentation, August 2023.
[441] O'Neil et al., 'Transforming First Nations' health governance', 230.
[442] Office of Audit and Evaluation, *Evaluation of Canada's Role in Supporting BC First Nations Health Authority as a Governance Partner,* https://www.canada.ca/en/public-health/corporate/transparency/corporate-management-reporting/evaluation/health-canada-role-supporting-british-columbia-first-nations-health-authority-governance-partner.html.
[443] Office of Audit and Evaluation, *Evaluation of Canada's Role.*

accountability from First Nations to the FNHA.[444] Similar sentiments were reported in the 2015 roundtable, where 'several participants emphasized the significance of this governance model in putting First Nations 'into the driver's seat,' in order to 'do for ourselves' what federal and provincial organizations have for many decades tried to do 'on our behalf,' giving primacy to the agency of First Nation communities and leaders.' [445]

In 2023, the FNHA received renewed funding of over $8 billion (CAN) in funding over 10 years, with further ability to determine the social determinants of health. The FNHA full control over the funding.[446] The ongoing functions, responsibilities and accountabilities of the FNHA are discussed further below.

Structure of Authority

The FNHA was imagined by the 2005 *Transformative Change Accord* and the 2007 *Tripartite First Nations Health Plan*, and was incorporated in 2011 to enable the *Tripartite Framework Agreement on First Nations Health Governance*. It was in operation from 2013, receiving financial and program transfers from Canada Health. The FNHA has, in its own words, a 'unique governance structure'.[447] The tripartite structure includes:

- The First Nations Health Authority (FNHA): the service delivery arm that 'manages, designs, delivers, and funds health and wellness programs, services, and initiatives in partnership with BC First Nations communities'.[448]
- The First Nations Health Council (FNHC): the political representative arm composed of regionally appointed members, the FNHC 'provides governance, leadership, and oversight for the implementation of health plans and is responsible for maintaining the holistic governance structure established by BC First Nations'. [449]
- The First Nations Health Directors Association (FNHDA): the technical arm, the FNHDA includes First Nations health directors and managers. It 'acts as a technical advisory body to the FNHC and the FNHA on research, policy, program planning and design, and the implementation of the health plans.'[450]
- The Tripartite Committee on First Nations Health (TCFNH): the communication arm, the TCFNCH includes members of the FNHA, BC Health Authorities, BC Ministry of Health and Health Canada Partners to align and coordinate 'programming and planning for BC First Nations health and wellness across the entire provincial system'.[451]

Importantly, alongside leadership through the FNHC, the system is underlined by First Nations' input. The FNHA, FNHC, and FNHDA all 'receive direction from community leadership and Nations throughout the five regions of the province through community engagement sessions'.[452]

[444] Miriam Jorgensen, presentation, August 2023.
[445] O'Neil et al., 'Transforming First Nations' health governance', 235.
[446] Giovanni Torre, 'First Nations Health Authority in Canada given $8.2 billion and power to set their own course', *National Indigenous Times*, 16 April 2023, https://nit.com.au/16-04-2023/5611/first-nations-health-authority-in-canada-given-82-billion-and-power-to-set-their-own-course.
[447] FNHA, 'FNHA Overview', https://www.fnha.ca/about/fnha-overview.
[448] Gallagher et al., 'The First Nations Health Authority', 257.
[449] Gallagher et al., 'The First Nations Health Authority', 258.
[450] Gallagher et al., 'The First Nations Health Authority', 259.
[451] Gallagher et al., 'The First Nations Health Authority', 259.
[452] FNHA, *First Nations Health Governance Structure in BC,* https://www.fnha.ca/Documents/First-Nations-Health-Governance-Structure-in-BC-Placemat.pdf.

Functions, responsibilities and accountabilities

The larger health governance structure has significant impacts on the ways in which the FNHA undertakes its role. The FNHA undertakes a 'unique' role, including 'strategic policy functions, service delivery functions, and population health functions at all levels.' [453] This sees the FNHA essentially acting as the 'operational arm' of the larger health governance structure.[454] As put by Gallagher et al., this ensures that the structure 'effectively separates business from politics, while respecting both'.[455] The FNHC is the political arm of the structure.

The FNHA is underlined by the directives that 'describe the fundamental standards and instructions for the new health governance relationship'.[456] These are intimately connected to sovereignty and self-determination, and were developed by BC First Nations from 'hundreds of regional and sub-regional caucus meetings'.[457] They include:

1. Community-driven, nation based

- This directive is, according to the FNHA, 'foundational to the entire health governance arrangement'. It is to ensure that the 'Autonomy and authority of First Nations will not be compromised'.[458]

2. Increase First Nations decision-making and control
3. Improve services
4. Foster meaningful collaboration and partnerships
5. Develop human and economic capacity
6. Be without prejudice to First Nations' interests
7. Function at a high operational standard.

The overarching 'shared vision' of all components is, according to the FNHA, 'Healthy, Self-Determining and Vibrant BC First Nations Children, Families and Communities'. [459]

Crucially, originally seven connected performance were used to track progress against the directives, thus 'breaking out from the usual excessive reporting required on every single program or funding stream'.[460] More recently, 15 new indicators that 'reflect a First Nations perspective on health and wellness that is grounded in a strength-based approach such as connection to land, self-determination, and cultural wellness'. [461] According to Stelkia et al., 'the indicators are meant to be emblematic of the sources of strength that make First Nations in BC healthy and well'.[462]

[453] Gallagher et al., 'The First Nations Health Authority', 259.
[454] Gallagher, 'Indigenous approaches', 5.
[455] Gallagher et al., 'The First Nations Health Authority', 259.
[456] FNHA, 'The 7 Directives', https://www.fnha.ca/about/fnha-overview/directives.
[457] FNHA, 'The 7 Directives'.
[458] FNHA, 'The 7 Directives'.
[459] FNHA, 'The 7 Directives'.
[460] Jorgensen, presentation, August 2023
[461] Krista Stelkia et al., 'Weaving Promising Practices to Transform Indigenous Population Health and Wellness Reporting by Indigenizing Indicators in First Nations Health', *International Journal of Indigenous Health* 18:1 (2023): 8.
[462] Stelkia et al., 'Weaving Promising Practices', 8.

Fundamentally, the FNHA seeks to increase First Nations' self-determination through health. While providing an overarching structure, services and support are dependent on particular 'needs' of the First Nation.[463] This ensures that the FNHA primarily acts as a 'funding partner', allowing individual First Nations to provide the specific services themselves.[464] Within this context, First Nations become 'customer-owners' as they engage in multiple roles, including accessing, governing and providing specific programs.[465] Such services are 'culturally appropriate' to the specific First Nations, whilst also 'drawing upon best-practices models to improve access and service utilization for First Nations patients'.[466] As put by Gallagher et al., the 'overarching objective' with such actions is to 'return community- and regional-level decision-making to First Nations communities and decolonize relationships between health professionals and government partners in their territories'.[467]

While working for communities to deliver their own health services, through the interconnection of the FNHA, it is able to assume a broader range of activities than Health Canada. Because it is not 'regionally based or confined by geographic boundaries within the province', the FNHA can, for example, collate appropriate data to undertake more targeted services.[468] Further, because the FNHA can access data across First Nations, it is able to launch effective cross-First Nation programs, for example around healthy medication use.[469]

Is First Nations law incorporated into the FNHA?

Yes.

The FNHA is underpinned by First Nations' law. According to Gallagher et al., this includes 'cultural humility', 'knowledge and teaching',[470] and 'leading with ceremony'.[471] These are 'foundational to the success of the work'. [472] This is compounded by 'strong leadership, rooted in the knowledge and teachings that have sustained BC First Nations for thousands of years', which 'is integral to achievement of the vision.'[473]

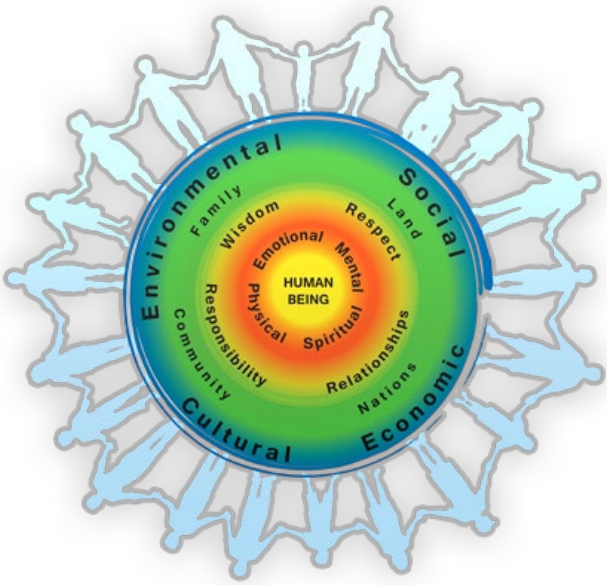
Beyond this, the FNHA has worked to incorporate First Nations' law, knowledge and perspectives into its operational framework. While initially performance indicators for health goals were defined by Canada, as of 2023, the FNHA has transitioned towards fully community-defined health aspirations, and indicators that match these. This has been a long-term goal of the FNHA, to develop its indicators, reflecting First Nations' priorities and values, and allowing for the inclusion of Indigenous law and cultural considerations in the assessment of healthcare services and well-being.

Most significantly, fundamental ideas of 'health' are defined in accordance with First Nations worldviews. Contrasting the 'Western biomedical model of health', where 'disease and health are individual' and 'highly biological', and which has 'shaped' common indicators and

[463] Gallagher et al., 'The First Nations Health Authority', 259.
[464] Gallagher et al., 'The First Nations Health Authority', 259. FNHA partnering with local First Nations to deliver on areas of priority that matter to them; for example, Elders accessing emergency care that is ''Trauma Informed and Culturally Safe'. See Janice Johnson and Leena Hasan, 'Paddling Together for Culturally Safe Emergency Care for Elders', *International Journal of Indigenous Health* 16:1 (2021): 146.
[465] Gallagher, 'Indigenous approaches', 6.
[466] O'Neil et al., 'Transforming First Nations' health governance', 239.
[467] Gallagher et al., 'The First Nations Health Authority', 255.
[468] Soha Sabeti et al., 'Collaborative Data Governance to Support First Nations-Led Overdose Surveillance and Data Analysis in British Columbia, Canada', *International Journal of Indigenous Health* 16:2 (2021): 340.
[469] Gina Gaspard et al., 'Indigenous End-of-Life Doula Course: Bringing the Culture Home', *International Journal of Indigenous Health* 16:2 (2021): 167.
[470] Gallagher et al., 'The First Nations Health Authority', 261.
[471] Gallagher, 'Indigenous approaches', 5.
[472] Gallagher, 'Indigenous approaches', 5.
[473] Gallagher, 'Indigenous approaches', 5.

measures used,[474] there is a shift from 'deficit' and 'sickness' to a 'more holistic and strength-based perspective on health and well-being'.[475] Holistic conceptions of 'wellness' is a central philosophy to the FNHA. According to Gallagher et al., this concept of wellness includes living well through a balanced lifestyle and a harmonious relationship with one's environment.'[476] Significantly, physical, mental, emotional and 'spiritual' dimensions of wellness are incorporated into the indicators to measure success of programs of the FNHA.[477] Critically, indicators of such wellness are now self-defined by the relevant Indigenous nation, enabling it to actually correspond to nation law. First Nations have 'control over decisions about what constitutes evidence of wellness.'[478]

Figure 6. FNHA Models of Wellness[479]



Governance challenges

The current operation of the FNHA and its related governance structure was the result of many years of planning, relationship-building and negotiations both internally with First Nations and externally with settler governments.

As detailed above, initial discussions between First Nations about creating a joint model were tabled due to concerns that First Nations could stand to lose some of their individual authority. While there was a desire to share administrative and fiscal services, in order to both reduce red tape and increase self-determination, there were concerns that a combined authority may not be significantly better for First Nations than current arrangements with the province.[480]

[474] Stelkia et al., 'Weaving Promising Practices', 2.
[475] Stelkia et al., 'Weaving Promising Practices', 8.
[476] Gallagher et al., 'The First Nations Health Authority', 260.
[477] Stelkia et al., 'Weaving Promising Practices', 2. See also O'Neil et al., 'Transforming First Nations' health governance', 237.
[478] Joe Gallagher, 'Introduction: Welcome from the First Nations Health Authority', *International Journal of Indigenous Health* 11:1 (2016): 1.
[479] FNHA, 'Wellness', https://www.fnha.ca/wellness.
[480] Jorgensen, presentation, August 2023. Private conversation with Chris Corrigan, Maplelag, Minnesota.

While First Nations overcame these differences and re-imagined the FNHC to ensure it was representative, from the start, First Nations and settler governments had different conceptions of the role of the FNHA. According to Jorgensen, First Nations conceived of the FNHA as a 'middle ground' between the settler state and First Nations communities. Its purpose was to interact with the settler state to absorb various funding streams, programs, and services, ultimately to reduce dependence on the settler colonial state and enable self-determination. On the other hand, the settler state initially saw the FNHA as a health service delivery body that could reduce costs but would continue to fundamentally deliver government services.[481]

In line with this, transferring services from Health Canada to the FNHA was more complex than Health Canada initially expected. Writing in 2017, Health Canada acknowledged that its:

> role post-transfer has evolved considerably from what was originally anticipated. While one of the keys to success has been to document and follow formal processes, partners now recognize that a certain level of flexibility is necessary to ensure that the FNHA is able to continue delivering quality services to member communities.[482]

However, due to the careful relationship building and formal agreement-making, it seems that the new relationship between the settler state and BC First Nations was able to evolve.

Potential implications for Aboriginal and Torres Strait Islander nations

The First Nations Health Authority is part of a unique structure. Key differences from other case studies is that it is not 'simply' established in legislation, and involves many First Nations acting collectively. However, it is widely assumed that the 'transformation of First Nations health governance in BC can serve as an example in other indigenous health settings both within Canada and internationally'.[483]

Potential points of significance for Aboriginal and Torres Strait Islander nations include demonstrating how a particular area can be utilised to fundamentally expand authority – i.e. using health and service delivery to not only take care of nation citizens, but to do sovereignty work.[484] In turn, this points to the fact that a broad understanding of health and wellbeing is useful, and can be utilised by nations to gain broader authority over a greater range of issues than the settler state may traditionally classify as 'health'. It is also suggestive of the importance of multi-year funding and minimisation of reporting items.

The FNHA also provides a model for how First Nations in an area or region may be able to come together collectively in a way that doesn't undermine the individual sovereignty or sovereign aspirations of particular nations. Particular implications include a recognition that Aboriginal Community Controlled Health Organisations (ACCHO) may offer possibilities to support Indigenous nation jurisdiction. In such an undertaking, the role of ACCHOs could be to support individual nations (avoiding attempting to 'be' the nation), with opportunities for nation self-determination prioritised. Further discussion of this can be found in ground-breaking research led by Professor Daryle Rigney on the 'political determinants' of health and wellbeing.[485]

[481] Jorgensen, presentation, August 2023.
[482] Office of Audit and Evaluation, *Evaluation of Canada's Role*.
[483] O'Neil et al., 'Transforming First Nations' health governance', 230.
[484] See also Rigney et al., *Indigenous Nation Building*, 47-51.
[485] Rigney et al, *Indigenous Nation Building and the Political Determinants of Health and Wellbeing*. Discussion Paper. Melbourne: Lowitja Institute, 2022.

Finally, the experience of First Nations in the FNHA also points to the significance of negotiated agreement making in working to broker relationships and hold outsiders to account. We discuss this further in Part 5.

4.4 Criminal justice joint jurisdiction courts and programs

We now analyse three hybrid programs within the criminal justice system which provide useful conceptual models for the exercise of First Nations and settler jurisdiction. In these examples, negotiations are necessarily narrowly focussed on the exercise of jurisdiction and the respective roles of the two sovereigns. That is, in developing institutions where offenders potentially face two criminal systems, negotiators have had to be precise about how the two jurisdictions are going to interact. The first two case studies briefly describe Indigenous nation courts and the third case study presents an example of a First Nation post release program. All three examples exist in environments where settler-colonial governments assert jurisdiction over crime on the relevant reserve or reservation. As such, we do not use the same headings of 'history of authority', 'establishment' here. Instead, we provide a brief overview of each hybrid system.

Tsuut'ina First Nation Court, Alberta, Canada

The Tsuut'ina Nation (formerly Sarcee Nation) resides on the Tsuu T'ina 145 Reserve in what is now known as Alberta, Canada, bordering the city limits of Calgary. Unsurprisingly, Tsuut'ina traditional territory is a much larger area in southern Alberta. Although the Tsuut'ina are part of the Blackfoot Confederacy, their language is an Athabaskan language related to the Dene Peoples of northern Canada and Alaska.

The Tsuut'ina First Nation Court (Tsuut'ina FNC) is a dual jurisdiction court, being the first Aboriginal court in Canada.[486] The Tsuut'ina FNC formally merges two legal systems: the Provincial Court of Alberta and the Tsuut'ina peacemaker system. The Tsuut'ina FNC was first proposed in 1996 in response to Tsuut'ina concerns about Indigenous overrepresentation in the settler criminal justice system. A 1998 report – the Tsuut'ina Nation Court Proposal Final Report – analysed a number of First Nations' courts and recommended the establishment of a court. The Tsuut'ina FNC commenced in 2000 as an initiative of the Tsuut'ina Chief and Council with support from the Alberta provincial court to address over representation of First Nations people in the criminal justice and corrections systems. The Tsuut'ina FNC is both a provincial court of Alberta and Tsuut'ina peacemaking system with jurisdiction over all adult and youth provincial offences (except homicide and sexual assault) committed on the Tsuut'ina reserve, and breaches of First Nation by-law.[487] It presides over Tsuut'ina members, non-Tsuut'ina First Nations persons, and non- First Nations persons.

Court procedures are culturally grounded.[488] The day begins with a smudging ceremony with sage or sweetgrass, and all parties sit in a culturally designed circular room with traditional

[486] Shelly Johnson, 'Developing First Nations Courts in Canada: Elders as foundational to Indigenous therapeutic jurisprudence' (2014) 3(2) *Journal of Indigenous Social Development* 1, 6. The Tsuut'ina First Nations Court was the first Aboriginal court in what is now Canada but a number of other Indigenous courts now operate, including the Cree-speaking Court and Dene-speaking Court in Saskatchewan, the Gladue (Aboriginal Persons) Court in Ontario, and the First Nations Court in British Columbia.

[487] Dale Dewhurst, 'Parallel Justice Systems' in Catherine Bell & David Kahane (eds) *Intercultural Dispute Resolution in Aboriginal Contexts* (Canada, UBC Press: 2004), 216. Some crimes around sexual assault are now covered by amendments to the *Violence Against Women Act 2009*.

[488] While there is a strong preference that the judge, prosecutor, court clerks, probation officer and peacemaker coordinator be Aboriginal people, the appointment of the judge is a provincial responsibility and that discretion cannot be fettered. Similarly, while the prosecutor takes Aboriginal values into consideration in evaluating what charges to lay, what charges to proceed with and whether to drop charges at the end of a successful peacemaker

Tsuut'ina symbols where no-one is elevated and the robes of the judge and court staff include beaded medallions and eagle feathers.[489] Peacemaking is voluntary: if the offender agrees to take responsibility for their actions, and the victim agrees to participate, the case can be referred to a Tsuut'ina peacemaker who is considered 'fair' by both sides.[490]

Peacemakers are highly regarded in the community as knowledgeable in traditional law and customs, and receive training in the facilitation of conventional participatory dispute resolution processes.[491] Peacemaking can take hours or days through four circuits, including Elder peacemakers, the offender, victim/s, family members and sometimes additional personnel (counsellors, addiction specialists etc).[492] Peacemakers use a range of techniques that may involve traditional circles, sweat lodges and spiritual healing techniques.[493] If resolution is reached and the offender commits to complete an agreed action plan, the matter returns to the prosecutor. If the prosecutor is satisfied with the agreement, they withdraw the charges.[494] If the prosecutor is not satisfied, the agreement is considered by the judge in sentencing.[495] Once the offender completes the agreed actions, they return to court for a celebration. If they do not complete the agreement, they return to the adversarial court to be sentenced by the judge, without prejudice.[496]

Leech Lake Band of Ojibwe (Joint Jurisdiction) Court, Minnesota, US

The Leech Lake Band of Ojibwe (also known as the Leech Lake Band of Chippewa) (Leech Lake), is based on the Leech Lake Reservation in the north central region of what is now Minnesota, close to the Canadian border. The Reservation contains small, rural, highly separated towns and communities within an environment that is primarily forests, lakes and wetlands.[497] Half the reservation is situated within Cass County but it is spread across four counties.[498]

The Leech Lake Band of Ojibwe is one of the six nations making up the Minnesota Chippewa Tribe (MCT). While each band manages its own reservation, the MCT administers the nation and provides services to the bands in the areas of education, finance and human services, unless the bands have opted to provide services themselves.

In the early 200s, Leech Lake experienced a high degree of socioeconomic distress with high levels of unemployment and extreme poverty, including for many people who were employed below the poverty level and an alarmingly high percentage of residents with mental health issues.[499] At the time, Indigenous people were disproportionately represented in the criminal justice system and Indigenous youth vastly overrepresented in child protection and juvenile

process, they are at all times under the authority of the chief Crown prosecutor of Alberta. See Dewhurst, Parallel Justice Systems.

[489] Dewhurst, Parallel Justice Systems.

[490] Norma Large, 'Healing Justice' *albertaviews* (1 May/June 2001). < https://albertaviews.ca/healing-justice/>; Lynette Parker, 'Tsuu T'ina Peacemaking Justice in Canada' (2004) *Restorative Justice Online*, Article No 4733.

[491] Catherine Bell, 'Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks' in Catherine Bell & David Kahane (eds) *Intercultural Dispute Resolution in Aboriginal Contexts* (Canada, UBC Press: 2004) 241, 256

[492] Parker, Tsuu T'ina Peacemaking Justice in Canada.

[493] Dewhurst, Parallel Justice Systems, 217.

[494] Parker, Tsuu T'ina Peacemaking Justice in Canada.

[495] Parker, Tsuu T'ina Peacemaking Justice in Canada.

[496] Parker, Tsuu T'ina Peacemaking Justice in Canada.

[497] Wahwassuck, 'The New Face of Justice,' 745.

[498] Wahwassuck, 'The New Face of Justice,' 743.

[499] Wahwassuck, 'The New Face of Justice,' 743-744.

justice in Minnesota.[500] On the reservation, public safety and substance abuse were serious issues with increasing calls to the Leech Lake Police Department for assistance.[501]

The general rule in the United States is that First Nations have jurisdiction over civil and most criminal matters on their reservations (except for serious crimes under federal jurisdiction). However, Minnesota is a PL-280 state, meaning that Minnesota has jurisdiction over all criminal matters. State criminal jurisdiction was imposed without consent or federal funding. Although First Nations in Minnesota were denied federal funding to develop criminal courts, most, including the Leech Lake Band of Ojibwe, developed courts for civil matters, municipal by-laws and traffic infringements etc.[502]

Leech Lake offenders were previously tried in Minnesota County Courts, which tended to focus on the symptoms of drug and alcohol related crime, unable to address root causes.[503] Like many Minnesota nations, Leech Lake citizens were highly critical of settler state courts, viewing them as culturally inappropriate and inadequate to deal with their community's needs.[504] The Honourable Korey Wahwassuck, the former Leech Lake Tribal Court Chief Judge, observed that:

> Rather than building on the strengths and capabilities of offenders and their families, the state court system has simply dealt with their deficiencies and preached virtue at them, rarely successful in dealing with the problems that undercut their chances of success. [505]

Leech Lake citizens were therefore mistrustful and sometimes hostile toward the state judicial system in Minnesota,[506] with frustration at a 'revolving door' of incarceration and recidivism.[507]

Nonetheless, the nation and counties shared common concerns and priorities around the elevated levels of substance abuse associated with crime and family distress. In 2006, the Leech Lake Tribal Court agreed to cooperate with the Cass County District Court to form a unique joint jurisdiction, problem-solving court that was the first of its kind in the United States.[508] The Leech Lake-Cass County Wellness Court commenced as a post-conviction, post-sentencing Driving While Impaired (DWI) Court founded on the ten principles of drug courts.[509] The wellness court model emphasises rehabilitation rather than punishment and is open to qualifying volunteers (First Nations and non- First Nations) who have been sentenced in the state system and who opt to participate, rather than complete their sentence.[510]

Judges from both jurisdictions jointly preside over the matter, either side-by-side or by videoconference, giving participants the choice of appearing in the most convenient court.[511] Multidisciplinary and multijurisdictional teams made up of representatives from Tribal, County,

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[500] Wahwassuck, 'The New Face of Justice,' 745.
[501] Wahwassuck, 'The New Face of Justice,' 744.
[502] Harvard Project on American Indian Economic Development, *Honoring Nations: 2010 Honoree. Joint Tribal-State Jurisdiction: Leech Lake Band of Ojibwe* 1 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://hwpi.harvard.edu/files/hpaied/files/joint_tribal-state_jurisdiction.pdf?m=1639579101>.
[503] Wahwassuck, 'The New Face of Justice,' 746.
[504] Tribal Law and Policy Institute, *Promising Strategies: Tribal–State Court Relations* (March 2013, updated August 2013) 13-14 < chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.walkingoncommonground.org/files/Promising%20Strategies%20Tribal-State%20Court%20Final%203-13.pdf >.
[505] Wahwassuck, 'The New Face of Justice,' 746
[506] Wahwassuck, 'The New Face of Justice,' 751.
[507] HPAIED, *Joint Tribal-State Jurisdiction: Leech Lake Band of Ojibwe.*
[508] Wahwassuck, 'The New Face of Justice,' 747.
[509] Wahwassuck, 'The New Face of Justice,' 747.
[510] HPAIED, *Joint Tribal-State Jurisdiction: Leech Lake Band of Ojibwe.*
[511] Wahwassuck, 'The New Face of Justice,' 747.

State, and other agencies create individualised treatment plans for offenders that are jointly monitored by judges from both jurisdictions.[512] Services and support from both systems can be used including substance counselling from the state system and spiritual healing programs from Leech Lake to help participants make cultural connections and deal with historical trauma.[513] The Ojibwe flag flies in the joint jurisdiction courts and Ojibwe ceremonies are central to the joint process.

The joint nation-state court arrangement has been highly successful on a range of measures leading to an expansion to Itasca County in 2008 and expanded jurisdiction to include juvenile and family cases in 2010.[514] Further, mutually positive experiences led to led to cooperation and collaboration in other areas including juvenile justice, culturally-appropriate diversion programs, more flexible community service arrangements and capacity for incarcerated parents to appear by videoconference in child protection cases.[515]

Over time, confidence and cooperation has developed through open communication leading to the mutual understanding that they have 'equal but parallel systems'.[516] According to Justice Wahwassuck, increasing respect built through the success of the court also brought unprecedented recognition not only for the Leech Lake Tribal Court, but also for tribal sovereignty in general.[517]

Muscogee (Creek) Nation Reintegration Program, Oklahoma, United States

Muscogee (Creek) Nation (MCN) is a federally recognized tribe now resident in what is now known as Oklahoma. MCN is one of the five 'Civilised Tribes' that were forced to relocate during the Trail of Tears, from Tennessee, Georgia and Alabama to Indian Territory west of the Mississippi River, which is now Oklahoma. It is the fourth largest First Nation in the United States with over 100,000 citizens. The MCN government is located in Okmulgee.

Oklahoma is a PL-280 state with jurisdiction over criminal matters on reservations and in relation to nation citizens who break state law. Oklahoma has extremely high incarceration rates (third highest for men and the highest for women in the US).[518] MCN has 60,000 enrolled citizens in east-central Oklahoma and in the mid-2000s, its leadership became alarmed about the high number of incarcerated citizens and recidivism.[519]

The MCN recognised that incarcerated people face serious problems reintegrating into the community upon release from prison, which can increase the likelihood of recidivism.[520] At the time, over two-thirds of returning inmates were re-arrested within three years of release from prison and two out of five were re-incarcerated.[521] In addition to the opportunity cost of not having offenders as productive citizens, incarceration policies run counter to Muscogee

[512] Wahwassuck, 'The New Face of Justice,' 747.
[513] HPAIED, *Joint Tribal-State Jurisdiction: Leech Lake Band of Ojibwe*, 15.
[514] HPAIED, *Joint Tribal-State Jurisdiction: Leech Lake Band of Ojibwe*, 16.
[515] Wahwassuck, 'The New Face of Justice,' 748-749.
[516] HPAIED, *Joint Tribal-State Jurisdiction: Leech Lake Band of Ojibwe*, 2.
[517] Wahwassuck, 'The New Face of Justice,' 748.
[518] Muscogee Creek Nation, 'Reintegration' <https://www.muscogeenation.com/department-of-education-and-training/reintegration/>.
[519] Harvard Project on American Indian Economic Development, 'Honoring Nations: 2008 Honoree. Muscogee Creek Nation Reintegration Program 1 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://hwpi.harvard.edu/files/hpaied/files/muscogee_creek_nation_reintegration_program.pdf?m=1639579104>.
[520] Tribal Access to Justice Innovation, *Reintegration Program: Muscogee (Creek) Nation* <https://tribaljustice.org/places/corrections-reentry/muscogee-creek-reintegration-program/>.
[521] Tribal Access to Justice Innovation, *Reintegration Program: Muscogee (Creek) Nation*.

perceptions of justice as restorative and aimed at changing the behaviour of offenders and bringing the offender back into the community.[522]

In 2005, the MCN passed legislation creating a reintegration program for enrolled citizens. A pilot project was trialled and fully funded by the MCN. In its first year it had a 96 per cent success rate, defined as the participant acquiring pro-social skills, being engaged in securing housing and employment or education and incurring no new criminal charges.[523]

The reintegration program is not a hybrid program per se, since the program is offered solely by the MCN, but in practice operates as a hybrid program due to the high degree of cooperation between Oklahoma and the MCN that are integral to its success. It begins in prison where program staff regularly meet with inmates and offer group programs on substance abuse and seminars on planning for reintegration, job skills and character building.[524] There is often a waiting list and inmates who are mandated to take classes prior to release have priority; others may take classes after they have been released. Program staff facilitate cleansing ceremonies to help inmates prepare spiritually for re-entry into society. Staff may also attend parole hearings to discuss rehabilitation planning and a participant's progress, which, at times, has aided early release.[525]

After release from prison, case managers (who are available 24/7) first address clients' immediate physical and financial needs, and engage clients in services aimed at promoting long-term stability and support. A comprehensive range of physical, mental health, substance abuse, financial, legal and spiritual services are tailored to the needs of the individual client. In return clients must agree to attend probation and parole meetings (with assistance if needed); meet their financial obligations; remain substance free; and work or be in training. A program participant who is not in work or training must work for the MCN in community activities. Case managers provide on-going support and supervision until the client no longer needs it. They monitor compliance and attempt to assist non-compliant participants to re-establish compliance. If a client consistently does not comply with program requirements, then they may be suspended, and eventually, terminated from the program.[526]

Recidivism rates for program participants are approximately 5 per cent, which is dramatically lower than US national or state averages.[527] Further, Muscogee participants and their families have been overwhelmingly positive about the program and Oklahoma officials have demonstrated their trust and confidence in the program. Oklahoma judges include referral to the program as a sentencing option, parole boards are more likely to grant parole to inmates who are eligible for the program and correctional facilities invite program staff to give presentations to Muscogee inmates.[528] The Reintegration Program has expanded over time, and now includes a purpose-built residential and vocational training facility to assist with transition from prison, the first of its kind in the United States. The program also seeks to constantly evolve, providing more services in the hope the program can serve a preventative role.

Potential implications from criminal justice case studies for Aboriginal and Torres Strait Islander hybrid bodies

In addition to the guidance that the US and Canadian criminal justice case studies may provide to more effective criminal justice outcomes for Aboriginal and Torres Strait Islander people, we

[522] Tribal Access to Justice Innovation, *Reintegration Program: Muscogee (Creek) Nation*; HPAIED, *Muscogee Creek Nation Reintegration Program*, 1.
[523] Tribal Access to Justice Innovation, *Reintegration Program: Muscogee (Creek) Nation*.
[524] Tribal Access to Justice Innovation, *Reintegration Program: Muscogee (Creek) Nation*.
[525] Tribal Access to Justice Innovation, *Reintegration Program: Muscogee (Creek) Nation*.
[526] Tribal Access to Justice Innovation, *Reintegration Program: Muscogee (Creek) Nation*.
[527] Tribal Access to Justice Innovation, *Reintegration Program: Muscogee (Creek) Nation*.
[528] Tribal Access to Justice Innovation, *Reintegration Program: Muscogee (Creek) Nation*.

also consider that the criminal justice case studies provide guidance on elements contributing to the success of hybrid bodies more broadly. In particular, the case studies reveal the critical importance of clear jurisdictional boundaries separating the authority of the sovereign parties with clear understanding of the role of the sovereign parties. This clarity illustrates the effective respect that each sovereign has for the other's authority, providing room for each party to exercise authority according to their own law and to act without interference, which may adversely impact outcomes. As witnessed in the case studies, giving jurisdictional room within defined roles led to an increased inter-jurisdictional respect and ultimately, to better outcomes.

Common themes

At present in Australia, the closest to First Nations exercise of criminal justice jurisdiction is the participation in circle sentencing courts by Aboriginal and Torres Strait Islander Elders, who advise on sentencing Aboriginal and Torres Strait Islander offenders who agree to plead guilty and to participate in the program. While Aboriginal and Torres Strait Islander Elders unquestionably use lore/law in determining their sentencing recommendations, we do not describe circle sentencing as a hybrid system. Sentencing is entirely within the settler criminal justice system and the role of the Aboriginal and Torres Strait Islander Elders is purely advisory. We do not minimise the important function of circle sentencing and the improved outcomes achieved for First Nations offenders, but seek to focus more on case studies that illustrate a greater level of Indigenous nation jurisdictional control.

Analysis of the case studies reveals strong common and inter-related themes that illustrate the significance of self-determination to positive justice outcomes. These include:

- Community control over design, process and preferred outcomes

Each case study illustrates the link between community control over design, process and preferred outcomes and program success. In each case, the need for the specific program was identified and initiated by the community.

- Embedding cultural worldviews

Given the place that historical and intergenerational trauma plays in offending, it is unsurprising that these successful programs had a cultural and/or spiritual focus that contributed to the benefit described by program participants.

- Jurisdictional control or influence

An important element was the cultural legitimacy or cultural integrity of the processes in each case study. For example, the hybrid Tsuut'ina First Nation Court and Leech Lake Band of Ojibwe Wellness (joint jurisdiction) Court, while ostensibly settler law courts, apply nation lore/law so that the process accords with relevant First Nations concepts of justice. Introducing peacemaker systems into mainstream courts, for example, provides foundational concepts of healing and mending and restoring well-being to the community, rather than a focus on punishment of the individual.

- Sufficient and sustainable resourcing

There is significant need for sufficient and sustainable resourcing. Services and programs that provide an individualised and holistic approach for program participants are intensive, long term and elements may need to be repeated.

- An integrated approach to case management

A common characteristic of these case studies was the approach taken by services or programs to address the needs of individual program participants.

- A holistic approach to wellbeing and healing (physical, social, emotional and psychological wellbeing of the wrongdoer)

Closely aligned with an integrated approach is that of a holistic approach whereby wellbeing is understood to encompass all aspects of personhood. Central to the case studies are cultural and spiritual values and beliefs and processes that assist program participants to understand themselves as having roles and responsibilities as a nation citizen.

- High levels of competence and capacity

Common to all the case studies are high levels of competence and capacity demonstrated by services, personnel and volunteers. Throughout the case studies, there was an emphasis on recruiting, training and providing highly competent Indigenous staff, including where staff are formally employed through the settler system (such as in the Tsuut'ina FNC) but are engaged in undertaking nation law.

- Time to grow and evolve

As a corollary to the prerequisite for community decision-making for optimal outcomes, the case studies emphasise the improvement in decision-making that occurs over time as decision-makers learn through experience. Learning and adapting was evident in the evolution of each case study, as nations and relevant settler governments learned how to coordinate their complementary jurisdictional responsibilities.

5 Implications for Aboriginal and Torres Strait Islander nations

Common themes from the case studies and their implications for hybrid models

The case studies we present in Part 4 emerge from a range of contexts, with hybrid governance systems established at different points for often specific, contextual reasons. There is little literature focused on comparing the examples we have used in this report. Mulrennan and Scott, for example, consider the Cree Regional Authority (CRA) and the Torres Strait Regional Authority (TSRA) to have similarities as they are both connected to 'co-management of land' and 'occup[y] peripheral areas in settler state contexts'.[529] The range of case studies we have explored suggests however that this analysis is only partly relevant for understanding the utility of particular hybrid governance mechanisms in differing contexts.

The case studies we present above all rely on, and are intimately connected with, settler law. All also have at least a purported connection with First Nations law, however the extent to which nations are able to prioritise and operate within their law and worldviews through the hybrid governance mechanism differs across the case studies. Only some case studies see an effective increase in First Nations' authority, or the achieving of collective aspirations.

This section therefore focuses less on the specific mechanisms that see First Nations law recognised or incorporated within settler law, or the differences between legislation in different contexts. Instead, in comparing the case studies, the most significant findings are around the significance of delineating jurisdiction shared between First Nations and settler governments; and the crucial difference between the *recognition* of jurisdiction and the *exercising* of that jurisdiction – in other words, self-determination. Our comparison of the case studies ultimately reinforces key INB literature. [530]

- First Nation and settler interest convergence

The most critical element in the success of hybrid bodies is that the two sovereigns identify a common problem that they have not been able to solve on their own, or a common purpose that requires the combined efforts of the two sovereigns to solve. That is, the case studies reveal a high degree of Indigenous nation and settler-colonial 'interest convergence', a term first articulated by renowned African American legal scholar Derrick Bell.[531]. Bell describes how minority groups are able to achieve social change when their interests are seen to align with those of the majority.

In relation to the criminal justice case studies, interest convergence was explicitly stated in relation to concern held by both the relevant Indigenous nations and settler government about the overrepresentation of Indigenous people in the settler criminal justice system. Justice Korey Wahwassuck, the former Leech Lake Tribal Court Chief Judge, described in detail the essential need to identify mutual goals to be achieved through trust, open communication and remaining

[529] ME Mulrennan and CH Scott, 'An Attainable Partnership? Two Cases from James Bay, Northern Quebec and Torres Strait, Northern Queensland', *Anthropologica* 47:2 (2005): 197.
[530] See Part 1 of this report.
[531] Derrick A Bell, 'Brown v. Board of Education and the Interest-Convergence Dilemma'. *Harvard Law Review* 93:3 (1980): 518–533.

focussed on the mutual goals.[532] Wahwassuck observes that success can be achieved even in an environment where there had been a high degree of suspicion and mistrust.[533] The leverage that the Cree Nation was able to exert related to a major infrastructure project desired by the state that could not proceed without Cree sanction. The interest convergence for the FNHA and TSRA is evident in the inadequacy of services provided by settler-colonial governments leading to a search for alternatives.

- First Nations led initiatives

Each of the five case studies was an initiative of First Nations to achieve self-defined aims, whether narrow (e.g. service delivery for the FNHA or criminal justice case studies) or broad (e.g. self-government for the Cree Nation Government (CNG) and TSRA case studies). These initiatives were made by First Nations regardless of whether settler governments were aware of their broader aims. That is, each case study is reflective of high degree of self-determination borne from processes created to identify and implement collective goals. For the TSRA and CNG, separate community governing bodies agreed to combine to form a nationwide governing structure with the intention to form self-government. For the FNHA and the three criminal justice case studies, dissatisfaction with 'services' delivered by settler-colonial governments provided the impetus for the First Nations to propose shared jurisdictional arrangements to the relevant settler-colonial government.

- Clear jurisdictional authority

The case studies reveal that hybrid bodies are most effective when the jurisdictional authority exercised by the sovereign partners is clearly defined. In some senses, this is demonstrated by the challenges facing the TSRA and alleged ineffectiveness due, in large part, to overlapping jurisdiction of numerous stakeholders contributing to a lack of clarity.

- Time for evolution and growth

The case studies reveal that where hybrid bodies were given the space to build capacity over time, they have been able to cement and expand jurisdiction, taking over additional aligned responsibilities. The time taken to build capacity and demonstrate excellence also enabled sovereign partners to build relations of trust and confidence. In the case of the FNHA and CNG, the extensive preparation before establishing the hybrid body and as it developed allowed both sovereigns to be clear about respective responsibilities and how responsibilities were to be achieved. While the Cree Nation was forced to litigate to compel Quebec to fulfil its responsibilities, through perseverance, it was able to create new forms of relationship.

[532] Wahwassuck, 'The New Face of Justice,' 754-755.
[533] Wahwassuck, 'The New Face of Justice,' 750-751.

The Ideal First Nation Hybrid Statutory Authority

Over the course of this project, the Research Directors conceptualised the elements that would ideally constitute an Aboriginal and Torres Strait Islander hybrid statutory, based on their experiences as Indigenous nation building experts and on the case studies included above. As we have emphasised throughout this report, the nature of the 'self-government landscape' mean that the components of such an 'ideal' First Nation Hybrid Statutory Authority (FNHSA) are necessarily affected by changes in the settler policy landscape. As such, the components outlined below are based on a May 2024 snapshot – i.e. where settler-state and First Nations relations are without negotiated treaties; negotiated agreements are largely pursuant to settler-colonial legislation, policies or initiatives; and Aboriginal and Torres Strait Islander and settler-colonial jurisdictions are overlapping and contested.[534]

As of May 2024, the components of an ideal FNHSA include that it:

- *Acknowledges that relations between First Nations and settler societies are that of nation-to-nation*

A critical challenge for Aboriginal and Torres Strait Islander nations wishing to increase their capacity for self-determination is that settler governments and their representatives lack understanding that they are engaging with contemporary, discrete and sovereign nations, rather than groups of stakeholders or interest groups. Asserting nationhood relations is far more difficult than accepting settler-colonial terms of engagement but is essential for the ideal FNHSA to have the types of powers, functions and responsibilities enabling it to exercise appropriate hybrid jurisdiction.

- *Is established according to both First Nation and settler jurisdiction*

This is crucial to ensure settler law engages with Indigenous jurisdiction as distinct and sovereign. It is also crucial to ensure that the FNHSA has the degree of 'cultural match' with the relevant Indigenous nation appropriate for hybrid operation. In practice, this may mean that the FNHSA has a novel structure (i.e. does not necessarily replicate the frequent settler statutory authority structure of Board, CEO etc).

- *Clearly delineates functions and responsibilities between First Nation and settler government/s*

The case studies demonstrated that precise demarcation of jurisdictional responsibility greatly improve the effectiveness of a hybrid body. Clear allocation of jurisdiction means that encroachment is avoided, allowing for the development of effective working relationships between sovereigns. Where jurisdictional responsibility is not clear, accountability can become malleable and ill-defined, leading to partnership breakdown.

- *Functions according to both First Nation and settler jurisdiction*

This is necessary to ensure that in its dealings, the FNHSA does not prioritise settler law or settler government priorities, inadvertently or otherwise. Simply including the language of First Nations law and custom within settler law is insufficient, and does not necessarily result in a statutory authority actually functioning in accordance with First Nation law. To ensure the FNHSA is able to function according to both the First Nation's and settler law, the FNHSA may require differing dispute resolution mechanisms for each.

- *Is accountable to both First Nations and settler government/s*

[534] See Part 3, 'the Indigenous Self-Government Landscape'.

This is to ensure that primary objectives of the FNHSA cannot be redirected to only fulfil settler obligations (or changing settler desires), and to highlight the intended nation-to-nation political relationship between the First Nation and settler state. To do this, we anticipate that the 'accountable authority' would need to be both the First Nation and the relevant settler government/s in the enabling legislation.

- *Does not occupy a 'seat at the table', but sits above the various settler-colonial government or other interests in the relevant area of jurisdiction*

As we describe in Part 3, settler policy around 'Indigenous Affairs' (and more broadly) involves a complicated web of overlapping jurisdictions exercised by bodies with often competing interests and roles. Statutory authorities are frequently created to provide overarching direction and independence in such complex areas to promote clarity and, ideally, a more streamlined, simpler operation. The FNHSA must be able to sit above the various local/state/federal government interests, as well as other stakeholders and interests.

- *Commences with authority/responsibility for a particular issue or area, but has the ability to extend its jurisdiction/areas of responsibility over time*

The case studies demonstrated the mutual benefits of hybrid jurisdiction bodies leading to agreements to expand First Nation jurisdiction as capacity was exhibited. This is crucial to ensure that the FNHSA is able to expand its authority over time, in line with the nation's priorities. To do this, the First Nation must have the ability to determine what its (expanded) areas of responsibility are, and how they connect to community aspirations and existing capabilities. For example, a holistic understanding of 'health' could see issues more generally connected to First Nations' wellbeing determined under the FNHSA's authority (issues that settler governments do not generally assume fall under 'health').

- *Has decision-making power over its areas of responsibility*

Within many statutory authorities (particularly pertaining to First Nations people), the Minister has ultimate decision-making power. It is crucial that the FNHSA is able to make its own decisions, to ensure it is actively accountable to the First Nation and not just the relevant settler government. In line with this, the FNHSA would need to have secure and sufficient revenue.

- *Has a streamlined, singular reporting structure*

First Nations often receive funding or have contracts or other agreements with many different bodies. Having to acquit funding to multiple funders and bodies is deeply time consuming and can hinder the effective operation of the organisation concerned.[535] It can be considered a 'politics of distraction' that results in nation leadership being caught up in administrative business rather than political business. Rather than responding to numerous areas and layers of settler government, it is crucial that the FNHSA would have a singular reporting structure at a time interval agreed by the First Nation and relevant settler government/s.

- *Has fiscal independence*

When funding is siloed for purposes determined by settler governments, it reduces the ability of First Nations to self-determine areas of priority; to respond to issues quickly; or to re-direct monies as necessary. The FNHSA needs to be able to determine the uses of its own funding, including for multiple purposes.

- *Can create the rules, codes and laws over its area of jurisdiction*

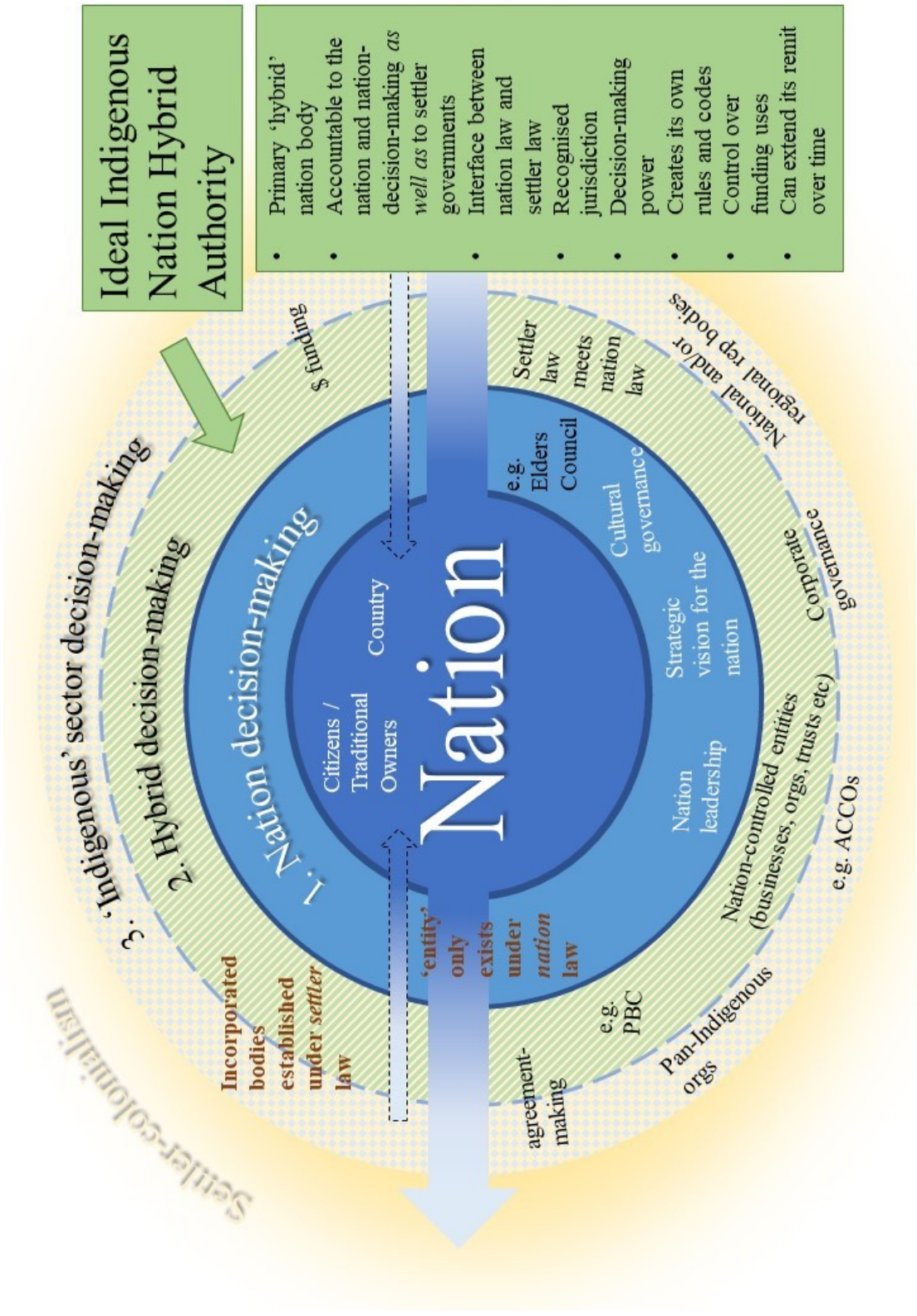
[535] This, for example, was one reason for the FNHA's streamlined financial reporting.

The starting premise for this project is that settler-colonial law and policy is insufficient for the types of governance that First Nations seek to enact both within their nation and/or on Country. The FNHSA must be able to make relevant rules and codes over its area/s of jurisdiction, whilst meeting other necessary settler-colonial and/or First Nation law/lore requirements.

- *Is reinforced through regular agreement-making between the First Nation and relevant settler government/s*

The experience of First Nations within Australia is of settler governments creating and then abolishing relevant statutory authorities (e.g. ATSIC); or, of creating and then effectively limiting the power of statutory authorities. Regular, negotiated agreement-making between the First Nation and relevant settler governments about the FNHSA may assist in keeping settler governments to account over the relevant responsibilities and aspirations of all parties. Such agreement-making may also assist the First Nation to be able to shift the legislated purpose, functions and responsibilities of the FNHSA over time.

Figure 7. Situating the FNHSA



Potential spaces for a First Nation Hybrid Statutory Authority

Originally, we anticipated that the IHA project would specifically identify and assess certain pieces of legislation or policy for their potential utility for Aboriginal and Torres Strait Islander nations to undertake hybrid governing. We sought to determine the components of Aboriginal and Torres Strait Islander law/lore that settler governments recognize (for example, whether particular responsibilities are recognized), and whether such responsibilities could be under the jurisdiction of a FNHSA.

As we indicate in Part 3, the 'self-government landscape' as an overarching framework impacts Aboriginal and Torres Strait Islander nations more significantly than specific pieces of settler legislation and policymaking. As such, we focus here on the more general principles that are likely to affect whether a certain jurisdictional issue or area could be relevant for a hybrid statutory authority under nation control.

To reiterate the discussion in Part 2, settler governments establish statutory authorities when there is considered sufficient need for greater:

- Efficiency; or
- Independence.

In other words, when settler governments are unable (for a range of reasons) to provide effective services over particular areas of jurisdiction.

To enable hybrid jurisdiction from Aboriginal and Torres Strait Islander collectives, there is a further condition. There must be a need for:

- Aboriginal and Torres Strait Islander *nation*-specific input, decision-making or knowledge.

In other words, in spaces where generalised pan-Aboriginal or pan-Indigenous input or ownership is considered insufficient. As such, the issue is likely – or even must - have a connection to First Nations' sovereignty that is recognised by settler society.

Jurisdictional Areas

The jurisdictional areas that are likely to be of interest to settler governments for a possible statutory authority are ones that are recognised by settler society as being connected to the specific interest or jurisdictional responsibility of First Nations. This relates to the spaces of hybrid jurisdiction discussed in Part 3 and indicated again in Figure 7: Situating the FNHSA.

Of course, it is entirely feasible that *all* areas of jurisdiction could exist under Zone 2 hybrid authority.[536] However, considering the current entrenchment of service delivery 'boundaries' and 'populations' in settler policymaking, we focus here on the areas that are recognised as having an explicit connection to Indigenous *nation* authority. We base this on the assumption that all areas that settler governments concede exist in the 'hybrid' Zone 2 space could be under the control of a FNHSA; and that First Nations may have more ability to leverage from the jurisdictional areas over which they already have some recognised status.

- Treaty

The possibility of negotiated treaties between First Nations and settler governments offers one clear area for possible hybrid authorities. Bar Western Australia, every state and territory has

[536] Following Gertz, 'Gugu Badhun Sovereignty'.

made some form of public commitment to treaty discussions with Indigenous peoples. Following the failure of the Voice Referendum, it is unclear whether such commitments will be realised.[537] Regardless, early evidence from Victoria suggests that settler governments are seeking to engage with Traditional Owners as distinct collectives.[538]

- Local Decision Making

There is increasing recognition amongst settler governments of the need for place-based decision-making that prioritises local needs and local knowledges. Local decision-making or 'regional' authority frameworks have been implemented in various jurisdictions (e.g. NSW, Northern Territory, South Australia and the Commonwealth), while shared decision-making is key to the 2020 National Agreement on Closing the Gap. Evaluations of LDM in the Northern Territory also suggest that there is some awareness that LDM is strongest when understood as a continuation of ongoing Aboriginal governance systems: that it is not a 'new phenomenon, but a new initiative by the government to take seriously local and traditional practices for growing up healthy new generations of young people on country'.[539]

It is unclear whether such policy shifts will continue, particularly due to their crossover with the proposed Indigenous Voice to Parliament (consisting of local, regional and national elements). There may also be a time in the future where settler governments realise *why* such policy frameworks are insufficient for meeting the collective aspirations of First Nations peoples. For the most part, this is because such frameworks often artificially separate Country and First Nations into 'regions' or 'areas' that do not necessarily correspond to First Nations' own boundaries.

A related finding from this project is of the significance of Traditional Owner organisations to enable Aboriginal and Torres Strait Islander collectives to be recognised for their relationship to Country – i.e., that they are the 'right' people to speak for and act on behalf of Country in certain areas and ways. Traditional Owner organisations may provide a vehicle for First Nations to enable outsiders and other Aboriginal people to 'see' that they are the 'right' people. While the native title system has an extremely high barrier to entry, particularly in certain states, Victoria has created other pathways for Traditional Owner groups to be formally 'recognised' in ways that are similar to Prescribed Body Corporates.[540] Outside of these processes, we are aware of some nations who are regardless using the native title process as a way to broker relationships (even if they do not assume they will receive a consent determination for their Country). In line with this, while Traditional Owner organisations remain a state-sanctioned apparatus, we are aware of nations modifying their Rule Books to ensure that the process aligns with nation law as much as possible; and to regardless use the organisation for collective aspirations outside of the legislated remit of the organisation itself.[541] In line with this, we could see some Traditional Owner organisations transitioning into an IHA.

- Cultural heritage

[537] See Dani Linder and Harry Hobbs, 'After the Voice referendum: how far along are First Nations treaty negotiations across the country?' *The Conversation*, 25 October, 2023, https://theconversation.com/after-the-voice-referendum-how-far-along-are-first-nations-treaty-negotiations-across-the-country-215159#:~:text=South%20Australia%20was%20one%20of,is%20back%20on%20the%20agenda.
[538] The First Peoples' Assembly of Victoria is dedicated to 'directly empower Traditional owners of Country to implement their own solutions at a local level', whilst also engaging in a state-wide treaty. See First Peoples' Assembly of Victoria, 'This is Treaty', https://www.firstpeoplesvic.org/treaty/.
[539] Spencer et al., *Ground Up Monitoring and Evaluation,* 9.
[540] This is not to suggest Victorian policy is ideal. In fact, we argue that it may create problematic parameters on 'what' and 'who' nations are and the types of jurisdiction they are interested in. Regardless, the fact that these alternate mechanisms exist is ahead of other jurisdictions.
[541] Compton et al, 'Native title'; Gertz, 'Gugu Badhun Sovereignty'.

There is currently significant change in settler discourses around 'heritage' and appropriate legislation to 'manage' First Nations cultural heritage. Such shifts are the product of significant Aboriginal and Torres Strait Islander advocacy in the space.[542] The fact that this is a space where Aboriginal and Torres Strait Islander jurisdiction continues to exist – whether recognised or not – is being increasingly noted in academic and political discourse. As put by the Heritage Chairs of Australia and New Zealand, in a report commissioned by the Australian Government:

> In Australia the protection of Aboriginal and Torres Strait Islander heritage has been maintained over thousands of years by Aboriginal and Torres Strait Islander people. More recently, this protection has been augmented by legislation, policy, professional codes of conduct and Australian community appreciation and regard for our heritage places. Across Australia, legislative responsibility for its protection is divided along jurisdictional lines. This legislation is inconsistent and, in some instances, outdated and inadequate.[543]

Partly in response to such issues, over the past 20 years, all states and territories bar Tasmania have 'either introduced completely new laws (or at least, have substantively amended their laws) or are currently in the process of doing so'.[544] This is particularly significant in the wake of the destruction of Juukan Gorge, which has seen movement around the continent to shift heritage laws to provide greater protections for Traditional Owners.[545]

It remains to be seen what changes actually occur in settler legislation. However, if such policy shifts are informed best practice in cultural heritage management, there may be the possibility of significantly greater Indigenous control, that in turn could feasibly be under the jurisdiction of an IHA. Best practice in heritage management aligns closely with the UNDRIP, ensuring a foundational focus on self-determination. In practise, a key priority of the Heritage Chairs is that 'Aboriginal and Torres Strait Islander heritage is managed consistently across jurisdictions according to *community ownership*'.[546] Best practice recommends that settler jurisdictions 'collectively work' with First Nations.[547] This sort of jurisdictional overlap fits well with the FNHSA described above, able to manage and oversee competing interests. Finally, increasing recognition of First Nations' desire to manage intangible cultural heritage may present opportunities for nations to use 'heritage' to assert their authority more broadly, and over a greater range of mechanisms.[548]

Linked to cultural heritage and increasing recognition of the need for Indigenous data sovereignty (discussed below), language revitalisation may emerge as a space in which First Nations are able to not only utilise and protect their language, but to further their authority and recognition of their sovereignty more broadly. While only NSW currently has language legislation (and this is not specific to individual First Nations), it is feasible that other settler

[542] Ngarrindjeri developed a new relationship with the State using agreements and leading to treaty negotiations built upon a sovereign approach to Caring as/Speaking as Country – a direct critique, resistance and transformation of 'cultural heritage and natural resource management' discourses and practices. This is nation-specific led change. See Hemming, S., Rigney, D. & Berg S. 2019 'Ngarrindjeri Nation Building: Securing a Future as Ngarrindjeri Ruwe/Ruwar (Lands, Waters and All Living Things)', in Nikolakis, W., Cornell, S. & Nelson, H. (Eds.), *Reclaiming Indigenous Governance: Reflections and Insights from Australia, Canada, New Zealand, and the United States*, The University of Arizona Press, Tucson, USA, pp. 71- 104.
[543] Heritage Chairs of Australia and New Zealand, *Dhawura Ngilan (Remembering Country): A Vision for Aboriginal and Torres Strait Islander Heritage in Australia* (Canberra: Commonwealth of Australia, 2020), 14.
[544] Department of Primary Industries, *Review of the Aboriginal Heritage Act*, 3.
[545] Not withstanding significant public outcry in Western Australia. See Part 3 of this report.
[546] Our emphasis. Heritage Chairs, *Dhawura Ngilan*, 22.
[547] Heritage Chairs, *Dhawura Ngilan*, 13.
[548] Currently only Victorian heritage legislation includes intangible cultural heritage; however, this is considered best practice in heritage management.

governments could be open to shifts to actively support First Nations in this area (which rightfully should remain solely under nation control).

- Repatriation

Shifts in settler discourse surrounding the repatriation of First Nations' Old People is also occurring, in line with increasing First Nations' advocacy for the self-determined and culturally safe return of ancestors to Country, and relevant academic research.[549] Similarly to broader 'cultural heritage' concerns, repatriation is intimately connected to settler recognition of ongoing sovereignty.[550] As put by the Heritage Chairs, the 'presence of Indigenous Ancestral Remains (IAR) in country is the clearest and most poignant illustration of an Indigenous People's ongoing association with their traditional lands'.[551] A 'fundamental principle' is 'that their management is the right and duty of the Indigenous community of origin of the ancestor in question'.[552] Repatriation is a burgeoning field. As settler governments continue to acknowledge their duties under the UNDRIP and respond to First Nations' advocacy, there is likely to be a much greater need for protocols and legislative or other mechanisms. This may present an opportunity for nations to position themselves to undertake crucial work around repatriation whilst building their autonomy (such as the Ngarrindjeri nation have been undertaking). It is feasible that a First Nation statutory authority could undertake such work, and that such statutory authorities would need to be nation-specific and nation-controlled.

- Archives management

First Nations' demand for access to their data, knowledge and artefacts stored in archives has led to many institutions designing (and in some cases co-designing) new protocols for Indigenous data management.[553] It has also seen a rise in the digital return of materials from institutions to First Nations. Such return, in the words of Thorpe et al, 'requires both appropriate systems for returning both the digital collections, metadata and contextual information that relates to them, and agreements, policies, and procedures for meaningfully engaging with First Nations communities throughout the process'.[554] This may offer spaces for First Nations to work with institutions and/or settler governments in the 'hybrid' space. Povinelli suggests as much, arguing that archives may offer a particularly helpful tool for First Nations to manage access to and store their knowledge in a way that helps to build and protect nations' autonomy and knowledges.[555] This is linked to broader changes in discourse around data sovereignty and the highly challenging issues around sustainable resourcing, safe storage and access etc.

- Country and environmental management

To date, issues around Country and 'environmental management' have proven one of the most significant opportunities for First Nations to assert and extend their jurisdiction. First Nations leaders regardless assert that current regimes around Country are overlapping and inadequate, particularly when the primary mechanism through which nations can have their rights to Country recognised is native title. Despite the relationship of native title to INB, it is a deeply

[549] For example, see Cressida Fforde et al (eds), *Repatriation, Science and Identity* (London: Routledge, 2024).
[550] Repatriation is a sovereign act of wellbeing – a part of nation (re)building (see Hemming et al 2020a,b). Refer to Routledge Companion to Repatriation, the Fforde et al and to the RRR website.
[551] Heritage Chairs, *Dhawura Ngilan*, 37.
[552] Heritage Chairs, *Dhawura Ngilan*, 37.
[553] See, for example, Linda Barwick et al., 'Reclaiming archives: guest editorial', *Preservation, Digital Technology & Culture* 50:3-4 (2021): 99-104.
[554] Kirsten Thorpe et al., 'Designing archival information systems through partnerships with Indigenous communities: Developing the Mukurtu Hubs and Spokes Model in Australia', *Australasian Journal of Information Systems* 25 (2021): n. pag.
[555] See the detailed discussion in Povinelli, *Geontologies*, chapter 6.

flawed tool.[556] Outside of native title and particular 'rights' to land, a number of areas related to Country could see effective arguments made concerning the need for a FNHSA.[557] Connected issues that are showing increasing recognition of the need for nation-specific information and ownership are consolidating around climate change; the possibility of joint management of national parks and rivers; and fishing and other rights connected to Sea Country.

- Certain 'Zone 3' jurisdictional areas

While 'refreshed' Closing the Gap policy is still firmly embedded within 'service' mindset,[558] it is entirely feasible that in the future, nations may work to arrangements where, through agreement making or otherwise, service delivery is under *their* jurisdiction.[559] 'Health', 'justice' and 'natural resource management' are areas in which there is increasing settler recognition of the need for both identification of 'issues' and 'solutions' to be place-based and First Nations led, which may open the possibility for further nation controls. A variety of innovative collaborations are emerging which may lead to increased jurisdictional collaboration as relationships of trust and confidence are solidified. Universities can also provide further sites of place-based partnership with Aboriginal and Torres Strait Islander nations, as several of the authors are able to attest in relation to partnerships at UTS, Flinders University and The University of Melbourne.

Recent research led by Ngarrindjeri scholar, Professor Daryle Rigney, has highlighted the need to recognise the 'political' determinants of Indigenous health, including the ability of First Nations to meaningfully enact their authority and sovereignty.[560] Further, and in line with increasing settler recognition of INB to First Nations, the National Aboriginal and Torres Strait Islander Health Plan 2021-2031 now includes INB as a foundational principle.[561] As described in Part 3, at the Commonwealth level, 'justice reinvestment' is also being trialled, as Aboriginal peoples remain overrepresented in almost every measure of charges and incarceration, and continue to die in police or other custody. Similarly, almost every jurisdiction across Australia asserts that they are working on changing policies in relation to Aboriginal families and the removal of children. Although change has been limited, and issues related to the removal of Aboriginal children continue, increasingly there are calls for self-determined solutions and the devolution of power to First Nations people.[562] Finally, as suggested in Part 4.4, many hybrid-style jurisdictions have been trialled in different jurisdictions across Australia in regards to sentencing (e.g. circle sentencing courts). While the links between recognition of First Nations sovereignty and these issues remains limited, they are regardless areas of jurisdiction which are likely to be increasingly informed by holistic understandings of wellbeing and safety to inform broad-ranging action. Due to the continued advocacy of First Nations people, we maintain that in the longer-term, these are the types of issues likely to come under more hybrid control. We

[556] For a fulsome discussion see Compton et al, 'Native title'. Among other issues, the native title system is under resourced and does not have the infrastructure to develop the capacity of claimants to deal with the highly technical and oppressive system. The burden of proof sits with claimants who generally have limited knowledge and experience with native title law, and the preparation of the complex anthropological/ genealogical reports that are required to discharge the burden of proof. Worse, through 'extinguishment' of native title rights and interests, there is no investment from governments (the institution) which were responsible for the destruction to alleviate it.
[557] See Hemming et al, 'Ngarrindjeri Nation Building: Securing a Future as Ngarrindjeri Ruwe/Ruwar (Lands, Waters and All Living Things)' in In *Reclaiming Indigenous governance: reflections and insights from Australia, Canada, New Zealand, and the United States*, ed. William Nikolakis et al (Tucson: The University of Arizona Press, 2019).
[558] Howard-Wagner et al., *Looking Beyond Indigenous Service Delivery*, 1.
[559] Following Gertz, 'Gugu Badhun Sovereignty'.
[560] Rigney et al., *Indigenous Nation Building*.
[561] Australian Government, *National Aboriginal and Torres Strait Islander Health Plan*.
[562] For example, see Paul Gray, 'Governments must let go of their power over the lives of Australia's First Nations children', *The Guardian,* 14 May 2021, https://www.theguardian.com/commentisfree/2021/may/14/governments-must-let-go-of-their-power-over-the-lives-of-australias-first-nations-children.

maintain that it feasible to imagine effective arguments around a nation-based FNHSA to oversee the sorts of expanded and multi-jurisdictional action required in these areas.

Challenges

> *What happens when someone or something tries to harm or destroy the authority?*
>
> *What happens if they do actually destroy the authority?*
>
> *What happens when the mob moves on?*
>
> Damein Bell, 2024

General challenges

In this report, and our description of both 'self-government landscape' (Part 3) and the 'ideal' FNHSA, we have described *one* way nations can conceptualise hybrid forms of self-government, and the particular vehicles and areas of jurisdiction that may be fruitful. Of course, the 'lines' of jurisdiction we describe within this report are not clear cut. As Bignall suggests, both settler and First Nations polities are spiky, overlapping, and in flux.[563] In practise, jurisdictional divisions are similarly messy.

Utilising hybrid authorities also does not mean that the needs of citizens will automatically be met, or that settler-colonialism, as an ongoing and evolving 'reality', will stop its attempts to permeate Indigenous nation and nation decision-making. It is our experience that nations undertaking self-determined work will inevitably face challenges that can threaten or undermine their governance processes. This is regardless of the structures that nations are utilising to further their aspirations. Evidence from North America (and also from Aboriginal and Torres Strait Islander nations) suggests that when nations start to see success in their endeavours, the question is not *if* challenges will arise, but *when* they will arise. As put by Cornell:

> Success—even modest success—in the pursuit of self-determination eventually leads to issues of governance. As Indigenous peoples increase their control over major decisions, how they make and implement such decisions are becoming, more and more, a topic of discussion, not least among those peoples themselves. As long as they had little or no governing power, such discussions were pointless. Now that Indigenous peoples have some governing power, both they and outside authorities look to the resultant governments for decisions and for capable execution of decisions, once made. Along with the shift in power, there is a shift in accountability—a point not missed by many Native communities now looking to their own leadership to address problems that outside governments have neglected or been incapable of solving.[564]

Such challenges can be internal or external to the nation. Common challenges include that settler institutions (whether as a government 'partner' in a hybrid space; a 'funder'; or an otherwise interested party) may attempt to:

- set the agenda;

[563] Bignall, 'The collaborative struggle', 340.
[564] Stephen Cornell, 'Reconstituting Native Nations: Colonial Boundaries and Institutional Innovation in Canada, Australia, and the United States', in *Reclaiming Indigenous Planning*, ed. Ryan Walker et al. (Montreal: McGill-Queens University Press, 2013), 160.

- undermine nation or cultural authority;
- create arduous requirements that make nation priorities difficult to achieve; and/or
- shift their requirements or support with little to no notice[565]

These challenges often increase as nations gain success, as settler-colonial institutions inevitably act according to their own priorities. Such institutions can, for example, seek to expand the activity in line with their own priorities, or take ownership or control from the relevant nation.[566]

Internal challenges that can arise from nation building success include:

- the involvement of a greater number of individuals, who may be attracted to the growing success. These individuals may not act in a community-spirited way or share the same collective vision. These individuals may also be interested in undertaking particular roles or becoming office-holders for the benefits of career advancement, rather than being nation-minded.[567]
- when decisions are made according to 'political criteria' rather than merit/ or effectiveness. Such criteria can include prioritising family members or individuals, and can lead to a wider breakdown of communication and trust within the community.[568]

These issues offer particular challenges to Aboriginal and Torres Strait Islander collectives, due to the often-limited resources, funding and opportunities within First Nations spaces wrought by settler-colonialism. As such, when opportunities arise, communities may experience particular internal struggles over allocation of power or funding.

Such challenges are not First Nations issues, but are *human* challenges, common across different types of governments and contexts. Between 2007 and 2022, Australia, a country once lauded for its political stability, had seven prime ministers and hosted five elections. Four of the seven prime ministers were deposed by their own governments, which had become dissatisfied by their performance and fearful of electoral loss. The period was exemplified by a focus on internal politics, rather than on policy and governing. However, a critical difference between settler governments and governing systems and Aboriginal and Torres Strait Islander governments and governing systems, is that despite extreme instability, there was little suggestion that the Australian political system itself had failed.[569] By contrast, political challenges within Aboriginal and Torres Strait Islander governments and governing systems are often treated as structural problems requiring the dismantling of the system (of which ATSIC's disbanding is a clear example). We are aware of at least one example of an external analysis of an Aboriginal governing system that attributed the political instability faced by one Aboriginal community to its traditional decision-making. The fact that disgruntled citizens were using settler systems to undermine 'the other faction' (in exactly the same fashion as settler political parties) was entirely absent from the external review.

Further hybrid governance challenges

Such challenges may be exacerbated for the 'ideal' FNHSA described above. As we describe in Part 2, even settler government statutory authorities face a range of challenges that can impede their abilities to carry out their functions or meet their purpose. The components of the FNHSA

[565] Whether deliberately or accidentally. For discussion of such challenges see Cornell, 'Reconstituting Native Nations'; Cornell & Kalt, 'Two Approaches'; and Behrendt et al, *Indigenous Nation Building*.
[566] See Behrendt et al., *Indigenous Nation Building*, chapter 6 for further discussion.
[567] Cornell & Kalt, 'Two Approaches'.
[568] Cornell & Kalt, 'Two Approaches', 23.
[569] Apart from the commentary about the failure of democratic systems worldwide.

described above do not make it immune from the enmeshment of settler-colonialism throughout Australian social and legal landscapes, or the challenges around independence inherent to all statutory authorities. The issues succinctly described by Damein Bell above – namely, the possibility of hostile settler governments, disbandment, or internal community discord – are particularly significant in hybrid governance spaces. The nature of attempting to govern in an environment - that maintains, on the one hand, that First Nations sovereignty does not exist; while on the other, engaging in shared decision-making - can exacerbate the issues outlined above.

- Complexity of relationships

The FNHSA we describe above is one that is likely seen as necessary by settler governments due to overlapping jurisdictional requirements between the relevant First Nation, state and federal governments. While the 'ideal' FNHSA sits above this network, the case studies detailed in Part 4 suggest that it will regardless be involved in highly complex relationships involving different actors with their own distinct priorities and governance systems. It is also unlikely that such actors will always 'see' or understand the broader uses of FNHSA by First Nations (i.e. as instruments of self-government separate to the First Nation itself), increasing the possibility of discord. Of course, the First Nations likely to be able to make arguments for the need for a FNHSA to settler governments are those that are already highly experienced with the many layers of settler government assuming authority over their Country or related areas of jurisdiction. However, with an overarching structure like a FNHSA, the need for excellence and efficient achievement of outcomes will likely increase.

- Dispute resolution

If citizens are unhappy with decision-making within their own systems, there is a significant risk that they can turn to settler-colonial systems to overturn decisions made within the hybrid structure. The experience of nations with which we work is that settler-colonial systems will intervene, removing dispute resolution mechanisms from the community, ultimately causing further harm. Often, the settler mechanism relied upon (e.g, ORIC) may not understand the fundamental nature of First Nations collective governing, or understand the aspirations that nations are attempting to pursue.[570]

This points to the need for any FNHSA to have extremely strong dispute resolutions based in *nation* law, even if citizens can still also turn to settler law. In turn, such findings ultimately reinforce the need for 'identity' work as an essential first process in INB: that strong collective, political identity is required to bolster organisational mechanisms.[571] The stronger nation identity is, and the more effective and legitimate nation processes of organisation can be, the more likely citizens are to utilise nation dispute resolution processes. As Gertz has shown, such 'identity' work is also the strongest defence against settler-colonialism.[572]

Final reflections

In reaching the end of the IHA project, the Project Directors were in some ways surprised by how closely the findings of the project matched and reinforced the original findings of the Harvard Project (see Part 1). The reason for the surprise was in the fact that the Harvard Project had been and is conducted primarily with nations in North America that are recognised as sovereign (although Harvard Project researchers have conducted research in Aotearoa New Zealand and Australia, including with the IHA project's directors and researchers). Our research

[570] For relevant examples, see Behrendt et al., *Indigenous Nation Building*, chapter 2 and 3.
[571] Following Cornell, 'Processes of Native Nationhood'. See Part 1 of this report for further detail.
[572] Gertz, 'Gugu Badhun Self-Determination'.

in Australia with Aboriginal nations has reinforced those findings. As we have described in Part 1, this project, however, took a step away from our customary investigations of nation self-government to explore intermediary hybrid bodies, which, we thought, may have operated according to different principles.

Our analysis of the 'self-government landscape' and of the hybrid jurisdiction case studies suggest that a First Nations hybrid statutory authority will only 'work' in the ways Indigenous nation aspire to if the nation has underlying stable political governance, manifest in decision-making to guide the FNHSA; effective and culturally legitimate institutions of self-government separate to the FNHSA; long-term strategic planning to inform the work of the FNHSA; and community-spirited leadership to keep the FNHSA focused on nation priorities.[573] Although INB research has previously established the significance of Harvard Project findings to Aboriginal and Torres Strait Islander nations, this project has further confirmed the relevance of these findings even in the face of the geopolitically specific formations of Australian settler-colonialism.

One key area that is not an area of primary focus for the Harvard Project, however, is the sharing of jurisdiction between sovereigns in the face of continued refusal of settler states to formally acknowledge First Nations sovereignty.[574] This was the key question this project explored; namely, querying the fundamental characteristics of structures that could support the meetings of jurisdiction in ways that further First Nations' INB goals. Of course, the movement from nation decision-making to 'hybrid' and 'Indigenous sector' decision-making we have suggested in Part 3 is not necessarily linear. Following Norman et al, who note that Aboriginal communities can (and do) change and shift the character and uses of organisations within the Indigenous Sector,[575] the reality of Indigenous self-government within Australia is that the decision-making undertaken at these hybrid and Indigenous sector levels can also be used to create nations' internal decision-making structures.

Further, actually undertaking this work to 'best' utilise hybrid authorities and structure nation decision-making around Zones 1-3 is deeply fraught. The practical difficulties First Nations face in implementing these real and hypothetical distinctions are immense. The nation-builders we work with emphasise how difficult it is to build collective capacity for self-government when the socio-economic needs of their citizens are not being met. This, they theorise, is the reason that the instruments of self-government often naturally arise from, or can become entangled with, hybrid and sector decision-making, as nation leadership is focused on improving the pressing needs of their communities. This can be an important iterative process – whereby the wellbeing of citizens can strengthen INB, and INB can aid in building wellbeing[576] – but separating the instruments of political decision-making from this work remains difficult.

Ultimately, and as we indicate in Part 3, in the shorter term, Aboriginal and Torres Strait Islander nations may use the FNHSA as the primary self-government and decision-making body. However, and as we strongly suggest, in the long-term, the fact that statutory authorities are settler-colonial institutions means that they are ultimately unlikely to have sufficient protections in place to support the full range of aspirations that such self-government bodies would otherwise seek to meet.

A key and unexpected finding from interviews undertaken as part of this project was the extent to which First Nations peoples are utilising novel structures outside of settler-governments altogether to undertake collective decision-making and achieve collective aspirations. In some

[573] Following Cornell & Kalt, 'Two Approaches', discussed in the Part 1 of this report.
[574] Largely, this is a result of the Harvard Project's focus on North America, where most Native Nations experience some form of recognition from the settler state (even if such recognition is limited, and faulty).
[575] Norman et al., 'Mapping Local and Regional Governance'.
[576] Rigney, et al., *Indigenous Nation Building*.

instances, this is occurring in explicitly 'hybrid' ways. In particular, we were struck by at least two instances (and anecdotally many more) where First Nations people have rejected community organisations as suitable vehicles to achieve their aspirations. Instead, we found that there were instances where First Nations people were using businesses to undertake the types of activities that previously we assumed only (or largely) emerged from the community-controlled sector. The essential intention of such businesses is to use the flexibility afforded to businesses and economic structures to avoid the CATSI Act and other structures that limit the effectiveness of Aboriginal community-controlled organisations whilst meeting their nation's own separate, collective goals. In other words, to explicitly undertake 'stealth governance'.[577] This preliminary finding has potentially profound significance for INB research and for our understanding of settler-colonialism more generally. Key future INB research questions arising from this include:[578]

- What is the nature of First Nations businesses? Where do they sit in the 'self-government landscape'? Does this change, for example, if businesses are situated on- or off- Country; are privately owned, or are owned by non-nation citizens?
- What are the crucial differences between First Nations businesses and other bodies in the Indigenous Sector?
- Are businesses able to operate as a self-government body?
- What is the nature of First *Nation* economies, and how do such economies interact with, be informed by, and transform settler economies?
- What is the nature of agreement-making between First Nations businesses and external actors, and how does this compare to agreement-making between settler governments and community organisations?

A future conceptual challenge being addressed by our collaborator - Wiradyuri and Wonnarua nation builder and Indigenous Allied Health Australia CEO Donna Murray – concerns how Indigenous sector organisations (Zone 3) can conceive of themselves in relation to First Nations' INB efforts (whether they are receiving instructions from a nation or nation self-government body or not). As a roadmap for First Nations aspiring to expand their powers of jurisdiction, Murray has designed a framework for how such bodies can respond to, and be informed by, Zone 1 cultural governance corresponding to the Country that that organisation exists upon.[579] A different diagram could be made if we undertook analysis of the self-government landscape from such a perspective.

A further related, preliminary finding emerging from this project (from both desktop research and the interviews we undertook) is that while the workings of settler governments continue to represent an existential and real threat to the existence of First Nations, neoliberalism and climate change offer significant challenges to First Nations achieving their collective aspirations. In line with the iterative opportunities and challenges presented by changing settler government landscapes, changes to the nature of global neoliberalism (and its effects on the climate) similarly present both significant challenges and opportunities for First Nations. This is a key area of research that deserves further exploration. It suggests that current analyses of settler-colonial power formations may be inadequate to describe the current challenges facing First Nations.

[577] Cornell, 'Processes of Native Nationhood'. In respect of this type of governance, we do not include identifying details of these collective businesses' or their stories here.
[578] Jon Altman's work on the meeting of customary, market and state economies in the 'hybrid' space will be highly useful.
[579] Private document on file.

It is partly due to the nature of and growth of such changes and challenges that First Nations continue to seek alternative structures through which to determine and achieve their collective aspirations. The failure of the October 2023 Voice Referendum has made such stakes even clearer. Reformation of Australian legal and political systems to 'see' and engage with First Nations' ongoing sovereignties is not only feasible,[580] but urgently required.

Such change is unlikely in the recent future. In its absence, First Nation Hybrid Statutory Authorities such as we have described in this report may be a beneficial starting point.

[580] Following Vivian et al., 'Indigenous Self-Government'.

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