

DISTINCT NATIONS, DISTINCT MEANINGS: UNDERSTANDING NATIONHOOD THROUGH INDIGENOUS VOICES

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This article proceeds on the basis that advancing Indigenous rights requires a multi-faceted approach grounded in a careful understanding of Indigenous political aspirations. Guided by this premise, and written by a non-Indigenous scholar, this article explores one such aspiration: Nationhood. It argues that when Aboriginal and Torres Strait Islander Peoples invoke Nationhood, they articulate a legal and political vision grounded in Indigenous authorities and enduring relationships to Country, one that unsettles the limits of Australian legal interpretation. This article first clarifies the distinction between Sovereignty and Nationhood, concepts frequently conflated in public and legal discourse, before adopting an interpretive methodology centred on Indigenous-authored texts, governance instruments, and political declarations. It shows how the settler state's misrecognition of Nationhood – particularly in treaty-making and institutional design – undermines structural reform and calls for interpretive practices attentive to Indigenous political language.

I INTRODUCTION

In the hearts and minds of Aboriginal and Torres Strait Islander peoples, our 'nationhood' has always survived and continues to be acknowledged between us.¹

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1 Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Social Justice and Native Title Report 2014* (Annual Report, 20 October 2014) 132 ('*Social Justice and Native Title Report*'). See also Janine Gertz, 'Gugu Badhun Sovereignty, Self-Determination, and Nationhood' (PhD Thesis, James Cook University, 2022) <<https://doi.org/10.25903/abhm%2D4m07>>; Anna Dziedzic and Mark McMillan, 'Australian Indigenous Constitutions: Recognition and Renewal' (2016) 44(3) *Federal Law Review* 337 <<https://doi.org/10.1177/0067205X1604400301>>; Stephen Cornell, 'Processes of Native Nationhood: The Indigenous Politics of Self Government' (2015) 6(4) *International Indigenous Policy Journal* 4:1–27 <<https://doi.org/10.18584/iipj.2015.6.4.4>>; Sarah Maddison, 'Separatism as a Mode of Relations: Practicing Indigenous Resurgence and Nationhood in the 21st Century' in Sarah Maddison and Sana Nakata (eds), *Questioning Indigenous–Settler Relations* (Springer, 2020) 147 <https://doi.org/10.1007/978-981-13-9205-4_10> ('Separatism as

The concept of Nationhood holds growing analytical relevance in Indigenous² rights discourse in Australia.³ While this language has long been foundational in North America,⁴ where Native Nations engage in structured forms of self-governance and have achieved formal recognition as political entities, its emergence in Australia is more recent.⁵ Yet, its growing use by Aboriginal and Torres Strait Islander Peoples signals a renewed articulation of political autonomy, law, and identity that cannot be reduced to colonial concepts of nation-statehood.

The 2023 referendum on the Voice to Parliament and the *Statewide Treaty Act 2025* (Vic) (*'Statewide Treaty Act'*) serve as critical staging points for this inquiry, revealing a public law landscape that is increasingly forced to engage with Indigenous political language. However, as this article argues, the Australian legal system habitually filters Indigenous claims through the lens of sovereignty, imagined as state-like jurisdiction or rival public authority. As Steven Newcomb, a Shawnee and Lenape scholar, argues, the Western sovereignty lens is a 'paradigm of domination' rooted in absolute power.⁶ For many Indigenous Peoples, this makes sovereignty a conceptual oxymoron because it attempts to fit an aspiration for relational authority into a category designed to systematise the 'controlling will' of a conqueror.⁷ This narrow refiltering recasts Indigenous assertions as either threats to settler authority or symbolic cultural claims. By contrast, Nationhood names the collective political identity of Indigenous Peoples as distinct polities grounded in Country, kinship, and what Ambelin Kwaymullina, a Palyku scholar,

a Mode of Relations'); Sarah Maddison and Sana Nakata (eds), *Questioning Indigenous–Settler Relations* (Springer, 2020) <<https://doi.org/10.1007/978-981-13-9205-4>>.

- 2 This article uses the terms 'Indigenous', 'Aboriginal and Torres Strait Islander', and 'First Nations' interchangeably to refer to the political communities that have populated the Australian mainland and surrounding islands since before British colonisation. I acknowledge that these are colonial terms and may not reflect the preferred self-identification of all peoples.
- 3 See Cornell (n 1) 3. Stephen Cornell is a non-Indigenous political and cultural sociologist. I have relied on his work throughout this article as he is heavily involved in Indigenous affairs on a global scale. He is the Co-founder and Co-director of the Harvard Project on American Indian Economic Development and is heavily respected by Indigenous authors.
- 4 Ibid 2–3. See also at 3 n 4; Alison Vivian, 'Aboriginal Self-Governance: Turning Practices into Rights in South Eastern Australia' (PhD Thesis, University of Arizona, 2014); Manuhia Barcham, 'Noongar Nation' in Janet Hunt et al (eds), *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (Australian National University Press, 2008) 265 <<https://doi.org/10.22459/CAEPR29.08.2008.10>>.
- 5 See Cornell (n 1) 3, where the author discusses this point, with reference to the Ngarrindjeri Nation and Noongar Nation. See also Gertz (n 1); *Social Justice and Native Title Report* (n 1); Maddison, 'Separatism as a Mode of Relations' (n 1); Sarah Maddison, 'It's Time for Indigenous Nationhood to Replace a Failing Colonial Authority', *The Conversation* (5 April 2019) <<https://theconversation.com/its-time-for-indigenous-nationhood-to-replace-a-failing-colonial-authority-114088>>; Heidi Norman and Anne Maree Payne, 'Asserting Aboriginal Polity and Nationhood: The Campaign for the Return of Indigenous Ancestral Remains' (2022) 46 *Aboriginal History* 29 <<https://doi.org/10.22459/AH.46.2022.02>>.
- 6 See generally Steven T Newcomb, 'The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination' (2011) 20(3) *Griffith Law Review* 578 <<https://doi.org/10.1080/10383441.2011.10854711>> ('Paradigm of Domination'); Steven Newcomb, 'Domination in Relation to Indigenous ("Dominated") Peoples in International Law' in Irene Watson (ed), *Indigenous Peoples as Subjects of International Law* (Routledge, 2017) 18 <<https://doi.org/10.4324/9781315628318-3>> ('Domination in Relation to Indigenous Peoples').
- 7 Newcomb, 'Domination in Relation to Indigenous Peoples' (n 6) 20.

terms ‘narrative sovereignty’ – a law arising from relationality rather than central institutions.⁸ Treating Nationhood as the primary interpretive lens – distinguished from the power-based assertions of sovereignty – allows legal interpretation to meet Indigenous claims on their own terms, rather than flattening them into the administrative categories of the nation-state.⁹

This framing also demonstrates why comparative contexts matter: Indigenous Nations elsewhere have long expressed Nationhood in ways that highlight its political, legal, and relational character. In North America, Native Nations have asserted Nationhood through tribal constitutions, treaty relationships, and distinct legal orders.¹⁰ In Australia, however, the term ‘Nation’¹¹ is increasingly used in statements by community leaders,¹² treaty bodies,¹³ and representative groups,¹⁴ though it remains largely absent from formal legal recognition by the settler state.¹⁵ This growing traction suggests a shift in the legal–political landscape but also reveals a challenge: the Australian legal system lacks an interpretive framework capable of accommodating Indigenous expressions of Nationhood. Too often, settler law reads these expressions through its own logic, flattening diverse political traditions into administrative categories.¹⁶

8 Ambellin Kwaymullina, ‘Aboriginal Nations, the Australian Nation-State and Indigenous International Legal Traditions’ in Irene Watson (ed), *Indigenous Peoples as Subjects of International Law* (Routledge, 2017) 5, 9–12 <<https://doi.org/10.4324/9781315628318-2>>.

9 See below Part IV.

10 See generally Cornell (n 1).

11 *Nation* refers to a distinct Indigenous group that shares laws, culture, societal values, land boundaries and a name. There are many examples of Aboriginal Nations, like the Yolŋu Nation, Wiradjuri Nation and Noongar Nation. *Nationhood* refers to the status, characteristics, and recognition of a group as a Nation. It is a deeper concept than *Nation* as it has political implications. This is because it encompasses the broader identity, autonomy, and Self-Determination of Indigenous Peoples as political entities.

12 See, eg, Steve Hemming, ‘Ngarrindjeri Nation Yarluwar-Ruwe Plan: Caring for Ngarrindjeri Country and Culture’ in Luke Mosley et al (eds), *Natural History of the Coorong, Lower Lakes, and Murray Mouth Region (Yarluwar-Ruwe)* (University of Adelaide Press, 2018) 3; Steve Hemming, Daryle Rigney and Shaun Berg, ‘Ngarrindjeri Nation Building: Securing a Future as Ngarrindjeri Ruwe/Ruwar (Lands, Waters, and All Living Things)’ in William Nikolakis, Stephen Cornell and Harry W Nelson (eds), *Reclaiming Indigenous Governance: Reflections and Insights from Australia, Canada, New Zealand, and the United States* (University of Arizona Press, 2019) 71 <<https://doi.org/10.2307/j.ctvqc6jwv.8>>; Janine Gertz et al, ‘“For the Good of the Gugu Badhun People”: Indigenous Nation Building, Economic Development and Sharing as Sovereignty’ (2025) 187(1) *Thesis Eleven* 145 <<https://doi.org/10.1177/07255136241308886>>; *Social Justice and Native Title Report* (n 1).

13 See, eg, Geraldine Atkinson and Marcus Stewart, ‘The Work of the First Peoples Assembly of Victoria: Cultural Authority, Representation and the Treaty Process’ in Marcia Langton, Aaron Corn and Samuel Curkpatrick (eds), *Indigenous Knowledge: Australian Perspectives* (Melbourne University Publishing, 2024) 187.

14 See, eg, *Social Justice and Native Title Report* (n 1); ‘Nation Building, Treaty and Development’, *AIGI* (Web Page, 2025) <<https://aigi.org.au/toolkit/nation-building-treaty-and-development>>.

15 See, eg, *Native Title Act 1993* (Cth) (*‘Native Title Act’*); *Statewide Treaty Act 2025* (Vic) (*‘Statewide Treaty Act’*); *Treaty Authority and Other Treaty Elements Act 2022* (Vic). See also Marcia Langton, ‘Understanding Sovereignty’, *Agreements, Treaties and Negotiated Settlements* (Web Page, 2020) <<https://www.atns.net.au/understanding-sovereignty>>. This was written by Marcia Langton for the 22nd Biennale of Sydney.

16 See especially Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia’s Future* (Federation Press, 2003) (*‘Achieving Social Justice’*); Harry Hobbs, *Indigenous Aspirations and*

This challenge is compounded by the limits of translation itself. As Larissa Behrendt, a Euahlayi and Gamillaroi scholar, reminds us, legal engagement with Indigenous Peoples must begin with a genuine understanding of Indigenous aspirations.¹⁷ That work cannot be achieved through translation alone. When Indigenous concepts are translated into English or into the categories of settler law, essential meaning is often lost – flattened, softened, or reframed in ways that reflect the priorities of the receiving system rather than the intentions of Indigenous speakers. This article argues that when Aboriginal and Torres Strait Islander Peoples invoke Nationhood they are not mimicking Western statehood. Rather, they are expressing a set of legal and political ideas grounded in Indigenous law, kinship and Country – ideas that challenge the limits of recognition in Australian law and demand a reimagining of legal interpretation.

Before outlining the structure of this article, it is necessary to clarify the scope and limits of the analysis. The discussion focuses on the legal and political expression of Nationhood as articulated by Aboriginal and Torres Strait Islander Peoples. It does not engage directly with the internal processes of Nation-building, such as governance capacity, institutional development, or community-led design. That work is being undertaken by Indigenous scholars and leaders, and others involved in the Indigenous Governance of Development Project.¹⁸ While the readiness of Nations to engage in treaty-making or institutional reform varies, this article is concerned with how Aboriginal and Torres Strait Islander Peoples are articulating Nationhood in their own terms – and how settler legal systems interpret and respond to those claims.

Given the breadth of this terrain, the analysis also centres on the interpretive meaning of Indigenous Nationhood in Australian public law. It does not attempt a comprehensive doctrinal analysis of native title developments, nor does it provide a detailed evaluation of particular treaty processes or intra-community debates such as those surrounding the Noongar Settlement. Where these matters appear,

Structural Reform in Australia (Hart Publishing, 2021) <<https://doi.org/10.5040/9781509940172>> ('*Indigenous Aspirations*').

17 Behrendt, *Achieving Social Justice* (n 16) 15.

18 See, eg, Miriam Jorgensen et al, 'Yes, the Time Is Now: Indigenous Nation Policy Making for Self-Determined Futures' in Nikki Moodie and Sarah Maddison (eds), *Public Policy and Indigenous Futures* (Springer, 2023) 129 <https://doi.org/10.1007/978-981-19-9319-0_8>; Daryle Rigney et al, *Indigenous Nation Building and the Political Determinants of Health and Wellbeing* (Discussion Paper, Lowitja Institute and Jumbunna Institute for Indigenous Education and Research, August 2022); Daryle Rigney et al, 'Gunditjmarra and Ngarrindjeri: Case Studies of Indigenous Self-Government' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 204 <<https://doi.org/10.1017/9781108633949.009>> ('Gunditjmarra and Ngarrindjeri'); Tim Rowse and Jennifer Green, 'Mparntwe/Alice Springs: Towards a History of Indigenous and Settler Jurisdictions' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 186 <<https://doi.org/10.1017/9781108633949.009>>; Alison Vivian et al, 'Indigenous Self-Government in the Australian Federation' (2017) 20 *Australian Indigenous Law Review* 215; Daryle Rigney et al, 'Treaty as a Technology for Indigenous Nation Building' in Diane Smith et al (eds), *Developing Governance and Governing Development: International Case Studies of Indigenous Futures* (Rowman & Littlefield, 2021) 119 <<https://doi.org/10.5040/9798881814731.ch-6>>; Daryle Rigney et al, *Indigenous Nation Building in Australia: Resistance, Resilience, Resurgence* (Bloomsbury Academic, 2026).

the discussion is illustrative rather than exhaustive, and their detailed treatment falls outside the scope of this article.

This article proceeds in six parts. Part II clarifies the conceptual distinction between Sovereignty and Nationhood, establishing the foundation for the interpretive approach adopted throughout this article. Part III outlines the methodological approach and my positionality, including the interpretive commitments that guide the analysis. Part IV identifies six key features of Indigenous Nationhood as described by Aboriginal and Torres Strait Islander Peoples. In doing so, I find that Nationhood is deep-rooted in Indigenous Peoples' unique connection to Country, their collective identities, and their aspiration for recognition by the settler state as distinct political entities. Indigenous Nationhood also distinguishes Indigenous claims for political empowerment and structural reform from those of other minority groups. It is a unique concept that plays a crucial role in negotiating new relationships with the Australian settler state and advancing the process of decolonisation.¹⁹

Part V situates Nationhood within international and Australian legal contexts, tracing both the legacy of denial in Australian jurisprudence and the increasing presence of Indigenous Nationhood discourse. Part VI explores the legal implications of misrecognising these expressions, particularly in the context of treaty-making and institutional design. This article concludes with a call for legal scholars and institutions to approach Indigenous Nationhood as a legitimate legal and political concept – one that demands interpretive humility, doctrinal imagination, and a commitment to justice.

II DISTINCT AND YET RELATED: SOVEREIGNTY AND NATIONHOOD

To engage meaningfully with Indigenous Nationhood, it is essential to clarify a conceptual distinction that underpins this article. In both public and legal discourse, the terms Sovereignty and Nationhood are often used interchangeably. However, this conflation can obscure Indigenous political aspirations and facilitate legal misrecognition. Understanding the difference between these concepts is foundational to interpreting Indigenous law, governance, and identity through Indigenous voices.

19 Decoloniality is a theoretical and political movement that seeks to challenge and dismantle the enduring structures of colonialism. It is built on Frantz Fanon's seminal work on decolonisation and has been explored further by several scholars. See Frantz Fanon, *The Wretched of the Earth*, tr Constance Farrington (Penguin Classics, 2001). For other works in this field, see Maria Lugones, 'Toward a Decolonial Feminism' (2010) 25(4) *Hypatia* 742 <<https://doi.org/10.1111/j.1527-2001.2010.01137.x>>; Frantz Fanon, *Black Skin, White Masks*, tr Richard Philcox (Penguin Classics, 2021); Albert Memmi, *The Colonizer and the Colonized*, tr Howard Greenfeld (Beacon Press, rev ed, 1991); Walter D Mignolo and Catherine E Walsh, *On Decoloniality: Concepts, Analytics, Praxis* (Duke University Press, 2018) <<https://doi.org/10.1215/9780822371779>>; Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 1999); Ngũgĩ wa Thiong'o, *Decolonising the Mind: The Politics of Language in African Literature* (James Currey, 2011).

Sovereignty, in this context, refers to the inherent authority of Indigenous Peoples to govern: to make laws, exercise jurisdiction, and determine political futures.²⁰ This can be seen, for example, in the Yolŋu People's Yirrkala Bark Petitions of 1963, which asserted jurisdiction over their lands and demanded recognition of their own governance systems.²¹ Nationhood, by contrast, refers to the collective identity and legal–political status of Indigenous Peoples as self-governing communities grounded in Country, kinship, and cultural continuity.²² The survival and renewal of Koori identities in south-eastern Australia – expressed through language revival, kinship obligations, and the continuation of cultural protocols – exemplify Nationhood in practice.²³ Put differently, Sovereignty is the *assertion* of governance power; Nationhood is the *expression* of collective identity and law. This distinction matters. When courts and legislatures interpret Indigenous claims solely through the lens of sovereignty – as statehood, territorial independence, or competing jurisdiction – they misread assertions of Nationhood as threats to settler authority. Such misinterpretation, as explored in Part VI, reduces Indigenous Nations to cultural minorities or administrative populations, stripping away their political status and legal distinctiveness.²⁴

The importance of this distinction also lies in the divergent ontological foundations of each concept. As Newcomb argues – drawing on Antony Anghie's account of sovereignty's colonial origins²⁵ – Western sovereignty is a product of the 'colonial encounter' designed to systematise the domination of the conquered by the conquerors.²⁶ Because this framework is rooted in a 'metaphorical pattern of domination and subordination',²⁷ it is more than just structurally incapable of recognising Indigenous authority; it is conceptually ill-fitting, rendering the term a conceptual oxymoron for Indigenous Peoples whose political systems are based not on dominion over territory but on relationality.²⁸ While Western sovereignty

20 Behrendt, *Achieving Social Justice* (n 16); Hobbs, *Indigenous Aspirations* (n 16).

21 'Defining Moments: Yirrkala Bark Petitions', *National Museum Australia* (Web Page, 25 March 2026) <<https://www.nma.gov.au/defining-moments/resources/yirrkala-bark-petitions>>.

22 See especially Gertz (n 1).

23 Kay Harrison, 'A Good Yarn: Koori Elders Talk about Culture, Country and History', *Indigenous Strategy, Education and Research* (Web Page) <<https://web.archive.org/web/20250329024352/https://www.indigenous.unsw.edu.au/good-yarn-koori-elders-talk-about-culture-country-and-history>>; Wendy Somerville, 'Koori Critical Storying: Re-imagining to Re-connect with Memories, Archives, and Country' (PhD Thesis, University of Canberra, 2022); Gary Foley, 'The Koori History Website' (Web Page) <<https://www.kooriweb.org/foley/indexb.html>>.

24 While this article focuses on Nationhood, it is also closely linked to the broader aspiration of Self-Determination. I distinguish Self-Determination as the process of decision-making, Sovereignty as the power to govern, and Nationhood as the collective identity and political status through which governance is expressed. See also Gertz (n 1), who connects Nationhood and Self-Determination in the reclamation of political autonomy and cultural integrity. The Australian Indigenous Governance Institute likewise frames Self-Determination as recognition of Indigenous Nations' right to self-govern: 'Self-Determination for Aboriginal and Torres Strait Islander Peoples', *AIGI* (Web Page, 2025) <<https://aigi.org.au/toolkit/self-determination-and-governance>>.

25 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) 310 <<https://doi.org/10.1017/CBO9780511614262>>.

26 Newcomb, 'Domination in Relation to Indigenous Peoples' (n 6) 18, citing *ibid*.

27 Newcomb, 'Domination in Relation to Indigenous Peoples' (n 6) 19 (citations omitted).

28 See, eg, *ibid*; Newcomb, 'Paradigm of Domination' (n 6).

seeks a ‘singular order’ through divided central institutions, Indigenous conceptions – what Kwaymullina terms ‘narrative sovereignty’ – are grounded in a ‘relationship-based’ model where authority is comprised of equal parts rights and responsibilities to Country and kin.²⁹ In this framework, Country acts as a ‘legal actor’ that intervenes to enforce its own boundaries,³⁰ and the juridical force of this authority is carried through kinship and story rather than central institutions, functioning as a ‘relationship-based government’,³¹ through which laws are made and administered. Ultimately, Indigenous assertions of Indigenous Sovereignty are often misunderstood not because they lack substance, but because interpreting them solely through the power-based lens of sovereignty risks flattening these ancient legal traditions into the hierarchical and dominating structures of the settler state.

This article argues that Nationhood, as articulated by Aboriginal and Torres Strait Islander Peoples, is not a derivative of statehood nor a metaphor for cultural identity. It is a legal and political reality grounded in Indigenous law, governance, and relationality. Recognising this reality is essential for treaty-making, institutional design, and the development of interpretive practices capable of engaging Indigenous political language with humility, imagination, and a commitment to justice.

III METHODOLOGY AND POSITIONALITY

Drawing on the conceptual distinction between Sovereignty and Nationhood, this Part outlines the interpretive and ethical commitments that guide this article’s engagement with Indigenous political identity. If settler jurisprudence has distorted these identities through its own conceptual habits, legal scholarship must develop methodologies capable of listening differently.

This article adopts an interpretive legal methodology grounded in close textual analysis of Indigenous-authored materials, including governance documents, political declarations, and scholarly work. It does not rely on empirical interviews or fieldwork. Instead, it reads public and published sources to explore how Indigenous Peoples describe, assert, and articulate Nationhood in their own voices and frameworks. The aim is not to translate these concepts into settler legal categories, but to engage with them on their own terms. This interpretive approach is guided by a commitment to listening, rather than assimilating. In identifying recurring features of Nationhood in the following Part, this article does not attempt to fix or define Indigenous political identity. Instead, these features are offered as interpretive entry points – fluid, relational, and contingent. There is, however, an inherent risk in this process: structure can flatten relationality, and categorisation can reproduce the very logics of control that this article critiques. This risk is acknowledged explicitly and carried throughout this article.

29 Kwaymullina (n 8) 8, 14–15.

30 Ibid 14.

31 Ibid 15.

As a non-Indigenous scholar, I also approach this work with humility and caution. I do not speak for Aboriginal and Torres Strait Islander Peoples, and what I write is necessarily incomplete. My role is to amplify Indigenous expressions of Nationhood that are often marginalised in legal interpretation. This requires ongoing reflexivity and a willingness to be unsettled by the limits of settler legal thought.

Finally, this article capitalises terms such as ‘Peoples’, ‘Nations’, ‘Nationhood’, and ‘Sovereignty’ as a deliberate recognition of the political and legal status of Indigenous Peoples and Nations.³² This choice signals a recognition of Indigenous Sovereign identity and underscores the central claim in this article: legal interpretation must begin by taking Indigenous Nationhood seriously, as a legal and political reality.

IV FEATURES OF NATIONHOOD

Building on the interpretive approach set out in Part III, this Part now turns to the substance of Indigenous Nationhood as articulated by Aboriginal and Torres Strait Islander Peoples. Drawing on Indigenous-authored texts, governance documents, and political declarations, it identifies recurring *features* through which Nationhood is expressed. These features are not fixed categories or universal elements, but *interpretive entry points* – grounded in Indigenous voices – that help legal scholars engage with Indigenous political identity on its own terms.

In identifying the recurring features through which Nationhood is expressed, this article builds on the foundational work of Stephen Cornell, who identifies five features of *Native Nationhood*:³³ topographical links to place; cognitive bonds of culture and kinship; collective narratives of loss and survival; a quest for political status as Nations within nations; and the pursuit of positional politics – prioritising collective self-governing power over the distributional rewards of the settler state.³⁴ I extend Cornell’s description in two respects to meet the interpretive needs of Australian public law. First, I move beyond a sociological or cognitive account by centring Indigenous-authored jurisprudence to specify how connection to Country, kinship, and cultural authority function as lived law and governance. Second, I identify the legal consequences of misrecognising these features within the Australian constitutional and statutory framework, demonstrating how the state flattens these positional claims into administrative or corporate categories (see Parts V and VI).

32 See Gertz (n 1), who deliberately uncapitalises settler-colonial institutions such as ‘australia’ and ‘commonwealth’ to signal their contested legitimacy and to centre Indigenous Sovereignty. As a non-Indigenous author, I have chosen to retain conventional capitalisation for these settler institutions, while capitalising ‘Sovereignty’, ‘Nationhood’, ‘Self-Determination’ and ‘Peoples’ to reflect their status as legal and political concepts articulated by Indigenous communities. Capitalisation is reserved for these terms where they denote Indigenous Sovereignty, Nationhood, and Peoplehood specifically; references to Western or settler state sovereignty, and to native title as a general concept, are not capitalised. Quotations from other authors retain their original capitalisation.

33 Cornell (n 1).

34 Ibid 4–5.

The six features considered in this Part operate at different conceptual levels and describe different dimensions of Nationhood. *Connection to Country* and *Collective Identity* (expressed through kinship, language, and cultural governance) are treated as inherent characteristics – lived legal realities through which Indigenous law, identity, and authority are sustained. *Distinct Politics* and *Distinguishing Claims from Minority Populations* are points of differentiation from the settler state, identifying Indigenous Nations as political communities with jurisdictional authority rather than cultural minorities seeking inclusion. *Narrative Resilience* and *Decolonisation and Healing* reflect works-in-progress or aspirations that nevertheless hold juridical force, marking the ways Indigenous Nations assert continuity, restore law, rebuild governance, and pursue collective wellbeing. Together, these features present Nationhood as a living, relational and context-specific expression of political identity, law and governance that exceeds the conceptual limits of the settler state.

The following sections trace each feature in turn, beginning with Country as the primary locus of Indigenous law and authority.

A Cultural and Spiritual Connection to Land: The Heart of Indigenous Nationhood

The concept of Indigenous Nationhood is inextricably linked to the cultural and spiritual connection of Aboriginal and Torres Strait Islander Peoples to land, a relationship that goes far beyond Western notions of territorial ownership. For Aboriginal and Torres Strait Islander Peoples, this connection forms the very foundation of their identity, law, governance and cultural continuity.³⁵ ‘Country is central to everything Aboriginal: it is a continuum, without beginning or ending.’³⁶ It encompasses ‘people, animals, plants, rocks, earth, water, stars, air and all else. There is no division between animate and inanimate.’³⁷ It also includes the Indigenous ‘relationship to the physical, ancestral and spiritual dimensions’.³⁸ This holistic understanding of the land is central to Indigenous Nationhood, embodying a reciprocal relationship where people care for Country, and Country, in turn, cares for them. As Jude Barlow, a Ngannawal Elder, eloquently states: ‘Country is everything. It’s family, it’s life, it’s connection.’³⁹ This perspective positions Country as a living entity and an active participant in law, governance and identity formation.

35 Margo Neale, ‘First Knowledges: An Introduction’ in Bill Gammage and Bruce Pascoe, *Country: Future Fire, Future Farming*, ed Margo Neale (Thames & Hudson, 2021) 1, 5; Megan Davis and Marcia Langton (eds), *It’s Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) (*It’s Our Country*); ‘Welcome to Country’, *AIATSIS* (Web Page, 25 May 2022) <<https://aiatsis.gov.au/explore/welcome-country>>; Jude Barlow, ‘Ngannawal Elder Jude Barlow Talks about What Country Means to Her’ (Video, Australian Institute of Aboriginal and Torres Strait Islander Studies, 25 May 2022) <<https://aiatsis.gov.au/explore/welcome-country#toc-what-is-country>>.

36 Neale (n 35) 1.

37 Ibid.

38 Ibid 5.

39 Barlow (n 35) 00:00:06–00:00:10.

The connection to Country for Indigenous Peoples is both spiritual and physical, encompassing complex ideas about law and custom. Michael Dodson, a Yawuru man, explains:

Country is the spiritual, the ecological, social and aesthetic realm of my people ... When we say country we might mean homeland or tribal or clan area and in saying so we may mean something more than just a place; somewhere on the map. We are not necessarily referring to place in a geographical sense. But we are talking about the whole of the landscape, not just the places on it ... It is place that also underpins and gives meaning to our creation beliefs ... It is also deeply spiritual.⁴⁰

This unique relationship to land predates colonisation and is fundamental to Indigenous Nationhood. Unlike the Western concept of nationhood, which revolves around political sovereignty and territorial boundaries, Indigenous Nationhood is rooted in a reciprocal relationship with the land. The dichotomy between Indigenous and non-Indigenous understandings of Nationhood is explained by Tom Dystra, an Aboriginal Elder,⁴¹ in the following words: ‘We endeavoured to live with the land; they seemed to live off it. I was taught to preserve, never to destroy.’⁴² This relational worldview positions Country as a participant in Indigenous governance systems, shaping the laws and responsibilities that guide their societies.

Cornell’s idea of Indigenous Nationhood having a ‘topographical’ feature aligns with this, as it emphasises the role of the place and ancestral ties in shaping a Nation’s and a person’s identity and political claims.⁴³ Indeed, some Aboriginal Peoples may specifically describe themselves in relation to their Country, such as rainforest people, ‘freshwater people’ or ‘saltwater people’, illustrating the intimate connection between land and identity.⁴⁴

The connection to Country is also central to Indigenous governance systems and social structures. It informs how communities interact with one another and establishes a collective responsibility that differs significantly from Western individualism. Each Indigenous Nation has a unique relationship with its specific territory, defined by ancestral ties and cultural practices that have been passed down through generations. And, despite the devastating impacts of colonisation, which sought to dismantle Indigenous structures, many Nations have maintained or adapted their traditional practices.⁴⁵ This resilience underscores the enduring importance of the connection to land in Indigenous Nationhood.

While Sovereignty has been theorised elsewhere,⁴⁶ this article focuses instead on Nationhood and, in particular, on the cultural and spiritual connection to

40 Michael Dodson, *Indigenous Protected Areas in Australia*, UN Doc PFII/2007/WS.3/11 (27–29 August 2007) 2 <https://www.un.org/esa/socdev/unpfii/documents/workshop_IPPE_dodson.doc> (citations omitted).

41 Tom Dystra is publicly identified as an Aboriginal Elder. However, despite efforts to identify his Nation or Nations, this information was not publicly available at the time of writing.

42 ‘Heterogeneity of Indigenous Australians’, *University of Technology Sydney* (Web Page, 2026) <<https://www.uts.edu.au/about/faculty-health/school-public-health/indigenous-health/indigenous-health-resources/essential-understandings/heterogeneity-indigenous-australians>>.

43 See Cornell (n 1) 4.

44 Larissa Behrendt, *Indigenous Australia for Dummies* (Wiley, 2nd ed, 2021) 41 (‘*Indigenous Australia for Dummies*’).

45 *Social Justice and Native Title Report* (n 1) 132.

46 See, eg, Behrendt, *Achieving Social Justice* (n 16); Hobbs, *Indigenous Aspirations* (n 16).

Country as its foundation. Drawing on Kwaymullina, Country is not a metaphor but ‘both the source of law and a legal actor’ that sustains and enforces the network of relationships that constitute the Nation.⁴⁷ Put differently, the juridical force of Country is carried through kinship and story – ‘kinship [is] a relationship-based government, in that it is through kinship that laws are made, administered and enforced’.⁴⁸ On this footing, Nationhood is the lived expression of political identity and law grounded in Country.

In essence, the cultural and spiritual connection to land is not just a feature of Indigenous Nationhood; it is its very heart. Nationhood cannot be understood apart from Country. It is through land that law is enacted, identity affirmed, and governance sustained. Recognition of Indigenous Nationhood must begin with recognition of this foundational relationship. The implications of this connection for legal recognition and jurisdictional authority are explored in Part V.

B Collective Identity: Kinship, Language, and Cultural Governance Structures

A second feature of Nationhood is the expression of collective identity through kinship, language, and cultural governance. These elements are not peripheral social or cultural markers but a sophisticated political architecture that sustains Indigenous law, authority, and belonging. As Cornell observes, these ‘bonds of culture and kinship’ function as the ‘binding sinews’ of a shared political consciousness that persists despite colonial disruption.⁴⁹ Kwaymullina deepens this account: in Indigenous jurisprudence, belonging is constituted through ‘relationship-based citizenship’,⁵⁰ where kinship and Country – laid down by the Dreaming Ancestors – anchor law, responsibility, and identity. Here, to be a ‘fully realised human being’ is to exist within a ‘collective’ that encompasses human and non-human life, carrying responsibilities to sustain the relationships that sustain the world.⁵¹ These relational structures shape how Indigenous Nations organise themselves, relate to one another and exercise governance.

Cornell describes this feature in relation to Indigenous Peoples living in Canada, Australia, New Zealand and the United States – the so-called ‘CANZUS’ group of countries:

[The feature] has to do with the claimed role within these communities of bonds of culture and kinship, the claim that an Indigenous community shares a distinctive set of cultural understandings and real or assumed kinship ties that in some significant degree have survived the rigors of colonialism ...⁵²

Cornell’s description broadly explains the role of cultural bonds and kinship in shaping collective identity. Cornell identifies that ‘[t]his feature of nationhood is fundamentally cognitive: The issue is not whether such bonds actually exist but the

47 Kwaymullina (n 8) 14.

48 Ibid 15 (citations omitted).

49 Cornell (n 1) 4.

50 Kwaymullina (n 8) 13–16.

51 Ibid 15–16.

52 Cornell (n 1) 4.

perception or belief that they do'.⁵³ The High Court in *Mabo v Queensland [No 2]* ('*Mabo*') appears to accept the cognitive aspect of Nationhood – in recognising the existence of native title, the Court did not require proof of continuous possession of land in the European sense but instead accepted the Indigenous connection to land as a cultural and spiritual bond that exists in the minds of people.⁵⁴

Building on Cornell's account, First Nations peoples in Australia seem to articulate a broader picture of Nationhood that embraces language and culturally-based governance structures alongside kinship and cultural bonds. I therefore extend Cornell's description by centring Indigenous-authored jurisprudence to specify how Country, kinship and cultural authority function as law and governance. Accordingly, I analyse 'collective identity' through three mutually reinforcing elements – kinship, language, and cultural governance – to show how these relational structures form the internal architecture of Indigenous Nations.

1 Kinship as a Political Organisation

Kinship systems in Indigenous Nations are much more than familial relationships; they are political structures that govern social order, leadership, resource allocation, and law. These systems ensure the survival of Indigenous governance and laws, which are passed down through generations. For example, the Yolŋu's Gurrutu is a complex kinship system that governs fundamental aspects of life, including ceremony and marriage.⁵⁵ These kinship relationships are mapped onto lands.⁵⁶

Dispossession, particularly during the era of the Stolen Generations, disrupted these systems.⁵⁷ Children were forcibly removed from their families, assigned numbers instead of names, and placed in institutions or non-Indigenous homes, severing their connection to Country and kin. This fragmentation undermined the transmission of law and governance embedded in kinship structures, with long-term consequences for cultural continuity and political organisation.⁵⁸ While initiatives like Link-Up have sought to reconnect individuals with their families

53 Ibid 4 n 5, citing Rogers Brubaker, Mara Loveman and Peter Stamatov, 'Ethnicity as Cognition' (2004) 33(1) *Theory and Society* 33 <<https://doi.org/10.1023/B:RYSO.0000021405.18890.63>>; Stephen Cornell and Douglas Hartmann, *Ethnicity and Race: Making Identities in a Changing World* (Pine Forge Press, 2nd ed, 2007).

54 (1992) 175 CLR 1 ('*Mabo*').

55 'History and Culture', *East Arnhem* (Web Page, 2026) <<https://www.eastarnhemland.com.au/history-and-culture>>.

56 Ibid.

57 Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Final Report, 1997) ('*Bringing Them Home*'); Pat Anderson and Edward Tilton, Aboriginal and Torres Strait Islander Healing Foundation, *Bringing Them Home 20 Years On: An Action Plan for Healing* (Report, 2017); James C Beaufils et al, "'We All Grow up with Our Mob Because It Takes All of Us": First Nations Collective Kinship in Australia' (2025) 169 *Children and Youth Services Review* 108059, 1–10 <<https://doi.org/10.1016/j.childyouth.2024.108059>>.

58 Beaufils et al (n 57).

and communities,⁵⁹ the damage to kinship-based governance structures remains significant. Nationhood is therefore grounded in restoring these kinship-based political structures that colonisation sought to dismantle.

2 Language as Political Identity

Language, too, is a central pillar of Nationhood.⁶⁰ It is not only a means of communication but a repository of law, identity, and connection to Country.⁶¹ As Behrendt notes, the word for ‘person’ in many Aboriginal languages is often the same as the word for Nation.⁶² Amelia Turner, an Arrernte woman, speaking on behalf of the Lhere Artepe Aboriginal Corporation, describes language as sacred: ‘Words are given to us by the land ... the land speaks for us and we use the language for this’.⁶³ Language affirms political identity and kinship, and its survival is an act of jurisdictional continuity.

The Uluru Dialogues offer an example of language as a mode of law and diplomacy. During the National Constitutional Convention at Uluru in 2017, Elders from diverse First Nations across the continent spoke in their own languages, with messages interpreted and reinterpreted across linguistic boundaries.⁶⁴ This was the first time such a process occurred at a national level in Australia, demonstrating a remarkable exercise of cultural identity, Sovereignty, and Nation-to-Nation diplomacy in the context of significant law reform.⁶⁵

Yet the survival of Indigenous languages has been profoundly disrupted by colonisation.⁶⁶ Many languages have been lost or severely diminished due to the

59 ‘Link-Up’, *AIATSIS* (Web Page, 13 May 2025) <<https://aiatsis.gov.au/family-history/you-start/link>>. There are Link-Up organisations in most states and territories: Link-Up New South Wales Aboriginal Corporation; Northern Territory Stolen Generations Aboriginal Corporation; Central Australian Aboriginal Congress Link-Up Service; Link-Up Queensland; Nunkuwarni Yunti of SA Inc; Link-Up Victoria; Yorgum Healing Services Western Australia; and Kimberley Stolen Generations Aboriginal Service.

60 See Anita Heiss, ‘NGUMAMBINYA’ in Jasmin McGaughey and Poet’s Voice (eds), *Words to Sing the World Alive: Celebrating First Nations Languages* (University of Queensland Press, 2024) 13, 18: ‘[Language] is a strong reminder of our presence, of the richness of our culture and of our nationhood’.

61 Reconciliation Australia, ‘Let’s Talk ... Languages’ (Fact Sheet, 8 March 2019) <https://www.reconciliation.org.au/wp-content/uploads/2021/10/ra-letstalk-factsheet-languages_final.pdf>.

62 Behrendt, *Indigenous Australia for Dummies* (n 44) 40.

63 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Our Land Our Languages: Language Learning in Indigenous Communities* (Report, September 2012) 10 [2.14] <https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/languages2/report/full%20report.pdf>.

64 See Referendum Council, Parliament of Australia, *Final Report of the Referendum Council* (Report, 30 June 2017) 7.

65 Ibid.

66 See, eg, ‘Languages Alive’, *AIATSIS* (Web Page, 13 October 2025) <<https://aiatsis.gov.au/explore/languages-alive>>; Laura Rademaker, ‘The Great Australian Silencing: The Elimination of Aboriginal Languages and the Legacy of Colonisation’, *ABC Religion & Ethics* (online, 30 May 2019) <<https://www.abc.net.au/religion/the-elimination-of-aboriginal-languages-and-the-legacy-of-colon/10731474>>; Laura Rademaker, *Found in Translation: Many Meanings on a North Australian Mission*, ed Noelani Goodyear-Ka‘ōpua and April K Henderson (University of Hawai‘i Press, 2018) <<https://doi.org/10.1515/9780824873585>>; Dana Morse, ‘The Next Generation Is Bringing Australia’s Ancient Languages into the Future’, *ABC News* (online, 14 November 2020) <<https://www.abc.net.au/news/2020-11-14/australias-ancient-languages-brought-into-the-future/12882204>>; Annalee Pope, ‘Why Reviving

policies of assimilation, forced removal, and the suppression of Aboriginal cultural expression.⁶⁷ The *National Indigenous Languages Report* found that '[a]ll of Australia's Aboriginal and Torres Strait Islander languages are under threat'.⁶⁸ The grief associated with language loss is deeply felt in Nations and Peoples, as language carries not only words but worldviews, law, and connection.⁶⁹

Despite this, revitalisation efforts are underway across Australia. Community-led initiatives, often in partnerships with universities and cultural organisations, are reclaiming 'sleeping' languages from archival materials and oral histories. For example, the Dharawal language is being revitalised through a partnership between the Gujaga Foundation and the University of New South Wales, which supports Elders and knowledge holders in teaching and documenting language.⁷⁰ Kaurna Elder, Rod O'Brien, a Cultural Advisor at the University of Adelaide's Wirltu Yarlu Aboriginal Education, 'devotes his time to reclaiming Kaurna warra (language) and culture'.⁷¹ The University of Queensland also supports language revitalisation through research and a graduate certificate.⁷²

Beyond the practical work of revitalisation, language carries emotional and spiritual significance for many Indigenous Peoples. Cultural healing frameworks led by Aboriginal and Torres Strait Islander communities emphasise that practices such as ceremony, storytelling, and language restore strength through connection to Country, kinship, and spirit.⁷³ For many, hearing and speaking language brings a sense of grounding and spiritual healing, reconnecting individuals to ancestral knowledge and cultural identity. This emotional and spiritual connection is increasingly recognised as a protective factor for mental health and wellbeing. These projects are not merely linguistic – they are political acts of cultural resurgence and jurisdictional continuity. Revitalising language strengthens Indigenous

Indigenous Languages Is So Important', *ABC News* (online, 21 February 2019) <<https://www.abc.net.au/news/2019-02-21/inside-the-battle-to-keep-australias-indigenous-languages-alive/10825812>>; Nicholas Evans (ed), *The Non-Pama-Nyungan Languages of Northern Australia: Comparative Studies of the Continent's Most Linguistically Complex Region* (Pacific Linguistics, 2003) <<https://doi.org/10.15144/PL-552>>.

67 *National Indigenous Languages Report* (Report, 16 August 2020) <<https://www.arts.gov.au/sites/default/files/documents/national-indigenous-languages-report-lowres.pdf>> ('*National Indigenous Languages Report*').

68 *Ibid* 42.

69 *National Indigenous Languages Report* (n 67).

70 Kay Harrison, 'Connecting Country, Spirituality and Kinship: Reclaiming Language Is Key to Aboriginal Cultural Identity and Wellbeing', *UNSW Sydney* (Web Page, 2022) <<https://www.unsw.edu.au/arts-design-architecture/our-research/research-impact/case-studies/connecting-country-spirituality-and-kinship-reclaiming-language-is-key-to-aboriginal-cultural-identity-and-wellbeing>>.

71 Rudi Maxwell, 'Saving First Languages a Mission to Preserve Cultures', *National Indigenous Times* (online, 26 February 2024) <<https://nit.com.au/26-02-2024/9945/saving-first-languages-a-mission-to-preserve-cultures>>.

72 'Indigenous Language Revitalisation Program', *School of Languages and Cultures* (Web Page) <<https://languages-cultures.uq.edu.au/indigenous-language-revitalisation>>.

73 See, eg, Pat Dudgeon et al, 'Connection between Family, Kinship and Social and Emotional Wellbeing' (Summary Paper, Australian Institute of Health and Welfare Indigenous Mental Health and Suicide Prevention Clearinghouse, 14 July 2021); 'Embedding Cultural Healing as a Core Component to Australia's Mental Health System' (Position Paper, Gayaa Dhuwi (Proud Spirit) Australia) <<https://www.gayaadhuwi.org.au/s/Cultural-Healing-Position-Paper.pdf>>.

Nationhood by affirming identity, restoring intergenerational knowledge, and reconnecting communities to Country. It is a form of governance, a mode of law, and a declaration of survival.

3 Cultural Practices as Governance

Cultural governance systems are a defining feature of Indigenous Nationhood, where tradition, practices and governance structures underpin political authority and social cohesion. These systems are unique to each Nation, reflecting distinct laws, cultural protocols, and decision-making processes rooted in Country, kinship and ancestral knowledge.⁷⁴ Ceremonies, storytelling, and other forms of cultural expression are not peripheral but central to governance, embedding law within lived practice.⁷⁵ Elders' councils and other culturally-grounded governance bodies play a critical role in maintaining social order and ensuring that decisions carry cultural legitimacy.

Across the continent, diverse examples illustrate how Indigenous Nations enact governance in ways that affirm Nationhood. The Noongar Nation, for instance, negotiated the South West Native Title Settlement through a regional governance model that reflects cultural unity and decision-making authority.⁷⁶ In Arnhem Land, Yolŋu Mala (clan councils) operate through Rom (law), songlines and ceremonial authority, maintaining legal order grounded in ancestral law.⁷⁷ The Anangu Pitjantjatjara Yankunytjatjara Lands Council, while a statutory body, reflects traditional governance principles through its use of language, cultural protocols, and Elder-led decision-making.⁷⁸ The Gugu Badhun Nation⁷⁹ and Yawuru Nation⁸⁰ have also developed governance models that centre cultural revitalisation and community-led development, grounded in traditional law and philosophy. This is a method of affirming Indigenous Nationhood.

C Distinct Polities: The Voice of a Nation, Not a Corporation

As alluded to above, Indigenous Nationhood claims are distinctly political, not corporate. They are entrenched in the right to govern as distinct political entities.

74 See generally Gammage and Pascoe (n 35); Marcia Langton and Aaron David Samuel Corn, *Law: The Way of the Ancestors*, ed Margo Neale (Thames & Hudson, 2023); Behrendt, *Indigenous Australia for Dummies* (n 44).

75 See generally Noel Pearson, *Our Right to Take Responsibility* (Noel Pearson and Associates, 2000).

76 Adam Levin and Emma Chinnery, 'Noongar Governance Structure Manual' (Manual, Department of the Premier and Cabinet (WA), 20 December 2016) <<https://www.wa.gov.au/government/publications/noongar-governance-structure-manual>>. See also Dziedzic and McMillan (n 1).

77 See generally Gillian Hutcherson, *Djalkiri Wānga, the Land Is My Foundation: 50 Years of Aboriginal Art from Yirrkala, Northeast Arnhem Land* (University of Western Australia, 1995).

78 'APY Administration', *Anangu Pitjantjatjara Yankunytjatjara* (Web Page, 2026) <<https://anangu.com.au/apy-administration>>.

79 See generally 'Gugu Badhun', *Gugu Badhun Aboriginal Corporation RNTBC* (Web Page) <<http://www.gugubadhun.com>>; Gertz (n 1); Theresa L Petray and Janine Gertz, 'Building an Economy and Building a Nation: Gugu Badhun Self-Determination as Prefigurative Resistance' (2018) 12(1) *Global Media Journal Australian Edition* 1.

80 'About Us: Our Story', *Nyamba Buru Yawuru* (Web Page, 2020) <https://www.yawuru.org.au/about/?doing_wp_cron=1754375244.5820639133453369140625>.

Nationhood, in this context, concerns the re-establishment of Indigenous Peoples as *Nations* with their own laws, governance systems, and territories – rather than state-constructed corporate entities. Here, I demonstrate that Indigenous Nationhood involves aspirations of self-governing communities – of Nations within the nation. As Irene Watson has stated, ‘[t]here is no single “Aboriginal nation” within Australia but there are hundreds’.⁸¹

A central issue in the Australian settler state is the consistent failure to recognise Indigenous Nations as self-governing political entities. Instead of recognising inherent political status, the state often forces communities to incorporate under legislation to obtain the required legal status to engage with external bodies. As Cornell observes, ‘while some Indigenous communities have been able to use the resulting corporate bodies for their political purposes, the formal organization of that authority has to fit governmental prescription, not Indigenous preference’.⁸² Janine Gertz similarly critiques native title corporate bodies as inappropriate mechanisms for Nationhood. In her words, ‘[n]ative title corporations are a state constructed apparatus for native title administration’.⁸³ The corporate model prioritises accountability to the state over accountability to the community. It reflects an assimilationist logic, where Indigenous governance must be legible to settler institutions to be recognised. This erases the political and legal character of Indigenous Nations and substitutes it with economic or administrative functionality.

Indigenous Nationhood claims are therefore about restoring and maintaining inherent political status – claims to govern, to make law, and to relate to Country on Indigenous terms. These claims predate colonial legal frameworks and resist being subsumed within them. The conclusion is clear: recognition must begin with the voice of Nations, not the structure of corporations. The specific judicial and statutory mechanisms of this misrecognition – including the native title system and statutory representative bodies – are examined in Parts V and VI.

D Distinguishing Claims from Other Minority Populations

Nationhood is also used politically and pragmatically by Aboriginal and Torres Strait Islander Peoples to distinguish their claims from those of other minority populations. Cornell notes in the context of CANZUS countries, the ‘idea of nations within nations’ sets Indigenous claims apart from those of other minority groups, whose aspirations typically centre on inclusion, equality, or resource distribution within the dominant state.⁸⁴ In the Australian context, this distinction is particularly important. While other minority groups may share cultural, linguistic, or ethnic characteristics that differentiate them from the broader population, Indigenous Peoples assert a unique and pre-existing political status that predates colonisation. Indigenous Peoples’ claims are not just about participation in the state – they

81 Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 105 <<https://doi.org/10.4324/9781315858999>>.

82 Cornell (n 1) 15 n 24.

83 Gertz (n 1) 157 (citations omitted).

84 Cornell (n 1) 4–5.

are about recognition as polities with their own governance systems, laws, and relationships to Country.

By distinguishing themselves from other minority populations through Nationhood claims, Indigenous Peoples demonstrate their goal to reassert their status as Sovereign Nations. Cornell explains that ‘Indigenous peoples [unlike minority populations] typically have a positional as opposed to a distributional politics’.⁸⁵ This means that Indigenous Peoples focus on achieving power and authority to govern themselves (positional politics) as opposed to simply seeking a share of resources, rights or opportunities within the existing settler state structure (distributional politics). This again serves to distinguish themselves from other minority populations who have no claim of sovereignty or nationhood – other minority populations would be more concerned with distributional politics in the Australian state. In this way, Nationhood serves as a claim to an Indigenous right of self-governance.

However, as explained by Cornell, ‘[i]t is not that the distribution of socioeconomic rewards available to many people in highly developed Western societies is of little interest to Indigenous peoples’.⁸⁶ Indeed, it is quite the opposite in Australia, where Aboriginal and Torres Strait Islander Peoples recognise the urgent attention needed to improve Indigenous disadvantage⁸⁷ in relation to employment, education and healthcare. This disadvantage is addressed very differently by Indigenous Peoples and the Australian government – Indigenous Peoples prioritise *collective* autonomy while the settler state prioritises *individual* wellbeing.⁸⁸ Nationhood, therefore, acts as a claim to contextualise these issues ‘within a prior and encompassing commitment to the survival of ... [the] nation ... as a political entity with substantial control over its own affairs’.⁸⁹ As Cornell recognises, ‘[t]his prioritisation frustrates the CANZUS states, which commonly prefer to focus their relevant policy prescriptions on individual well-being and equality instead of collective aspiration and difference’.⁹⁰ The tension between individual rights (aligned with neoliberalism) and collective rights (central to Indigenous Nationhood) demonstrates the ongoing conflict between the settler state and Indigenous Peoples who seek recognition not only as individuals but as distinct political entities with their own governance systems.⁹¹ This is unlike any

85 Ibid 5.

86 Ibid.

87 I acknowledge these inequalities are the result of colonialism and its ongoing impacts. It is not my intention when referring to ‘Indigenous disadvantage’ to problematise Indigeneity itself. Instead, my focus is on critiquing and challenging the systems and structures that have produced and perpetuated disadvantage.

88 Cornell (n 1) 5.

89 Ibid.

90 Ibid.

91 Pierre Bourdieu states neoliberalism is a ‘programme for destroying collective structures which may impede pure market logic’: Pierre Bourdieu, ‘The Essence of Neoliberalism’, *Le Monde diplomatique*, tr Jeremy J Shapiro (online, December 1998) <<https://mondediplo.com/1998/12/08bourdieu>>. See also David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2007). Jon Altman and Melinda Hinkson argue that ‘under current global circumstances the quest for cultural homogeneity and economic sameness represents great risk to Indigenous Australians’: JC Altman, ‘Beyond Closing the

other minority population in Australia. At the same time, the terminology of ‘rights’ is itself limited in this context: it is historically framed toward individual claims, and, in the case of *United Nations Declaration on the Rights of Indigenous Peoples* (‘UNDRIP’), is not binding in domestic law. What is at stake in Nationhood is the recognition of Peoples as polities with law and governance of their own.

An example of the contrast of prioritisation is the National Agreement on Closing the Gap, a policy initially introduced in 2008⁹² and revised in 2020.⁹³ The policy aims to address significant disparities in health, education, employment, and life expectancy between Indigenous and non-Indigenous Australians. The original policy framework (2008) was largely shaped by a neoliberal approach, focusing on individual socioeconomic and measurable outcomes like increasing employment targets, reducing infant mortality, and improving literacy and numeracy for Aboriginal and Torres Strait Islander Peoples. This policy approach framed success as being able to ‘close the gap’ between Indigenous individuals and the broader Australian population in these socioeconomic indicators. The policy did not, however, address the structural and collective dimensions of Indigenous disadvantage, particularly the political control over Indigenous affairs.

The policy was heavily criticised for several reasons.⁹⁴ First, there was a lack of Indigenous consultation and leadership in the design of the original policy. In submissions by the Northern and Central Land Councils,⁹⁵ it was stated that for the framework to be effective, ‘it needs the full involvement of Indigenous peoples in its design, and agreement from COAG’.⁹⁶ Second, the policy focused on individual outcomes while neglecting collective rights like Nationhood, Self-Determination and Sovereignty. The policy also failed to address structural causes of disadvantage, including the impacts of colonisation and dispossession. It overemphasised economic integration through market-based solutions, which do not align with Indigenous economic development and governance perspectives. Lastly, the policy framed Indigenous communities primarily in terms of socioeconomic gaps rather than recognising their strengths and aspirations. This means it significantly

Gap: Valuing Diversity in Indigenous Australia’ (Working Paper No 54, Centre for Aboriginal Economic Policy Research, 2009) 7; Jon Altman and Melinda Hinkson, ‘Very Risky Business: The Quest to Normalise Remote-Living Aboriginal People’ in Greg Marston, Jeremy Moss and John Quiggin (eds), *Risk, Welfare and Work* (Melbourne University Press, 2010) 185, 185.

92 ‘National Indigenous Reform Agreement (Closing the Gap)’ (Agreement, Council of Australian Governments, November 2008) (‘National Indigenous Reform Agreement’). There are no references to Nationhood, Sovereignty or Self-Determination in this agreement.

93 ‘National Agreement on Closing the Gap’ (Agreement, Coalition of Aboriginal and Torres Strait Islander Peak Organisations a and Australian Governments, July 2020) (‘National Agreement on Closing the Gap’). There are no references to Nationhood or Sovereignty in this agreement. There are three references to Self-Determination.

94 For a detailed review of the ‘National Indigenous Reform Agreement’ (n 92), see Michael Dillon, ‘The First Decade of Closing the Gap: What Went Wrong?’ (Discussion Paper No 298, Centre for Aboriginal Economic Policy Research, 2021) <<https://doi.org/10.25911/P9NB-F114>>.

95 Both independent statutory authorities were established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). They are also Native Title Representative Bodies recognised under the *Native Title Act* (n 15).

96 Northern Land Council and Central Land Council, Submission to Council of Australian Governments, *Closing the Gap Refresh Initiative* (1 June 2018) 1.

contributed to deficit discourse – a ‘mode of thinking ... that frames Aboriginal identity in a narrative of negativity, deficiency and disempowerment’.⁹⁷

In 2020, following critique by Indigenous and non-Indigenous advocates,⁹⁸ the Closing the Gap policy was ‘refreshed’ to incorporate more of a focus on collective rights and Indigenous governance. The updated framework increased community control in areas such as health services and cultural preservation, including targets related to maintaining language and cultural identity. Yet, despite these developments, the policy remains anchored in an individual socioeconomic paradigm that does not engage with the collective political rights – the Nationhood – of Aboriginal and Torres Strait Islander Peoples. Its emphasis on partnerships with Aboriginal Community Controlled Health Organisations (‘ACCHO’) illustrates this point: while ACCHO perform vital and respected work, they are service-delivery organisations, not representative bodies of Nations. This reflects the broader corporatisation trend identified earlier, in which the state is willing to recognise Indigenous organisations in administrative terms, but not Indigenous Peoples as polities with inherent governance authority. Nationhood, therefore, offers a means of articulating the tension between liberal policy frameworks centred on individual outcomes and Indigenous aspirations for collective political autonomy.⁹⁹

Gertz, for example, states that neoliberalism and capitalism, as enforced through the Australian state’s constituted sovereignty, represent significant threats to the integrity of the Gugu Badhun Nation’s cultural and community cohesion.¹⁰⁰ While this observation is made in relation to one Aboriginal Nation, it reflects a broader concern: that dominant political and economic systems undermine Indigenous governance and collective identity. Behrendt similarly acknowledges that while Indigenous interpretations of Sovereignty and Self-Determination may incorporate liberal democratic concepts such as representative government and democracy, they remain fundamentally grounded in collective rights and community-based aspirations.¹⁰¹

This emphasis on collective autonomy – on the right of Indigenous Nations to govern themselves according to their own laws and relationships to Country – is what distinguishes Nationhood claims from those of other minority populations. Where other groups may seek inclusion or equitable distribution within the settler state, Indigenous Peoples assert a political identity that predates and exists alongside the state. Nationhood, therefore, is not a claim for recognition within

97 Cressida Fforde et al, ‘Discourse, Deficit and Identity: Aboriginality, the Race Paradigm and the Language of Representation in Contemporary Australia’ (2013) 149(1) *Media International Australia* 162, 162 <<https://doi.org/10.1177/1329878X1314900117>>.

98 See, eg, Megan Davis, ‘Closing the Gap in Indigenous Disadvantage: A Trajectory of Indigenous Inequality in Australia’ (2015) 16(1) *Georgetown Journal of International Affairs* 34; Paige Taylor, ‘Community Control “Key to Indigenous Advancement”’, *The Australian* (online, 7 July 2020) <<https://www.theaustralian.com.au/nation/indigenous/community-control-key-to-indigenous-advancement-says-pat-turner/news-story/1ece1e375b211bfe6879efa30d161fc6>>; Altman (n 91).

99 See Gertz (n 1) 80, 99.

100 Ibid 80.

101 Behrendt, *Achieving Social Justice* (n 16) 110.

the state – it is a claim to be recognised as a Nation. This distinction is central to understanding Indigenous political aspirations and sets the stage for the next feature: the role of narratives in affirming Nationhood through trauma, survival and resilience.

E Intergenerational Trauma, Survival and Resilience: The Narratives of Nationhood

Another key feature of Nationhood, as understood and used by Aboriginal and Torres Strait Islander Peoples, is its foundation in the collective narratives of trauma, survival and resilience. This feature of Nationhood, albeit in different formats, is a core feature of any Nationhood claim.¹⁰² Cornell explains that in the CANZUS countries, narratives of Indigenous Nationhood ‘are diverse but express a broadly common sequence’.¹⁰³ He explains the sequence as (1) the original presence of Indigenous Peoples in a particular place, (2) European invasion, (3) land expropriation, (4) cultural suppression, and (5) the collective persistence and agency of distinct peoples with timeless roots.¹⁰⁴ That sequence is specifically applied here to Aboriginal and Torres Strait Islander Peoples to show how their collective narrative is a foundation of their Nationhood. The following narrative highlights Indigeneity, loss and survival.

It should be undisputed that Aboriginal and Torres Strait Islander Nations were the ‘first sovereign Nations of the Australian continent and its adjacent islands’.¹⁰⁵ Indeed, the original presence of Aboriginal and Torres Strait Islanders in Australia was recognised by the very people who invaded the country. Take, for example, instructions to Governor Arthur Phillip that stated: ‘endeavour by every possible means to open an Intercourse with the ... Natives and to conciliate their affections, enjoining all Our Subjects to live in amity and kindness with them’.¹⁰⁶ The Uluru Statement from the Heart explains that this original presence is, ‘according to the reckoning of our culture, from the Creation’.¹⁰⁷ This is a core part of the Indigenous narrative in Australia – one that stresses a timeless and continuing presence in traditional lands.

Like the Indigenous peoples of other countries, Aboriginal and Torres Strait Islander Peoples were invaded by Europeans with the arrival of the British in

102 On the idea of narrative as a core feature of Nationhood, see Robert J Foster (ed), *Nation Making: Emergent Identities in Postcolonial Melanesia* (University of Michigan Press, 1997). See also the discussion of ethnicity and narrative in Stephen Cornell, ‘That’s the Story of Our Life’ in Paul Spickard and W Jeffrey Burroughs (eds), *We Are a People: Narrative and Multiplicity in Constructing Ethnic Identity* (Temple University Press, 2000) 41, 41.

103 Cornell (n 1) 4.

104 Ibid.

105 Referendum Council, ‘Uluru Statement from the Heart’ (Statement, First Nations National Constitutional Convention, 26 May 2017) <<https://ulurustatement.org/the-statement/view-the-statement/>> (‘Uluru Statement from the Heart’).

106 Instructions from King George III to Arthur Phillip, Governor of New South Wales, 25 April 1787, 15 <https://www.foundingdocs.gov.au/resources/transcripts/nsw2_doc_1787.pdf>, archived at Public Records, National Archives, United Kingdom, ref CO 201/1 <<https://discovery.nationalarchives.gov.uk/details/r/C968970>>.

107 ‘Uluru Statement from the Heart’ (n 105).

1770. This marked the start of a long and violent process of land dispossession and expropriation. The narrative of invasion, followed by the forced removal of Indigenous Peoples from their land, is central to Indigenous Nationhood. There are many examples of this violence, including mass killings, rape, infection by various diseases, withdrawal of resources by confiscating land and other economic resources, and the forced removal of children.¹⁰⁸ The historical aspect of the narrative is vital in understanding contemporary Indigenous and non-Indigenous relations. It reflects the violence of colonisation and the subsequent marginalisation of Indigenous cultural, political and legal Sovereignty.

Colonisation in Australia also involved deliberate and concerted efforts to suppress Indigenous knowledges, cultures, languages and practices. As is clear from above, these are the very things that tell Aboriginal and Torres Strait Islander Peoples who they are. The introduction of policies such as the forced removal of children, known as the Stolen Generations,¹⁰⁹ which occurred from approximately the 1910s to the 1970s,¹¹⁰ has left deep, complex and real wounds¹¹¹ – scars that ‘are still being felt personally, socially, spiritually and collectively’.¹¹² Before the 1967 referendum, which removed constitutional barriers to counting Aboriginal and Torres Strait Islander Peoples in the national population and enabled the Commonwealth to legislate for them,¹¹³ systemic discrimination and racial violence denied Aboriginal and Torres Strait Islander Peoples the right to birth certificates,¹¹⁴

108 Such violence has been described as ‘colonial terrorism’: Asafa Jalata, ‘The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians’ (2013) 3(3) *SAGE Open* 1 <<https://doi.org/10.1177/2158244013499143>>.

109 The Stolen Generations refers to the forced separation and removal of thousands of children between 1910 and 1970: see, eg, *Aboriginals Ordinance 1918* (Cth); *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Aborigines Act 1934* (SA); *Aboriginal Protection Act 1869* (Vic); *Native Administration Act 1936* (WA). See also Auber Neville, *Australia’s Coloured Minority: Its Place in Our Community* (Currawong Publishing, 1947). These sources contain derogatory slurs, extreme racism, deeply offensive words, white superiority messaging, and misleading historical context. They demonstrate the racist colonial beliefs behind the assimilation of First Peoples. My intention here is to acknowledge rather than ignore the disturbing realities of Australia’s history. Confronting these harmful narratives is essential to fully understand the colonial mindset that shaped policies and attitudes toward Aboriginal and Torres Strait Islander Peoples.

110 As provided by Australians Together, a not-for-profit organisation that creates educational resources, ‘policies of forced removals were in place from 1910 to 1969, but there are many stories of forced removals prior to and after these dates’: ‘The Stolen Generations: The Forcible Removal of First Nations Children from Their Families’, *Australians Together* (Web Page, 2026) <<https://australiantogether.org.au/discover-and-learn/our-history/stolen-generations>>.

111 See, eg, Brian Butler and John Bond, *Sorry and Beyond: Healing the Stolen Generations* (Aboriginal Studies Press, 2021). See also Human Rights and Equal Opportunity Commission (n 57). This report was tabled in Parliament on 26 May 1997. It examines historical laws, practices and policies that led to the forced removal of children from their families and offers recommendations aimed at fostering healing and reconciliation for the Stolen Generations, their families and the broader Australian community.

112 The Healing Foundation, ‘Intergenerational Trauma Animation’ (YouTube, 26 July 2018) 00:02:27–00:02:32 <<https://www.youtube.com/watch?v=vlqx8EYvRbQ>>.

113 See Bain Attwood and Andrew Markus, *The 1967 Referendum, or, When Aborigines Didn’t Get the Vote* (Aboriginal Studies Press, 1997).

114 See, eg, Alannah Calabrò, ‘Registering the Births of Indigenous Australians: Has New South Wales Got It Right?’ (2013) 36(3) *University of New South Wales Law Journal* 809; Paula Gerber, ‘Making Indigenous Australians “Disappear”: Problems Arising from Our Birth Registration Systems’ (2009) 34(3)

land ownership (and thus the ability to accumulate intergenerational wealth), driver's licences, and passports. These are just a few examples of policies aimed at dismantling Indigenous structures and practices. Such cultural suppression is an important aspect of the Aboriginal and Torres Strait Islander narrative of loss and survival, with cultural erasure being a tool of colonisation that Indigenous communities continue to resist.

Despite these colonial processes of land dispossession and expropriation, violence, and cultural suppression, the narrative of Indigenous Nationhood in Australia is also one of resilience and survival. Resilience and survival are not something conferred on Aboriginal and Torres Strait Islander Peoples by the Australian Government, but instead are an inner and collective power and strength to deal with the ongoing impacts of colonisation. The sources of this resilience are those that colonisation sought to destroy – identity, cultural beliefs, values, knowledges, land rights, and connection to Country. Megan Davis simply and eloquently illustrates this part of the narrative after the 2023 referendum: 'our people have endured far worse. And we are not giving up.'¹¹⁵

The story of Indigenous resilience in Australia is also represented in the Uluru Statement from the Heart, particularly with reference to establishing a Makarrata Commission, as Makarrata is a Yolŋu word meaning a coming together after a struggle, facing the facts of wrongs and living again in peace.¹¹⁶ Many Nations have retained or adapted their traditional practices, while others have sadly been fractured.¹¹⁷ Yet, '[i]n the hearts and minds of Aboriginal and Torres Strait Islander Peoples, our "nationhood" has always *survived*'.¹¹⁸ These narratives affirm Indigenous identity and also serve as a powerful political tool. From William Cooper's petition¹¹⁹ to the Aboriginal Tent Embassy,¹²⁰ Indigenous Peoples have consistently drawn on their enduring sense of Nationhood through the narratives explored above to demand justice and recognition from the Australian settler state.

Alternative Law Journal 158 <<https://doi.org/10.1177/1037969X0903400303>>; Joel Orenstein, 'The Difficulties Faced by Indigenous Victorians in Obtaining Formal Identification' (2008) 7(8) *Indigenous Law Bulletin* 14.

115 Megan Davis, 'Reflections on the Referendum' (NAIDOC Week Keynote Lecture, University of Queensland, 10 July 2024).

116 'Makarrata', *The Uluru Statement* (Web Page) <<https://ulurustatement.org/our-story/makarrata/>>.

117 *Social Justice and Native Title Report* (n 1) 132.

118 *Ibid* (emphasis added).

119 Yorta Yorta leader, William Cooper, petitioned King George V to intervene to 'prevent the extinction of the Aboriginal Race', improve conditions and grant Indigenous Peoples a voice in parliament: William Cooper, 'Petition to King George V from the "Aboriginal Inhabitants of Australia"' (Petition, Central Office, Department of the Interior, 1934), archived at National Archives of Australia, ref A431, 1949/1591 <<https://www.naa.gov.au/students-and-teachers/learning-resources/learning-resource-themes/first-australians/rights-and-freedoms/petition-king-george-v-aboriginal-inhabitants-australia>>.

120 The Aboriginal Tent Embassy, established in 1972 outside Parliament House in Canberra, is a powerful symbol of Indigenous protest and ongoing demands for rights, Sovereignty and recognition. Peter O'Mara, a Wiradjuri man, describes the Tent Embassy as standing for everything that Aboriginal and Torres Strait Islander Peoples strive to achieve: '[confronting] and [reversing] the negative impacts of colonisation, discrimination and cultural suffocation': Peter O'Mara, 'The Spirit of the Tent Embassy: 40 Years on' (2012) 197(1) *Medical Journal of Australia* 9, 9 <<https://doi.org/10.5694/mja12.10829>>.

F Decolonisation and Healing

As established above, the narratives of trauma, survival and resilience are foundational to the concept of Nationhood. These narratives give rise to another feature of Nationhood: its role as a project of decolonisation and healing. Nationhood operates both retrospectively – as an assertion of survival in the face of the colonial ‘apocalypse’¹²¹ – and prospectively, as a political project aimed at restoring law, memory and autonomy. Acts such as reclaiming Nation names, revitalising languages and rebuilding culturally grounded governance institutions are exercises of political resurgence that challenge what Kwaymullina describes as the ‘singular order’ of colonial power.¹²² Through these processes, Nations reclaim authority that colonisation sought to suppress, while simultaneously addressing the intergenerational trauma produced by that suppression through the renewal of relationships to Country, kinship and collective responsibility.

1 Decolonisation

When Indigenous Peoples assert their Nationhood, they challenge the dominant power structure that has subordinated their political authority. One form this takes is asserting names and identity in non-colonial ways (for example, identifying by traditional ‘mob’ names), which reflects what Kwaymullina terms ‘relationship-based citizenship’,¹²³ where belonging is constituted through networks of kinship and Country rather than an individualised, rights-bearing model. As Mick Gooda observes, the reclamation of Nations’ names is a ‘powerful precursor to [Nations] taking control of ... [their] own destinies’,¹²⁴ highlighting how naming practices function as acts of political resurgence. Alison Vivian similarly notes that the Ngarrindjeri Nation ‘overtly use the language of ... nation ... [in] active resistance to the limitations that non-Indigenous governments seek to impose’,¹²⁵ and governance restoration follows: the Ngarrindjeri Regional Authority integrates Ngarrindjeri cultural governance with state decision-making. In the south-west, the Noongar Settlement created a novel governance model within a colonial framework, asserting collective political authority through a unified claim, while also remaining a site of internal debate about its implications for inherent rights and the form of authority it establishes.

Further, in the context of decolonisation, Nationhood plays a crucial role in reclaiming political and cultural authority that was systematically denied through colonisation. For example, Indigenous Peoples have restored their governance structures to reinstate their traditional laws, customs, and practices.¹²⁶ The

121 Kwaymullina (n 8) 7.

122 Ibid 8.

123 Ibid 14.

124 Mick Gooda (Speech, Social Justice and Native Title Report 2014 Launch, 5 December 2014) 00:45:47–00:45:55 <<https://www.youtube.com/watch?v=1MFU8h34IXw>>.

125 Vivian (n 4) 134.

126 However, it is important to note that Western legal systems do not generally recognise Indigenous laws, customs, and governance structures. An exception is the Noongar Native Title Settlement in Western Australia, which provides legal protection and recognition of Noongar cultural practices, customs, and governance under a Western legal framework.

Ngarrindjeri Regional Authority in South Australia exemplifies a shared governance model that integrates Ngarrindjeri cultural governance with state decision-making processes, reflecting the survival and rejuvenation of Indigenous law alongside nation-state governance.¹²⁷ Similarly, the Assembly of First Nations in Canada demonstrates how distinct First Nations can unite to form a culturally authoritative decision-making body, strengthening collective advocacy and dispute resolution.¹²⁸

Through this process, Aboriginal and Torres Strait Islander Peoples are advocating for rights to land and resources and their inherent rights as distinct political entities. Cornell explains that the Noongar Nation have ‘used the native title process and land claims to assert the nationhood of a dispersed Indigenous population’,¹²⁹ exemplified in the landmark Noongar Settlement, one of the largest and most comprehensive Indigenous land settlements in Australian history. It is also an example of a conservative government recognising Indigenous Nationhood.¹³⁰ The Noongar People, who live in the south-west corner of Western Australia, had been widely dispersed due to the impacts of colonisation. Traditionally, their Country was 200,000 square kilometres. There are 14 different language groups (which may be spelled in different ways), but they constitute a single community, speaking dialects of a common language.¹³¹ The Nation, through the South-West Aboriginal Land and Sea Council, used the native title process to bring together these dispersed groups under a unified land claim. Ultimately, the Noongar Settlement¹³² created a new model of Indigenous governance, including land ownership, management rights and financial compensation.¹³³ The example of the Noongar Nation here is deeply connected to decolonisation (within the colonial framework itself) as it subverts the colonial narrative of terra nullius and challenges colonial legal assumptions to assert their existence as a Nation with ongoing rights to land.¹³⁴

At the same time, it is essential to recognise that the Settlement remains a site of internal debate among Noongar Peoples, including concerns about its implications for inherent rights and whether the model of authority it establishes adequately reflects Noongar law and governance. This complexity underscores that decolonisation is neither uniform nor uncontested. Nevertheless, examples like the Noongar Settlement illustrate both the possibilities and the tensions inherent in using colonial legal tools to rebuild political authority, unify communities and renew governance traditions within a settler state framework.

127 See, eg, Rigney et al, ‘Gunditjmara and Ngarrindjeri’ (n 18); Steve Hemming, Daryle Rigney and Shaun Berg, ‘Ngarrindjeri Futures: Negotiation, Governance and Environmental Management’ in Morgan Brigg and Sarah Maddison (eds), *Unsettling the Settler State: Creativity and Resistance in Indigenous Settler-State Governance* (Federation Press, 2011) 98.

128 On the concept of an Assembly in Australia, see *Social Justice and Native Title Report* (n 1) 149–52.

129 Cornell (n 1) 10.

130 On this point, see George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020) 250.

131 *Bennell v Western Australia* (2006) 153 FCR 120, 192–3 [273]–[277] (Wilcox J).

132 For a detailed explanation of the Noongar Settlement and governance structure, see Williams and Hobbs (n 130) 241–52.

133 See generally *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA).

134 Barcham (n 4); Stuart Bradfield, ‘Settling Native Title: Pursuing a Comprehensive Regional Agreement in South West Australia’ in Marcia Langton et al (eds), *Settling with Indigenous People: Modern Treaty and Agreement-Making* (Federation Press, 2006) 207.

2 Healing

Healing is deeply intertwined with the resilience embedded in the collective narratives of trauma and survival. The stories of displacement, violence, and cultural loss are both historical accounts and lived experiences that shape the present and inform future aspirations.¹³⁵ By reaffirming their Nationhood, Aboriginal and Torres Strait Islander Peoples engage in an act of healing that acknowledges and confronts the intergenerational trauma inflicted by colonial violence, dispossession, and cultural suppression. This healing process is multifaceted – restoring mental, emotional, and spiritual wellbeing through cultural practices such as storytelling, art, and connection to Country.¹³⁶

Nationhood also functions as an intergenerational project of renewal. It encourages younger generations to engage with cultural heritage, ensuring the transmission of knowledge, traditions, and values.¹³⁷ As the Uluru Statement from the Heart reminds us in its Indigenous aspiration for ‘a better future for our children’,¹³⁸ this work is foundational. In this sense, Nationhood is both a project of decolonisation and a means of healing for Aboriginal and Torres Strait Islander Peoples. Nationhood reclaims narrative, resists colonial legacies and paves the way for a future where Indigenous identities, cultures and Nations are recognised and respected.

G Summary of Features

Together, these six features reveal Indigenous Nationhood as a living political reality grounded in law, governance, and identity. They demonstrate that Aboriginal and Torres Strait Islander Peoples are asserting cultural distinctiveness and articulating jurisdictional authority, collective autonomy, and enduring relationships to Country. Nationhood, as expressed through these features, resists assimilation into settler legal categories and demands recognition as a distinct legal and political status.

This interpretive framing is essential for understanding the consequences of misrecognition – that is, the settler state’s failure to recognise Indigenous Nationhood as a legal and political reality. Part V examines how Australian jurisprudence has historically misread Indigenous Nationhood, distorting its legal character through colonial categories. Part VI then turns to the consequences of

135 See generally Beverley Raphael, Patricia Swan and Nada Martinek, ‘Intergenerational Aspects of Trauma for Australian Aboriginal People’ in Yael Danieli (ed), *International Handbook of Multigenerational Legacies of Trauma* (Springer, 1998) 327 <https://doi.org/10.1007/978-1-4757-5567-1_21>.

136 Kim Usher et al, ‘Indigenous Resilience in Australia: A Scoping Review Using a Reflective Decolonizing Collective Dialogue’ (2021) 9 *Frontiers in Public Health* 630601 <<https://doi.org/10.3389/fpubh.2021.630601>>; Bronwyn Carlson, Madi Day and Terri Farrelly, Australia’s National Research Organisation for Women’s Safety, *What Works? Exploring the Literature on Aboriginal and Torres Strait Islander Healing Programs That Respond to Family Violence* (Research Report, June 2021); Francesca Mussi (ed), *Indigenous Storytelling and Connections to the Land: More-than-Human Worlds* (Palgrave Macmillan, 2024) <<https://doi.org/10.1007/978-3-031-65591-3>>; Jane McKendrick et al, Healing Foundation, *Aboriginal and Torres Strait Islander Healing Programs: A Literature Review* (Report, 2013).

137 ‘Uluru Statement from the Heart’ (n 105).

138 Ibid.

this misrecognition, analysing how legal and institutional frameworks displace or erase Indigenous law and governance – and what reforms are needed to support meaningful recognition.

V MISRECOGNISING INDIGENOUS NATIONHOOD

Using the interpretive account of Indigenous Nationhood developed in Part IV as an analytical framework, this Part examines how Australian jurisprudence has historically misrecognised Indigenous political identity. To maintain a focused analysis, it does not attempt an exhaustive doctrinal survey. The discussion concentrates on selected High Court decisions – *Mabo*,¹³⁹ *Members of the Yorta Yorta Aboriginal Community v Victoria* ('Yorta Yorta'),¹⁴⁰ and *Love v Commonwealth* ('Love')¹⁴¹ – together with the structure of the *Native Title Act 1993* (Cth) ('*Native Title Act*'), to show how Indigenous polities are repeatedly translated into corporate, administrative or cultural forms rather than recognised as Nations. While later doctrinal developments in native title, such as the refinements evident in cases like *Akiba v Commonwealth*,¹⁴² *Northern Territory v Griffiths*,¹⁴³ and *Commonwealth v Yunupingu*¹⁴⁴ offer important shifts, a comprehensive treatment of those cases lies beyond the scope of this article. References to policy measures, statutory settings and comparative examples are included *illustratively* to highlight the interpretive point. The purpose, in short, is to expose the interpretive mechanism of misrecognition, not to catalogue every doctrinal or policy development.

The Australian legal system has long struggled to engage substantively with Indigenous legal and political orders.¹⁴⁵ In both legal doctrine and public discourse, Indigenous political claims are frequently conflated with Sovereignty – understood narrowly as legal and territorial authority under the nation-state model. This article distinguished Sovereignty from Nationhood in Part II: while Sovereignty refers to jurisdictional authority, Nationhood encompasses the broader collective identity,

139 *Mabo* (n 54).

140 (2002) 214 CLR 422 ('Yorta Yorta').

141 (2020) 270 CLR 152 ('Love').

142 (2013) 250 CLR 209.

143 (2019) 269 CLR 1.

144 (2025) 421 ALR 604.

145 See generally Gabrielle Appleby, Ron Levy and Helen Whalan, 'Voice versus Rights: The First Nations Voice and the Australian Constitutional Legitimacy Crisis' (2023) 46(3) *University of New South Wales Law Journal* 761 <<https://doi.org/10.53637/SIIN1165>>; Watson (n 93); Lisa Strelein, *Compromised Jurisprudence: Native Title Cases since Mabo* (Aboriginal Studies Press, 2nd ed, 2009); Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17; Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law: White Sovereignty after Empire* (Palgrave Macmillan, 2012) <<https://doi.org/10.1057/9781137284983>>; George Williams, Sean Brennan and Vanessa Bosnjak, 'Rights-Based Reconciliation Needs Renewed Action from Canberra' (2003) 28(3) *Alternative Law Journal* 122 <<https://doi.org/10.1177/1037969X0302800305>>; CF Black, *The Land Is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2011); Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387 <<https://doi.org/10.1080/14623520601056240>>.

law, and governance rooted in Country, kinship, and culture. Yet Indigenous expressions of Nationhood are routinely refracted through settler legal logics that equate them with statehood, symbolic sovereignty, or cultural identity. As scholars like Mark McMillan,¹⁴⁶ Aileen Moreton-Robinson,¹⁴⁷ and Davis¹⁴⁸ show, this interpretive filtering preserves settler dominance by translating Indigenous political authority into culturally recognisable but politically innocuous terms.¹⁴⁹

This Part focuses first on the courts' narrow treatment of Indigenous Sovereignty claims, before exploring statutory, policy, and comparative frameworks that further entrench misrecognition. I argue that this misreading is not incidental but structural, flattening Indigenous Nations into populations or cultural groups and thereby undermining Indigenous laws and governance.

A Judicial and Legislative Constraints

Although Australian jurisprudence has largely addressed Indigenous claims through the language of Sovereignty, this section argues that such legal reasoning also misrecognises Indigenous Nationhood. By rejecting jurisdictional authority, the courts simultaneously deny the political identity and legal status of Indigenous Nations. The cases discussed below illustrate how settler law flattens Indigenous Nationhood into cultural identity or administrative function, erasing its legal and political content.

Historically, Anglo-Australian legal doctrine operated on the assumption that Aboriginal and Torres Strait Islander Peoples were 'without law'.¹⁵⁰ This presumption underpinned the doctrine of terra nullius, which justified British sovereignty and land acquisition. Although *Mabo* overturned terra nullius, the legal system continues to marginalise Indigenous legal orders, recognising them only within narrow statutory or common law frameworks. As scholars have noted, this amounts to a denial of lawfulness that persists in contemporary legal interpretation.¹⁵¹

146 Mark McMillan and Cosima McRae, 'Law, Identity and Dispossession: The *Half-Caste Act of 1886* and Contemporary Legal Definitions of Indigeneity in Australia' in Zoë Laidlaw and Alan Lester (eds), *Indigenous Communities and Settler Colonialism: Land Holding, Loss and Survival in an Interconnected World* (Palgrave Macmillan, 2015) 233 <https://doi.org/10.1057/9781137452368_12>.

147 Aileen Moreton-Robinson, 'Writing Off Indigenous Sovereignty: The Discourse of Security and Patriarchal White Sovereignty' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Routledge, 2007) 86 <<https://doi.org/10.4324/9781003117353>>.

148 Megan Davis, 'Listening but Not Hearing: When Process Trumps Substance' (2016) 51 *Griffith Review* 73.

149 This tendency reflects James Tully's argument that dominant struggles of accommodation recognise Indigenous Peoples as members of the settler state subject to its sovereignty, thereby reframing political identity in terms legible to that state and reducing political claims to cultural difference: see James Tully, 'The Struggle of Indigenous Peoples for and of Freedom' in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 36, 41, 45–7.

150 See generally Jesse Fleay, 'Surviving the Crown of Terra Nullius: Constitutionalising Australia's Lands, Peoples, and Cultures' (2024) 27(1–2) *Journal of Australian Indigenous Issues* 3 <<https://doi.org/10.3316/informit.T2024080800004300551362439>>; Stuart Banner, 'Why Terra Nullius? Anthropology and Property Law in Early Australia' (2005) 23(1) *Law and History Review* 95 <<https://doi.org/10.1017/S0738248000000067>>; Ed Wensing, 'Comparing Native Title and Anglo-Australian Land Law: Two Different Timelines, Two Different Cultures and Two Different Laws' (Discussion Paper No 25, Australia Institute, November 1999).

151 Irene Watson, 'Aboriginal Laws and the Sovereignty of Terra Nullius' (2002) 1(2) *Borderlands e-Journal* 1; Shireen Morris, 'Re-evaluating *Mabo*: The Case for Native Title Reform to Remove Discrimination

In *Mabo*,¹⁵² the High Court marked a historic shift by recognising native title, yet it explicitly rejected the notion of Indigenous Sovereignty. The Court acknowledged Indigenous connection to land only insofar as it could be absorbed into common law proprietary rights,¹⁵³ thereby denying the political and legal authority of Indigenous Nations.¹⁵⁴ In doing so, the Court recognised land-based identity but not the legal system or governance structures that constitute Indigenous Nationhood.¹⁵⁵ This reflects a broader colonial logic that treats Indigenous law as subordinate or symbolic, rather than as a legitimate legal order.

Following *Mabo*, the Parliament was quick to act, introducing the *Native Title Act*. While this legislation marked a significant shift in legal recognition, it also imposed a framework that requires Indigenous groups to form corporate entities to manage their rights and interests. The Act requires Indigenous groups to incorporate as Prescribed Bodies Corporate ('PBCs') to manage native title,¹⁵⁶ reframing Indigenous Nations as administrative entities subject to corporate governance rules. This legal form is often incompatible with traditional governance structures and reduces Nationhood to bureaucratic functionality.¹⁵⁷ This statutory framework recognises Indigenous groups only as legal entities within settler law, rather than as Nations with their own governance systems.

A similar corporatisation dynamic appears in South Australia's First Nations Voices architecture:¹⁵⁸ both the Local First Nations Voices and the State First Nations Voice are established as body corporates.¹⁵⁹ The legislation, whilst subject to some community consultation,¹⁶⁰ prescribes the requirements, functions, membership, and structure of the Voices.

The High Court's decision in *Yorta Yorta* further entrenches this misrecognition.¹⁶¹ The Court rejected the Yorta Yorta Peoples' native title claim, reasoning that their laws and customs had ceased to exist.¹⁶² In doing so, the

and Promote Economic Opportunity' (2012) 5(3) *Land, Rights, Laws* 1; Phillip Falk and Gary Martin, 'Misconstruing Indigenous Sovereignty: Maintaining the Fabric of Australian Law' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Routledge, 2020) 33 <<https://doi.org/10.4324/9781003117353-4>>; Moreton-Robinson (n 147).

152 *Mabo* (n 54).

153 Ibid 57–60 (Brennan J), 88–90 (Deane and Gaudron JJ).

154 See generally Falk and Martin (n 151); Moreton-Robinson (n 147); Mick Dodson, 'Mabo Lecture: Asserting Our Sovereignty' in Lisa Strelein, *Dialogue about Land Justice: Papers from the National Native Title Conferences* (Aboriginal Studies Press, 2010) 13.

155 *Mabo* (n 54) 31, 58 (Brennan J), 182–3 (Toohey J).

156 *Native Title Act* (n 15) pt 2 div 6.

157 Gertz (n 1) 164–6.

158 See generally Cornelia Koch, Anna Olijnyk and Madeleine Perrett, 'A "Fresh Bridge": South Australia's First Nations Voices' (2024) 35(2) *Public Law Review* 112.

159 *First Nations Voice Act 2023* (SA) ss 10(2)(a), 23(2)(a) ('*First Nations Voice Act*').

160 See, eg, Commissioner for the First Nations Voice to the South Australian Parliament, *Engagement Report: August to October 2022* (Report, November 2022); Commissioner for the First Nations Voice to the South Australian Parliament, *Second Engagement Note: November 2022 to January 2023* (Report, February 2023).

161 *Yorta Yorta* (n 140).

162 Ibid 446 [51]–[53], 458 [96] (Gleeson CJ, Gummow and Hayne JJ), 468 [135] (McHugh J), 494 [190] (Callinan J).

Court applied a rigid continuity test, requiring claimants to demonstrate that their traditional laws and customs had been continuously acknowledged and observed as a normative system since the assertion of British sovereignty.¹⁶³ This test was rigid in both form and effect: it excluded the possibility of revival following disruption, privileged colonial historical records over oral testimony, and treated adaptation as evidence of rupture.¹⁶⁴

These requirements were not only prescriptive in theory but burdensome in practice. The *Yorta Yorta* case ran for 114 hearing days between 8 October 1996 and 4 November 1998,¹⁶⁵ ultimately resulting in an unsuccessful claim. The scale, duration, and adversarial nature of the litigation highlighted the difficulties inherent in proving continuity in a courtroom setting and underscored the unsuitability of such processes for advancing Nationhood claims. It also failed to account for the adaptive nature of Indigenous governance and reinforced the notion that Indigenous law must mirror Western legal permanence to be recognised.¹⁶⁶ By requiring such continuity, the Court failed to recognise the adaptive resilience of Indigenous legal orders – an essential feature of Nationhood.

More recently, *Love* illustrates both a conceptual advance and a legal impasse.¹⁶⁷ The majority of the High Court (Bell J, Gordon J, Nettle J and Edelman J) held that Aboriginal Peoples, defined through the tripartite test in *Mabo*,¹⁶⁸ could not be classified as ‘aliens’ under section 51(xix) of the *Constitution*. This recognition affirmed a unique relationship between Aboriginal Peoples and the Australian polity, grounded not in citizenship but in cultural and spiritual connection. However, this recognition remained confined to identity and belonging, without acknowledging the legal and political dimensions of Nationhood. Several Justices referenced *Mabo* to support the argument that Aboriginal Australians maintain a *sui generis* status that precludes classification as aliens.¹⁶⁹ As a result, even the majority judgments in *Love* reinforce a conceptual framework in which Aboriginality is accommodated within settler constitutionalism rather than disrupting it, reflecting a broader pattern in which Indigenous Nationhood is misread as cultural identity, rather than as a source of law and governance.

The dissenting judges (Kiefel CJ, Gageler J and Keane J) were more explicit in rejecting any suggestion of Indigenous political authority. Kiefel CJ and Keane

163 Ibid 456 [87] (Gleeson CJ, Gummow and Hayne JJ). Patrick Wolfe terms this logic ‘repressive authenticity’: a settler–colonial demand that Indigenous identity, law and culture be proven in a static, essentialised form, such that change or adaptation is taken as evidence of loss: see generally Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (Cassell, 1999) ch 6.

164 Kirsten Anker, ‘Law in the Present Tense: Tradition and Cultural Continuity in *Members of the Yorta Yorta Aboriginal Community v Victoria*’ (2004) 28(1) *Melbourne University Law Review* 1.

165 *Yorta Yorta* (n 140).

166 See, eg, James Cockayne, ‘*Members of the Yorta Yorta Aboriginal Community v Victoria*: Indigenous and Colonial Traditions in Native Title’ (2001) 25(3) *Melbourne University Law Review* 786, 791–2.

167 *Love* (n 141).

168 *Mabo* (n 54) 70. The tripartite test is a three-part definition established by Brennan J: (1) a First Nations person must be of Aboriginal or Torres Strait Islander descent, (2) regard themselves as Aboriginal or Torres Strait Islander, and (3) be accepted as such by the relevant First Nations community.

169 *Love* (n 141) 190 [74] (Bell J), 272 [333] (Gordon J).

J, in particular, raised concerns about ‘competing sovereignties’,¹⁷⁰ objecting to the idea that Aboriginal communities could determine who is beyond the reach of the aliens power. Keane J described this as ‘an exercise of political sovereignty’,¹⁷¹ while Kiefel CJ characterised it as a ‘kind of sovereignty which was implicitly rejected by *Mabo [No 2]*’.¹⁷² These dissents lay bare the anxiety within settler jurisprudence that recognition of Indigenous Sovereignty – even limited to identity recognition – might imply or restore a form of political authority. The High Court’s decision reflects an unambiguous rejection of Indigenous Sovereignty as a source of jurisdictional power. Yet this rejection of Sovereignty also obscures the recognition of Nationhood, which does not depend on competing jurisdiction but on the survival of Indigenous legal and political identity.

In sum, Australian legal reasoning has consistently misrecognised Indigenous Nationhood by interpreting political identity through the lens of Sovereignty. This has led to a jurisprudence that either rejects jurisdictional authority outright or reframes Indigenous law as cultural practice.

B Policy and Symbolic Recognition

Australian policy frameworks reinforce this structural misrecognition – that is, the tendency to recognise Indigenous Peoples only as cultural minorities or service recipients, rather than as sovereign political entities with their own legal systems. Closing the Gap, for example, emphasises individual socioeconomic indicators – employment, education, health – while neglecting collective political rights. The original 2008 framework did not engage with Indigenous governance or Nationhood, treating Indigenous Peoples as disadvantaged populations rather than self-governing polities.¹⁷³ Although the framework was ‘refreshed’ in 2020 to include stronger commitments to community control and cultural preservation, it still falls short of engaging meaningfully with Indigenous Nationhood.¹⁷⁴ The policy continues to reflect a liberal logic that privileges individual wellbeing over collective autonomy and governance. This reflects a broader pattern in Australian policymaking: addressing the symptoms of colonialism without acknowledging its structural roots.¹⁷⁵

Public opinion research reinforces this interpretive limitation. An Australian National University Poll in 2015 found that while Australians broadly supported constitutional recognition, their understanding is often tied to symbolic or service-

170 Ibid 176–7 [25] (Kiefel CJ), 226 [197] (Keane J).

171 Ibid 226 [197].

172 Ibid 176–7 [25] (citations omitted).

173 ‘National Indigenous Reform Agreement’ (n 92).

174 ‘National Agreement on Closing the Gap’ (n 93).

175 See, eg, W Sanders, ‘Big Picture Essays on Australian Indigenous Policy: Deep Structures and Decolonising’ (Policy Insights Paper No 5, Centre for Aboriginal Economic Policy Research, 2021); Natalie Bryant, ‘Introducing Indigenist Critical Policy Analysis: A Rights-Based Approach to Analysing Public Policies and Processes’ (2024) 59(4) *Australian Journal of Social Issues* 824 <<https://doi.org/10.1002/ajs4.350>>; Elizabeth Strakosch, ‘The Technical Is Political: Settler Colonialism and the Australian Indigenous Policy System’ (2019) 54(1) *Australian Journal of Political Science* 114 <<https://doi.org/10.1080/10361146.2018.1555230>>.

oriented initiatives rather than recognition of Indigenous political authority.¹⁷⁶ Many respondents viewed Indigenous disadvantage as a product of social attitudes and government policy, but few supported structural reforms that would empower Indigenous Nations as political entities.¹⁷⁷

This pattern was echoed in the 2023 Voice referendum campaign, where prominent ‘No’ campaigners argued that the Voice was merely symbolic and would not deliver practical benefits.¹⁷⁸ The ‘No’ case frequently emphasised that ‘more bureaucracy will not help’ and that ‘Truth and Treaty should come before the Voice’, framing the proposal as lacking real power and failing to address material disadvantage.¹⁷⁹ However, the ‘No’ campaign was not a unified bloc. It comprised a range of factions with differing motivations and critiques. Some First Nations critics argued that truth-telling and treaty should precede constitutional reform, viewing the Voice as an inadequate step toward structural change.¹⁸⁰ Other critics expressed concern about the lack of detail in the proposal, fearing that its provisions could be interpreted broadly by the High Court and impose obligations on ministers – a position often associated with conservative legal scholars.¹⁸¹ Some opponents believed the Voice would cede Sovereignty,¹⁸² while others felt it did not go far enough to achieve meaningful Self-Determination.¹⁸³ Some viewed existing representative structures, such as the Coalition of Peaks, as sufficient.¹⁸⁴ These divergent positions reflect the complexity of constitutional reform debates and the varied aspirations, concerns, and political interests held by different communities.

176 See generally Matthew Gray and William Sanders, *Australian Public Opinion on Indigenous Issues: Injustice, Disadvantage and Support for Recognition* (Report No 17, March 2015).

177 Ibid.

178 See, eg, Bronwyn Carlson, ‘There Are Two Sides to the “No” Campaign on the Voice: Who Are They and Why Are They Opposed to It?’, *The Conversation* (online, 7 September 2023) <<http://theconversation.com/there-are-two-sides-to-the-no-campaign-on-the-voice-who-are-they-and-why-are-they-opposed-to-it-212362>>; Finn McHugh, ‘Yes or No? Here Are the Key Arguments for and against the Voice’, *SBS News* (online, 13 June 2023) <<https://www.sbs.com.au/news/article/yes-or-no-here-are-the-main-arguments-for-and-against-the-voice/2h82rx9tj>>; Nicholas Biddle et al, *Detailed Analysis of the 2023 Voice to Parliament Referendum and Related Social and Political Attitudes* (Report, 28 November 2023).

179 McHugh (n 178).

180 Andrew Tillett, ‘Lidia Thorpe Urges Albanese to Call off “Divisive” Voice Vote’, *Australian Financial Review* (online, 16 August 2023) <<https://www.afr.com/politics/federal/lidia-thorpe-urges-albanese-to-call-off-divisive-voice-vote-20230816-p5dwwk>>.

181 Carlson (n 178); John Quiggin, ‘Voice Referendum: The Devil Is in the Lack of Detail’, *Independent Australia* (online, 20 January 2023) <<https://independentaustalia.net/politics/politics-display/voice-referendum-the-devil-is-in-the-lack-of-detail,17156>>.

182 Gabrielle Appleby, Sean Brennan and Paul Kildea, *Expert Analysis of the ‘Official Yes/No Cases’ Published by the Australian Electoral Commission: Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Report, 28 August 2023); Paul Karp, ‘Why a Voice to Parliament Won’t Affect First Nations Sovereignty as Lidia Thorpe Fears’, *The Guardian* (online, 26 January 2023) <<https://www.theguardian.com/australia-news/2023/jan/26/will-indigenous-voice-to-parliament-impact-first-nations-sovereignty-explainer>>.

183 Appleby, Brennan and Kildea (n 182).

184 Jacinta Nampijinpa Price, ‘The Voice and Other Indigenous Matters’ (Speech, The Sydney Institute, 23 September 2023) <<https://www.liberal.org.au/2023/09/23/voice-and-other-indigenous-matters-sydney-institute>>.

C Comparative Models and Interpretive Possibilities

Comparative constitutional scholarship further highlights Australia's static and narrow approach to recognition of Indigenous law and governance. Unlike plurinational states such as Bolivia or Ecuador, which constitutionally recognise Indigenous Nations as political entities,¹⁸⁵ Australia's recognition tends to focus on cultural identity and socioeconomic disadvantage. This deficit-based framing is evident in public policy and discourse, where Indigenous 'issues' are often addressed through welfare-based measures rather than structural reform.¹⁸⁶ It infantilises Indigenous Peoples, positioning them as service recipients rather than sovereign actors, and functions as a mechanism of control.¹⁸⁷ As Benjamin Gussen notes, Australia's approach is static and narrow,¹⁸⁸ shaped by its colonial legacies and lacking the dynamic constitutional flexibility seen in other jurisdictions.¹⁸⁹ In contrast, strength-based frameworks value the resilience, intelligence, and creativity of Aboriginal and Torres Strait Islander Peoples, recognising their evidence-based and solutions-oriented approaches to governance and community wellbeing.¹⁹⁰

The Nisga'a Treaty in Canada offers a contrasting example to Australia's approach.¹⁹¹ It recognises the Nisga'a Nation as a self-governing polity with jurisdiction over land, law, and governance.¹⁹² As Edward Allen explains, the Treaty

185 Benjamin Gussen, 'A Comparative Analysis of Constitutional Recognition of Aboriginal Peoples' (2017) 40(3) *Melbourne University Law Review* 867, 894–902.

186 On the point of welfare and Aboriginal affairs, see Moreton-Robinson (n 147) 63; Darryl Pearce, 'Aboriginal Self-Government' in Christine Fletcher (ed), *Aboriginal Self-Determination in Australia* (Aboriginal Studies Press, 1994) 47, 49; Peter Yu, 'Kimberley: The Need for Self-Government and a Call for Radical Change' in Christine Fletcher (ed), *Aboriginal Self-Determination in Australia* (Aboriginal Studies Press, 1994) 115, 119; Gertz (n 1) 140; Kevin Sobel-Read et al, 'Building Bridges: Using Existing Law to Support the Cultural Self-Determination of Aboriginal and Torres Strait Islander Businesses and Communities' (2023) 32(2) *Griffith Law Review* 149 <<https://doi.org/10.1080/10383441.2023.2218232>>; Charles Perkins, 'Self-Determination and Managing the Future' in Christine Fletcher (ed), *Aboriginal Self-Determination in Australia* (Aboriginal Studies Press, 1994) 33, 35.

187 William Fogarty et al, *How Narrative Framings of Aboriginal and Torres Strait Islander People Are Reproduced in Policy* (Report, May 2018); Fforde et al (n 97); Alexander Page, 'Fragile Positions in the New Paternalism: Indigenous Community Organisations during the "Advancement" Era in Australia' in Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez (eds), *The Neoliberal State, Recognition and Indigenous Rights* (Australian National University Press, 2018) 185 <<https://doi.org/10.22459/CAEPR40.07.2018.10>>.

188 See Gussen (n 185) 902 fig 2.

189 Ibid. As famously stated by Geoffrey Sawyer, Australia 'is the frozen continent', constitutionally speaking: Geoffrey Sawyer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208.

190 Jacob Prehn, 'An Indigenous Strengths-Based Theoretical Framework' (2025) 78(2) *Australian Social Work* 145 <<https://doi.org/10.1080/0312407X.2024.2340464>>; Joanne Bryant et al, 'Beyond Deficit: "Strengths-Based Approaches" in Indigenous Health Research' (2021) 43(6) *Sociology of Health and Illness* 1405 <<https://doi.org/10.1111/1467-9566.13311>>; William Fogarty et al, *Deficit Discourse and Strengths-Based Approaches* (Report, May 2018); 'Stronger Smarter: A Strength-Based Approach to Aboriginal and Torres Strait Islander Education' (Position Paper, Stronger Smarter Institute, 2020) ('Stronger Smarter').

191 *Nisga'a Final Agreement Act*, RSBC 1999, c 2.

192 'The Nisga'a Final Agreement in Brief' (1998) 3(4) *Australian Indigenous Law Reporter* 562.

defines our [the Nisga'a Nation's] jurisdiction and law making authority in the areas of lands, language, culture, education, health, child protection, traditional healing practices, fisheries, wildlife, forestry, environmental protection, and policing ...¹⁹³

This legal pluralism is constitutionally protected and operates 'within and in accordance with the constitutional framework of the Canadian State'.¹⁹⁴ The Treaty affirms the Nisga'a Nation's inherent right to self-government, a right that was 'diminished, [but] not extinguished' by the assertion of Crown sovereignty and is now 'constitutionally [guaranteed]'.¹⁹⁵ The Nisga'a legislature, Wilp Si'ayuukhl Nisga'a, enacted 18 laws on its first day of operation, demonstrating the Treaty's practical empowerment of Indigenous governance.¹⁹⁶

However, the Treaty's recognition of self-government is not absolute. Canadian federal and provincial laws remain supreme in cases of conflict, meaning Nisga'a laws must operate within the bounds of Canadian constitutional and legislative frameworks. As Richard Stacey explains, '[t]he extent to which Canadian law recognises a realm of self-government for Indigenous peoples is limited',¹⁹⁷ with the Canadian Constitution allocating legislative powers exclusively to federal and provincial governments, leaving 'no room for First Nations, Métis or Inuit authority'.¹⁹⁸ This reflects the limits of legal pluralism in settler states, where Indigenous jurisdiction is often conditional, negotiated and vulnerable to being overridden.

Contemporary Canadian developments illustrate both the potential and the limits of engaging Indigenous Nations on their own terms. At the federal level, the *United Nations Declaration on the Rights of Indigenous Peoples Act* ('*UNDRIP Act*') is now in force,¹⁹⁹ accompanied by a 2023–28 Action Plan and ongoing annual reports,²⁰⁰ which together direct federal portfolios to align legislation and policy with *UNDRIP* – functioning as an interpretive baseline for public administration.²⁰¹ In parallel, Canada continues to conclude modern self-government agreements: the *Anishinabek Nation Governance Agreement* (2022) recognises First Nation law-making in core governance domains (governance, language, culture).²⁰²

193 Edward Allen, 'Our Treaty, Our Inherent Right to Self-Government: An Overview of the Nisga'a Final Agreement' (2004) 11(3) *International Journal on Minority and Group Rights* 233, 235 <<https://doi.org/10.1163/1571811042802019>>.

194 Ibid 233.

195 Ibid 247.

196 Ibid 239.

197 Richard Stacey, 'The Dilemma of Indigenous Self-Government in Canada: Indigenous Rights and Canadian Federalism' (2018) 46(4) *Federal Law Review* 669, 670 <<https://doi.org/10.1177/0067205X1804600411>>.

198 Ibid (citations omitted).

199 *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 ('*UNDRIP Act*').

200 'United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan 2023–2028', *Government of Canada* (Web Page, 21 January 2026) <<https://www.justice.gc.ca/eng/declaration/ap-pa/index.html>> ('*UNDRIP Action Plan*').

201 The courts have generally treated the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) as an interpretive tool rather than a freestanding source of enforceable rights: see, eg, *Kebaowek First Nation v Canadian Nuclear Laboratories* [2025] FC 319.

202 *Anishinabek Nation Governance Agreement Act*, SC 2022, c 9, s 1 ('*Anishinabek Act*').

These instruments do not erase parliamentary supremacy, but they institutionalise processes and vocabularies through which Indigenous polities state their own laws, concepts and decision-making within the Canadian order.

By contrast, the consequences of Australia's interpretive failure – its refusal to recognise Indigenous law as law – are profound. Reading Indigenous Nationhood through colonial categories flattens its legal and political content, reducing Indigenous Peoples to 'populations' or 'cultural groups' and eroding the legitimacy of Indigenous governance. This erasure distorts political declarations, treaty processes, and institutional design. The Nisga'a example shows that common law systems can accommodate Indigenous Nationhood when political will and legal imagination are present. The more recent Canadian measures (*UNDRIP Act*, Action Plan, and modern self-government agreements) reinforce that engagement is most credible when institutions adopt Indigenous concepts and law-making authority as such, rather than translating them into advisory or corporate forms – an interpretive stance Australia has yet to take seriously.

This article argues that legal scholars must move beyond translation – the process of interpreting Indigenous law through colonial legal categories – and toward genuine interpretation. This does not require fluency in Indigenous languages; rather, it demands recognition that many Indigenous political and legal concepts are carried in, and shaped by, their linguistic forms. Genuine interpretation therefore calls for methods that take Indigenous languages seriously as sites of law and authority – such as consulting Indigenous-language speakers, relying on community-authorized translations, or acknowledging when English concepts fail to capture Indigenous meaning. Engaging Indigenous voices thus requires more than acknowledging their presence: it demands a willingness to engage with their political language and cultural authority on its own terms. Nationhood, as articulated by Aboriginal and Torres Strait Islander Peoples, is not a derivative concept. It is a legal and political reality grounded in law, Country, kinship, and collective memory. Recognising this reality is essential for meaningful public law reform and treaty-making in Australia.

VI LEGAL IMPLICATIONS OF MISRECOGNISING INDIGENOUS NATIONHOOD

Having explored how Australian jurisprudence has historically misrecognised Indigenous political identity, Part VI now turns to the legal implications of such misrecognition. When Indigenous Peoples are interpreted through settler-centric categories – as cultural communities or administrative units – their political identity is distorted. The legal system becomes structurally incapable of recognising jurisdiction, lawfulness, and governance that fall outside its conceptual limits. This misrecognition undermines treaty-making, institutional design, and the pursuit of justice itself. What follows is an examination of these consequences and the doctrinal and structural reforms necessary to support Indigenous Nationhood as a legal and political reality.

A Treaty-Making Without Political Recognition

Treaty-making assumes the existence of political entities capable of entering into binding agreements. Harry Hobbs specifically identifies recognition of Indigenous Peoples as ‘a [distinct] polity’ as the first of three criteria for valid treaty-making with Indigenous Peoples, alongside a fair and equal negotiation process and an outcome enabling self-government.²⁰³ Yet, in Australia, emerging treaty processes are unfolding within existing state governance and commercial frameworks that routinely treat Aboriginal and Torres Strait Islander Peoples as ‘stakeholders’, cultural communities or corporate actors rather than as self-governing polities – a framing that undermines the Nation-to-Nation basis of treaty relationships.²⁰⁴

This misrecognition directly contradicts the feature of distinct polities outlined in Part IV. Indigenous Nations are not corporations – they are political communities grounded in law, kinship, and Country. Frameworks that require incorporation under settler law – as seen in the native title framework – reduce political identity to legal personality under administrative rules. Indigenous governance structures rooted in kinship, ceremony, and relational authority are displaced by board structures and fiduciary compliance.

Equally damaging is the erasure of Country as a source of law. Settler treaty frameworks often treat land as negotiable property – reflecting what Kwaymullina describes as the Eurocentric notion of ‘dominion over (non-living) territory’ – rather than as a living juridical entity.²⁰⁵ As Kwaymullina argues, Country is not a metaphor but ‘both the source of law and a legal actor’ that intervenes to enforce its own boundaries and sustain the network of relationships that constitute a Nation.²⁰⁶ Dodson and Barlow similarly identify that Country is not just territory – it is law, kinship, and authority.²⁰⁷ This epistemological divergence creates a profound dissonance: treaty frameworks that commodify land fail to recognise its legal and spiritual centrality within Indigenous Nationhood.²⁰⁸ By stripping Country of its character as a legal actor, settler law flattens Indigenous political identity, treating the primary locus of Indigenous authority as if it were merely negotiable terrain within the singular order of the state.

Comparative models offer compelling alternatives. The Nisga’a Treaty in Canada recognises the Nisga’a Nation’s legislative authority, jurisdiction over

203 Harry Hobbs, ‘Treaty Making and the *UN Declaration on the Rights of Indigenous Peoples*: Lessons from Emerging Negotiations in Australia’ (2019) 23(1–2) *International Journal of Human Rights* 174, 176 <<https://doi.org/10.1080/13642987.2018.1562918>>.

204 Harry Hobbs, ‘Taking Stock of Indigenous–State Treaty-Making in Australia: Opportunities and Challenges’ (2024) 47(2) *University of New South Wales Law Journal* 548 <<https://doi.org/10.53637/SREA8485>>.

205 Kwaymullina (n 8) 9.

206 Ibid 14.

207 Barlow (n 35); Dodson (n 40).

208 Irene Watson, ‘Buried Alive’ (2002) 13(3) *Law and Critique* 253 <<https://doi.org/10.1023/A:1021248403613>>; Moreton-Robinson (n 147); Irene Watson, ‘There Is No Possibility of Rights without Law: So Until Then, Don’t Thumb Print or Sign Anything!’ (2000) 5(1) *Indigenous Law Bulletin* 4; Mary Graham, ‘Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews’ (2008) 45 *Australian Humanities Review* 181.

land, and cultural governance.²⁰⁹ Contemporary Canadian measures add further routes for engaging Indigenous polities on their own terms: the *UNDRIP Act*²¹⁰ – implemented through an Action Plan²¹¹ – functions as a federal interpretive baseline directing alignment of laws and policy with *UNDRIP*, while modern self-government agreements recognise First Nation law-making authority in core domains (governance, language, culture).²¹²

In Aotearoa New Zealand, iwi-based institutions reflect Māori *tikanga* and kinship structures. For example, the Te Awa Tupua (Whanganui River) Settlement (2017)²¹³ embodies engagement on Māori terms: the river is recognised as a legal person,²¹⁴ guided by the river's own principles (*Tupua te Kawa*)²¹⁵ and represented by *Te Pou Tupua*²¹⁶ – an institutional design that adopts Māori concepts and decision-making. These arrangements demonstrate that settler states can recognise Indigenous polities where there is both the political commitment and doctrinal creativity to do so. Australian treaty processes must begin with this recognition. Without it, treaties risk becoming another mechanism of inclusion, not tools of political negotiation. Justice demands more.

B Institutional Design and the Displacement of Indigenous Governance

Australian institutional design continues to reflect settler legal priorities, not Indigenous governance. From native title PBCs to statutory voice mechanisms, Indigenous representation is structured through compliance-based, Western forms of authority. These institutions prioritise administrative legibility over cultural legitimacy. Requiring Indigenous groups to form bodies corporate not only structures legal personality in settler terms but also reveals how recognition is conditioned on conformity to Western legal forms. Under the *Native Title Act*, for example, Indigenous groups must form PBCs to hold native title. The First Nations Voice in South Australia similarly requires the State Voice and Local Voices to incorporate.²¹⁷ While this offers a form of legal recognition, it distorts Indigenous governance. As Part IV outlined, Indigenous authority is grounded in kinship, ceremony and relational law – not corporate governance models.

This dynamic is not simply procedural but constitutes a structural redefinition of Indigenous laws: Elders' authority is subordinated to fiduciary duties, Country is reduced to asset management, and cultural governance is translated into risk

209 Allen (n 193).

210 *UNDRIP Act* (n 199).

211 'UNDRIP Action Plan' (n 200).

212 See, eg, *Anishinabek Act* (n 202); *Self-Government Treaty Recognizing the Whitecap Dakota Nation/Wapaha Ska Dakota Oyate Act*, SC 2023, c 22; *Cree Nation of Eeyou Istchee Governance Agreement Act*, SC 2018, c 4, s 1.

213 See *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ).

214 *Ibid* s 4.

215 *Ibid* s 13.

216 *Ibid* s 19.

217 *First Nations Voice Act* (n 152) s 10(2)(a) (for Local First Nations Voices), s 23(2)(a) (for State First Nations Voice).

management. These frameworks do not support Indigenous laws – they overwrite them. By contrast, the Tsawwassen First Nation in Canada governs under a self-government agreement that reflects its own political and legal traditions.²¹⁸ Iwi authorities in Aotearoa manage services under *tikanga*-consistent frameworks.²¹⁹ These models demonstrate that institutional design can accommodate Indigenous governance, but only if it begins with political recognition, not assimilation.²²⁰ Importantly, grounding governance in Indigenous language and law embeds decision-making within Indigenous conceptual frameworks, which helps prevent Indigenous authority from being absorbed into settler administrative categories. In this way, language functions as a safeguard against co-optation by anchoring governance practices in Indigenous jurisprudence rather than in the logics of the state.

The failure to adopt Indigenous terminology within legal institutions also facilitates what Newcomb identifies as ‘linguistic colonization’.²²¹ Newcomb argues that the systematic use of Western metaphors of domination and subordination enables the state to maintain a reality of control over Indigenous Nations.²²² By forcing Indigenous concepts into foreign cultural patterns of settler law, the state engages in a form of flattening that erases the political character of Indigenous governance. Institutional design must therefore go beyond translation and be willing to adopt Indigenous-language terms as safeguards against co-optation, anchoring decision-making within Indigenous jurisprudential frameworks rather than administrative or corporate categories.

Accordingly, legal institutions in Australia must adopt design principles that embed Indigenous laws as laws: kinship as political organisation, language as jurisdictional continuity, and cultural practice as governance. Only then can institutional structures reflect and sustain Indigenous authority rather than reshape it into settler-legible forms.

C Misrecognition as a Barrier to Justice

Misrecognition is more than just a conceptual failure; it constitutes a structural barrier to justice. As Nancy Fraser argues, misrecognition is a form of institutionalised subordination that denies equal participation in political life by

218 Kim Baird, ‘Away from the *Indian Act*: Treaty Governance at Tsawwassen First Nation’ (2011) 1(2) *Aboriginal Policy Studies* 171 <<https://doi.org/10.5663/aps.v1i2.11688>>.

219 Natalie Coates, ‘The Recognition of Tikanga in the Common Law of New Zealand’ [2015] (1) *New Zealand Law Review* 1.

220 Shireen Morris and Noel Pearson, ‘Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success’ (2017) 91(5) *Australian Law Journal* 350; Andrea Carson et al, ‘Voiceless: A Multi-level Analysis of the 2023 Voice to Parliament Referendum Outcome and Its Implications’ (2024) 59(3) *Australian Journal of Political Science* 308 <<https://doi.org/10.1080/10361146.2024.2409075>>; Bede Harris (ed), *Indigenous Peoples and Constitutional Reform in Australia: Beyond Mere Recognition* (Springer, 2024) <<https://doi.org/10.1007/978-981-99-7121-3>>.

221 Newcomb, ‘Domination in Relation to Indigenous Peoples’ (n 6) 20, quoting Email from Chet Bowers to Steven Newcomb, 27 February 2016.

222 Ibid.

distorting or erasing the subject's political status.²²³ When legal frameworks interpret Indigenous Nationhood as cultural identity or administrative function, they strip it of its political content, collapsing jurisdictional authority into the language of ethnicity. This interpretive move renders Indigenous governance unintelligible to law, foreclosing the recognition of Indigenous Peoples and Nations as polities. Glen Sean Coulthard has shown that such 'recognition' practices often serve to entrench colonial power by re-articulating Indigenous political claims in state-sanctioned, non-threatening forms.²²⁴

This failure is stark in policies like Closing the Gap, which frame Indigenous Peoples as disadvantaged populations rather than as sovereign Nations. The 'problem' is defined through socio-economic indicators, not through the structural denial of jurisdiction. Jessica Dawson et al's analysis of Closing the Gap demonstrates that its targets and reporting mechanisms operationalise a deficit discourse, obscuring the colonial origins of inequality and re-centring state authority.²²⁵ As a result, the feature of positional politics – which differentiates Nationhood from other minority rights claims – is erased. Nationhood claims are not demands for improved service delivery; they are assertions of legal authority, political status, and jurisdiction.

Narratives of trauma, survival, and continuity, central to the legal and political meaning of Nationhood, are also flattened by this misrecognition. Within law and policy, these narratives are treated as historical grievances to be acknowledged symbolically, rather than as ongoing jurisdictional claims. As Rodolfo Stavenhagen observes, governments frequently recast Indigenous Peoples as 'members of "minorities" or as equal citizens ... possessing specific cultural characteristics', confining jurisdictional narratives to the realm of culture or history and denying their force as political declarations of continuity and legitimacy.²²⁶ The result is that Indigenous law and governance remain inaudible within the dominant legal order, even as their existence is nominally 'recognised'.

D Toward Nationhood in Law and Institutions

To move beyond the persistent failure of misrecognition, legal institutions in Australia must develop interpretative and doctrinal frameworks capable of realising Indigenous Nationhood as a legitimate legal and political category. This requires more than formal inclusion within settler legal systems; it demands structural transformation rooted in Indigenous legal epistemologies and the

223 Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in George Henderson and Marvin Waterstone (eds), *Geographic Thought: A Praxis Perspective* (Routledge, 2008); Nancy Fraser and Axel Honneth, *Redistribution or Recognition: A Political-Philosophical Exchange*, tr Joel Golb, James Ingram and Christiane Wilke (Verso, 2003).

224 Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014) <<https://doi.org/10.5749/minnesota/9780816679645.001.0001>>.

225 Jessica Dawson et al, 'Closing the Gap: Examining How the Problem of Aboriginal and Torres Strait Islander Disadvantage Is Represented in Policy' (2020) 56(4) *Australian Journal of Social Issues* 522 <<https://doi.org/10.1002/ajis.4.125>>.

226 Rodolfo Stavenhagen, 'How Strong Are the Rights of Indigenous Peoples?' (2011) 10(3) *Journal of Human Rights* 414, 418 <<https://doi.org/10.1080/14754835.2011.596079>>.

assertions of Nationhood.²²⁷ The features outlined in Part IV provide a potential starting point for such transformation. Recognition must be grounded in the law of Country as a living legal order, the authority of kinship relations, and governance embedded within Indigenous cultural practices.²²⁸ Indigenous Nations cannot be relegated to administrative units within settler frameworks; they must be recognised as autonomous polities possessing inherent jurisdictional authority that express their Nationhood. This shift is more than conceptual or symbolic. It is juridical and transformative. Nationhood is a mode of legal resurgence and political assertion that challenges colonial legal orders. Meaningful recognition of Indigenous political authority through treaties, institutions, and legal frameworks is a necessary precondition for genuine decolonisation and justice.

Victoria's treaty process offers a tentative yet significant step in this direction. The enactment of the *Statewide Treaty Act* marks the first time an Australian government has legislated for a negotiated treaty with First Peoples, establishing Gellung Warl as a representative and deliberative body with decision-making powers.²²⁹ While Gellung Warl is established as a statutory body (a body corporate)²³⁰ and remains subject to parliamentary sovereignty with no veto over legislation,²³¹ its design departs from advisory or service-delivery models by embedding Indigenous language and concepts (for example, Gellung Warl,²³² Nginma Ngainga Wara,²³³ Nyerna Yoorrook Telkuna)²³⁴ and by recognising representative, deliberative and rule-making functions linked to Treaty implementation.²³⁵ The architecture therefore signals a qualified shift toward Indigenous-led decision-making within a settler constitutional frame, with its significance lying less in immediate jurisdiction than in its potential to normalise legal-pluralist practice and provide a platform for the realisation of Indigenous Nationhood in Victoria.

As Aboriginal and Torres Strait Islander Peoples articulate Nationhood, legal thought must be reimaged accordingly. Treaty-making, institutional design, and statutory and constitutional interpretation must reflect Indigenous political authority in its full complexity – resisting reduction to symbolic or administrative reform. This is not a matter of mere recognition; it is a call for structural justice embedded within law itself.

227 Coulthard (n 224).

228 Gertz (n 1).

229 *Statewide Treaty Act* (n 13) pt 2.

230 Ibid s 10(3)(a).

231 Ibid s 7.

232 'Gellung Warl' is Gunaikurnai language. It means 'tip of the spear' or 'pointed spear': 'Treaty in Language', *First Peoples' Assembly of Victoria* (Web Page, 2025) <<https://firstpeoplesvic.org/treaty-in-language/>>.

233 'Nginma Ngainga Wara' is Wadi Wadi language. It means 'you will do': ibid.

234 'Nyerna Yoorrook Telkuna' is Wamba Wamba/Wemba Wemba language. It means 'to sit, to listen, to hear, to remember' (Nyerna), 'to truth' (Yoorrook), 'to cure, to heal' (Telkuna): ibid.

235 *Statewide Treaty Act* (n 13) s 9(2).

VII CONCLUSION

This article has argued that Indigenous Nationhood, as articulated by Aboriginal and Torres Strait Islander Peoples, represents a distinct legal and political reality grounded in Country, kinship, governance, and law. It is not a metaphor, cultural claim, or request for inclusion – it is a juridical expression of self-defined political identity.

Part II clarified the conceptual distinction between Sovereignty and Nationhood. Part III outlined my methodology, grounded in Indigenous-authored texts and interpretive humility. Part IV identified six recurring features of Indigenous Nationhood – connection to Country, collective identity, distinct polities, differentiation from minority claims, narrative resilience, and Nationhood as a pathway to decolonisation and healing. Part V traced how Australian jurisprudence and policy have misread Nationhood, filtering it through categories of sovereignty, statehood, or cultural identity. Part VI showed how legal and institutional misrecognition of these features undermines treaty-making, distorts institutional design and blocks meaningful reform.

At its core, this misrecognition is a structural barrier to justice. When Indigenous law is treated as culture, and Indigenous Nations as stakeholders or corporate entities, the legal system perpetuates colonial denial. Recognition, in this context, demands more than symbolic inclusion: it requires a jurisprudence capable of hearing Indigenous political authority on its own terms. Nationhood, as asserted by Indigenous Peoples, is not a claim to mimic statehood. It is a call to be recognised as Nations – distinct polities with law, governance, and enduring relationships to Country. Responding to this call requires legal systems to move beyond translation and toward genuine engagement with Indigenous legal orders.

As a non-Indigenous scholar, I write from a position of reflexivity and humility. I do not speak for Indigenous Peoples. Rather, my role is to challenge the interpretive habits of settler law, to centre Indigenous frameworks, and to contribute to a legal scholarship that is accountable to Indigenous voices. The challenge ahead is one of political imagination as opposed to technical reform. If treaty-making and institutional reform are to have integrity, they must begin from the recognition of Indigenous Nations as self-governing polities – not as stakeholders or administrative categories. This is not simply a question of recognition; it is a question of justice.