Australian Indigenous Policy in the Neoliberal Age:

Reassessing 'Indigenous' Responsibility

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Declaration By Author

To the best of my knowledge, this thesis contains no material that has previously been published by any other person except without due acknowledgement being made.

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Abstract

A neoliberal paradigm has shaped Australian Government Indigenous policy over the last twenty-five years. Neoliberal policy proscriptions are one part of a wider dialectic of domination that shapes indigenous/settler relations within Australia. This dialectic includes hegemonic processes of social and material domination, resulting in the imposition of a narrative that focuses on 'responsibility', imposes neoliberal economics, and apportions 'blame' for disadvantage on Indigenous communities through an agreement-making regime that relies on 'consent' to appropriate Indigenous cultural identity. This neoliberal notion of responsibility hampers and restricts possibilities for genuine reconciliation because it perpetuates a settler-colonial logic and heralds the triumph of settler cultural identity, a prospect that requires the demise of Indigenous autonomies.

The colonization of these autonomies is here explored through case-study analysis of the Noongar Agreement in Western Australia and the Victorian treaty process. In these processes neoliberal responsibility as *accountability* is used to transform the Indigenous estate. This is resisted by some Indigenous peoples. This thesis explores how Indigenous resistance to neoliberal logics constitutes 'decolonising' practices that facilitate an Indigenous reclamation of a diverse 'responsibility' through the articulation of an unsurrendered Indigenous alterity. These responses are premised on a self-affirmation that promotes an emancipatory Indigenous process of self-determination. This project challenges neoliberal ideologies by emphasizing Indigenous expressions of self-identity, what it sees as an Indigenous reclamation of 'responsibility'. It also highlights the settler state's failure to fulfill its responsibility to Indigenous peoples.

Genuine decolonization processes challenge the 'practical reconciliation' orthodoxy that has dominated political discourse over the last twenty-five years. To promote decolonization, this project uses a qualitative case-study analysis to highlight the limitations of neoliberal Indigenous policy and to inform a more inclusive approach to reconciliation through the promotion of a differentiated citizenship model. This model formalizes Indigenous alterity in policy and in a series of clan-based treaties that recognize Indigenous sovereignty.

Keywords

Differentiated citizenship, governmentality, hybridity, Indigenous peoples, Indigenous estate, Indigenous policy, neoliberalism, Noongar, reconciliation, resilience, resistance, responsibility, settler colonialism, sovereignty.

Australian and New Zealand Standard Research Classification (ANZSRC)

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List of Abbreviations

AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ADC	Aboriginal Development Commission
ALF	Aboriginal Land Fund
Argyle Agreement	Argyle Diamond Mine Indigenous Land Use Agreement
ATSIC	Aboriginal and Torres Strait Islander Commission
CAEPR	Centre for Aboriginal Economic Research
CDF	Community Development Framework
CERD	United Nations Committee for the Elimination of Racial Discrimination
CDEP	Community Development Employment Projects
Closures Policy	West Australia Remote Indigenous Community Closure policy
COAG	Council of Australian Governments
EPF	Economic Participation Framework
ERTA	Economic Recovery Tax Act of 1981
HREOC	Australian Human Rights and Equal Opportunities Commission
IEA	Institute for Economic Affairs
ILUA	Indigenous Land Use Agreement
IMF	International Monetary Fund
MPS	Mont Pelerin Society
NCC	National Aboriginal Consultative Committee
NHPA	Noongar Heritage Partnership Agreement
Noongar Agreement	The South West Noongar Native Title Settlement Agreement
NTAA	Native Title Amendment Act of 1998
OECD	Organisation of Economic Cooperation and Economic Development
The Nuwul project	Nuwul Environmental Services in East Arnhem Land ('
RCADC	Royal Commission into Aboriginal Deaths in Custody
The Apology	Rudd Government Apology to the Stolen Generations
The Assembly	Victorian Aboriginal Community Assembly
The NT Intervention	Northern Territory Intervention
The NT Report	Northern Territory Government's *Little Children are Sacred* report 2007 (the NT Report
The Plan	Ten Point Plan ('the Plan') that later become the Native Title Amendment Act of 1998
The Strategy	Victorian Aboriginal Economic Strategy 2013 - 2020
The Trust	Noongar Boodja Trust
The VAFF	Victorian Aboriginal Affairs Framework 2013 - 2018
The Working Group	Victorian Aboriginal Treaty Interim Working Group
The Commission	Trilateral Commission
SWALSC	South Western Aboriginal Land and Sea Council
VCOSS	Victorian Council of Social Services
WEF	World Economic Forum

Prologue

The inspiration for this work comes from an unremarkable event that occurred in a remote and isolated part of Australia. It was around 2005 and I had left the 'big smoke' of my hometown, Adelaide, for a job working in an administrative capacity for an employment agency in Katherine, Northern Territory. It was while lodging in the frugal confines of a budget backpackers' hostel that I came into the acquaintance of a one-eyed Aboriginal artist known to me as 'Eddie'. Eddie painted didgeridoos for the backpacker hostel's owner. The owner sold them to tourists at a substantial profit.

Eddie was fun and friendly, if not a little shy. He was also generous and committed to his extended family. Eddie changed my life. While sitting around the common area table one evening with Eddie and a number of others, sharing a beer, the owner of the hostel was explaining aloud that Eddie had little beer left, even though he had been paid earlier that day. He went on to explain that as soon as Eddie was paid, he went outside and met a number of his kin and then divided his money among them while keeping very little of it for himself. The owner and others tried to come to terms with the seemingly illogical act. In mainstream society, Eddie's act seemed unreasonable. In retrospect, his intervention represented a challenge to one of the fundamental tenets of Western culture, where individual proprietorship is everything. Eddie's act turned that on its head. His duty to his kin, his commitment to the notion that wages earned were not his but rather belonged to the community, offered a glimpse of what being responsible means.

While the social relations that Eddie's act illustrated seemed foreign, nonsensical, and 'inferior' to the assembly of foreigners that occupied the backpacker's hostel, his action and the communal social organisation that it responded to should be viewed as an alternative to current Western social organisation. Eddie's act of community can be viewed as an illustration of a truly emancipatory society where its members cared for each other to the extent that each member adhered to a certain duty, a certain code that meant taking care of each other. Eddie illustrated an Indigenous response to the dominant social organisation of the day. I did not know it at the time, but Eddie's selfless act was possibly a decolonising act, perhaps without even knowing it, Eddie was exposing all that was wrong

with the dominant social and economic logic of our time. Eddie was also resisting neoliberalism.

Years later, I would revisit Eddie's act as I considered the impacts and violence of global capitalism, a consideration that led me to approaching settler colonial studies and the understanding that neoliberal settler capitalism represses acts of insubordination such as the community-minded duty displayed by Eddie. I became aware that Eddie expressed an Indigenous alterity that threatened the status of the settler state, a settler-capitalist project dedicated to acquiring land and dispossessing Indigenous people. The experience taught me that there was power in communal social organisation. There was, and is, power within Indigenous alterity. It must be preserved, it must survive. One way to preserve Indigenous alterity is to study what threatens it. Countless anthropological studies have been conducted. However, to borrow from Edward Said's notion of Orientalism, how many studies of the 'Occident' have been conducted? How many studies have deconstructed settler colonialism in its neoliberal version? This work draws its inspiration from 'Eddie from Katherine', who illustrated how Indigenous culture can be viewed in a positive, emancipatory light. A relational social organisation can challenge us to look beyond the settler state's rhetoric and toward an alternative that embraces an Indigenous type of responsibility. This responsibility is not a settler type of responsibility.

This project is undertaken by a settler. It is not my ambition to define or even truly understand the Indigenous experience that would be an act of colonial epistemic violence. What I offer is an excursion into the settler experience. I am committed to exploring and critiquing ongoing Indigenous dispossession with the intention of assisting in a process of decolonisation, a commitment inspired by one unremarkable event that occurred in one isolated part of Australia at an unremarkable time.

1. Introduction

Australian public policy is neoliberal. Neoliberalism as ideology and discourse ascended to a position of prominence within the Australian political landscape in opposition to the social welfare paradigm that dominated public policy from the end of the Second World War until the latter part of the 1970s.[1] One crucial moment in this development was when the Australian dollar was unpegged from the gold standard: economic policy in Australia no longer aimed to insulate the country from the wider world. Before 'joining' the Asian neighbourhood under Prime Minister Paul Keating, Australia had joined the global neoliberal regime.

During the 1970s and 1980s, a global economic crisis struck most of the developed world as high inflation and unemployment sent most of the world's developed countries into recession. In 1980, the United States entered recession in response to inflation. The latter arose following the 1973 oil crisis and a second oil shock in 1979, when Iran decreased production following revolution.[2] Like the United States, Australia experienced significant inflationary pressures. Singaporean Prime Minister Lee Kuan Yew warned Australia that it risked becoming the 'white trash' of Asia.[3] The United States recovered quickly with conservatives arguing this was due to the adoption of a 'Reaganomics' policy suite of lower income tax, 'smaller' government reduced government spending, and a tightening of money supply.[4] In Australia, the Hawke Government came to power in 1983 and adopted a neoliberal agenda, or what Joe Collins and Drew Cottle call a 'Neo-Labor' agenda. It was the first expression of a broader neoliberal regime.[5] Soon after Keating's election in 1993

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1 Elizabeth Strakosch, *Neoliberal Indigenous Policy in Australia: Government, Sovereignty and Colonialism*, PhD Thesis, (Brisbane: University of Queensland, 2011), 12.
2 Fiona Venn, *The Oil Crisis* (New York: Routledge, 2013).
3 Prime Minister Hawke later commented in 1987 that Prime Minister Lee's comment was "not an overstatement". See Girish Sawlani and others. *Singapore founding PM Lee Kuan Yew once warned Australia could be 'white trash' of Asia*. ABC News, 24 March 2015 (available at: http://www.abc.net.au/news/2015-03-24/lee-kuan-yew-warned-australia-could-be-the-white-trash-of-asia/6342578).
4 Michael J. Mandel, "Reagan's Economic Legacy." *Bloomberg*, 21 June 2004 (available at: https://www.bloomberg.com/news/articles/2004-06-20/reagans-economic-legacy).
5 Joe Collins and Drew Cottle, "Labor neoliberals or pragmatic neo-laborists? The Hawke and Keating Labor Governments in office, 1983 – 96," *Labour History: A Journal of Labour and Social History* 98 (May 2010).

neoliberal responsibility entered mainstream public discourse later expanded by John Howard's Coalition Government after its election win in 1996. The neoliberal era began.[6]

While the change of government in 1996 furthered the ascendency of neoliberalism in Australia, the right and left of Australian politics in the 1990s were not that far apart in terms of economic policy. Norman Abjorensen has argued that Labor (led by Keating) and the Liberal Coalition (led by Howard) espoused similar views on neoliberal economic reform heading into the 1996 election. However, Australia's 'culture' or 'history' wars provided Howard with a point of differentiation, as Keating engaged with Aboriginal reconciliation, Asian integration, and Australian republicanism.[7]

In an Indigenous policy context, Howard's neoliberal response to the social welfare paradigm consolidated a conservative reaction to 'black armband' history and the self-determination paradigm. While the Australian High Court's ostensible dismissal of *terra nullius* in the Mabo and Wik decisions had invigorated new approaches, a neoliberal assertion of individual responsibility fuelled a conservative response. A triumph of responsibility over rights followed and resonated in many of the Howard Government's policies. Geoff Boucher and Matthew Sharpe have outlined how dry economics combined with 'culture war' attacks on 'guilt purveying' during the period.[8] By assuaging white guilt through the conflation of an economic imperative with a specific form of Indigenous 'agency' (i.e., *economic* agency), the Howard Government asserted an unfulfilled and continuing settler-colonial ambition. Howard reinstated policies operating in accordance with what Patrick Wolfe termed a 'logic of elimination': the Indigenous estate was then subjected to government policy oriented toward assimilation.[9] Wolfe explains that successive governments during the neoliberal era have attempted to displace 'the burden of history from the fact of expropriation to the character of the expropriated'.[10] Consigning

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6 This commenced an unabated twenty-five year period of neoliberal public policy domination.
7 Norman Abjorensen, "The History wars," in *The Culture Wars: Australian and American* Politics *in the 21st Century*, eds. Jim George and Kim Huynh (South Yarra: Palgrave Macmillan, 2009), 142–145.
8 Geoff Boucher and Matthew Sharpe, *The Times Will Suit Them: Postmodern conservatism in Australia* (Sydney: Allen & Unwin, 2008).
9 Patrick Wolfe, "Recuperating Binarism: a heretical introduction," *Settler Colonial Studies* 3 (2013): 3 – 4.
10 Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999), 212.

colonialism to history is an assimilatory act that dismisses claims regarding *contemporary* Indigenous sovereignty.

Meanwhile, neoliberal economic responsibility addresses Indigenous sovereignty, providing the state with an ideological apparatus that reinforces a settler/Indigenous binary that places Indigenous people in what Deborah Bird-Rose calls a 'double bind': indigenous people that assimilate economically lose their autonomy, while those that do not assimilate are labelled 'irresponsible'.[11] Even when the Indigenous individual does acquiesce to assimilation and expresses the values of dominant culture she is 'bracketed' – Indigenous people are the 'same' yet 'different'. When Indigenous alterity resists the dominant settler culture, it is characterised as exhibiting an innate deviancy that casts doubts over Indigenous capability. This further entrenches a sense of settler superiority emanating from colonial structures established over two hundred years of European occupation.

This sovereignty has taken a distinct form over the last twenty-five years as the settler-colonial relationship has evolved through the development of two critical concepts: economic responsibility and Indigenous capability. Both combine and define a neoliberal paradigm. In Australia, neoliberalism is decidedly settler colonial. As Elizabeth Strakosch has concluded, in 'the most immediate sense, neoliberalism facilitates colonialism and resecures colonial hierarchies'.[12] The neoliberal settler state reinvents a colonial ambition of elimination through assessing Indigenous capacity and then using the assessments to 'allocate [Aboriginal individuals and communities] to particular governmental regimes'.[13] These assessments respond to different strategies and may take different forms: treaty, legislative decision and policy.[14] But, as Strakosch points out, the exact nature of the strategy that is employed depends upon how the settler state assesses the capacity of the Indigenous person.[15] As neoliberalism dominates the Australian political consensus, with its focus on individual agency and 'capacity', its iteration in public policy has become the focus of settler colonisation.

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11 Deborah Bird Rose "Land rights and deep colonising: the erasure of women [online]," *Aboriginal Law Bulletin* 3, no. 85 (Oct 1996): 6.
12 Elizabeth Strakosch, *Neoliberal Indigenous Policy: Settler Colonialism and the 'Post-Welfare' State* (London: Palgrave Macmillan, 2015): 180.
13 Strakosch, *Neoliberal Indigenous Policy*.
14 Strakosch, *Neoliberal Indigenous Policy*.
15 Strakosch, *Neoliberal Indigenous Policy*.

Australian Indigenous policy throughout the neoliberal era embodies many of the strategies highlighted by Strakosch, such as native title decisions and treaty making.[16] The two interrelate. Increasingly, treaty-making takes the form of agreement-making and operates throughout the neoliberal era as a companion to Native Title legislation. Indigenous policy resolves the 'Indigenous problem'.

The South West Noongar Settlement in Western Australia (the 'Noongar Agreement'), what Constitutional scholars Harry Hobbs and George Williams have described as Australia's first treaty, has 'settled' a native title claim over the South West of Australia, the first such claim over a capital city in Australian history.[17] Agreement-making is fast becoming the settler state's first choice for enacting its colonization agenda of social transformation. The Noongar Agreement and current treaty negotiations in Victoria indicate that neoliberal transformation processes are gathering pace as federal and state governments employ the agreement-making regime to increase access and transform Indigenous-occupied land. However, as Indigenous peoples enjoy a unique relationship to the land, attempts to alter this relation have serious implications. Damien Short calls the forcible transformation of land and relations genocide. For Short 'indigenous peoples fighting to retain or regain their lands are fighting for their life as distinct peoples since, for them, their spirituality and cultural vitality are based in and on and with their lands. If we take this point seriously, when this relationship is forcibly interrupted and breaks down we can conclude that genocide is occurring'.[18] Neoliberal logics provide a new framework to pursue this genocide.

This research employs a settler colonial studies approach to analyse current and recent Australian Indigenous public policy. The thesis is formulated through historical analysis of neoliberal global and domestic hegemony and of Indigenous policy formations, case-study analysis of the Noongar Agreement and Victoria treaty negotiations, and a discussion of alternatives that seek to produce a hybridised space to ensure the

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16 Strakosch notes that policy-making is one of several strategies of colonization, a strategy that operates 'on the same political plane as juridical decisions or treaty making.' Strakosch, *Neoliberal Indigenous Policy*, 69.
17 Harry Hobbs and George Williams, "The Noongar Settlement: Australia's First Treaty," *Sydney Law Review* 40, no. 1 (2018).
18 Damien Short, *Redefining Genocide: Settler Colonialism, Social Death and Ecocide* (London: Zed Books, 2016): 36.

preservation of Indigenous alterity. The dissertation aims to show how the neoliberal settler state takes advantage of a dialectic of domination. In the neoliberal era responsibility is employed within public policy discourse as an expression of a 'logic of elimination' common to settler colonial societies such as Australia. I will show how this dialectic of domination is challenged and then transformed by an Indigenous assertion of a different kind of responsibility. This resistance is part of a decolonisation process that can lead to differentiated post-settler citizenship, sovereignty, and more meaningful reconciliation.

1.1 Research Questions

Given neoliberalism's profound impact on global and domestic public policy, it is imperative to ask what impact neoliberalism has had on Australian Indigenous policy. This research asks three questions:

1. Does neoliberal Indigenous policy in Australia apply a reified notion of responsibility that results in an economic narrative that sustains domination?

2. What implications does the neoliberal Indigenous policy approaches have for reconciliation?

3. Will a differentiated citizenship model that recognizes Indigenous exceptionalism provide greater opportunity for Indigenous autonomy?

1.2 Context

Three key elements provide empirical context to these research questions. These include the 'Indigenous estate'; an ascendant neoliberal system of governance; and a shift from 'rights' to 'responsibility' in Indigenous public policy.

1.2.1 The Indigenous Estate

'Indigenous estate' in the context of this research refers to Indigenous-controlled land and the various activities (and social organisation) that occur on it. Drawing from Ron Duncan in addition to David Pollack, Jon Altman conceptualises the Indigenous estate as land regained or controlled by Aboriginal groups after the arrival of settlers. This accounts for some one

million square kilometres (around 18–20% of the continent), with much of this land located in remote Australia.[19]

The Indigenous estate could be far more expansive. Chairperson of Indigenous Business Australia Eddie Fry outlines how the Indigenous estate extends across remote, regional, and also urban Australia under title and agreements. Fry argues that some estimates have the Indigenous estate potentially covering up to 40% of Australia. Moreover, while linked to tangible assets such as land, the Indigenous estate also encompasses intangible assets (i.e., knowledge and intellectual property).[20]

1.2.2 Ascendant Neoliberalism

Neoliberalism began as an intellectual and economic body of opinion evolving in response to Keynesianism and Socialism. Wendy Lerner has pointed out that the neoliberal 'movement' offered an alternative to the Keynesian orthodoxy established at Bretton Woods, a structure where 'Markets [were] understood to be a better way of organizing economic activity because they [were] associated with competition, economic efficiency and choice. In conjunction with this general shift towards the neoliberal tenet of "more market", deregulation and privatisation have become central themes in debates over welfare state restructuring'.[21] As global economic changes in the latter part of last century saw Keynesianism's political currency fall, neoliberalism ascended.

1.2.3 Australian Indigenous Public Policy: From Rights to Responsibility

The ascendancy of neoliberal public policy influence within Australia followed leads from the United States and the United Kingdom. In Australia it emerged too in response to a perceived failure of Keynesianism. Following WWII, the Curtin Government had joined other 'developed' world economies and embraced a Keynesian model.[22] The United Kingdom's

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19 Jon Altman, "Economic development and Indigenous Australia: contestations over property, institutions and ideology," *The Australian Journal of Agricultural and Resource Economics* 48, no. 3 (2004): 516.
20 Eddie Fry, "Engaging with the Indigenous Estate" (speech, 20 June 2017) *Developing Northern Australia Conference: Progress, Growth and Investment*.
21 Wendy Larner, "Neoliberalism: policy, ideology, governmentality" *Studies of Political Economy* 63 (Fall 2000): 5.
22 Donald Markwell suggests the Australian Government's emphasis on full employment and the means for achieving it had made Australia 'more Keynes than Keynes was'. Donald J. Markwell, *Australia and Bretton*

1944 *White Paper on Employment Policy* inspired the Australian Government's 1945 *Full Employment White Paper*, which ensconced Keynesian economic policy as well as the Bretton Woods agreement in Australian domestic policy. The Keynesian model and its regulation of International trade reflected political orthodoxy until 1971, when the Australian Government pegged the Australian dollar to the US currency. In 1983, Bob Hawke floated the Australian dollar internationally, and the Australian political landscape changed forever.[23]

In a social context, the 1980s represented a tumultuous time, as the so-called 'culture wars' played out in the Australian public forum. Mark Davis traces neoliberal-conservative cultural imperatives within the Australian political landscape back to resistance against what Geoffrey Blainey termed the 'black armband' view of history. Elite left views were thus challenged in a series of 'culture wars'. Blainey campaigned against Asian immigration, while mining magnate Hugh Morgan contested Aboriginal land rights.[24]

A neoliberal notion of responsibility emerged at this time as a tool for implementing government ideology. As Davis indicates, the 'public–private logic of rights versus "individual responsibility" animates most neoliberal–conservative responses to public issues'.[25] The term 'responsibility' is used within this neoliberal context to reify market capitalism through a social structure that marginalises any individual or group that expresses opposition to the tenets of market capitalism. As Mark Bovens notes, 'Responsibility is used as a normative concept, as a set of standards for the behaviour of actors, or as a desirable state of affairs'.[26] Natasha Wardman concludes that 'responsibility is constantly re-aligned to neoliberal discourses of productivity and accountability that depend largely on economic validation and neoconservative discourses that emphasize standardization, conformity, discipline and

Woods: More Keynesian than Keynes, Keynes and Australia – Discussion paper (Canberra: Reserve Bank of Australia, 2000; available at: http://www.rba.gov.au/publications/rdp/2000/2000-04/general-theory-in-australia.html).

23 Chris Jericho, Floating the dollar was worth the pain. *ABC News*, 27 November 2013 (available at: http://www.abc.net.au/news/2013-11-27/jericho-floating-the-dollar-was-worth-the-pain/5118028).

24 Mark Davis, "Neoliberalism, the culture wars and public policy," in *Australian Public Policy: progressive ideas in the neoliberal ascendancy,* eds. Lionel Orchard and Chris Miller (Bristol: Policy Press, 2014), 32.

25 Davis: *Neoliberalism, the culture wars*, 34.

26 Mark Bovens, "Responsibility." In *International Encyclopaedia of Political Science* (Gale Virtual Reference Library, 2011): 2299.

docility through self-governance'.[27] This formalised domination is inherent within the Australian Government's use of the term, a usage that is consistent with Yasha Mounk's position that within the context of neoliberal Australian government public policy responsibility has become 'accountability'.[28]

Prominent Indigenous spokesperson Noel Pearson provides an example of how this neoliberal understanding of responsibility is embraced. When 'it all boils down', he noted, 'the most important right we have is the right to take responsibility for ourselves'.[29] Pearson applies a broad neoliberal critique of Welfarism in his 'gammon [deceitful] economy' thesis, arguing that the 'key problem with welfare is that it inherently does not demand reciprocity'.[30] He thus attributes dysfunction in Indigenous communities primarily to Indigenous welfare, racism and the legacy of colonial dispossession.[31] He emphasizes market 'engagement' and 'responsibility' as avenues to champion Indigenous agency and as *means* to remedy the pitfalls and dysfunction of welfare dependency.

Prioritisation of 'responsibility' over 'rights' has defined Indigenous policy over the last twenty-five years, a development that places an emphasis on a neoliberal version of responsibility as a definitive characteristic of Indigenous policy. Most Australian government policies and documents during this period have used this notion of responsibility as a means to promote Indigenous acquiescence to economic imperatives and facilitate settler access to the Indigenous estate. These policies include the closure of the Aboriginal Torres Strait Islander Commission (ATSIC) and the strategic linkage between Indigenous self-management and financial incompetence/corruption; the NT 'Intervention', which conflated social ills with a lack of participation and integration; Shared Responsibility Agreements (SRA), which impose participation with the 'real' economy; and the 'Closing the Gap' reports, which measures Indigenous culture and wellbeing in accordance with quantitative

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27 Natasha Wardman, "Productive' and 'disciplined' students for the 'common good': Globalised discourses of neoliberal and neoconservative responsibility in Australian education policy," *Global Studies of Childhood* 6, no. 3 (2016): 321.

28 Yasha Mounk, *The Age of Responsibility: Luck, Choice and the Welfare State* (London: Harvard University Press, 2017), 56.

29 Noel Pearson, "White Guilt, Victimhood and the Quest for a Radical Centre," *Griffith Review* 16 (Winter 2007): 67.

30 Noel Pearson, "Aboriginal Disadvantage," in *Essays on Reconciliation*, edited by Michelle Grattan (Melbourne: Black Inc., 2000), 168.

31 Noel Pearson, "Aboriginal Disadvantage".

data sets. These policies cast Indigenous disadvantage as a product of 'choices' and downplay the impact of colonising structures of oppression.[32] Pearson's contribution echoes neoliberal themes, appealing to mainstream sentiment because it applies a definition of 'responsibility' that reflects values associated with private property.

This neoliberal notion of responsibility is simultaneously alarming and contradictory, as it creates a two-tiered citizenry. The settler citizen retains more freedoms and rights than the Indigenous one. For example, in 2016 the Turnbull Government trialled a welfare card system aimed at preventing Indigenous people from spending welfare payments on alcohol and drugs.[33] In 2017, the Government announced that the system would be made permanent in two remote communities.[34] The main contention that underpins the policy is that Indigenous people on welfare who spend their benefits on alcohol and drugs are not acting 'responsibly' (their freedoms can thus be legitimately restricted though the restrictions do not affect non-Indigenous Australians in similar circumstances).[35] It is no accident then that Prime Minister Malcolm Turnbull subsequently announced that Kalgoorlie (another heavily Indigenous populated locale) would be the next site for implementation of the policy claiming it represented an 'exercise in practical love, in compassion'.[36] In July 2018 the Turnbull Government announced it would look at implementing the policy in Tennant Creek as well.[37] These are all Indigenous communities. While Turnbull invoked 'compassion', and celebrated settler 'concern' for the Indigenous peoples, his policy restricted the freedoms of Indigenous citizens and targeted them. Again, the state's 'concern' extends to its desire to 'fix' the Indigenous 'problem'.

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32 These structures of oppression are the legacy of colonialism. They are ongoing. For a recent discussion on the role of the academy, and political science more specifically in perpetuating the settler colonial relationship, see Alissa Macoun, Kristy Parker and Elizabeth Strakosch, "Australian political studies and the production of disciplinary innocence," *Australian Journal of Political Science* 54, no.3 (2019); Sana Nakata and Sarah Maddison. "New collaborations in old institutional spaces: setting a new research agenda to transform Indigenous-settler relations," *Australian Journal of Political Science* 54, no.3 (2019); Morgan Brigg et al. "Toward the dialogical study of politics: hunting at the fringes of Australian political science," *Australian Journal of Political Science* 54, no.3 (2019).

33 Sarah Martin, "National Cashless Welfare Card". *The Australian*, 20 January 2016.

34 Sarah Martin, "Cashless welfare card 'cuts use of alcohol and drugs." *The Australian*, 14 March 2017.

35 Phoebe Wearne, "Report blasts cashless welfare card trials." *The West Australian*, 18 July 2018.

36 Gareth Hutchens, "Turnbull says cashless welfare card all about 'practical love' while announcing new site". *The Guardian*, 1 September 2017.

37 Paul Karp, "Turnbull reveals Tennant Creek 'deal' as cashless welfare card considered." *The Guardian*, 23 July 2018.

1.2.3.1 Australian Indigenous Policy and 'Consent'

The settler state requires broad public approval for its efforts to address the Indigenous 'problem'. Notions of 'equality', 'freedom' and 'compassion' represent valuable rhetorical devices, as they mobilise consent for an economic system that encourages 'competition' and guarantees that while some members of society will be successful, others will not. 'Consent' is a crucial element of the neoliberal project (the Mont Pelerin Society established in 1947 to promote the possibility of a global neoliberal system of governance, expressly included a provision for acquiring public consent in its charter).[38] Neoliberalism seeks *public* acquiescence to the eminence of the market and private property.

In a context of Australian Indigenous policy, the 'public' audience consists of Australian settler society and Indigenous Australian communities. Settler consent is obtained through an appeal to 'liberal' values (opportunity, freedom, equality and responsibility) – all notions that settler society generally and easily relate to. These are all values that can reify a material notion of private property. The dominant social group experiences those notions from a position of privilege and familiarity. In contrast, Indigenous consent is obtained through replacement. Reified notions of 'responsibility', 'opportunity', and 'equality' replace Indigenous categories that may contradict them. As Wolfe notes, in settler colonial societies such as Australia Indigenous alterities are not cajoled, they are systematically replaced.[39] Lorenzo Veracini similarly notes that successful colonies 'co-opt, and extinguish indigenous alterities'.[40] The state issues Indigenous Australians an ultimatum: 'consent' to the imposition of a dominant economic narrative, along with a series of associated notions (private property, etc.), or become marginalized, and face sanction. This consent is central to the neoliberal notion of responsibility explored in this thesis.

1.3 Conceptual Framework

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38 Ronald Hartwell, *A History of the Mont Pelerin Society* (Indianapolis: Liberty Fund, 1995), 41–42.
39 Patrick Wolfe argues that Settler-colonization is 'a winner-take-all project whose dominant feature is not exploitation but replacement'. Wolfe, *Settler Colonialism and the Transformation of Anthropology*, 163.
40 Lorenzo Veracini, "Introducing, Settler Colonial Studies," *Settler Colonial Studies* 1, no. 1 (2011): 3.

The nature of neoliberal influence upon Australian public policy, specifically neoliberal inspired Indigenous policy is explored in this thesis through a conceptual framework that draws from settler colonialism, political economy and, to a lesser extent post-colonial theory to explore neoliberal inspired Indigenous policy as a dialectic of domination. A number of key concepts inform this framework, they include settler/Indigenous interaction in hybrid (third) spaces; settler-colonial power relations; resistance as a decolonizing process; 'practical' reconciliation; and a rights-focussed differentiated citizenship model that formalises Indigenous sovereignty. These concepts form a lens that can be used to view neoliberal inspired Indigenous policy as a settler colonial project of domination. They also inform and promote potential alternatives that can better protect Indigenous alterity.

1.3.1 Dialectic of Domination

The specific form and application of a colonial dialectic of domination differs widely.[41] The 'dialectic of domination' concept applied in this dissertation draws on post-Marxists Theodor Adorno and Max Horkheimer's notion of a 'Dialectic of Enlightenment'.[42] Adorno and Horkheimer identify the limitations of the enlightenment project, where state control over market forces by ruling elites perpetrates a continual state of class-based domination. In a settler-colonial context, market-oriented dispossession and its internalization by the Indigenous person becomes a fight for survival, a pragmatic response to an existential threat. Scholar of biopolitics Vanessa Lemm points out that '[w]hen the human being's relation to nature and to itself stands under the rule of self-preservation, it is impossible to escape the predicaments of domination, whether the latter is other or self-directed'.[43] Over the last twenty-five years, neoliberal responsibility has emerged as a discourse that reinforces settler domination as the Indigenous actor assumes 'responsibility' not through freewill but through a pragmatic instinct for survival. This amounts to a neoliberal capturing of Indigeneity, a process not new in the neoliberal era as modes of dissent from capitalism

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41 See Bruce Berman, *Control & Crisis in Colonial Kenya: The Dialectic of Domination* (Oxford: James Currey, 1990), 1.

42 Max Horkheimer and Theodor Adorno, *Dialectic of Enlightenment* (New York: Continuum, 2002), 32.

43 Vanessa Lemm. "Critical theory and affirmative biopolitics: Nietzsche and the domination of nature in Adorno/Horkheimer," *Journal of Power* 3, no. 1 (2010): 77.

such as feminism and multiculturalism have been similarly co-opted.[44] Neoliberalism is a project of domination. Indigenous responsibility is the very specific form this domination takes in the context of Indigenous policy.

1.3.2 Settler/Indigenous Interaction and Hybrid 'Third' Spaces

Like Feminism and multiculturalism, indigeneity is 'co-opted' or 'colonised' throughout the neoliberal era as Indigenous people are 'invited' to consent to the elimination of Indigenous alterity. Primarily, this occurs through an agreement-making process that ostensibly reconciles state and Indigenous sovereignties. And yet agreements between the state and Indigenous people occur in a 'third' space that is not entirely controlled by the settler state. Short conceives of this space as a 'social space' where 'truth, justice, vengeance and forgiveness are validated and joined together'.[45] The third (or 'social') space is a space of contestation that facilitates assertions of Indigenous sovereignty and resistance to settler attempts to assimilate. Drawing from Postcolonial theorist Homi Bhabha, Kevin Bruyneel conceptualizes this space as a 'third space of sovereignty' and elucidates how, in a postcolonial context it encompasses Indigenous alterity and resistance:

> In resistance to this colonial rule, indigenous political actors work across American spatial and temporal boundaries, demanding rights and resources from the liberal democratic settler-state while also challenging the imposition of colonial rule on their lives. This resistance engenders what I call a 'third space of sovereignty' that resides neither simply inside nor outside the American political system but rather exists on these very boundaries, exposing both the practices and the contingencies of American colonial rule.[46]

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44 See the 'capture' of feminism in Nancy Fraser, "How feminism became capitalism's handmaiden." *The Guardian*, 14 October 2013. See also the 'capture' of Bolivian multiculturalism in Jeffrey Gardner and Patricia Richards, "Indigenous Rights and Neoliberalism in Latin America." In *The Palgrave Handbook of Ethnicity*, edited by Steven Ratua (Singapore: Palgrave Macmillan, 2019).

45 Damien Short, "Reconciliation, Assimilation and the Indigenous Peoples of Australia." *International Political Science Review* 24, no.4 (October 2003): 504; See also Damien Short. *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Abingdon: Taylor & Francis Group, 2008).

46 Kevin Bruyneel, *The third space of sovereignty: the postcolonial politics of U.S.-indigenous relations* (Minneapolis: University of Minnesota, 2007), xvii.

In settler-colonial contexts, third spaces are sites of resistance. Indeed, where the neoliberal logics employed by the settler state in Australia are characterized by a universalized identity that proscribes a specific form of responsibility, the third space is an eminent space of contestation.

A form of hybridity emerges from this dialectical interaction, a hybridity that can resist the dominant narrative of the settler state. Bhabha posited that it is 'in this space that we will find those words with which we can speak of Ourselves and Others. And by exploring this hybridity, this "Third Space", we may elude the politics of polarity and emerge as the others of our selves'.[47] Developing this further, Marianne McLaughlin suggests that Bhabha's 'third space' is an 'ambivalent and luminal space' where the space itself, and the people that participate in it, are termed 'hybrid'.[48] The third space is fluid and flexible, a space that facilitates assertions of identity that challenge accepted norms.

The third space, however, also comes with risks to Indigenous autonomy. In an Australian Indigenous policy context Indigenous actors and the state interact to develop ostensibly 'hybrid' policies that (theoretically) incorporate elements of both cultures in a synthesized outcome that some, including Eileen Willis and colleagues, claim is mutually beneficial.[49] However, not all negotiated agreements are 'hybrid'. For example, the Argyle Diamond Mine Participation Agreement between the Argyle Diamond Mine and the East Kimberley Traditional owners (the 'Argyle Agreement') is an ILUA that appears to have been conducted in a hybrid 'third space'. Prominent Indigenous leader Marcia Langton argues that the Argyle Agreement represents an example of Indigenous and non-Indigenous representatives negotiating an outcome favorable to both negotiating parties.[50] And yet negotiations occur either in the 'first space' of the colonizer, or in the third space colonized by him. Legislative instruments such as ILUAs retain an ability to compel and are affirmed in

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47 Homi Bhabha, "Race, Time and the Revision of Modernity", in *The Post-Colonial Studies Reader,* eds. Bill Ashcroft, Gareth Griffiths and Helen Tiffin (New York: Routledge, 2006), 157.
48 Marianne McLaughlin, *Crossing Cultural Borders – A Journey Towards Understanding and Celebration in Aboriginal Australian and Non-Aboriginal Australian Contexts*. PhD Thesis (Bentley: Curtin University, 2012).
49 Eileen Willis et al, "Hybrid Cultures: Creating a Third Space in Aboriginal Healthcare," *Journal of Australian Indigenous Issues* 18, no. 4 (December 2015): 2.
50 Marcia Langton, "From Conflict to Cooperation: Transformations and challenges in the engagement between the Australian minerals industry and Australian Indigenous peoples," *Minerals Council of Australia,* 7 February 2015, 62.

this instance through the settler state's authority over land and mineral resources. ILUA's therefore can represent a risk. Some Indigenous people resist these agreements.[51]

This risk is explored explicitly in this thesis through the two case-studies: the treaty process currently underway in Victoria and the Noongar Agreement in Western Australia. These case-studies consider two negotiated agreements constituting hybrid sovereign formations. I will explore how these negotiations may actually expose the Indigenous estate to a greater risk of appropriation. Some third spaces are not third spaces at all.

1.3.2.1 Third Spaces: The Risk of Appropriation

Neoliberal-era ILUAs pose a risk to Indigenous peoples because they can facilitate the commodification of Indigenous culture.[52] For example, the Argyle Mine Agreement (the Argyle Agreement) can be viewed as an instance of 'first' space commodification of Indigenous 'relationships with country'.[53] The Argyle Agreement, it should be noted, fundamentally alters the nature of the environment and therefore the nature of the relationship between Indigenous people and the land. This constitutes a very real danger of what Short terms 'ecocide'; when mining companies exercise a preference for 'externalizing environmental costs'. This can lead to physical and cultural destruction.[54] It is contended in this thesis that commodification that risks ecocide occurs through shared partnerships and mining agreements in particular.

These commodification negotiations point to the critical role of free-market economics in neoliberal era Indigenous policy. Neoliberal-era negotiation is invariably related to clearly exploitable resources such as labor, land, and mining or other resources. These resources are to be accessed, and this subsumption requires that Indigenous alterity be subsumed too. For example, MacDonald and Spuyut outline how Andrew Forrest's

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51 Daniel O'Dea discusses risks of ILUAs being used to perpetuate injustice. See Daniel O'Dea, "Indigenous Land Use Agreements as a risk management tool: an Aboriginal Perspective." *AMPLA Yearbook (1999)*: 253. See also Deirdre Howard-Wagner and Amy Maguire "'The Holy Grail' or 'the good, the bad and the ugly'? : a qualitative exploration of the ILUAs agreement-making process and the relationship between ILUAs and native title," *Australian Indigenous Law Review* 14, no. 1 (2010); Deirdre Howard-Wagner, "Scrutinising ILUAs in the context of agreement making as a panacea for poverty and welfare dependency in Indigenous communities," *Australian Indigenous Law Review* 14, no. 2, (2010).
52 David Ritter, *The Native Title Market* (Crawley: University of Western Australia Press, 1999).
53 Ritter, *The Native Title Market*, 75.
54 Short, *Redefining Genocide*, 36.

Fortescue Mining has tried to avoid negotiating with the Yindjibarndi people in the Pilbara, and even paid money for them to turn against each other in pursuit of conditions more favorable to the interests of the company.[55] Fortescue and government share a mutually beneficial relationship as both are motivated by increased access to minerals, while the Federal Government receives mining revenue. The two conspire in a commodification of Indigenous assets that is assimilatory as it restricts expressions of Indigenous alterity. Returning to Short, commodification can lead to 'social death'.[56]

This thesis will explore how agreements that impose an economic imperative upon Indigenous people can entrench colonization and can be understood as an instance of what Anthropologist Deborah Bird-Rose sees as 'deep colonising'.[57] The Noongar Agreement and the prospect of a Victorian treaty may appear to empower Indigenous people but can also 'conceal, naturalise or marginalise continuing colonial practices'.[58] While the agreement-making process is not ostensibly hostile to Indigenous interests, the dominant culture shapes the legal structures that facilitate the agreement-making process, and these are designed to protect settler interests. Combined with government policy that has reduced Indigenous avenues for representation, a significant difference in the power of the settler state on the one hand and Indigenous participants on the other means that Indigenous interests are unlikely to prevail.

Settler power is a product of the colonial relationship. This colonial relationship and its comprising structural inequality mean that agreements can become tools of exploitation and assimilation. I argue in this thesis that these agreements are therefore not 'hybrid'; rather, they constitute a site of domination where the settler culture is imposed and reinforce Indigenous subjugation. Even where the intent is to provide self-determination, structural inequalities turn policies into assimilatory devices. As long as colonial structures remain intact, well-meaning initiatives remain unfulfilled.

1.3.2.2 Hybrid Alternatives: The Risk of Appropriation

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55 MacDonald and Spruyt, "Aboriginal inequality".
56 Short, *Redefining Genocide*, 36.
57 Deborah Bird Rose "Land rights and deep colonising: the erasure of women [online]," *Aboriginal Law Bulletin* 3, no. 85 (Oct 1996): 6
58 Bird Rose "Land rights and deep colonising".

These colonial structures limit the success of hybrid alternatives that aim to emancipate Indigenous peoples and provide greater access to the 'real' economy. These become double edged instruments. In this thesis I will explore Altman's 'Hybrid Economy' model as an example of a hybridized pragmatic solution to the problem of Indigenous disadvantage that attempts to find a way to ensure Indigenous cultural survival as a 'project of alternative livelihood generation [and] through partial commodification of goods and services deriving from the Indigenous customary domain'.[59] Specifically, Altman's approach is 'based on combining elements of the market, the state and the customary sectors to provide meaningful livelihood opportunities for people living on their remote ancestral lands'.[60] The 'Hybrid Economy model purports to provide flexibility, and to enable an inclusion of the non-monetised sector'.[61] Altman also argues that

> the relatively late colonization of remote Australia resulted in a less destructive transformation of the precolonial hunter-gatherer economy than elsewhere and today important elements of the customary economy remain productive. These elements provide a means to maintain land-based ways of life in many situations and has resulted in the emergence of a complex form of economy that includes state, market and customary sectors.[62]

The resulting Hybrid Economy, however, risks legitimizing the economic agenda that is characteristic of neoliberal interventions. The model endeavours to conjoin the 'real economy' and the 'Indigenous estate' in order to create a third 'hybrid' realm. And yet, the inter-dependent basis of this model is often tenuous. Altman is aware of this risk, and so are his informants: 'they invariably see the market, state and customary sectors' he notes, 'as discrete spheres between which they move rather than as inter-dependent, which is at the

59 Katherine Curchin, "If the market is the problem, is the hybrid economy the solution?" In *Engaging Indigenous Economy: Debating diverse approaches*, ed. Will Sanders (Canberra: Australian national University Press, 2016): 75. See also Jon Altman, "Exploring sustainable development options on Aboriginal land: the hybrid economy in the 21st Century." *CAEPR discussion paper no. 226* (Canberra: Centre Aboriginal Economic Policy Research, 2001).

60 Jon Altman, "In the Name of the Market?" In eds. Jon Altman and Melinda Hinkson, *Coercive Reconciliation: Stabilize, Normalize, Exit Aboriginal Australia*, (Melbourne: Arena, 2007), 308.

61 Benedict Scambary, *My Country, Mine Country: Indigenous people, mining and development contestation in remote Australia.* (Canberra: Australian National University Press, 2013), 239 – 240.

62 Jon Altman, "What future for remote Indigenous Australia? Economic hybridity and the neoliberal turn," in *Culture Crisis: Anthropology and Politics in Aboriginal Australia,* eds. Jon Altman and Melinda Hinkson (Sydney: University of New South Wales Press, 2010): 271.

heart of my [Hybrid economic model] conceptualisation'. Altman intends to further explore this 'divergence', and he avers that it all depends on localised articulations of power.[63] However, some Indigenous people may be reluctant to link the customary sector with the market and would resist any encroachment on collective life and identity.

Similar to ILUAs such as the Argyle Agreement, the 'Hybrid Economy' model includes risks. The risk is appropriation as Indigenous people living in remote Australia face the possible commodification of aspects of their culture that have not previously been appropriated by the dominant settler culture. These include climate change reduction resources, fresh water, carbon abatement, wildlife harvesting and arts.[64] These resources closely relate to Indigenous cultural identity and their commodification risks becoming an assimilative device into a capitalist economy. It is a possible 'ecocide'.[65] As Ritter eloquently puts it, 'free enterprise with a tea ceremony is still capitalism'.[66]

1.3.2.3 Hybridity as Indigenous Emancipation

While hybridity as negotiated agreement can be a tool for assimilation/appropriation, the concept of hybridity is not necessarily detrimental to Indigenous interests. Hybridity can provide a potent critique of settler identity, and hybrid spaces can expose and challenge power relations. In this context, 'authenticity', the logical opposite of hybridity, can be a site of repression. Wolfe posits that Indigenous 'authenticity' is the product of colonial power, where authentic Aboriginality 'is everything that "we" are not and vice versa'.[67] Yin Paradis identifies this as an assertion of 'essentialist' fantasies ascribing 'inauthenticity' to those Indigenous peoples that do not fit the dichotomy.[68] Postcolonial theorist Gavatri Spivak and others have termed the process 'othering'.[69] It is a process that shapes settler and Indigenous self-identity. As Edward Said notes, the

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63 Jon Altman, "The hybrid economy and anthropological engagements with policy discourse: a brief reflection." *The Australian Journal of Anthropology* 20, no. 3 (December 2009): 324.
64 Altman, *What Future for Indigenous Australia*, 276.
65 Short, *Redefining Genocide*, 36.
66 Ritter, *Native Title Market*, 74.
67 Wolfe, *Settler Colonialism and the Transformation of Anthropology*, 179–180.
68 Yin Paradis, "Beyond Black and White: Essentialism, Hybridity and Indigeneity," in *The Routledge Handbook of Indigenous Peoples' Rights, eds.* Corrine Lennox and Damien Short (London: Routledge, 2016).
69 See Gayatri Spivak, "The Rani of Sirmur: An Essay in Reading the Archives," *History and Theory* 24, no. 3, (October, 1985): 257.

development and maintenance of every culture requires the existence of another different and competing alter ego. The construction of identity […] whether Orient or Occident, France or Britain […] involves establishing opposites and *otherness* whose actuality is always subject to the continuous interpretation and reinterpretation of their differences from *us*.[70]

This is so in a settler-colonial context too. For Wolfe, the 'further from the pole of mythic authenticity that an Indigenous identity can be asserted or reclaimed, the greater the ideological danger [to the dominant culture] that it presents'.[71] Wolfe argues that expressions of Indigenous hybridity (children of mixed-race parentage, for example) represent a threat to state legitimacy because 'in threatening the black category, it thereby threatened the white one as well'.[72] By extension, Wolfe asserts, the 'narrative structure of repressive authenticity is the excluded middle'.[73] Similar to Byrd-Rose's notion of the 'double-bind' Thomas Biolsi explores this bracketing in a Native American Indian authenticity context. Urban Indian people in the United States are typically seen as less authentic than reservation Indians, while urban Indians are also seen as less authentic urban citizens than other citizens are.[74] In the context of an 'excluded middle', hybridity as an expression of identity informs and shapes Indigenous resistance against the imposition of the stratified, abstract and racial constitution of settler and indigenous identity in Australia. Hybridity is decolonisation.

1.3.3 Settler Colonialism and Structures of Power

While hybridity offers opportunity for Indigenous emancipation, the threat of appropriation follows pre-existing structures of power. In an Australian Indigenous policy context, this power structure is the product of colonisation and its perpetuator. Colonisation is ongoing.

The basis of this relationship is settler sovereignty. Australia is a settler-colonial polity that must constantly justify its illegal occupation of Indigenous land. Settler values are

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70 Edward Said, *Orientalism*. (London: Penguin Publishing, 2003).
71 Wolfe, *Settler Colonialism and the Transformation of Anthropology*, 183.
72 Wolfe, *Settler Colonialism and the Transformation of Anthropology*, 179 – 180.
73 Wolfe, *Settler Colonialism and the Transformation of Anthropology*, 181.
74 Thomas Biolsi, "Imagined geographies: Sovereignty, indigenous space, and American Indian struggle". *American Ethnologist* 32, no. 2 (2005): 248.

a pronouncement of settler sovereignty at the expense of Indigenous ones. Fiona Nicoll argues that 'White Australians are conditioned' to exercise sovereignty 'against that of Indigenous Australians through […] the "performative assumption of perspective"'. Moreover, 'The deployment of perspective', she adds, 'depends on one's proximity to power'.[75] Yet Indigenous survival turns perspective on its head. Identifying themselves as settlers, Toula Nicolacopoulos and George Vassilacopoulos argue that settlers 'perpetually enter the world insofar as we faithfully obey the imperative to act as if the land were initially without owners and it is through this imperative that we cover over the question "where do you come from?"'[76] Any Indigenous expression of alterity that exposes the state's lack of legitimacy, or prompts settler Australia to reflect on the history and nature of occupation, is threatening. Similarly, any Indigenous alterity that challenges the underlying capitalist precepts of neoliberalism threatens the legitimacy of neoliberal sovereignty. As Strakosch notes 'neoliberal sovereignty increasingly presents its own survival as critical to the survival of its citizens'.[77] Indigenous alterity thus threatens the legitimacy of both the settler state and neoliberalism. In response, the Australian settler state applies neoliberal strategies to limit, marginalise, and then forcibly assimilate a collective, relational Indigenous alterity. As David Lloyd and Patrick Wolfe have argued, neoliberalism finds a unique expression in settler colonial societies such as Australia, where 'settler colonialism's inventory of local strategies is becoming increasingly congenial to neoliberalism's emergent world order'.[78] Neoliberalism reinvigorates settler power.

A deep ideological convergence is at stake. Elimination is the point of neoliberalism and settler colonialism alike. While colonialism is a distinct mode of domination that 'reproduces itself', and where 'the freedom and equality of the colonized is forever postponed', Veracini has pointed out that Australia is a settler-colonial state where settler

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75 Fiona Nicoll, "De-facing Terra Nullius and Facing the Public Street of Indigenous Sovereignty in Australia," *Borderlands ejournal* 1, no. 2 (2002).

76 Toula Nicolacopoulos and George Vassilacopoulos, "Indigenous Sovereignty and the Being of the Occupier: Manifesto for a White Australian Philosophy of Origins." *Arena Journal,* 41/42 (2013/2014): 179, 192.

77 Strakosch, *Settler Colonialism and the 'Post-Welfare' State*, 55 – 56.

78 David Lloyd and Patrick Wolfe, "Settler colonial logics and the Neoliberal regime," *Settler Colonial Studies* 6, no. 2 (2016): 112. See also Donald Denoon, *The Dynamics of Dependent Development in the Southern Hemisphere*. Oxford: Clarendon Press, 1983; Philip McMichael, *Settlers and the Agrarian Question Capitalism in Colonial Australia* (Cambridge: Cambridge University Press, 1984).

colonialism 'justifies its operation on the basis of the expectation of its future demise'.[79] Here Veracini is distilling Wolfe's point about a 'logic of elimination': settler colonialism is for Wolfe 'premised on a zero-sum logic whereby settler societies, for all their internal complexities, uniformly require the elimination of Native alternatives'.[80.] Neoliberal logics provide settler colonialism with a theory of governance and with structures congruent with the settler-colonial project of replacing a 'failed' Indigenous agency. Conversely, while decolonization must resist the replacement of Indigenous identity, it can only do this by what Veracini calls 'the eventual undoing of settler colonialism as a mode of domination and its legacies'.[81] As Indigenous resistance asserts a powerful mode of Indigenous agency, Indigenous resistance *is* decolonisation.

1.3.4 Resistance and the Decolonising Process

Resistance offers Indigenous people a means for asserting an irreducible form of Indigenous alterity (and sovereignty). The aim is to cast off the yoke of 'postcolonial' settler rule. Resistance occurs when Indigenous social organisation, values and experiences such as relationality and victimhood are inconsistent with the precepts of the settler-colonial project, including an alterity determined and surveilled by the settler state. Lorna Lipman notes that resistance does not mean 'continually battling against', but it 'means that while the country was conquered, the people were not'.[82] Needless to say, Indigenous resistance has been ongoing since European arrival and has taken different forms.

1.3.4.1 Relationality

Effective Indigenous resistance typically emphasises an 'Indigenous' relational ontology. As Manu Vimalassery argues in a context of Indigenous relationality and its challenge to a global economic order, Indigenous relational engagement with land and each other 'raises a basic contradiction in capitalism', as the 'Indigenous work of relationality rubs against relations of colonialism that fuel the development and continued reproduction of a market

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79 Veracini, *Introducing Settler Colonial Studies*, 3.
80 See Wolfe, *Recuperating Binarism*, 257.
81 Lorenzo Veracini, "Decolonizing Settler Colonialism: Kill the Settler in Him and Save the Man," *American Indian Culture and Research Journal* 41, no.1 (2017): 7.
82 Lorna Lipman, *Generations of Resistance*, *second edition* (Melbourne: Longman Cheshire House Pty Limited, 1991), 168.

economy'.[83] Ranjan Datta similarly notes how this relational ontology 'encapsulates people's everyday practices, where meanings of nature, land and sustainability are considered relational, part of the social order, and connected to traditional experiences, one's own body, dreams, and spirituality'.[84] In this context, Indigenous peoples' link and connection to each other, the land, and to the external world are fluid. Asserting the relational nature of Indigenous culture and the experiences of Indigenous victimhood can protect the physical and allegorical space where alterity is expressed. This resistance is therefore at once an act of decolonization and one of reconciliation, as recognition of Indigenous relation to land is also recognition of Indigenous sovereignty.

1.3.4.2 Victimhood

Resistance takes many forms. For example, it can be expressed as violence.[85] The Indigenous reclamation of victimhood is another form of resistance. It gives Indigenous people the opportunity to identify colonial injury and provides the potential for mobilising white guilt to hold settler institutions accountable and charge it with assuming responsibility for restoration. Marjo Lindroth and Heidi Sinevaara-Niskanen outline how Indigenous victimhood can be reclaimed.[86] This reclamation takes place at the site of negotiation – the agreement-making process that forms and emerges from the hybrid space. Victimhood strengthens and protects the third space - it is a potential tool for decolonisation. Victimhood is also a key aspect of reconciliation as it enables Indigenous people to hold settlers accountable.

1.3.4.3 Decolonisation and Reconciliation

Decolonial practices challenge the 'exceptionalism' of the settler-colonial logic where settler cultural supremacy is a legacy of power. Decolonisation understands supremacy as a

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83 Manu Vimalassery, "The wealth of the Natives: toward a critique of settler colonial political economy," *Settler Colonial Studies* 3 no. 3 – 4 (2013): 297.

84 Ranjan Datta, "A relational theoretical framework and meanings of land, nature, and sustainability for research with Indigenous communities," *Local Environment* 20, no. 1 (2015): 111.

85 Gillian Cowlishaw, "Disappointing indigenous people: Violence and the refusal of help," *Public Culture* 15, no. 1, (Winter 2003): 120, Tess Lea, "Contemporary Anthropologies of Indigenous Australia," *The Annual Review of Anthropology*, 41 (2012).

86 Marjo Lindroth and Heidi Sinevaara-Niskanen, "The biopolitics of resilient indigeneity and the radical gamble of resistance" *Resilience* 4, no. 2 (2016).

product of the violence of empire and provides a pathway to reconciliation. As Ashley Falzetti notes, '[m]aking the violence of epistemic erasures apparent provides a moment to acknowledge, teach, protest, and mourn that which is lost – the histories, the languages, the families, the knowledges of this world'.[87] Where decolonisation deconstructs the fabric of colonialism it provides meaningful possibilities for reconciliation.

1.3.4.4 White (Settler) Possession

Decolonisation can express an Indigenous exceptionalism that becomes a legitimating mechanism for Indigenous peoples to invert and subvert the meaning of identity. For example, Aileen Moreton-Robinson argues that the analysis of Indigenous dispossession can be used to engage settler audiences in order to foster better outcomes for Indigenous people.[88] In a settler-colonial context like Australia, 'white' possession *is* 'settler' possession, and Indigenous people hold unique knowledge regarding 'whiteness' in what Chris Andersen terms an 'epistemologically *dense*' Indigeneity that maintains knowledge of 'whiteness' and not just a knowledge of self.[89] This knowledge of whiteness can be infused into the reconciliation process achieving a truly hybrid outcome.

This knowledge can contribute to a reworking of settler identity and provide a rebuttal and rejection of settler characterisations of Indigenous identity that have historically been imbued with an objectivity that arises from what Moreton-Robinson has termed the 'unnamedness of whiteness'.[90] Moreton-Robinson argues that the settler view of Indigeneity is afforded an objectivity that permeates the collective settler consciousness where 'racial superiority becomes part of one's ontology'.[91] The Indigenous perspective on settler identity, on 'whiteness' can thus become a catalyst for a more meaningful

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87 Ashley Glassburn Falzetti, "Archival absence: the burden of history," *Settler Colonial Studies* 5, no. 2. (2015): 140.

88 Aileen Moreton-Robinson, "Towards a New Research Agenda? Foucault, Whiteness and Indigenous Sovereignty," *Journal of Sociology* 42, no. 4 (2006): 383–95.

89 Chris Andersen, "Critical Indigenous Studies: From Difference to Density." *Critical Studies Review* 15, no. 2 (2009): 91, 97.

90 Lester-Irabinna Rigney's Indigenist research also provides a challenge to this eminence of whiteness. See Lester-Irabinna Rigney, "The first perspective: Culturally safe research practices on or with Indigenous peoples". *Chacmool Conference Proceedings* (1999): 629–636.

91 Aileen Moreton-Robinson, "Whiteness, Epistemology and Indigenous Representation". In ed. Aileen Moreton-Robinson, *Whitening Race: Essays in Social and Cultural Criticism* (Canberra: Aboriginal Studies Press, 2004), 78.

reconciliation based upon greater Indigenous and settler understanding and eventually, collaboration. As Scott Kouri and Hans Scott-Mhyre outline collaboration enables settlers to 'relate with accountability to Indigenous peoples, to our Indigenous friends, as we experience – and work to dismantle – ongoing colonialism together in a landscape where death is a shared predicament and life is a mutual goal'.[92] Resistance and collaboration contribute to a rewriting of the normative history of the settler presence in Australia. Collaboration between settler and non-settler groups may be uncomfortable and difficult, but it is crucial for Indigenous sovereignty.

The implications of Indigenous resistance and the process of decolonisation for the reconciliation process will be considered in this thesis through emphasis on Indigenous 'reclamation' of alterity and sovereignty. Yet the process is not without risk. Lindroth and Sinevaara-Niskanen sarcastically describe reclamation as the 'refusal to entertain the loving concern that bio-power occasions'.[93] Moreover, Lindroth and Sinevaara-Niskanen acknowledge that this refusal constitutes a significant gamble for Indigenous peoples; however, they note, it is a gamble that can enable the Indigenous population 'to set its own agendas, to reclaim a past for which the world today needs to be held accountable and, ultimately, to refuse to take the world as already settled for it'.[94] Indigenous assertions of a relational ontology and victimhood are critical for this reclamation to occur. The risks are mitigated when consideration is given to the very real existential challenges facing reconciliation and what reconciliation as 'practical reconciliation' has become through the neoliberal era: a practice of elimination.

1.3.5 Practical Reconciliation: Responsibility over Rights

Reconciliation in Australia is a relatively new concept. In the neoliberal era, it is a means for muting voices for Indigenous self-determination. Indeed, as Short has pointed out, reconciliation in Australia 'was born out of a political desire to deflect the growing campaign for a treaty in the 1980s'.[95] Short illustrates a type of officially-endorsed reconciliation that

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92 Scott Kouri and Hans Skott-Mhyre, "Catastrophe: a transversal mapping of colonialism and settler subjectivity," *Settler Colonial Studies* 6, no. 3. (2016): 292.
93 Lindroth and Heidi Sinevaara-Niskanen, "The biopolitics of resilient indigeneity": 139.
94 Lindroth and Heidi Sinevaara-Niskanen, "The biopolitics of resilient indigeneity".
95 Short, *Reconciliation and Colonial Power*: 169.

sought to legitimize the Australian settler state while also restricting Indigenous capacity for participation.[96] The setter state does this in the neoliberal era primarily through the neoliberal concept of responsibility, whereby Indigenous (in)capacity is used to restrict the implications of reconciliation.[97]

'Practical reconciliation' evolved from a neoliberal privileging of 'responsibility' over rights, and as conservative suspicion of 'black armband history' saw Indigenous rights perceived by many settlers (and continue to be) as a challenge to the dominance (and exceptionalism) of their culture.[98] Indeed, Veracini notes that Indigenous sovereignty is generally seen as fundamentally subversive to settler/national foundations.[99] Settler Australian society recoils at expressions of culture that are different or unfamiliar to it. There have been numerous instances of Indigenous cultural values and expressions of relationality coming into conflict with the reified values and precepts of the dominant (settler) culture.[100] The result is that reconciliation has come to mean assimilation, a process described by Emma Kowal as a 'postcolonial logic', a 'remedial' attempt to locate Indigeneity within the dominant 'white' norm.[101] However, this process is paradoxical, as even where indigenous people do acquiesce and espouse the values of the 'white' norm, they are 'bracketed' – and remain different. The impact of this 'same but always different' bracketing is a form of racism. In yet a further paradox, bracketing keeps Indigeneity alive even as settler colonialism proceeds with its logic of elimination. Remedialism and practical reconciliation attempt assimilation with the ultimate goal of elimination.

This reconciliation is primarily designed to bring closure. As Veracini suggests, its 'advocates (even if they may be advocating the term for very different reasons and on the

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96 Short, *Reconciliation and Colonial Power*.
97 'Practical reconciliation is a strategy for promoting an Indigenous policy based on the needs of poor people rather than the rights of indigeneity. It is a charitable policy arising from a type of liberalism which views equality as sameness and frowns upon difference. See Dominic O'Sullivan "John Howard and the Politics of Reconciliation," *Journal of Australian Indigenous Issues* 9, no. 2 – 3, (June – September, 2006): 40.
98 Gunstone argues that three surveys he conducted in East Gippsland in 2005, 2010 and 2015 on the reconciliation process found that of the most opposed statements were 'related to "differences", such as sovereignty and parliamentary seats.' See Gunstone, *Attitudes towards reconciliation*, 49.
99 Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (New York: Palgrave MacMillan, 2010), 116.
100 Manu Vimalassery includes in this term 'the work of kinship and relation to place.' See Vimalassery, *The wealth of the Natives*, 296.
101 Emma Kowal, "The Politics of the Gap: Indigenous Australians, Liberal Multiculturalism, and the End of the Self-Determination Era," *American Anthropologist* 110, no. 3 (2008): 346.

basis of very different understandings) adopt it because it promises closure'.[102] Neoliberal government policies apply this practical form of reconciliation not just, as a means for settler Australians to *not* recognize Indigenous rights but also as a means to eliminate their autonomy and diversity. It is no surprise then that the foundational pillars of dominant settler social organization are reinforced by practical reconciliation. The most prominent of these foundational pillars in the neoliberal era, the economic imperative, is significantly undermined by 'sovereignty, native title, reserved parliamentary seats and treaties' and other propositions.[103] Practical reconciliation protects those pillars, especially the economic imperative and therefore does not provide a meaningful accommodation of Indigenous sovereignty. Instead the state employs agreements to promote 'responsibility' over 'rights', as it seeks closure through remedialism. In this way, practical reconciliation is the embodiment of a settler-colonial logic of elimination.

1.3.5.1 Meaningful Reconciliation: Grappling with Colonial Injury

In contrast to practical reconciliation that imposes a settler narrative, meaningful reconciliation requires dialogue and inclusion of the Indigenous voice. This also requires a settler engagement with uncomfortable truths associated with a racist Australian history and present. Yet there is significant reason to question the commitment of the settler audience towards the reconciliation process.[104] Practical reconciliation essentially assigns responsibility for Indigenous disadvantage to Indigenous people. This enables settler Australia to avoid the discomfort of a painful reassessment of Australian history. Yet, as Moreton-Robinson points out there needs to be an 'open and honest admission that the patriarchal white nation state is predicated on retaining the spoils of colonial theft on the one hand, while exalting a national sense of tolerance and fair play on the other'.[105] Only once this realization has occurred, can a new way forward emerge. Though Moreton Robinson suggests that Indigenous sovereignty nevertheless exists irrespective of settler

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102 Veracini, *Decolonizing Settler Colonialism*, 11.
103 Andrew Gunstone, "Attitudes towards Reconciliation in East Gippsland, Victoria," *Journal of Australian Indigenous Issues* 18, no. 4 (December 2015): 49.
104 Ravi Da Costa and Tom Clark, "On the responsibility to engage: non-Indigenous peoples in settler states," *Settler Colonial Studies* 6, no. 3, (2016).
105 Aileen Moreton-Robinson, "Patriarchal Whiteness, Self-determination and Indigenous Women: The Invisibility of Structural Privilege and the Visibility of Oppression," in *Unfinished Constitutional Business: rethinking Aboriginal self-determination,* ed. Barbara Hocking (Canberra: Aboriginal Studies Press, 2005), 71.

engagement with it, she prescribes a specific decolonising process, contending that the same assemblages that create and assert the nation as a 'white patriarchal possession' – politics, law and culture – can also be used to establish Indigenous self-determination and sovereignty.[106] However, settler acquiescence will not come easily, as resistance and contestation of existing power structures by Indigenous actors can reinforce dominant power and interests. This causes discomfort and the marginalisation of resistors.

Reconciliation in circumstances where the settler society is not prepared to give actual and metaphorical ground is reduced to a process that only satisfies the gratification of the dominant culture, where citizens feel a moral compulsion to do 'something', but not too much. This settler attitude prioritises responsibility over rights rendering reconciliation a rhetorical exercise. As Short has detailed in his analysis of the Australian Reconciliation process and in particular the role of the Council for Aboriginal Reconciliation, reconciliation can be seen as merely another 'whitefella whitewash'.[107] Behrendt emphasizes the emptiness of reconciliation rhetoric and asks: 'why Prime Minister Rudd did not settle the question of reparations after he provided his apology to members of the Stolen Generations'?[108] This thesis investigates whether under a neoliberal notion of responsibility; reconciliation has become an assimilatory device. I ask if a return to a rights-based approach may sustain a more meaningful reconciliation. Power must precede negotiation.

1.3.6 Indigenous Sovereignty: The Human Rights Model

Genuine reconciliation requires structural reform and recognition of Indigenous sovereignty. Indigenous people must exercise greater self-autonomy *before* a meaningful negotiation can take place. As Short notes, if Australia really does seek to address the harms 'that flow from colonisation and become truly post-colonial it cannot ignore the problem of indigenous nationhood and sovereignty'.[109] In turn, recognition of Indigenous sovereignty requires meaningful and fair negotiation. As Travis Kemp also outlines, for 'any resolution to occur in

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106 Moreton-Robinson, "Patriarchal Whiteness".
107 Short, *Reconciliation and the Colonial Power*, 146.
108 Larissa Behrendt, "What comes after 'sorry'?" *Journal of Australian Indigenous Issues* 11, no. 2 (June 2008): 31.
109 Short, *Reconciliation and Colonial Power*, 171.

any situational conflict such as this one a balance of power must be restored before exploration and problem solving can begin'.[110]

Indigenous rights can provide opportunity for realising Indigenous sovereignty. Indigenous rights pose a significant challenge to the liberal tradition from which those rights emerge. Paul Patton has discussed the challenges that Indigenous rights approaches pose for 'egalitarian liberalism' in particular. In his account of three important approaches that explore Indigenous rights: the political liberalism of John Rawls, the liberal culturalism of Will Kymlicka, and the treaty relations work of James Tully.[111] These are important contributions towards the development of alternatives to neoliberal Indigenous policy (and reconciliation). They establish a basis for Indigenous sovereignty and differentiated citizenship.

In developing his thesis, Rawls offers an understanding of *justice as fairness*, where a law of peoples 'is a family of political concepts along with principles of right, justice, and the common good that specify the content of a liberal conception of justice worked up to extend to and apply to international law'.[112] Rawls suggest that there are three characteristics of liberal ideals that extend to the law of peoples: a list of certain basic rights, a high priority of specific freedoms that relate to the general good and, the means for all citizens to access these freedoms.[113] Rawls develops a law of peoples framework predicated upon a liberal conception of justice. However, this universal liberal framework for governing peoples is open to contestation as it posits a universalism that is similar to that of neoliberalism. Nevertheless, Rawls offers an opportunity for analysis of the collective reasoning in his inference of a 'common reason' in liberal societies where, he suggests, the law 'settles fundamental constitutional questions and matters of basic justice as they arise for that society, must also be based on a public political conception of justice and not on a comprehensive religious, philosophical, or moral doctrine'.[114] This notion of a public political

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110 Travis J. Kemp, "Where to from here? A Goonya man's perspective on the stalled process of reconciliation," *Journal of Australian Indigenous Issues* 6, no. 1 (March 2003): 22.
111 John Robert Patton, "Philosophical foundations for Indigenous economic and political rights." *International Journal of Social Economics* 46, no.7 (2019).
112 John Rawls, "The Law of Peoples," *Critical Inquiry* 20, no.1 (October 1993): 43. See also; John Rawls, Political Liberalism, expanded edition (New York: Columbia University press, 2011).
113 Rawls, "The Law of Peoples", 44.
114 Rawls, "The Law of Peoples", 68.

justice or a common political reason manifests in the settler collective suspicion of Indigenous sovereignty.

This adds to a form of nationhood. This nationhood is critical to settler-colonial societies. In his work on liberal egalitarian multiculturalism, Will Kymlicka has written extensively about *popular sovereignty* and how it presents as nationhood where people 'belong together in a single state', and not merely as a group of individuals located within a single state and bound by a 'common' law.[115] This notion of nationhood is the basis for Kymlicka's assertion that a shared notion of nationhood is continuously reinforced through 'mechanisms [such] as national media, national symbols and holidays, national education systems, a national language, national transportation systems, and so on.'[116] Kymlicka's assertion that claims of a legitimate sovereignty are neither simple nor innocent provides a starting point for advocating an alternative type of citizenship, a mode that rejects the very basis of a universal 'statehood'.[117] Kymlicka's work likens Indigenous peoples to national minorities and other 'stateless' peoples.[118] Kymlicka argues that Indigenous peoples share many of the same characteristics dedicating an entire chapter of *Politics in the Vernacular* to critically evaluating the claim of James Anaya that Indigenous rights are increasingly accepted as distinct from other national minority rights in International law.[119] Kymlika essentially argues that Indigenous rights are the same as other minority groups, while asserting that they are not.

While this inconsistency requires further inquiry, it is Kymlicka's notion of statelessness that is crucial to the argument developed in this thesis. Others, James Tully for example, have conceived of statelessness as the basis for realising Indigenous sovereignty in a form of treaty constitutionalism.[120] Tully's method envisages three passages: Indigenous peoples exercise a 'stateless' and 'popular' sovereignty over territory they reserve for themselves, settlers exercise jurisdiction over unoccupied land (or land given to them by the

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115 See for example: Will Kymlicka, "Liberal Multiculturalism as a Political Theory of State–Minority Relations." *Political Theory* 46, no. 1 (2018): 81 – 91.
116 Kymlicka, "Liberal Multiculturalism as a Political Theory of State–Minority Relations", 87.
117 Kymlicka, "Liberal Multiculturalism as a Political Theory of State–Minority Relations", 88.
118 Will Kymlicka, *Politics in the Vernacular: Nationalism, multiculturalism, and citizenship* (New York: Oxford University Press, 2001): 120.
119 Kymlicka, *Politics in the Vernacular*.
120 James Tully, *Public Philosophy in a New Key: Volume 1, Democracy and Civic Freedom* (Cambridge: Cambridge University Press, 2008), 280.

settler state), and finally Indigenous peoples agree to share jurisdiction over the remaining 'overlapping territory'.[121] Tully identifies this as a method for resolving internal (domestic) colonisation policed through international law as agreements are recognised as international treaties. But, as Short notes, the 'stateless' aspect of Tully's method affords Indigenous peoples equal status and therefore permits negotiation of shared resources.[122]

Duane Champagne touches on these elements while offering a slightly different approach arguing for a multinational state that recognises and includes Indigenous sovereignty (he is talking with reference to North America).[123] Champagne and Tully emphasise the value of a shared or differentiated citizenship. They provide a means for ensuring a more equitable negotiation process that recognises citizenship beyond the traditional nation-state. Emphasising a 'stateless' citizenship that is nevertheless afforded equal status, Tully notes

> They [i.e., the settler state and Indigenous peoples] set up negotiation procedures to work out consensual and mutually binding relations of autonomy and interdependence and to deal multilaterally rather than unilaterally with the legitimate objectives of the larger society.[124]

Tully's proposal illustrates the possibility of differentiated citizenship as a response and antidote to the neoliberal inspired practical reconciliation that has dominated recent public policy. However, the proposal also requires the settler state to relinquish control over land (something it has been reluctant to do for over 200 years in Australia). Tully does not suggest how this might occur. Indeed, settler states rarely make meaningful concessions to Indigenous peoples.

If differentiated citizenship is a destination, rights based approaches represent a means to arrive. Rights-based approaches offer an ontological basis for assessing colonial power structures. Here, the academy can make a significant contribution. For example, by promoting a Sociology of Human Rights, Patricia Hynes and collaborators point out that

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121 Tully, *Public Philosophy in a New Key,* 279 – 80.
122 Short, *Reconciliation and the Colonial Power*, 172.
123 Duane Champagne, "Rethinking Native Relations," in *Indigenous peoples and the Modern State*, eds. Duane Champagne, Karen Jo Torjesen and Susan Steiner (New York: AltaMira Press, 2005): 20.
124 Tully, *Public Philosophy in a New Key*, 280.

power and inequality lay at the heart of sociology and therefore sociology as a discipline should turn its gaze toward how human rights theory and practice relate to these concepts as they pertain to domestic, national and international concerns.[125] Reconciling sovereignty is central to these concerns. A common feature of inclusive rights-based approaches to reconciliation is recognition of sovereignty, a reworking of space and how Indigenous people occupy that space.[126] Rights-based approaches also enable a dialectical engagement of the settler/Indigenous relationship. Helga Leitner and collaborators argue that 'there are clearly non-neoliberal social and spatial imaginaries, alternative forms of subject formation, and newly emerging practices of contestation-including alternative economic and social practices and innovative alliances across multiple axes of social difference'.[127] Alternative spatial imaginaries can be the basis for alternative policy settings.

In a settler colonial society like Australia, a first step towards developing non-neoliberal social and spatial 'imaginaries' begins with a critical review of settler-colonial discourse. This can assist with developing alternatives that are more inclusive of Indigenous alterity. For example, Ghassan Hage argues that critical writing enables us to 'weave oppositional concerns (anti-politics) with a search for alternatives' (he calls them 'alter-politics'). For Hage, these alternatives take the form of 'alternative economies, alternative modes of inhabiting and relating to the earth, alternative modes of inhabiting and relating to the earth, alternative modes of thinking and experiencing otherness'.[128] Decolonisation is one alternative model in a broad array of alternative models; it necessitates substantive forms of Indigenous alterity and diversity.

1.3.6.1 Indigenous Sovereignty: A Differentiated Citizenship Response

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125 Patricia Hynes et al. "Sociology and human rights: confrontations, evasions and new engagements." In *Sociology and Human Rights: New Engagements*, edited by Patricia Hynes, Michelle Lamb, Damien Short and Matthew Waites (London: Routledge, 2011): 1 – 22.

126 Adam Barker offers an analysis of Indigenous land occupations and the Occupy Wall Street movement. Despite assumptions of congruency between the two, Indigenous people have provided a powerful critique of the Occupy movement, in particular its participation in understanding public land as belonging to the settler majority. See Adam J. Barker "Already Occupied: Indigenous Peoples, Settler Colonialism and the Occupy Movements in North America," *Social Movements Studies* 11, no. 3 – 4 (2012): 327 – 334.

127 Helga Leitner and others, "Contesting Urban Futures: Decentering Neoliberalism," in *Contesting Neoliberalism Urban Frontiers*, eds. Helga Leitner, Jamie Peck and Eric Sheppard (New York: Guilford Publications, 2006), 22.

128 Ghassan Hage, *Alter-politics: critical anthropology and the radical imagination* (Carlton: Melbourne University Press, 2015), 4.

Alternatives emerge from the third space. A 'third space' is critical for Indigenous people to exert alterity and sovereignty in contemporary Australian society. Differentiated citizenship is the formalization of this third space and provides a useful model for achieving meaningful reconciliation.[129] The differentiated citizenship model reflects Claudio Corradetti's normative theory of human rights, an approach that grounds cognitive and linguistic possibilities with validated moral principles and claims.[130] This formation would establish a binational citizenship that recognises Indigenous exceptionalism. Fundamental to a differentiated citizenship approach is the formation of a public sphere or realm that permits recognition of Australia's violent colonial past. This public sphere would provide the basis of an Indigenous space authenticated by a diverse Indigenous alterity and presence. As Neil Hooley points out, '[w]ithin Australia, the issue of reconciliation and Indigenous self-determination could very well proceed through constitution of a public sphere. They are matters that involve public debate for the general good; they involve systematic discourse with a mixture of coercive and non-coercive discussion and impact upon Government policy making'.[131] Alternative models need to incorporate a space for Indigenous alterity without colonising that space. It is in these spaces that Indigenous sovereignties can emerge as effective responses to settler colonialism – a colonizing of space.

1.3.6.2 Treaty

Many argue that a treaty is impossible within Australia. As Mark Byrne comments, the 'Howard government has sidestepped the issue by claiming that that a treaty can only be made between sovereign states, thus raising the fear among settler Australians of a "nation within a nation"'.[132] Nevertheless, recognition for Indigenous peoples has been successfully enacted elsewhere. Patrick Dodson observes,

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129 A Differentiated Citizenship model borrows from a liberal theory of indigeneity. See Dominic O'Sullivan, (2014) "Maori Self-determination and a Liberal Theory of Indigeneity," in *Restoring Indigenous Self-Determination: theoretical and practical approaches*, ed. Marc Woons (London: E-International Relations, 2014).

130 Claudio Corradetti, *Relativism and Human Rights: A Theory of Pluralistic Universalism* (New York: Springer Books, 2009), xi.

131 Neil Hooley, "Indigenous Knowledge and Research: Aspects of Emancipation in Modernity." *Journal of Australian Indigenous Issues* 6, no. 2 (June 2003): 36.

132 Mark Byrne, "Reconciliation since 2000: stalled, fermenting, or taken out the back and shot?" *Journal of Australian Indigenous Issues* 8, no. 3 – 4 (Sept – Dec 2005): 107.

I'm sometimes criticized for my continuing reference the beauty and strength of the post-apartheid constitution of the Republic of South Africa – but the reality is this – a nation that suffered through a century of racism and hatred by one group of citizens upon another was able to create a document and the structures that supported the intent of the document that reflects all the best aspects of tolerance, justice and human values for every citizen.[133]

While there are risks associated with negotiated agreements between the settler state and Indigenous peoples, a formalised Indigenous third space can only be formed through a series of formal treaties that recognise Indigenous exceptionalism.

Decolonisation is imperative in a context of a treaty because treaties can address (in a formal manner) the fundamental racism/settlerism that has shaped reconciliation attempts to date. This 'whiteness' discourse shapes treaty debate in Australia. Calls for formal treaty/treaties acknowledge that there is a racial dimension in opposition to a treaty, and that Australian governments have found it difficult to relinquish power to Indigenous people. Moreover, Phillip Falk and Gary Martin wonder whether if it is possible that 'the real reason for government and judicial inaction continues to be the very same racism that has permeated white and Indigenous relations since invasion'.[134] Moreton-Robinson similarly contends that there is an element of racism in opposition to Indigenous sovereignty (i.e., committing to a treaty) when she notes that the Howard Government's 'deployment of the discourse of security is inextricably linked to an anxiety about dispossession shaped by a refusal of Indigenous sovereignty with clear roots in white supremacy'.[135] 'Security' and 'national interest', and other typically neoliberal terms perpetuate the dominance of settler culture over Indigenous ones. Indeed, settler culture retains inherently Euro-British institutions and values. With this comes the eminence and continuing privilege of

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133 Patrick Dodson, "Nulungu Lecture." *Journal of Australian Indigenous Issues* 11, no. 3, (September 2008): 44.
134 Phillip Falk and Gary Martin, "Misconstruing Indigenous sovereignty: Maintaining the fabric of Australian law," in *Sovereign Subjects: Indigenous Sovereignty Matters*, ed. Aileen Moreton-Robinson (Crows Nest: Allen & Unwin): 46.
135 Aileen Moreton-Robinson, "*Writing off Indigenous sovereignty*: The discourse of security and patriarchal white sovereignty," in *Sovereign Subjects: Indigenous Sovereignty Matters*, ed. Aileen Moreton-Robinson (Crows Nest: Allen & Unwin. 2007), 101.

'whiteness' that espouses and celebrates the triumph of European culture over Indigenous alterity.

The dislocation of Indigenous people from Indigenous culture caused by colonization is characterized by some as a voluntary abandonment. This reinforces the privilege of 'whiteness'. For example, prominent anthropologist Peter Sutton argues that 'Aboriginal people have abandoned many past practices voluntarily'.[136] For scholars such as Sutton, any attempt to engage with Indigenous culture keeps Indigenous peoples from experiencing the benefits that the settler (neoliberal) world can offer. Highlighting kinship, Sutton also argues that '[s]o long as kinship remains a major basis rather than a mainly private aspect of the political economy of a people, it is unlikely that they will pursue the desired benefits of the post-industrial world very effectively or at great speed'.[137] This view refers to a tendency within settler-colonial societies where 'authentic' Indigeneity is consigned to history – it no longer exists. Indigenous alterity is historical, they argue; it has no contemporary existence. This emphasises a triumph of 'whiteness' that 'washes' Indigenous difference in a process of assimilation that fails to recognise Indigenous sovereignty or exceptionalism.

A differentiated citizenship model response recognizes Indigenous sovereignty and exceptionalism potentially through establishment of a comprehensive treaty that includes each clan by employing a federal model that ensconces several smaller clan-based treaties and provides protection to Indigenous people collectives.

A variation of this model has been applied in Canada with some success. This would formalise a departure from a settler-colonial history of racism. Dialogue and communication on Australia's history, reconciliation, and treaty/treaties may break down barriers and increase the connection that settler Australians feel towards Indigenous peoples. This enables a retelling of history, a re-evaluation of identity, and a recalibration of the reconciliation process. Self-determination may be the outcome of a model finally able to alleviate Indigenous disadvantage. It would also constitute an expression of cultural plurality within Australia. Differentiated citizenship is the ultimate expression of Indigenous

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136 Peter Sutton, "The politics of suffering: Indigenous policy in Australia since the 1970s," *Anthropological Forum* 11, no. 2 (2001): 156.
137 Sutton, "The politics of suffering".

responsibility and the ultimate discarding of the neoliberal responsibility imposed by the settler state.

1.4 Methodology

A series of key concepts frame the research questions asked in this thesis. Specifically, I ask if Indigenous policy in Australia applies a reified notion of responsibility. I then explore the implications of neoliberal Indigenous policy for reconciliation and offer differentiated citizenship as a possible response. The way these questions are framed is important. In *Decolonizing Methodologies* Indigenous anthropologist Linda Tuhiwai Smith points out how research methodologies have been designed and employed within the academy to oppress Indigenous peoples as '… imperial legacies of Western knowledge'.[138] When looking at matters that concern Indigenous peoples, Tuhiwai Smith advocates development of research methodologies that include and promote the indigenous voice. In this inclusivity context, interview is typically the primary method used for expressing and including the indigenous voice. However, interview of Indigenous spokespersons was not pursued in this research as there is sufficient information available in the public discourse to satisfy the purpose of a research project that focuses on settler neoliberal discourse in Australian Indigenous public policy.

Tuhiwai Smith also advocates Indigenous and non-indigenous scholars develop research methodologies that '…promote and support Indigenous communities in their particular struggles.'[139] While indigenous scholars and activists are her target audience, Tuhiwai Smith espouses a solidarity among indigenous and non-indigenous actors in order to effect meaningful change. This research likewise pursues solidarity though it adheres to Clare Land's recommended 'practice of solidarity', a process whereby the non-indigenous actor should: act politically with self-understanding, reconstruct their (non-indigenous) interests through development of a moral and political framework and confront the complicity that reinforces domination.[140] These elements inform this research to the extent that while it is not about indigenous studies but about settler studies, it is conducted in full

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138 Linda Tuhiwai Smith, *Decolonizing Methodologies,* Second Edition (London: Zed Books, 2013), 24.
139 Tuhiwai Smith, *Decolonizing Methodologies*: 24.
140 Clare Land, *Decolonizing Solidarity* (London: Zed Books, 2015): 35-36.

compliance with the Guidelines for Ethical Research in Indigenous Studies prepared by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).[141] Moreover, this research participates, collaborates, and partners with the work of indigenous researches through its citations.

1.4.1 Methods

Neoliberal era Australian Indigenous policy is probed in this thesis through a discursive analysis that focusses primarily on a series of case studies featuring the Noongar Settlement and the Victorian Treaty process. These case studies provide a grounded analysis of the ways in which a neoliberal notion of responsibility has been employed by the settler state to gain access to, and then transform the Indigenous estate.

1.4.1.1 Textual Analysis

Discursive analysis is applied in this research in the manner outlined by Norman Fairclough, where language is seen as a social process, and where textual discourse analysis becomes the analysis of a production of that social process within a socio-cultural context.[142] Drawing from Fairclough, a method of textual analysis was used to study key Australian Government Indigenous policies. A potential limitation of the study relates to the textual analysis requirement for selecting relevant texts where there are many possibilities available. However, some texts have a greater and more profound effect on policy formulation and an 'ordering of ideas' within a hierarchical hegemonic context. Neoliberal responsibility in public policy reflects an ordering of ideas where a neoliberal notion of 'responsibility' has increasingly been applied by Australian Governments over the last twenty-five years. Responsibility is one form of an ongoing logic of assimilation that transfers Indigenous difference to the jurisdiction of the dominant 'white' norm where difference is deemed a threat to the material interests of the dominant group. Texts relevant to neoliberal responsibility and Indigenous policy over the last twenty five years have therefore been selected, they include: major government speeches, policies, strategies and statements that provide evidence of a continuous neoliberal logic of responsibility that has influenced

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141 See *Guidelines for Ethical research in Indigenous Studies*, AIATSIS (available at https://aiatsis.gov.au/research/ethical-research/guidelines-ethical-research-australian-indigenous-studies)
142 Norman Fairclough, *Language and Power* (London: Longman, 1989).

Australian Government Indigenous policy to reinforce and invigorate negative representations of difference through the imposition of reified notions of 'individual ethic', 'equality' and 'justice' over this period. The documents selected reflect an historical tradition pioneered by scholars such as Henry Reynolds who have explored court cases, legislation, policies and agreements in their analysis of settler discourses of domination.[143] 'Responsibility' features in all key documents analysed here:

- Court Cases (i.e., *Milirrpum v Nabalco Pty Ltd*, 1971; *Mabo v Queensland* (2) 1992; The *Wik People v The State of Queensland*, 1996; *Western Australia v Ward,* 2002; *Yorta Yorta Community v Victoria,* 2002 and *Bennell v State of Western Australia,* 2006);

- Legislation (i.e., The Native Title Act, 1993; The Native Title Amendment Act, 1998; The Aboriginal Land Rights (Northern Territory) Amendment*,* 2006; The Northern Territory National Emergency Response Bill, 2007; The Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act, 2016); and The Land Administration (South West Native Title Settlement) Act, 2016);

- Policies and agreements including: 'Closing the Gap', Shared Responsibility and Regional Partnership Agreement policies of the Howard era along with Community Development Employment Projects; the Remote Indigenous Housing Partnership; the Indigenous Economic Participation National Partnership of the Rudd/Gillard era; and the Indigenous Advancement Strategy of the Abbott/Turnbull Government) also follow this pattern;

- Agreements (The South West Agreement, the Argyle Participation Agreement).

1.4.1.2 Case Studies

I will use two critical instance case studies; the Noongar Agreement and the Victorian Treaty process to highlight how resistance constitutes a form of alternative Indigenous responsibility. These case studies also enable an analysis of how resistance operates in

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143 Henry Reynolds, *An Indelible Stain? The question of genocide in Australian history* (Melbourne: Penguin Books, 2001).

different situations.[144] As Amy Donley illustrates, critical instance case studies 'are used to examine a specific phenomenon of rare interest or to challenge an extremely generalized widespread claim'.[145] The general claim championed is that neoliberal responsibility is emancipatory.

The first case study provides evidence of how a post-colonial logic is disseminated through government policy. The Noongar Agreement combines Native Title legislation, partial recognition, shared responsibility agreements, and questionable negotiating practices to perpetuate a dialectic of domination.

The second case study, the Victorian treaty negotiation process currently taking place in Victoria (2019) is similar to the Noongar Agreement. The Victorian treaty process includes a controversial consent/consultation process, shared responsibility agreements, partial recognition and quantitative data and an unequal negotiation power differential are increasingly features of the negotiations. Similar to some of the objections raised by those who oppose the Noongar settlement, some Yorta Yorta elders have taken the position that the Victorian treaty process is a 'pathway to assimilation'.[146] These two case studies emphasize how neoliberalism informs the developing agreement and offer opportunity for the settler state to access the Indigenous estate.

1.5 Limitations

One of the main limitations concerning this work is that Indigenous people are diverse in their identity, values, locations, and levels of integration in economic structures. Indigenous peoples are not one homogenous group.[147] For example, Paradis has outlined how indigeneity is generally viewed through a prism of disadvantage and marginality that excludes some Indigenous peoples. Yet, indigeneity is more than a binary of settler and disadvantaged Indigene.[148] While the use of binaries such as 'settler' and 'Indigenous' are

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144 Robert E. Stake, *Multiple Case Study Analysis* (London: Guildford Publications, 2005): vi.
145 Amy M. Donley, *Research Methods* (New York: Infobase Publishing, 2012): 48.
146 Brooke Fryer, 'The Yorta Yorta Council of Elders is not convinced a treaty with Victoria is the best way forward.' *NITV News*, 26 June 2019 (available at: https://www.sbs.com.au/nitv/article/2019/06/26/farcical-yorta-yorta-elders-council-rejects-treaty-victoria).
147 Calling Aboriginal and Torres Strait Islander people 'Indigenous' reflects Australian Government convention. It should be noted that this is a contested term.
148 Paradis, *Beyond Black and White*.

here applied to a reality that is inevitably more complex the settler/native is nevertheless inevitable when considering the nature and design of the settler-colonial project. As Wolfe concludes, after all, 'settler colonialism is premised on a zero-sum logic whereby settler societies, for all their internal complexities, uniformly require the elimination of Native alternatives.'[149] He also asks: '[m]ore provocatively, could it be that the repudiation of binarism represents a settler perspective?'[150] Suggesting that a binary does not exist may herald the settler-colonial final 'achievement' – Alissa Macoun and Elizabeth Strakosch perceptively argue that 'the goal of the settler project' is indeed to enforce a 'neutral' condition.[151] This 'naturalizing of authority' can be achieved by 'assimilation through remedialism' within an overarching discourse of domination. Exceptionalism of course, works both ways. Indigenous people are to be relegated to an exceptional state, whereas settlers are to be promoted to it. The self-perceived 'exceptionalism' of settler regimes is especially important here. As David Lloyd has noted. exceptionalism and neoliberalism go hand in hand, and 'the settler colony, managing its permanent state of exception, offers a model for the future of the neo-liberal states globally, and not least to those states that have occluded where they have not renounced their own settler colonial histories'.[152]

One further, yet crucial limitation of this research is that a non-Indigenous scholar is analysing (and occupying) an Indigenous 'space'.[153] And yet, it is precisely because it aims to respectfully avoid occupying an Indigenous space that this thesis focuses on the policies of a settler government and its economic paradigm.

1.6 Chapter Outline

This thesis is structured as follows: after this Introduction, which has outlined the main premise of this research, chapter two canvasses the global and Australian histories of neoliberalism and the ideology's fundamental traits. The chapter also explores the ways in which 'responsibility' is being used in neoliberal contexts globally.

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149 Wolfe, *Recuperating Binarism*: 257.
150 Wolfe, *Recuperating Binarism*.
151 Alissa Macoun & Elizabeth Strakosch, "The ethical demands of settler colonial theory," *Settler Colonial Studies*, 3: 3 – 4, (2013): 431.
152 See David Lloyd, "Settler Colonialism and the State of Exception: The Example of Palestine/Israel," *Settler Colonial Studies*, 2:1 (2012): 77.
153 Pat O'Malley, Lorna Weir and Clifford Shearing, "Governmentality, Criticism, Politics," *Economy and Society*, 26 4 (1997): 504.

Chapter three details twenty-five years of neoliberal Indigenous policy; including the ways that neoliberal paradigm emerged through three successive administrations to its current hegemony. Starting with the Hawke/Keating Government and Keating's 'Redfern address' the chapter analyses a number of official agreements and the proceedings of the official reconciliation process. The chapter also outlines how neoliberalism has risen to unprecedented influence within the Howard Government through Indigenous policy that included the Native Title legislation amendment, the Wik and Mabo Native Title decisions, the unilateral closure of ATSIC, and the implementation of the Northern Territory 'Intervention'. The chapter also includes a discussion of the various Rudd/Gillard/Rudd/Abbott/Turnbull/Morrison Government Indigenous policies. These have been influenced significantly by neoliberalism. The chapter focuses on Rudd's apology to 'the stolen generations', the implementation of the 'Closing the Gap' policy direction, and the participation through jobs and education mantra.

Chapter four analyses the Noongar Agreement as a case study of a neoliberal approach to Indigenous policy. The Noongar Agreement has embedded the key notions of the 'real economy,' 'responsibility', and 'participation' in a structure of domination that permeates all aspects of indigenous political life. These neoliberal structures of domination are further highlighted within chapter five, as neoliberal notions such as the 'real economy', 'responsibility', and 'participation' shape Victorian treaty negotiations. Indigenous leaders have juxtaposed the Victorian Andrews Government's treaty overture with plans to demolish sacred trees in order to make way for a highway extension. This raises questions regarding the government's commitment to the process. In addition, a perceived exclusion of some Aboriginal parties from treaty consultation (not all clans are to be represented) has also raised serious questions about the legitimacy of the process.

Chapter six explores Indigenous resistance and decolonising practices. The chapter focuses on what decolonisation means for genuine reconciliation. By asserting an irreducible Indigenous alterity and promoting the reclamation of victimhood, Indigenous people are reclaiming *their* notion of responsibility and reinvigorating a public 'third' space. The chapter also engages with alternatives to the neoliberal model such as Altman's Hybrid Economy theory and the Indigenous entrepreneurship reclamation project advocated by Dennis

Foley. It outlines how Altman provides a meaningful and useful critique of neoliberalism and its assimilationist 'real economy' rhetoric. It also highlights, however, how a 'Hybrid Economy' approach may inadvertently restrict an Indigenous capacity to express an irreducible alterity. The chapter concludes with a discussion of Indigenous protests following a Sunrise television segment. The show legitimized government Stolen Generations policy. Subsequent Indigenous protests inverted the notion of 'responsibility' and held Sunrise accountable for the injury caused by colonization. The protests highlighted the ways Indigenous (in)capacity is represented in settler discourse and rejected it entirely and effectively.

A neoliberal shift to 'responsibility' cannot provide a meaningful basis for reconciliation. This thesis' last chapter, its Conclusion, recommend instead a return to rights-based policies and the adoption of a Differentiated Citizenship model. The latter provides a framework for treaty arrangements that recognizes, celebrates and protects Indigenous alterity.

2. Neoliberalism

In his seminal *A Brief History of Neoliberalism*, Harvey argues that neoliberalism is a transformative project that realises class interests.[154] Miller argues that Neoliberal*isation* occurs as an 'emergent transnational capitalist class [has] planned and constructed an architecture of global governance in response to threats from national capital'.[155] At its core, Harvey suggests transforms social organisation and concentrates wealth and power in the hands of the ruling class.[156] Harvey's outline of the evolution of liberalism as a global ideology is crucial to framing Australian neoliberalism. Neoliberal Indigenous policy is the manifestation of an ideological project.

The chapter engages with neoliberalism as an ideological project, related to what Michel Foucault described as 'governmentality', or the 'art of government'.[157] Shelley Bielefeld notes this ideological project employs a method of 'responsibilisation' to reconstitute and reorder individuals (and society) according to a new (neoliberal capitalist) order. This is an economic centric order. In an Indigenous context, this reconstituted order is pursued through an Indigenous responsibility whereby '…coercive disciplinarian interventions are warranted to reshape behaviours of Indigenous peoples.'[158] Essentially, the state requires Indigenous people to take responsibility for *their* "failure" to assimilate. Bielefeld points out that this neoliberal Indigenous responsibility '… has clear benefits for government in terms of reinforcement of state power over Indigenous peoples.'[159] Perpetuating settler colonial control and transformation of Indigenous people, this notion of

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154 David Harvey, *Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005), 130–131. See also Gerard Duménil and Dominique Lévy, 'The Economics of United States Imperialism at the Turn of the 21st Century,' *Review of International Political Economy* 11, no. 4 (2004): 657 – 676. Duménil and Levy conclude that neoliberalisation is a project designed to restore class power.

155 David Miller, "How Neoliberalism Got Where it is: Elite Planning, Corporate Lobbying and the Release of the Free Market," in *The Rise and Fall of Neoliberalism: The collapse of an economic order?,* eds. Kean Birch and Vlad Mykhenko (London: Zed Books, 2010), 23.

156 See Harvey, *Brief History*; see also David Harvey, "The 'new' Imperialism: accumulation by dispossession," *Socialist Register 40* (2004): 63 – 87.

157 Michel Foucault, "Governmentality", trans by Rosi Braidotti and revised by Colin Gordon, in (eds. Graham Burchell, Colin Gordon and Peter Miller), *The Foucault Effect: Studies in Governmentality*, (Chicago: University of Chicago Press, 1991)*,* 101.

158 Shelley Bielefeld, "Indigenous peoples, neoliberalism and the state: A retreat from rights to 'responsibilisation' via the cashless welfare card," in The Neoliberal State, Recognition and Indigenous Rights: New paternalism to new imaginings, eds. Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez (Canberra: ANU Press, 2018), 154.

159 Bielefeld, "Indigenous Peoples, 154.

neoliberal Indigenous responsibility has shaped recent Australian Indigenous public policy and continues to threaten Indigenous alterity. Critical review of the neoliberal role in shaping recent Indigenous policy is simultaneously an act of decolonisation and a refutation of the neoliberal economic imperative.

In this chapter I will outline the rise of neoliberalism to provide context for the discussion of its infiltration of Australian Indigenous public policy. Drawing from Manfred Steger and Ravi Roy this chapter is divided into three main parts that align with their 'three wave' conceptualisation of the neoliberal rise: neoliberal history and neoliberal thought (1921 – 1971), neoliberalism (1971 – 1979), and neoliberalisation (1979 to the present).[160] The first two waves will be outlined in order to emphasise the genesis of the third, neoliberalisation. The current (neoliberalisation) wave has seen unprecedented social change, especially in settler states. In the latter part of the chapter I trace the development of neoliberalism in settler societies through a survey of the neoliberal ascendancy in Anglophone settler states and rehearse the argument that neoliberalism often follows crises. Indeed, a pattern can be discerned – neoliberalism ascends after social/economic crises.[161] I will outline five broad neoliberal policy proscriptions common to all settler states: labour deregulation, privatisation, financialisation, taxation and welfare reform. These proscriptions form the basis of neoliberal social transformation (referred to here as 'neoliberalisation') and perpetuate a cohesive global system that has dominated global politics in recent decades.[162]

2.1 Neoliberal Thought: 1920 – 1972

Neoliberal thought has its genesis in liberalism, specifically foundational liberal ideas that arose in Western Europe through the Age of Enlightenment (17th century). These ideas featured an emphasis on individual ethics and an innate mistrust of governments. For John Hume, John Locke and other enlightenment thinkers, private property provided a suite of

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160 Manfred B. Steger and Ravi Roy, *Neoliberalism: a very short introduction* (Oxford: Oxford University Press, 2010): 99.

161 Strakosch perceptively emphasises this link. She discusses crisis management in the context of neoliberal domestic Indigenous policy through her analysis of the NT Intervention. See Strakosch, *Settler Colonialism and the 'Post-Welfare' State*. 55 – 56 and 104; Elizabeth Strakosch, "Colonial Risk management." *Borderlands ejournal* 11, no.1 2012: 13.

162 Harvey argues that these crises actually help perpetuate neoliberalism. See Harvey, *The 'new' Imperialism*.

rights designed to protect individuals from state abuse of power.[163] These ideas were subsequently formalised in political systems across capitalist states; they also became the basis for codifying human rights in various declarations, constitutions and legislative acts.[164] From Western Europe, liberal ideas spread across Latin America and the British Empire.

Liberalism was a genuinely global transformative project. Along with the Industrial revolution, the Age of Enlightenment inspired political discourse and public policies that transformed the political landscape of Western Europe (and further afield) from a system of feudal monarchies to a system of participatory democracy. As these liberal ideas coalesced in countries such as England and France, expressions of individualism triumphed over expressions of collective solidarity and a capitalist/socialist opposition became a feature of political discourse.[165] Neoliberal theorists adapted classical liberal individualism and developed a classical (liberal) economics approach.[166] The awarding of Nobel Prizes to neoliberal theoreticians Friedrich Hayek and Milton Friedman in 1974 and 1976 signalled that neoliberal thought and its conflation of individualism with economics was on the way to supplanting all alternative approaches.[167]

2.1.1 Neoliberal Theory

Neoliberal thought was first developed by a number of European intellectuals. Eli F. Heckscher's *Old and New Economic Liberalism* established in 1921 the foundational neoliberal philosophical principle that the free-market represented the most appropriate means to define and redefine the functions of the state; then in 1925 Hans Honegger published *Trends of Economic Ideas,* a seminal work that drew from Alfred Marshall, Eugen

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163 Mark Cowling (2012). 'Neoliberalism and Crime in the United States and the United Kingdom,' in
Organising Neoliberal Markets, Privatisation and Justice, eds. Philip Whitehead and Paul Crawshaw (London:
Anthem Press. 2012), 25. See also Locke, *Two Treatises*; John Trenchard and Thomas Gordon, *Cato's Letters*,
Volume 1 November 5, 1720 to June 17, 1721 (1724); Charles de Montesquieu, *The Spirit of Laws* (London: J.
Collingwood, 1823); and Adam Smith, *The Wealth of Nations*, ed. Edwin Cannan (New York: Modern Library,
2000).
164 Cowling, *Neoliberalism and Crime*: 24.
165 For example, Christian Fuchs has argued that Contemporary British politics is highly antagonistic and
shaped by ideological struggles between neoliberalism and democratic socialism. See Christian Fuchs,
"Neoliberalism in Britain: From Thatcherism to Cameronism," *TripleC* 14, no. 1 (2016): 187
166 Harvey, *Brief History*: 30. See also Jason Hackworth, *The Neoliberal City: Governance, ideology and
development in American Urbanism* (Ithaca: Cornell University Press, 2007): 5.
167 Harvey, *Brief History*: 33.

von Bohm-Bawerk, Friedrich von Wieser and others.[168] This text sketched in theoretical terms the core principles that would later form neoliberal ideology.[169]

A series of neoliberal think-tanks were established over the following thirty years including: The Colloque Walter Lipmann ('the Colloque') in the 1930s and the *Centre International d'etudes pour la renovation du liberalisme* in 1947.[170] Neoliberal think tanks, however, would not become significant until later in the century with the formation of the Mont Pelerin Society (MPS).[171] The MPS comprised pro free-market thinkers including Frederick Hayek and polymath Michael Polanyi.[172] The MPS was dedicated to supporting ideologies that embedded free-market principles. Its ethos was first formalised in the drafting of its Statement of Aims that set the neoliberal project in motion by asserting that further study would be required regarding the following topics:

- The moral and economic origins of the 'present' crisis,

- Redefinition of the functions of the state,

- Methods for re-establishing the rule of law,

- Establishing minimum standards not 'inimical' to initiative and the market,

- Methods for combating the furtherance of creeds hostile to liberty,

- Creation of an international order to facilitate economic relations.[173]

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168 Philip Mirowski and Dieter Piehwe, *The Road From Mont Pelerin: The Making of the Neoliberal Thought Collective*, (Cambridge: Harvard University Press, 2009): 10 – 11.
169 Mirowski and Piehwe argue that while a concerted understanding started to emerge, there was a degree of ambiguity associated with neoliberalism as the term began to emerge on the left and right of the political spectrum. See Mirowski and Piehwe, *Road from Mont Pelerin*, 11 – 12.
170 Francois Denord, "Aux origines du neo-liberalisme en France," *Le Mouvement Social* 195 (2001/2002): 16. Thatcher is said to have slammed Hayek's *The Road to Serfdom* on her desk as she met her Cabinet for the first time after the 1979 election, saying: 'this is what we believe'. See Cowling, *Neoliberalism and Crime*: 27. For Hayek's work, see Friedrich Hayek, *The Road to Serfdom, with a new introduction by Milton Friedman*, Fiftieth Anniversary (Chicago: University of Chicago Press, 1944).
171 The Second World War halted the evolution of the neoliberal movement, as many of its luminaries were scattered throughout North America. See Mirowski and Piehwe, *Road from Mont Pelerin*, 12.
172 After the Second World War that the most ardent promoters of neoliberal ideas reconvened at Mont Pelerin, Switzerland, where diverse groups, such as Austrian emigres, British intellectuals from the London School of Economics, Germans from the Freiburg School, and Americans from the Chicago School. See Kean Birch and Vlad Mykhenko, "Introduction: A world Turned Right Way Up," in *The Rise and Fall of Neoliberalism: The collapse of an economic order?,* eds. Kean Birch and Vlad Mykhenko (London: Zed Books, 2010), 3.
173 Hartwell, *Mont Pelerin society,* 41 – 42.

Like the Colloque before it, the MPS also established institutions designed to promote pro-market ideologies and began publishing *Cahiers du Liberalisme*[174] a 'neoliberal' academic journal. The confluence between United States' economic hegemony and the global ascendency of neoliberal thought would begin at this time. Neoliberal thought was not initially United States-based but following the Second World War, the United States began exercising greater influence. United States hegemony, in turn, turned neoliberalism into a global organisational apparatus.

2.1.2 Neoliberal Organisations

The neoliberal project has been successful because it engineered a framework for social transformation. This framework was embedded within the neoliberal project from the outset and allows a rapid and persuasive response to social and economic crises. Members of the Adam Smith Institute, another neoliberal think tank, understood it was critical that free-market *ideas* became generally accepted *practice*.[175] On this point, they agreed with Marxists that 'it is ideas in practical struggle that change things rather than ideas in the abstract'.[176] The 'neoliberals' sought primarily social and economic transformation.

As the neoliberal project coalesced into 'neoliberalism' it became a potent alternative to Keynesianism. It subsequently commandeered global institutions set up under the Keynesian global economic order. For example, through the International Monetary Fund (IMF), neoliberal theoretical propositions became institutionalized on a global scale. The IMF, provided neoliberalism with an international framework that implemented what would later be termed the 'Washington Consensus' along with other policy proscriptions.[177] This enabled neoliberalism to leverage social transformation.

Over time, the IMF would promote projects that favoured privatization of state-owned industries and pensions, taxation reform, legal and welfare policies, labour market

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174 Mirowski and Piehwe, *Road from Mont Pelerin*, 13.
175 Miller, *How Neoliberalism Got Where it is*, 37 – 38.
176 Miller, *How Neoliberalism Got Where it is*, 39.
177 Matt Dawson, "Introduction, the (In)compatibility of Socialism and Late Modernity," in *Late Modernity, Individualization and Socialism an Associational Critique of Neoliberalism*, ed. Matt Dawson (London: Palgrave Macmillan, 2013): 2.

(de)regulation and trade liberalization.[178] While the IMF established a global economic framework, other influential organisations such as the Institute for Economic Affairs (IEA), established in England in 1955, were created to produce neoliberal ideology.[179] The IEA developed explicitly neoliberal rhetoric and discourses and became a forerunner to more than a hundred prominent pro free-market think tanks throughout the world.[180] Other influential organisations include the World Economic Forum (WEF), established in 1971 (WEF holds annual meetings in Davos, Switzerland). Another powerful neoliberal organisation that sought political patronage was the Trilateral Commission established in 1973 and led by influential neoliberals including David Rockefeller and Zbigniew Brzezinski. The Trilateral Commission provided planning, lobbying and facilitation. Like the WEF, it cultivated a political commitment to neoliberal reform and a neoliberal global order.[181]

These neoliberal organisations continue to wield considerable power and influence today. Illustrating its contemporary relevance, Trilateral Commission member and author of *A Clash of Civilisations* Samuel Huntington once commented that 'Davos people control virtually all international institutions, many of the world's governments and the bulk of the world's economic and military capabilities'.[182] Huntington's assertion refers to a coordinated global information apparatus of neoliberal organisations that influence and shape government policies.[183] This illustrates how neoliberal logics are intrinsically linked to transformative agendas – the entire neoliberal project was designed to radically transform societies. Working in concert, neoliberal organisations contribute to the development of the neoliberal project and its global ascendancy. It was a neoliberal revolution.

2.2 Neoliberalism, 1971–1979: Protecting Global Elites

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178 Kean Birch and Adam Tickell, (2010) "Making Neoliberal Order in the United States," in *The Rise and Fall of Neoliberalism: The collapse of an economic order?*, eds. Kean Birch and Vlad Mykhenko (London: Zed Books): 53.
179 Miller, *How Neoliberalism Got Where it is*, 26.
180 Miller, *How Neoliberalism Got Where it is*, 27.
181 Miller, *How Neoliberalism Got Where it is*, 36.
182 Cited in Miller, *How Neoliberalism Got Where it is*, 37.
183 The powerful Dutch based Bilderberg Group was founded in 1952 with funding provided by the CIA and the British/Dutch Unilever Corporation. See Miller, *How Neoliberalism Got Where it is*, 34.

The evolution of neoliberal thought into a neoliberal system of government was the culmination of what Stuart Hall has called the 'long march of the Neo-liberal revolution'.[184] This march was expedited by a series of economic crises that occurred in the later part of the twentieth century.[185] Iain Ferguson has articulated how a crisis of accumulation prompted the neoliberal takeover; the oil shocks of 1973 and 1979 were crucial.[186] Harvey refers to this crisis as a 'crisis of capital accumulation' combining 'rising unemployment and accelerating inflation'.[187] The crisis of capital accumulation saw widespread discontent and a conjoining of labour and urban social movements throughout the capitalist world. With decreasing returns and facing an increasing socialist threat, ruling elites in capitalist countries such as Italy, France, Spain and Portugal and in some developing countries decided to act decisively.[188] Chile was the first site of 'neoliberalisation'. Chilean elites supported this experiment as Augusto Pinochet orchestrated a coup against socialist president Salvador Allende. Pinochet was also supported by a United States Government that was fully committed to combating international socialism everywhere. The Chilean coup was significant because of the influence it would have on neoliberal 'revolutions' in the United Kingdom and the United States. Elites in these countries also sought to arrest lowering profits and address the failures of the Keynesian orthodoxy. While Chile was peripheral; in 1979-1980 neoliberalism took over at the centre.

2.3 Neoliberalism since 1979: The Spread of Free Market Capitalism

Neoliberalism was a response to crisis and to alternative modes of social organisation. Keynesianism envisaged some redistribution and had to be entirely supplanted. Globalisation and crucial technological advancements were also important factors in the rise and rise of the neoliberal global order.

2.3.1 Globalisation

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184 Stuart Hall, 'The Neo-Liberal Revolution,' *Cultural Studies* 25, no. 6 (2011): 705.
185 Paul argues for example that crises represent 'the outcome of the ways in which the neoliberal state and world order function in the accumulation of wealth by dispossession and other means.' See Erik Paul, *Neoliberal Australia and US Imperialism in East Asia*, (London: Palgrave Macmillan, 2012): 7.
186 Iain Ferguson, *Reclaiming Social Work: Challenging Neo-liberalism and Promoting Social Justice*. (London: Sage, 2008): 24.
187 Harvey, *Brief History*, 23.
188 Harvey, *Brief History*.

As Mark Cowling notes, neoliberalisation 'is bound up with globalization', though they are not the same.[189] As James Greenberg also argues, these may be related concepts, but the former refers to rapid communication between economic, political, cultural institutions and specific parts of the world, while the latter can be categorised as a series of policies that promote this integration. In this context, globalization can be viewed as the 'intensification of worldwide social relations or as time-space compression'.[190] Globalisation shares an intrinsic and symbiotic relationship with neoliberalism and capitalism as it facilitates accumulation through quick communication, fast financial flows, outsourcing of production, cultural interaction, and increased movement.[191]

Neoliberalisation, globalisation and United States hegemony are linked.[192] And yet, the United States' role in establishing a global neoliberal order may have been overstated. The neoliberal project has been successful globally beyond the United States' ascendancy. As Harvey points out, the United States did not force Thatcher's neoliberal crusade or China's path to neoliberalisation, nor did United States imperialism force India's partial neoliberalisation in the 1980s or Sweden's in the 1990s.[193] And there remain some areas of the globe where the neoliberal project remains incomplete. As Peter Evans and William Sewell Jr have noted, the transformative effect of neoliberalism may seem overwhelming in the United States and the Western world, but in East Asia, neoliberalism is merely one element of a variety of ideological constructions that include statist developmental strategies and illiberal politics.[194] It is in these areas we see the flexibility of neoliberalism. As Karen Faulk notes, neoliberalism had a distinct 'flavour' in the global north under

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189 Cowling, *Neoliberalism and Crime*: 35.
190 James Greenberg and others, in "Conclusion" *Neoliberalism and Commodity Production in Mexico,* eds. Thomas Weaver, James Greenberg, William Alexander Anne Browning-Aiken (Boulder: University Press of Colorado, 2012), 316.
191 Cowling notes that this results in increased global inequality as power is exerted on a global scale. See Cowling, *Neoliberalism and Crime*: 35.
192 Harvey, *Brief History*: 31.
193 Harvey, *Brief History*, 18.
194 Peter B. Evans and William H. Sewell, "Neoliberalism: Policy Regimes, International regimes, and Social Effects," *in Social Resilience in the Neoliberal Era, eds. Peter Hall and Michele Lamont* (Cambridge: Cambridge University Press, 2013): 62.

Reaganomics and Thatcherism, while in the global south it was often introduced through a coordinated effort by international agencies and local elites.[195]

This indicates that despite its global reach and while neoliberalisation does mean a global system of free trade, the project remains incomplete. Evans and Sewell have noted that while countries such as the United States 'engage in old-fashioned efforts to gain political and economic control over other countries by political and military means' the world is more globalised '[b]ut not a world in which markets have been freed from politics'.[196] Neoliberalisation of the globe is not yet complete though it has been remarkably successful, thanks in no small part to its cohesion with global technological advancements. Indeed, neoliberal globalisation would not have been as successful without these technological advancements critical to the global neoliberal transformation.

2.3.1 Technological Advances

Technological advancements in transport and communications were independent of neoliberal policy yet have played a significant role in the global rise of neoliberal capitalism. Technological advancements assisted the spread of neoliberalism as it permitted international free trade, made international business easier and increasingly cost effective, and ensured that international business became more acceptable to corporate interests and the general public.[197] As Evans and Sewell have noted, 'the worldwide consolidation of a neoliberal institutional framework for international exchange fostered ever more rapid and "frictionless" global circulation'.[198] Neoliberalism was successful globally also because it was more consistent with the current information age than the regulatory project of Keynesian state regulation.

2.3.2 The Neoliberalisation of World Politics in the Anglophone World

The neoliberal free-market oriented response to Keynesianism spread around the globe like wildfire in the latter part of the twentieth century. Countries as diverse as the United

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195 Karen Faulk, *In the Wake of Neoliberalism: Citizenship and Human Rights in Argentina*. (California: Stanford University Press, 2013), 7.
196 Evans and Sewell, *Neoliberalism*, 62 – 63.
197 Evans and Sewell, *Neoliberalism*, 62 – 63.
198 Evans and Sewell, *Neoliberalism*, 62.

Kingdom, the United States, Canada, Chile, Mexico, the Dominican Republic, China, Japan, Australia and New Zealand all embraced neoliberal market reform. In 1978, neoliberalism began its transformation from a theoretical framework to a system of governmentality as Thatcher was elected in the United Kingdom and Reagan came to power in the United States.[199] George Monbiot records how Thatcher, and in particular Reagan gave neoliberalism and the free-market capitalist orthodoxy global political currency and status.[200] James Cronin argues that the British and American embrace of neoliberalism reflected more than just a robust acceptance of free-markets and a refutation of all things Keynesian, it also represented a means to assert their Anglo-American military supremacy globally.[201]

Nationalism and capitalism were not inconsistent within the emerging neoliberal global order. Indeed, nationalism became useful to neoliberalism, as countries such as China and Japan improved their position in the global economy. Within this neoliberal economic global system, the nation state represented a competitive agent attempting to attain the best possible business outcome. This mandated a form of nationalism.[202] This nationalism represented a contradiction within the neoliberal project. While in theory neoliberalism dissolved the bonds of local solidarity in pursuit of rampant global capitalism, Thatcher's Falkland War and United States support for Pinochet's nationalist coup in Chile illustrate how under certain circumstances the neoliberal project exploited a notion of national solidarity to implement neoliberal global economic restructuring.

This flexibility means that neoliberal projects find different application in different contexts. This is relevant for any analysis of neoliberal projects in Anglophone settler states where the presence of Indigenous people make a significant difference. In all locations, neoliberalisation has assimilated localised differences and dramatically transformed society. Jeffrey Gardner and Patricia Richards illustrate a Latin American example where states and elites have avoided questions pertaining to the injustices of neoliberal capitalism through developing a neoliberal multiculturalism framework that generates consent for the

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199 Deng Xiaoping had also mobilized the forces of 'market socialism' in China.
200 George Monbiot, "Neoliberalism – the ideology at the root of our problems," *The Guardian*, 15 April, 2016.
201 James Cronin, "Britain and America Beyond Empire: Neoliberalism: the 'Special Relationship' and the Search for Global Order',' a paper presented to the *Conference of Europeanists* (Chicago, 2006).
202 Harvey, *Brief History*, 96 – 97.

neoliberal project.[203] Gardner and Richards cite requests for recognition of Indigenous rights by Indigenous peoples in Bolivia through the eighties as an example of how a neoliberal form of multiculturalism has been used to perpetuate the domination of Indigenous peoples. The Bolivian government enacted policies of decentralisation and increased participation in response to Indigenous peoples' claims for increased autonomy.[204] Multiculturalism was used by the state to perpetuate the neoliberal agenda and facilitate the neoliberalisation process.

The Bolivian example referred to by Gardner and Richards emphasises how neoliberalisation fundamentally changes states and spaces irrespective of different social and economic conditions. It shows the localised application of neoliberalism in a global context. The Anglophone settler countries studied below illustrate a number of key themes common among settler colonial societies where neoliberal logics have been embraced yet in a specific and local way. These themes include protection of class interests, a racialized public policy, restriction of Indigenous freedoms, deregulation, resource commodification, privatisation and corporatisation. These themes underscore Indigenous policy in settler colonial societies as they embrace neoliberalisation and its transformative formulations. In the settler societies of the United States, Canada, Australia and New Zealand, a notion of responsibility is used to dispossess Indigenous people.

2.3.2.1 The United States

The United States was founded upon classical liberal economic ideas. The United States constitution was purposely written to include checks and balances intended to limit radical redistributive policies.[205] As Seymour Martin Lipset observes, 'the American social structure and values foster an emphasis on competitive individualism, an orientation that is not congruent with class consciousness, support for socialist or social democratic parties, or a strong union movement'.[206] Neoliberalism is 'deeply [embedded] into the economic

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203 Gardner and Richards, *Indigenous Rights and Neoliberalism*, 856.
204 Gardner and Richards, *Indigenous Rights and Neoliberalism*.
205 Cowling, *Neoliberalism and Crime*, 25.
206 Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (London: Routledge, 1990), 170.

ideology and collective imaginary of the nation'.[207] Despite this structural pre-disposition, it was social crises related to oil and inflation in the 1980s that saw the United States fully embrace neoliberalism after Paul Volcker changed monetary policy at the Federal Reserve in 1979 and Reagan's reforms curbed the power of organised labour. Reagan systematically deregulated industry (i.e., agriculture, resource extraction) and 'liberated' the 'powers of finance'.[208] In addition, Reagan unleashed a brutal attack on the welfare state and pursued a class restoration project similar to that undertaken by Margaret Thatcher in the United Kingdom by cutting taxes for the rich.

Neoliberal reform in the United States constituted a class-oriented project. As Tim Koechlin has noted, United States history over the last thirty-five years cannot be understood without emphasis on the role of class in formations of neoliberal theory.[209] The neoliberal class project in the United States featured labour deregulation, tax reform, identity politics, and suburbanisation. 'Reaganomics' (a neologism identifying Raegan's economic doctrine) promoted the interests of the capitalist class by disempowering labour (for example, firing striking air traffic controllers) and encouraging private employers to take on unions.[210] Tax cuts that favoured ruling elites featured prominently in United States neoliberal reform, commencing with Raegan's signature tax policy, the Economic Recovery Tax Act of 1981 (ERTA). The policy is an inherently neoliberal public policy. As Monica Prasad has noted, Raegan's tax cuts were 'not the only neoliberal policy, but the ERTA [could] make a claim to being the most important instance of American neoliberalism'.[211] The ERTA proved the seminal neoliberal document in United States political history, establishing tax cuts as a key political plank of Republican Party identity.[212] This tax cut formulae continues to feature in right wing conservative politics across the globe.

The conservative Republican Party in particular embraced neoliberalism as neoliberalism increasingly became 'tenuously connected to an equally pervasive form of

207 Daniel Keating et al, "National Differences in Population Health and Development," in *Social Resilience in the Neoliberal Era,* eds. Peter Hall and Michele Lamont (Cambridge: Cambridge University Press, 2013), 254.
208 Harvey, *Brief History,* 10.
209 Tim Koechlin, "The Rich Get Richer," *Challenge* 56, no. 2 (March-April 2013): 22.
210 Cowling, *Neoliberalism and Crime*, 33.
211 Monica Prasad, "The Popular Origins of Neoliberalism in the Ragan Tax Cut of 1981," *Journal of Policy History* 24, no. 3 (2012): 352.
212 Prasad, *Popular Origins of Neoliberalism*, 351 – 383.

social conservatism'.[213] This social conservatism, associated with fear and security issues related to the Republican Party's 'southern strategy' exploited a fear of crime and associated crime with black people as a means to attract southern 'Dixiecrat' voters who had previously voted Democrat.[214] Uneven geographies of class, race, and gender also contributed to the neoliberal ascendancy.[215] Sally Davison and George Shire argue that there is a relationship between discourses of race, migration and neoliberalism and the gradual dismantlement of the 'New Deal' social democratic settlement.[216]

As Mary Caplan and Lauren Ricciardelli have pointed out, neoliberalism within the United States has emphasised individualism, freedom of choice, rationality, self-interest, market mechanisms, and welfare capitalism.[217] This is neoliberal responsibility, it has resulted in some winning and some loosing. Indeed, institutionalisation has not transpired into greater economic opportunity though it does not appear to matter).[218] Erdogan Bakir has argued that the adoption of the neoliberal economic model in the United States may have contributed to the global recession of the early 2000s.[219] Kean Birch and Adam Tickell have similarly argued that the market model propagated by neoliberal academics and its relationship between the conservative movement and the neoliberal project has left many American people feeling financially and socially insecure.[220] Instead, some supporters of neoliberal policies have suggested that the 2008 global recession represented an opportunity to reorient the state to better meet neoliberal objectives.[221]

213 Hackworth, *The Neoliberal City*, 9.
214 Cowling, *Neoliberalism and Crime*: 37.
215 Adrian Parr, 'Urban Debt, Neoliberalism and the Politics of the Commons," *Theory, Culture & Society* 32, no. 3 (2015): 71.
216 Sally Davison and George Shire, "Race, migration and neoliberalism: how neoliberalism benefits from discourses of exclusion," *Soundings* 59 (Spring 2014): 86.
217 Mary Caplan and Lauren Ricciardelli, "Institutionalizing Neoliberalism: 21st-Century Capitalism, market Sprawl, and Social Policy in the United States," *Poverty and Public Policy* 8, no. 1 (March, 2016): 35.
218 Erdogan Bakir, "Capital Accumulation, Profitability and Crisis: Neoliberalism in the United States," *Review of Radical Political Economics* 47, no. 3 (2015): 405.
219 Bakir, "Capital Accumulation, Profitability and Crisis".
220 Birch and Tickell, *Making Neoliberal Order*, 56 – 57.
221 Timothy Weaver, *Blazing the Neoliberal: Urban Political Development in the United States and the United Kingdom* (Philadelphia: University of Pennsylvania Press, 2016), 280.

Despite the crisis or perhaps because of it, neoliberalism retains political power in the United States.[222] Graham Wilson and Wyn Grant have shown that little has changed in the United States following the 2008 recession and many of the global economic structures and institutions thought to have precipitated the global recession remain unchanged.[223] Neoliberalism remains because there are no credible alternatives.

There is a lack of workable alternatives to neoliberal logics within the United States. Change of government has not seen a change of ideology. Similar to the British experience with Blair, change of government in the United States within the first decade of the 21st century did not amend the neoliberal paradigm. While President Obama assumed the presidency upon a promise of change, he remained faithful to neoliberal precepts. Obama's 'promise zones' across nine cities in the United States exemplify this invariance.[224] As Timothy Weaver notes, Obama's 'promise zones' policy was quintessentially neoliberal: it involved tax incentives, and it established 'partnerships' devolving state responsibility for the needs of approximately 45 million people.[225] Neoliberalism and its individual responsibility emphasis remains a dominant and resilient paradigm of the United States political landscape.[226]

2.3.2.2 Canada

Similar to the United States, Canada embraced neoliberalism, though somewhat differently. Neoliberalism emerged in Canada as a response to Keynesianism and a series of economic crises - the same as the United States. However, according to Daniel Keating, Arjumand Siddiqi and Quynh Nguyen, neoliberalisation in Canada was a pragmatic response to budget deficits, even though social policy, citizenship rights, and egalitarian and universal ideals

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222 Leslie Rossman and Joshua Hana argue that the Trump Administration actually maintains the neoliberal status quo. See Leslie Rossman and Joshua Hana, "Trump's Promise to Make America Manufacture Again: USMCA and the Rhetoric of Neoliberal Exception," *National Communication Association* (19 February 2019; available at: https://www.natcom.org/communication-currents/trump%E2%80%99s-promise-make-america-manufacture-again-usmca-and-rhetoric-neoliberal).
223 Wilson and Grant argue that movements challenging neoliberal social transformation such as the Occupy Wall Street movement have been unable to provide a coherent alternative. See Graham Wilson and Wyn Grant (2012) "Conclusion," in *The Consequences of the Global Financial Crisis: The Rhetoric of Reform and Regulation*, eds. Wyn Grant and Graham Wilson (Oxford: Oxford University Press, 2012), 249.
224 Weaver, *Blazing the Neoliberal*, 281.
225 Weaver, *Blazing the Neoliberal*.
226 Wilson and Grant, *Global Financial Crisis*, 259.

remained relatively strong.[227] Canada transitioned from Keynesianism to neoliberalism following the perceived failure of Keynesianism, though Pierre Trudeau's Government signalled only a begrudging acceptance of the global 'reality' of neoliberalism. Initially, the shift to neoliberalism in Canada had a pragmatic basis. Jonathan Swarts quotes an unidentified Canadian Finance Minister that described the ascension of neoliberalism into mainstream Canadian political discourse as a 'gradual realization' that 'something had to be done about the deficit and the debt – politicians, journalists, everybody was talking about it'.[228] Father of current Canadian Prime Minister Justin, Pierre Trudeau's Government reluctantly engaged neoliberalism as a 'reality' that had to be accepted. However, this acceptance was tempered by a form of Canadian exceptionalism as Trudeau's Government protected Canada's differentiation from the United States. From Prime Minister Trudeau's perspective, the very existence of the United States was a reason to temper neoliberalism. Trudeau held an internationalist (rather than a United States-centric) point of view and was keen to limit Canada's dependence on the United States. This meant Canada embraced neoliberalism relatively late and with some trepidation.

Initially, the Trudeau government pursued a Keynesian set of economic policies through to 1982 when the Canadian economy contracted 5.5% on a per capita basis.[229] At that point, the government abandoned market regulation and reversed attempts to restrain inflation, though it did introduce a Keynesian stimulus to reduce unemployment.[230] Ultimately, Canada saw a neoliberal embrace as unavoidable. Trudeau's Keynesian market controls were later abandoned when Progressive Conservative party leader Brian Mulroney was elected in 1984 and Canada was opened to external economic penetration.[231] They could resist no more.

Like in the United States, conservatism in Canada has been strongly associated with free-market neoliberalism, though it is tempered as conservative politicians would 'roll out' the neoliberal project only 'incrementally' to ensure they did not jeopardise their chances of

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227 Daniel Keating et al, "National Differences in population Health and Development," in *Social resilience in the neoliberal Era (*Cambridge: Cambridge University Press, 2013): 254.
228 Jonathan Swarts, *Constructing Neoliberalism: Economic Transformation in Anglo-American Democracies* (Toronto: University of Toronto Press, 2013), 203 – 204.
229 Swarts, *Constructing Neoliberalism*, 72.
230 Swarts, *Constructing Neoliberalism*, 73.
231 Swarts, *Constructing Neoliberalism*, 72.

re-election. Strategic pragmatism was mixed with ideological commitment to neoliberal ideals.[232] It continues today.

Canada has transformed. A neoliberal policy of resource commodification within Canada has transformed the public space and changed the nation's social and economic system.[233] As a settler society, Canada has increasingly exposed the public space to development and committed to the commodification of resources on Indigenous land in much the same way as the United States did under the auspice of its Native American treaties. Like the United States, Australia and New Zealand, the Canadian example exemplifies how settler-colonial states exercise a very specific form of neoliberalisation that displaces and dispossesses Indigenous people.

2.3.2.3 Australia

Like in Canada, neoliberalism in Australia followed crisis. This crisis came relatively late to Australia but it came. Australia had embraced a Keynesian economic model since before WWII.[234] As John King has outlined, white settlement was the direct result of state intervention, and that state intervention was already firmly established within Australian society and politics. The labour market was comprehensively regulated.[235] In some ways, Australia was Keynesian before Keynesianism. This Australian Keynesianism was relatively successful. The Whitlam Government came to power in 1972 and pursued renewed Keynesian policies.[236] This saw a significant growth in government spending (26.3 percent in 1972 up to 32.3 percent in 1975). While the economy weathered the oil crises of 1973 (due in no small part to government spending), inflation spiralled out of control, forcing the Labour Whitlam Government to reduce spending before its controversial dismissal in

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232 James Farney and David Rayside, "Conclusion: The Distinctive Evolution of Canadian Conservatism," in *Conservatism in Canada*, eds. David Rayside and James Farney (Toronto: University of Toronto Press, 2013), 349.

233 Bryan Evans and Charles Smith, *Transforming Provincial Politics: The Political Economy of Canada's Provinces and Territories in the Neoliberal Era* (Toronto: University of Toronto Press, 2015), 391.

234 For example, the Curtin Government followed the United Kingdom's lead by producing the 1945 *Full Employment White Paper*.

235 John E. King, "Notes on the History of Post-Keynesian Economics in Australia," in *Capital Controversy, Post Keynesian Economics and the History of Economic of Economic Thought: Essays in Honour of Geoff Harcourt,* Volume One, eds. Philip Arestis, Gabriel Palma and Malcolm Sawyer (London: Routledge. 1997), 274.

236 Swarts, *Constructing Neoliberalism,* 74.

1975.[237] Whitlam's replacement, the conservative Coalition Government of Malcolm Fraser, actually increased government spending to 36.4 percent of GDP and resisted neoliberal change, fearful of the damage reform may have on Australian society.[238]

The decisive shift away from Keynesianism occurred later in Australia (though it had pegged its dollar to the United States currency already in the 1970s) and neoliberalism did not fully emerge there until the election of the Hawke/Keating Labor Government in 1983. After the newly elected Hawke Government floated the Australian dollar internationally, Australia's political landscape dramatically changed. As Peter Saunders and Chris Deeming outline the Hawke/Keating Labor Government's economic policies marked a watershed break in Australian political orthodoxy.[239] These reforms ended a long-lasting post-federation period of 'certainty', a period that Kelly has termed the 'Australian Settlement'.[240] Similar to Canada, a fellow settler colonial polity, the Australian government has applied a neoliberal logic tailored to local circumstances. For example, while Australia has embraced neoliberalism, it has ensured that a few elements of the 'Australian settlement' were retained.[241] Kelly suggests that the 1980s saw the replacement of the post-federation Keynesian paradigm as policies once fundamental to Australian society were replaced by policies that enacted neoliberal reform.[242] This reform featured three interlinked policies: an open economy, the management of multiculturalism, and Asia-Pacific integration.[243] The turn toward responsibility occurred with a nod to the notion of an open economy as Hawke and Keating envisaged an open economy and increased participation within the economy that would be realised through an individual responsibility ethos. This would later be extended by conservative Coalition governments.

Australia's neoliberal experiment was diffuse and very successful and enjoyed bipartisan support. Yet, like the United States and Canada there was no real alternative to neoliberalism. Peter Fairbrother, Stuart Svensen and Julian Teicher argue that Coalition and

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237 Swarts, *Constructing Neoliberalism,* 75.
238 Swarts, *Constructing Neoliberalism,* 76.
239 Peter Saunders and Chris Deeming, "The Impact of the Crisis on Australian Social Security Policy in Historical Perspective," *Social Policy & Administration* 45 (August 2011).
240 Paul Kelly, "Comment: The Australian Settlement," *Australian Journal of Political Science* 39, no. 1, (March 2004): 24.
241 Chris Jericho, *Floating the dollar*.
242 Kelly, *Comment*, 23.
243 Paul Kelly, *The End of Certainty* (Sydney: Allen & Unwin, 1992).

Labor governments' have pursued neoliberal agendas and that their policy platforms show only subtle differences that reflect the different constituencies of each party. Labor, for example promoted and pursued 'anti-conservative socio-cultural policies' while implementing a 'programme of neo-liberal economic restructuring'.[244] At the same time the Coalition tailored socio-cultural policies viewed more favourably by a conservative political audience as it further implemented neoliberal restructuring.

When the Howard government swept to power in 1996 it 'constructed a new public debate around the welfare system and welfare recipients based on narrow notions of individualism and self-reliance'.[245] The responsibility formation started under Keating matured under Howard. Since then neoliberal logics have permeated most aspects public policy in Australia since. Erik Paul outlines how Howard Government neoliberal policies included privatisation of water, education, telecommunications, transportation, and energy, deregulation, free-trade agreements, and financialization of the economy and welfare reform.[246] An ethic of individual responsibility has been the catalyst for many of these significant welfare reforms. The Howard Government reformed welfare in Australia by reversing redistributive policies, a long-standing feature of neoliberal discourse. The public space was also comprehensively transformed.[247] This recolonization of the public space has been a feature of neoliberalisation in settler countries.

2.3.2.4 New Zealand

The 'settlement' paradigm that dominated the Australian political landscape during the twentieth century was also dominant in New Zealand. However, New Zealand broke new ground before Australia did. As Philippa Mein Smith has noted, New Zealand was first to commence the (neoliberal) reformation of the settlement paradigm that had dominated the political landscape throughout Australasia for ninety years.[248]

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244 Peter Fairbrother et al, "The ascendancy of neo-liberalism in Australia," *Capital & Class* 63 (Autumn 1997): 9.
245 Philip Mendes, "Retrenching or renovating the Australian welfare state: the paradox of the Howard government's neo-liberalism," *International Journal of Social Welfare* 18, no. 1 (January 2009): 109.
246 Paul, *Neoliberal Australia*.
247 Paul, *Neoliberal Australia*, 2.
248 Philippa Mein Smith, *A Concise History of New Zealand*, Second Edition (Melbourne: Cambridge University Press, 2011), 218.

Throughout most of the previous century, New Zealand was a welfare state that embraced a full-throttle Keynesian policy proscription. The conservative government of Robert Muldoon for example was one of 'the most interventionist and regulatory [governments] of any industrialized capitalist democracy'.[249] Swarts likewise notes that New Zealand employed a radical Keynesian approach.[250] Change to neoliberalism *again* followed crisis in the 1970s when New Zealand experienced an economic slowdown, as the economy contracted 0.7 percent from 1973 to 1979. Similar to other parts of the world at that time, inflation rose (17.1 in 1980), the balance of payments deficit ballooned, and unemployment increased. While initially Muldoon argued that strong government intervention was the solution and pursued further regulation to control the economy,[251] the economy only worsened: crisis. By 1984 total debt had risen to 70.6 percent of GDP. While Muldoon employed yet more (Keynesian) intervention policies to try and control the economy, his government's efforts failed and the neoliberal project was thus embraced by the incoming Lange Labour Government. Like in the United States, Canada and Australia, New Zealand espoused a radical 'new' approach – a neoliberal approach that required dramatic reform.[252]

New Finance Minister Roger Douglas affirmed a commitment to neoliberal principles and 'had his neoliberal package ready to go from the start'.[253] Under Douglas, the Lange Labour Government vigorously embraced neoliberal policies through what has been termed 'Rogernomics'. New Zealand fully embraced neoliberalism. Swarts argues that this embrace of neoliberal principles occurred as a consequence of the conservatism of the Muldoon Government. Muldoon's conservatism and pragmatism gave Labour the impetus to pursue a bold reform agenda in the face of economic crisis.[254] Upon floating the dollar in 1984, Douglas reproached the conservative government and the Keynesian principles it pursued

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249 Swarts, *Constructing Neoliberalism*, 76.
250 Swarts, *Constructing Neoliberalism*.
251 Swarts, *Constructing Neoliberalism*, 77.
252 Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez have pointed out how neoliberal reform undermined the social contract of the former welfare state. See Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez, *From new paternalism to new imaginings of possibilities in Australia, Canada and Aotearoa/New Zealand: Indigenous rights and recognition and the state in the neoliberal age*, (Canberra: ANU Press, 2018): 17; For a contemporary Australian perspective on this attack on welfare as the current Australian Government pursues its 'Welfare card' reform see also Bielefeld*, Indigenous Peoples*.
253 Swarts, *Constructing Neoliberalism*, 76.
254 Swarts, *Constructing Neoliberalism*, 77.

when he declared in New Zealand's Parliament: 'For the past 9 years the former Government lived a big lie. It closed the door on reality – the problem for all of us was that reality continued to come in through the window'.[255] Neoliberal free-market deregulation and other market-centred reforms were reality. There was no credible alternative.

Neoliberal 'Rogernomics' fundamentally changed New Zealand society. As Smith points out, Rogernomics restructured New Zealand's social organisation: import and capital controls, strong trade unions, a large public service and redistributive welfare were all discontinued.[256] Smith contends that this restructuring was related to newly transformed global links that saw the economy change 'from industry to services' while 'information technology also helped unravel old accommodations'. Neoliberals actually 'strove to expose the economy to external shocks to make it more adaptable and resilient.'[257] Unlike elsewhere, Smith notes that labour reforms were introduced last. Following financial deregulation and a floating of the exchange rate, the Lange Government dismantled trade controls, targeted inflation by ascribing responsibility for inflation control on the New Zealand Reserve Bank and finally undertook significant tax reform.[258] From 1987, the neoliberal experiment in New Zealand also saw a model of corporatisation applied to government services. Unions resisted corporatisation, fearful that it would lead to privatisation. NZ Post, Postbank and Telecom were legislatively forced to run as businesses.[259] Privatisation was exactly what occurred.[260]

The neoliberal ascendancy continued after the Labour Party lost power. The National Bolger/Shipley Governments continued the neoliberal experiment and extended it. Conservative led labour reform took over where Rogernomics had left off. A deregulated the labour market was then paralleled by a welfare sector that introduced individual responsibility into social welfare programs that featured cuts and a welfare policy that shifted 'responsibility' from the state to the individual. The Bolger/Shipley Government also introduced market-orientated reforms to the health sector, immigration, social welfare and

255 Swarts, *Constructing Neoliberalism*, 205.
256 Smith, *Concise History of New Zealand*, 218.
257 Smith, *Concise History of New Zealand*, 220.
258 Smith, *Concise History of New Zealand*, 221.
259 Smith, *Concise History of New Zealand*, 221 – 222.
260 Smith, *Concise History of New Zealand*, 222.

education.[261] Neoliberal logics have now infiltrated most political parties in New Zealand. As Louise Humpage has outlined the Maori Party of New Zealand began to make significant social policy gains however, political constraints failed to 'hinder the smooth running of neoliberalism.'[262] Like the United States, Canada and Australia neoliberal reforms in New Zealand are assimilationist and represent significant risks for the Indigenous peoples of New Zealand. Like in other places, Indigenous peoples are urged to transform their societal structures. As Maria Bargh has pointed out 'Those Indigenous peoples who champion corporate structures speak of the need to modernize the tribe.'[263] Indigenous peoples in settler colonial societies are expected to acquiesce to neoliberal reform.

As a result of these neoliberal reforms, like in the other Anglophone countries listed above the New Zealand economy has seen inequality grow. In New Zealand, inequality has grown more rapidly than in any other country in the OECD. Real incomes of low-income households fell in the period from 1984 – 1996.[264] Yet apart from minor differences, there is no discernible domestic alternative as neoliberalism has successfully eliminated all its competitors.[265] As Swarts argues, the 1999 election of Labor's Helen Clark in New Zealand only saw a tinkering with neoliberal policies, specifically labour laws. Ultimately, Clark's Government accepted the underlying neoliberal logic of deregulation and left the neoliberal paradigm firmly intact.[266] This is similar to the Blair Government in the United Kingdom, The Clinton and Obama administrations in the United States, the Harper Government in Canada,

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261 Smith, *Concise History of New Zealand*, 223 – 224.
262 Louise Humpage, "Indigenous peoples embedded in neoliberal governance: Has the Māori Party achieved its social policy goals in New Zealand?" in *From new paternalism to new imaginings of possibilities in Australia, Canada and Aotearoa/New Zealand: Indigenous rights and recognition and the state in the neoliberal age,* eds. Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez (Canberra: ANU Press, 2018), 258.
263 Maria Bargh, "Moving on From The Developmental View of Humanity," *Alternatives: Global, Local, Political* 36, no. 10 (2011): 83.
264 Smith, *Concise History of New Zealand*, 225.
265 Neoliberalism represents current orthodoxy though it is not true to say there are no alternatives though it will be argued in this thesis that even these 'alternatives' come with risks. Patrick Sullivan for example argues for a 'humanising bureaucracy' in an attempt to realise Indigenous values. See Patrick Sullivan, "The tyranny of neoliberal public management and the challenge for Aboriginal community organisations," in *From new paternalism to new imaginings of possibilities in Australia, Canada and Aotearoa/New Zealand: Indigenous rights and recognition and the state in the neoliberal age*, edited by Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez (Canberra: ANU Press, 2018), 212; In addition, Bargh has pointed to Maori enterprises as potential alternatives to neoliberal policies. See Maria Bargh, "Māori Political and economic recognition in a diverse economy," in *From new paternalism to new imaginings of possibilities in Australia, Canada and Aotearoa/New Zealand: Indigenous rights and recognition and the state in the neoliberal age*, eds. Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez (Canberra: ANU Press, 2018).
266 Swarts, *Constructing Neoliberalism*, 206.

and the Gillard Government in Australia. All applied ostensibly neoliberal market policies that featured a neoliberal notion of responsibility to enact or further market deregulation, corporatisation and racialized public policies. The neoliberal notion of 'responsibility' in particular has come to shape public policy throughout the neoliberal age as it fundamentally changing the public space.

This analysis of neoliberalisation in Canada, Australia and New Zealand in particular illustrates how neoliberal social transformation in settler societies occurs according to three postulations: *evaluation*, *intervention*, and *negotiation* following crisis. Indigenous public policy in these settler societies throughout the neoliberal era culminates in a specific notion of responsibility. In an Indigenous policy context, policies such as the NT Intervention (intervention), the Noongar Agreement (negotiation) and Closing the Gap (evaluation) are examples of public policy in Australia that feature many of these neoliberal traits, notably the dispossession of Indigenous peoples and their expulsion from their estates. These features are not peculiar to Australia but are common among other settler colonial jurisdictions.[267]

2.4 Conclusion

This chapter outlined the history of neoliberalism through three stages: neoliberal thought; neoliberalism; and neoliberalisation. The neoliberalism and neoliberalisation that we know today commenced through the work of pro free-market thinkers such as Hayek and Friedman. They responded to a perceived socialist threat and developed an ideological machine (neoliberal thought) to resist it. Neoliberal thought then transitioned into 'neoliberalism', challenging the merits of the Keynesian economic model that had become the mainstream global economic orthodoxy following the Second World War. Responding to a number of economic crises that occurred in the 1970s, neoliberalism supplanted Keynesianism in the early 1980s, as Thatcher and Raegan embraced a project of free-market orientated conservative reform. A project of neoliberalisation has continued unabated ever since.

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267 Melanie Sommerville, "Naturalising Finance, Financialising Natives: Indigeneity, Race, and "Responsible" Agricultural Investment in Canada," *Antipode* (April 2018).

For Indigenous people in settler colonial societies neoliberalisation was of great significance. Settler states now had significant (new) tools to renew their attack on Indigenous alterity. The settler state could now attempt to transform the Indigenous estate by highlighting Indigenous incapacity and through the enforcement of universal settler norms and values.

3. Neoliberalism in Australian Indigenous Policy

Neoliberalism now shapes all aspects of Australian government public policy. More specifically, neoliberal concepts of private property and, critically, responsibility, now lay at the heart of Indigenous policy following a shift in policy orientation from what Paul Kelly terms the 'Australian settlement', and the 'neoliberal' era.[268] In an Indigenous policy context, the shift represents the latest iteration of settler efforts to transform the Indigenous estate. The new policy paradigm can therefore be understood in a settler-colonial context as a new colonising drive. Rather than representing a discontinuity, the adoption of neoliberal ideology by Australian governments in recent years is consistent with a logic of elimination.

Developing his ideas about settler colonialism's 'logic of elimination', Wolfe argues that Indigenous policy in its neoliberal iterations is a mode of elimination where the settler state relentlessly attempts to obtain, secure, and maintain territory.[269] Neoliberal-era Indigenous policy thus focuses on Native Title, the NT Intervention and successive iterations, and Closing the Gap. These policies combine methodically to associate policy success with quantitative (economic) outcomes, highlight Indigenous incapacity, and impose Western values to transform and assimilate the Indigenous estate to the 'real economy'.

The association of quantitative outcomes and dominant values is not new in Australian Indigenous policy, a process once known as assimilation has in recent times been rearticulated as 'mainstreaming'. This mainstreaming is not new. As Altman contends, as long ago as 1972 Australian governments adopted 'mainstreaming' Indigenous policies: 'results' must reflect social indicators consistent with the values and norms of the dominant (settler) group.[270] Neoliberal Indigenous policies conflate economic outcomes (development) and values (responsibility) to highlight a lack of Indigenous capability and transform the Indigenous estate. This occurs primarily through an emphasis on the individual and his responsibility. Neoliberal Indigenous policy places a disproportionate

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268 Kelly, "Comment", 24.
269 Patrick Wolfe, "Elimination of the Native," 402.
270 John Altman, "Indigenous policy: Canberra consensus on a neoliberal project of improvement," in *Australian Public Policy: Progressive Ideas in the Neoliberal Ascendency*, eds. Chris Miller and Lionel Orchard (Cambridge: Polity Press, 2014), 116.

emphasis on 'values'; this is what is supposed to make it a powerful agent of social transformation.

Pursuing transformation, neoliberal policies privilege individual over community identity. This assertion has shaped public policy in the neoliberal era and presents unique and significant challenges to Indigenous collectives and their relational social organisation. According to Altman, the individualist ethos in Australian Indigenous policy is beholden to Thatcher's neoliberal dictum that there is no such thing as society but only individual men and women, and families.[271] Like neoliberalism more broadly, Thatcher's directive rules out the possibility of relational social formations. A prioritising of individual over communal societal relations thus lies at the heart of neoliberal Indigenous policy. The state asserts that individual proprietary rights always prevail over the value of communal social relations. Quantitative measurements that underline native title proof of connection requirements and Closing the Gap reinforce this narrative.[272] In the neoliberal era capacity is attributed to the settler and incapacity ascribed to the Indigenous person, especially if she resists settler values and norms. Disadvantage thus becomes the product of Indigenous 'choices' and irresponsibility. Neoliberal Indigenous policy is thus predicated upon one key postulation: that disparity now exists because of Indigenous agency and *not* because of historic injury.

This working of agency (responsibility) has become the catalyst for intervention and subsequent transformation. This transformation takes the guise of intervention when Indigenous peoples express noncompliance, and correction, as the state assumes its 'responsibility' to act. A discourse of responsibility also justifies state access to the Indigenous estate in less overt ways. Unequal contractual agreements such as *Mutual Obligation* furnish the state with new tools and opportunities for further dispossession. Neoliberalism is merely the most recent mode of Indigenous dispossession, where the history of Indigenous policy in Australia is in essence a history of dispossession.

This chapter reviews this history and its historical evolution according to five distinct phases or modes of elimination: dispossession, protection, assimilation, integration, and the most recent phase, neoliberalism. The chapter is organised into six parts. The first part of

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271 Altman, *Indigenous Policy,* 117.
272 'Proof of connection' is one of the criteria needed for a successful native title claim.

the chapter outlines briefly settlement-era Indigenous policies comprising the first four modes of Indigenous elimination specifically, dispossession, protection, assimilation and integration.[273] Part two of the chapter is dedicated to the fifth mode – neoliberalism. This second part interprets a period of transition (the first phase of what Kelly terms the 'neoliberal era'), as Hawke, Keating and then Howard embraced the global emergence of neoliberalism and responded to Indigenous assertions of sovereignty and native title, formal recognition and representation.

Part three outlines neoliberal government responses to the Royal Commission into Aboriginal Deaths in Custody and the Stolen Generations reports by Hawke/Keating and then Howard governments. This saw the state refusing responsibility for past acts associated with dispossession. The fourth part of the chapter explores how the settler state's conflation of market engagement and individual agency is applied through a notion of responsibility that legitimises state efforts to control the Indigenous estate. I will argue that this imposition of individual responsibility reflects a point of maturation for neoliberal Indigenous policy as the state intervened to correct Indigenous 'incapacity', obtained Indigenous 'consent' for intervention, and accessed the Indigenous estate in exchange for the provision of services. This application of responsibility formed the justifying ethos for transformative neoliberal policies that include Closing the Gap, the NT Intervention, and the Mutual Obligation policies. Part five then discusses the threat that these neoliberal policies pose to reconciliation, and posits that this threat is ongoing. Part six outlines the current Indigenous policy of the Turnbull/Morrison Coalition Government to identify policy settings relevant to the proceeding two chapters; the Noongar Agreement and the Victorian treaty process.

3.1 The Settlement Era

The Australian state has employed various strategies for 'solving' the Indigenous 'problem'. Strakosch persuasively argues that the social liberal era of Australian history saw the recognition of Indigenous capacity, albeit within the broader purview of colonial relationships.[274] However, this period of 'inclusion' did not depart from previous paradigms.

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273 ALRC Report, 31.
274 Strakosch, *Settler Colonialism and the 'Post-Welfare' State*, 2 and 104.

Indigenous peoples were still subjected to policies expressing settler colonialism's logic of elimination. While four phases of settlement-era Australian Government Indigenous policy can be identified, it is important to note that all four were interrelated. The problem is ongoing Indigenous occupation of land.

3.1.1 Dispossession

From the beginning of European settlement, settlers espoused a simplistic view of the Indigenous polities they encountered. Henry Reynolds in *Aboriginal Sovereignty* has catalogued how settler Australia assumed Aboriginal people to be 'nomadic', with no permanent homelands or effective possession of the land.[275] Right from the start of European occupation, this attitude made it easier for settlers to justify the appropriation of Indigenous land. Speaking on behalf of the Judicial Committee at the British Privy Council, Lord Watson exemplified this rationale:

> There is a great difference between the case of a colony acquired by conquest or cession in which there is an established system of law, and that of a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British Dominion. The Colony of New South Wales belongs to the latter class.[276]

Lord Watson concluded that Australia did not have 'settled inhabitants, settled law, land tenure or even many people'.[277] His view was that territory had been 'peacefully annexed'. John Harris highlights an inherently hostile settler view and cites a 1838 *Sydney Herald* newspaper report that stated that Indigenous people were 'the most degenerate, despicable and brutal race of beings in existence, and stand as it were in scorn 'to shame creation' - a scoff and a jest upon humanity'. The report went on to note: 'They stand unprecedented in the annals of the most ancient and barbarous histories for the anti-civilising propensities they put forth'.[278] Europeans did not understand Indigenous culture. As Bruce Buchan notes, early colonial administrators associated the egalitarian nature of

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275 Henry Reynolds, *Aboriginal Sovereignty* (St Leonards: Allen & Unwin, 1996), 23.
276 See *Cooper v Stuart (1889)* 14 App Cas 286.
277 Reynolds, *Aboriginal Sovereignty,* 36.
278 John Harris, *200 Years of Aboriginal Encounters with Christianity: A Story of One Blood*. 2nd Edition, (Victoria: Concilia, 2013), 24.

Indigenous society and its perceived lack of government with a lack of society itself.[279] W. E. H. Stanner argues that Europeans failed to see the richness of Aboriginal culture and often cast Aboriginal people as relics of perhaps what was once a strong culture but now incapable of civilisation.[280] Indigenous incapacity already featured in Indigenous policy.

Seen as subhuman, the European settler subsequently excluded Aboriginal people from judicial processes and enacted dispossession; an alternation between neglect and violence was the norm.[281] Early settler views could not be reconciled with Indigenous occupancy; acts of violence were committed against Aboriginal people in massacres and frontier conflict.[282] These conflicts covered the whole of the land.[283] During this period, the settler mode of elimination was a policy of overt violence. As Australia was 'settled' and public appetite for violence on the frontier waned, Indigenous policy evolved to a form more acceptable to the palate of an increasingly sophisticated public consciousness.

3.1.2 Protection

During the nineteenth century and in the early twentieth century, settler violence committed against Aboriginal people sparked a public response that saw the implementation of a policy of protection. The state (various colonial and then state governments) passed protection legislation in Victoria (1867), Western Australia (1886), Queensland (1897), New South Wales (1909), South Australia and the Northern Territory (1910–1911).

This reform was undertaken at a time when the White Australia policy was also being implemented.[284] As Moreton-Robinson notes, the White Australia policy made Anglo-centric whiteness the defining characteristic of citizenship - Indigenous peoples were

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279 Bruce Buchan, "Subjects of benevolence: Concepts of Society and civilisation in early colonial indigenous administration," *Journal of Australian Studies* 29, no. 85 (2009): 43.

280 William Stanner, "Religion, Totemism and Symbolism," in *White Man Got No Dreaming: Essays 1938 – 1973*, ed. W. E. H Stanner (Canberra: ANU Press, 1979), 106 and 108.

281 Stanner, *Religion, Totemism and Symbolism*.

282 Raymond Evans, *A History of Queensland* (Cambridge: Cambridge University Press, 2007), 54.

283 Clive Moore, "Blakgin's Leap: A Window into Aboriginal-European Relations in Pioneer Valley, Queensland in the 1860s," *Aboriginal History* 14, no. 1 – 2 (1990): 61.

284 Myra Willard, *History of the White Australia Policy to 1920* (London: Frank Cass and Company, 1967).

excluded.[285] The defining characteristic of protection policies was an exclusionary intent. Buchan outlines how colonial administrators such as Charles La Trobe called for increasingly robust protection policies and military intervention on reserves, along with total separation of children from their families and homelands. La Trobe feared that European settlers in remote areas were susceptible to the influence of their 'savage' Indigenous neighbours.[286] While the state argued it wanted to 'protect' Aboriginal people, the real intent was to 'protect' Europeans and enforce Indigenous dispossession.

Under the auspice of protection, 'full-blood' Aboriginal people were corralled onto reserves and their rights limited in an attempt to keep Aboriginal and European people separate. This policy, better termed 'exclusion', built upon earlier negative views of Aboriginal peoples and polity. Protection policy saw Aboriginal people denied access to whatever form of social security, their movements were restricted and their employment was regulated. Aboriginal children become subject to forcible removal.[287] Central to this policy was the establishment of reserves and the forcible removal of some Indigenous peoples from their land.

Protection invariably ushered Indigenous peoples toward dependency, as the state attempted to overhaul a system of social organisation that had lasted since time immemorial. While the purport was protectionist, the effect was assimilationist. Rebecca Lawrence and Chris Gibson have argued that moving Indigenous people to reservations aimed to 'civilise' Aboriginal people under colonial rule.[288] They identify how these reservations then established a uniquely Indigenous space, a space that still occupies a 'peculiar position in the Australian geographical imagination'.[289] Ironically, attempts to erase Indigenous space actually created new Indigenous spaces.

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285 Aileen Moreton-Robinson, *Whitening race: Essays in Social and Cultural Criticism* (Canberra: Aboriginal Studies Press, 2004), 79.
286 Buchan, "Subjects of Benevolence," 47 – 48.
287 While the state argued it was protecting children of mixed-parents by removing them from their communities, the state had other motivations. See "Aboriginal Societies: The Experience of Contact," in *Recognition of Aboriginal Customary Laws*, Report 31, *Australian Law Reform Commission* (12 June 1986): 25.
288 Rebecca Lawrence and Chris Gibson, "Obliging Indigenous Citizens? Shared Responsibility Agreements and in Australian Aboriginal Communities," *Cultural Studies* 21, no. 4 – 5 (2007): 664.
289 Lawrence and Gibson, *Obliging Indigenous Citizens*: 664.

These unintended consequences aside, protection policies represented a distinct mode of elimination. The purport and intent of protection addressed overt violence, yet contrived a project of dispossession in response. Protection policy excluded Indigenous people and denied them citizenship rights based on an assumed incapacity. This rationale was the forerunner to later assimilation policies when citizenship would be linked to 'improvement' as the state asserted its sovereignty.

3.1.3 Assimilation

Protection morphed into assimilation sometime in the 1930s. Up until that time the states had responsibility for Aboriginal people under the constitution. From 1936 the states demanded that the Commonwealth take more responsibility for Aboriginal matters.[290] An agreement was reached. Subsequent Indigenous policy was developed to ensure that 'natives of Aboriginal origin but not of the full blood' would be absorbed into mainstream settler society.[291]

Similar to dispossession and to protection policies, assimilation encompassed negative views of Indigenous culture, though some 'experts' held more positive views of Indigenous culture than others. This schism would later lead to the birth of integration-oriented Indigenous policies. Anthropologist Adolphus Elkin's view that Australia could function well with different groups interacting contrasted with the widely held view that nationhood was predicated upon the dissipation of group identities.[292] Historically, assimilation in Indigenous policy has reflected this later view, as Australian governments have consistently applied assimilationist policies. For example, mixed-parent children were forcibly removed after WWII in what amounts to an attempt at cultural genocide. Assimilation continued Aboriginal dispossession and informed a later argument against land rights.[293]

Nationalism underscored assimilation as Indigenous people were 'invited' to become like settlers (yet not quite the same). Aboriginal people were granted access to welfare

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290 ALRC 31: 26.
291 Charles Dunford Rowley, *The Destruction of Aboriginal Society* (Ringwood: Penguin, 1978), 320 – 321.
292 Anthony Moran, "White Australia, Settler Nationalism and Aboriginal Assimilation," *Australian Journal of Politics and History* 51, no. 2 (2005): 193.
293 Moran, *White Australia*, 193.

provisions (1960) and the vote (1962); civil restrictions in the Northern Territory were removed, prohibition was largely repealed, industrial awards were extended to Aboriginal employment, and a referendum changed the constitution to ensure the inclusion of Aboriginal people in the census (1967).[294] Invariably, assimilation policy in Australia was nationalist and required Indigenous people to express their capacity through acquiescence to settler values and social organisation. As a mode of elimination, assimilation required Aboriginal people to see land as the settlers did. Reynolds cites the Native Welfare Conference of Federal and State Ministers 1961 to accentuate this point:

> Aborigines and part-Aborigines are expected to attain the same manner of living as other Australians and to live as members of a single Australian community, enjoying the same rights and privileges, accepting the same customs and influenced by the same beliefs as other Australians.[295]

Echoing Short's assertion, assimilation policy has been described as genocide by Colin Tatz and others.[296] Similarly, Andrew Markus has labelled it ethnocide.[297] Elimination is paramount in both; it is about the removal of all aspects of Indigenous alterity from public consciousness. As Anna Haebich also notes, it 'could be argued that assimilation sought to remove even the passing historical footnote by erasing the Aboriginal past, present and future'.[298]These analyses emphasise how Indigenous peoples were expected to acquiesce to mainstream values while Indigenous alterity was attributed to the past. Whether a policy of genocide or benevolent incorporation of Indigenous culture, assimilation represents a mode of elimination designed to eradicate expressions of Indigenous sovereignty while providing settler access to what remained of the Indigenous estate. In this sense assimilation epitomises what Short refers to as 'social death'.[299]

3.1.4 Integration

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294 ALRC 31: 26.

295 Henry Reynolds, *Aborigines and Settlers: The Australian Experience 1788-1939* (Sydney: Cassell Australia, 1972), 175.

296 Colin Tatz, "Genocide in Australia," *Journal of Genocide Research* 1, no. 3 (November 1999): 315 – 352.

297 Andrew Markus, "Genocide in Australia," *Aboriginal History* 5, (2001): 67.

298 Anna Haebich, *Spinning the Dream: Assimilation in Australia 1950 – 1970* (Perth: Fremantle Press, 2008), 386.

299 Short, *Redefining Genocide*, 36.

A fissure in assimilation policies saw the emergence of the fourth and final phase of settlement-era Indigenous policy: 'integration'. A precursor to neoliberalism and coinciding with the election of the left-leaning Whitlam Government (1972 – 1975), integration saw Aboriginal inequality increasingly addressed with policies designed to facilitate and promote socioeconomic advancement. Sometimes referred to as a period of 'self-determination' the period saw an increase in funding to health, education and employment, along with the creation of a dedicated government Department in 1972. In 1973 the Woodward Commission investigated land rights for Aboriginal people. This led to the creation of the *Aboriginal Land Fund* (ALF) in 1974,[300] and the enactment of the *Aboriginal Land Rights (Northern Territory) Act, 1976*.[301] While presented as a policy of Indigenous self-determination or self-management, integration was still dedicated to opening up the Indigenous estate to settler interests for land development.

The Whitlam administration's focus on development acquired legitimacy by obtaining Indigenous 'consent' through elected Indigenous representatives acting as advisors. Will Sanders describes the period as being marked by a series of government-sponsored experiments in Aboriginal representation.[302] The National Aboriginal Consultative Committee (NCC) provided advice to the Whitlam Government until it was disbanded by the Fraser Government in 1977 and replaced by the National Aboriginal Conference (NAC).[303] From 1980, the Fraser Government established another Indigenous representative body, the Aboriginal Development Commission (ADC). It consisted of ten part-time Indigenous Commissioners who managed Indigenous affairs programs dedicated to development of the Indigenous estate. In 1990 the program was dismantled and ATSIC was created.[304] The NAC and the NACC were terminated when the state became uneasy about the role and effectiveness of the advisory body.[305] This represents a pattern illustrated in the later

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300 See *Aboriginal Land Fund* (Commonwealth) *Act* 1974.
301 ALRC 31: 27.
302 William Sanders, "Reconciling Public Accountability and Aboriginal Self-Determination/Self-Management: Is ATSIC Succeeding?," *Australian Journal of Public Administration* 53, no. 4, (December 1994): 475.
303 NAC was subsequently terminated by the Hawke Government in 1985.
304 Angela Pratt and Scott Bennett, "The end of ATSIC and the future administration of Indigenous Affairs," *Parliament of Australia*. 9 August, 2004 (available at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/Current_Issues_Briefs_2004_-_2005/05cib04).
305 The Howard Government later used a similar justification to dismantle ATSIC.

termination of ATSIC. Indigenous 'incapacity' has featured in government attempts to restrict and restrain Indigenous representation from that point on.

Angela Pratt and Scott Bennett contend that Whitlam's self-determination policy formed the basis of Commonwealth Government approaches to Indigenous issues until the Howard Government came to power in 1996 and changed course.[306] However, Gary Foley challenges this idea, arguing that while there was great hope among Koori peoples that Whitlam would be one of black Australia's greatest white supporters (after Whitlam had consulted with Aboriginal Australia and visited the Aboriginal tent embassy as opposition leader in 1972), hope changed to disillusionment, as a series of policy blunders and government underfunding dashed Koori aspirations.[307] Indeed, the integration period illustrates how 'consultation' does not equate to action. While Indigenous consultation under Whitlam was genuinely progressive, the state did not yield substantive powers as it continued to manage Indigenous people. Claims of Indigenous inclusion actually benefited the state by contributing to nation-building rhetorics. For example, granting Aboriginal people access to award conditions in the 1960s did not cost the state a single dollar, while it did contribute to the state's nation-building agenda.

Regulating Indigenous labour did not mean the state relinquished power. It seldom did, and where the state did appear to yield power in an Indigenous policy context, it was careful to retain control over Indigenous sovereignty. For example, Nancy Williams highlights how the *Social Welfare Ordinance* (1964) removed previous restrictions on Aboriginal access to liquor, voting, and sexual relations with non-Aboriginals; however other legislation qualifying the removal of these restrictions remained.[308] Colonial power structures have remained unchanged, even in the face of apparent breakthroughs in Indigenous recognition. While Indigenous self-representation was increasingly sought by some Indigenous peoples throughout the period Fraser's preferred term 'self-management' probably better describes Indigenous policy through this era.[309] Self-management has an

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306 Pratt and Bennett, *The End of ATSIC.*
307 Gary Foley, "Whiteness and Blackness in the Koori struggle for self-determination: strategic considerations in the struggle for social justice for Indigenous people," *Just Policy* 19 (2000): 80 – 81.
308 Nancy M. Williams, *Two Laws: managing disputes in a contemporary Aboriginal community* (Canberra: Aboriginal Institute of Aboriginal Studies, 1987): 5.
309 Fraser preferred the term 'self-management'. See William Sanders, *Reconciling Public Accountability*, 487.

administrative connotation while self-determination evokes a degree of sovereign capabilities. The latter did not occur under Whitlam or Fraser. Proposals for Indigenous integration were predicated upon development. Settler-colonial power structures remained unchallenged while the settler state's aspiration of gaining access to the indigenous estate remained unchanged.

3.1.5 Settlement and Land

The four phases or modes of elimination that characterized the settlement-era illustrate a dialectical negotiation that occurred within a settler-colonial state structure.[310] A settler/Indigenous dichotomy posits a form of negotiation where the state seeks sovereignty while the Indigenous collective seeks survival. The object of the negotiation is land – the Indigenous estate. Given the relationship between Indigenous alterity, the colonization of land represents the colonization of the Indigene. The subtext for all Indigenous policy throughout Australian history has therefore been accessing and transforming Indigenous land. Likewise, neoliberal policies have also aimed at the discontinuation of indigenous occupation of land.

Neoliberal-era Indigenous policy has followed the settlement-era but retained the overarching aim of Indigenous elimination. Like the neoliberal takeover followed the shortcomings of Keynesianism, neoliberal approaches to Indigenous elimination were a reaction to the shortcomings of settlement-era Indigenous policy that failed in that task. Noel Pearson has argued that welfare access, coupled with dispossession, contributes significantly to the social ills experienced within Indigenous communities today. Pearson remarks that it was settlement-era policy (i.e., equal wages introduced in the 1960s and afterwards where many Indigenous families were removed from cattle stations where they had been receiving rations) that led to a reliance on welfare in proscribed settlements on the fringes of country towns.[311] While Pearson advocates a policy shift, neoliberal indigenous policy does too.

3.2 Neoliberal Transition

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310 Wolfe, "Elimination of the Native," 390.
311 Pearson, *Aboriginal Disadvantage*, 167.

To understand the nuances of how neoliberalism has shaped Australian Indigenous policy, it is important to restate that neoliberal principles are now dominating all public policy formulations. This influence commenced as Hawke and Keating embraced neoliberalism and developed Indigenous policy in response to Indigenous resistance and policy failures. This was a period of transition though with the election of the Conservative Howard Government in 1996, the neoliberal era had well and truly begun.

3.2.1 Transitioning to Neoliberal Indigenous Policy: From Hawke/Keating to Howard

In an Australian context, neoliberalism now dominates all public policy sectors. To some degree because opposition to neoliberalism was and continues to be, limited. Altman has referred to the neoliberal era in Australia allegorically as the 'Canberra Consensus' (a play on the term 'Washington Consensus').[312] The 'Canberra Consensus' sees neoliberalism as the only ideology admissible in the public sphere, a position the neoliberal ideology machine worked hard to cultivate. As discussed in the previous chapter, this lack of alternatives is a common theme of neoliberal public policy.

Neoliberal notions such as responsibility have subsequently ascended to dominate public policy discussion and formulation. Responsibility first emerged in the economic reforms pursued by the Hawke/Keating administrations where they emphasised individual agency. For example, Ed Carson and Lorraine Kerr have outlined how the Hawke Government's approach to social justice saw welfare payments directed to those most in need; they no longer were universal benefits, an approach that had characterised the earlier Whitlam Government.[313] Known as 'selectivity', the Hawke Government introduced a raft of policies that included the abolition of widow pensions for those without children in their care in 1987, the introduction of Family Allowance means tests in 1988, a Child Support Scheme was created in 1988-89, a Jobs, Education and Training Scheme for sole parents in 1989, and a Higher Education Contribution Scheme in 1989.[314]

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312 Altman, *Indigenous Policy*, 123.
313 Ed Carson and Lorraine Kerr, *Australian Social Policy and the Human Services* (Cambridge: Cambridge University Press, 2013), 60.
314 Carson and Kerr, *Australian Social Policy and the Human Services*, 60 – 61.

This emphasis on individual responsibility was extended by Keating in 1994, as his government commissioned a White Paper on employment and industry that culminated with the 'Working Nation' policy.[315] Critically, the package contained the notion of 'Reciprocal Obligation'.[316] Carson and Kerr refer to the 'Working Nation' package as a collection of labour market policies that offered (some) public employment creation but imposed reciprocal obligation requirements on the long-term unemployed.[317] As Jim Jose and John Burgess have noted, 'Working Nation' fundamentally changed the way welfare was provided within Australia; it was part of a wider, global neoliberal shift.[318] In addition to economic reform, Keating also undertook major social policy reforms. In what came to be known as Keating's 'big picture', the Keating Government pursued an Australian Republic, Indigenous reconciliation, and improved economic and cultural relations with Asia.[319] Keating's big picture represented a major departure from the 'Australian Settlement'.

Individual capacity became the centrepiece of Australian public policy too. However, in an Indigenous policy context and in the context of the dialectics outlined above the Hawke/Keating policies were not discontinuous from settlement policy proscriptions. Stephen Robson outlines how Keating's government rejected the language of the White Australia policy and yet embraced many aspects of governance that suggested cultural uniformity, for example legislating on behalf of Indigenous people.[320] By retaining a patronizing attitude toward Indigenous policy, the Hawke/Keating administrations perpetuated policy dedicated toward the acquisition of the Indigenous estate. While reform in Indigenous policy did occur, primarily through policy shifts towards recognition and native title, reform that granted an increase in Indigenous rights was very limited. The state remained in control, though a series of shocks would be coming.

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315 John Wanna, "Keating's Working Nation plan for jobs was hijacked by bureaucracy: cabinet papers 1994-95". *The Conversation* (available at: http//theconversation.com/keatings-working-nation-plan-for-jobs-was-hijacked-by-bureaucracy-cabinet-papers-1994-95-89013).

316 Alison Mclelland. "Mutual obligation and the welfare responsibilities of government," *Australian Journal of Social Issues* 37, no. 3 (2002): 216.

317 Carson and Kerr, *Australian Social Policy*: 61.

318 Jim Jose and John Burgess, "Working Nation, the Ethos of Competition and the Transformation of Public Policy," *Journal of Economic and Social Policy* 9, no. 2 (2005): 10.

319 Jack Waterford, "The big picture is getting fuzzy," *Eureka Street* 5, no. 1 (1995): 9.

320 Stephen W Robson, "Cultural respect and the Indigenous policies of the Keating and Howard governments," *Journal of Australian Indigenous Issues* 10, no. 3 (September 2007): 16.

In 1982 a group of Meriam men led by Eddie Mabo launched legal action in the High Court of Australia claiming 'native title' to the Murray Islands in a challenge against the State of Queensland and the Commonwealth.[321] In 1987 a public outcry led to the establishment of the Royal Commission into Aboriginal Deaths in Custody (RCADC). The Mabo Native Title case put Indigenous title to the forefront of Australian political discussion, while the RCADC delivered a sense of urgency to facing the Indigenous 'problem'. Forced to act, the government turned to neoliberalism as it framed its response. The age of neoliberal indigenous responsibility had begun.

This Indigenous responsibility emerged as the settler state reconfigured its approach and developed new tools to retain hegemony in response to Indigenous resilience. Thus, the state retained its power by devolving responsibility for reconciling colonial injury to Indigenous people. This shift in responsibility was first introduced in Indigenous policy in 1992, when Keating delivered his famous 'Redfern Address' and announced that all over Australia 'Aboriginal and Torres Strait Islander communities [were] taking charge of their own lives'.[322] While Keating's speech was welcomed by many in the Indigenous community, his invocation of responsibility contained 'capacity building' and assimilationary overtones. Australian government Indigenous policy thereafter associated justice and reconciliation with state-endorsed notions of participation and opportunity.[323] Seen retrospectively, Keating's announcement marked a watershed moment in Australian political history, as his imploration that Indigenous people take responsibility for their own disadvantage later became part of a neoliberal idiom that shaped public Indigenous policy.

This neoliberal responsibility is articulated through symbols and by conjuring reified concepts that assert reciprocity. Labor and Coalition governments have increasingly deployed catchwords such as participation and opportunity to impart a sense of duty upon Indigenous Australians. The state assumes the economic exploitation of the Indigenous estate is the most effective expression of individual and collective Indigenous responsibility. Indigenous people are exhorted to surrender their alterity as economic development

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321 Mabo Case, *Australian Institute of Aboriginal and Torres Strait Islander Studies* (available at: http://aiatsis.gov.au/explore/articles/mabo-case).
322 Paul Keating, 'Redfern Speech', *Australians for Native Title and Reconciliation*. 10 December 1992 (available at: https://antar.org.au/sites/default/files/paul_keating_speech_transcript.pdf).
323 Keating, 'Redfern Speech'.

equates to 'civilisation'. This ethos has enjoyed bipartisan support even though there has been some significant divergence in policy formation. Labor Government Indigenous policy under Hawke, Keating, Rudd and Gillard offered some progress on Indigenous recognition through native title legislation, the establishment of the RCADC, the Creation of ATSIC, the Closing the Gap policy, and the apology to the Stolen Generations. Coalition government policies enacted by Howard and later Abbott and then Turnbull/Morrison, on the contrary, saw amendments to Native Title, the dismantling of ATSIC, the NT Intervention, and 'Practical Reconciliation'. While they are different approaches both parties have demonstrated an attempt to limit Indigenous sovereignty through the imposition of a broader narrative of Indigenous responsibility and 'mainstreaming'.

3.2.2 Questions of Sovereignty

Many hoped that Hawke/Keating government era reforms might lead to policies that would facilitate Indigenous sovereignty. Initially, native title, increased Indigenous political participation and representation through the creation of ATSIC, along with a robust approach to reconciliation following the state's response to the RCADC, appeared promising. However, subsequent disappointment illustrates how Indigenous policies are the product of negotiations between a powerful state actor and a splintered Indigenous community. Neoliberal Australian Indigenous policy systematically disempowers Indigenous people and perpetuates a logic of elimination; even the most promising and well-intentioned Indigenous policies have delivered far less than what was expected. Three of these key policies, native title, formal recognition, and Indigenous representation, warrant closer inspection. They foreshadowed Indigenous autonomy yet in practice perpetuated settler control.

3.2.3 Native Title

Native Title in Australia did not commence with Hawke and Keating. As Hobbs and Williams have outlined, native title commenced within Australia with the 1971 Milirrpum v Nabalco Pty Ltd case, when the Yolngu peoples sought to assert in the Supreme Court (Northern Territory) that they had legal rights to their traditional land.[324] Justice Blackburn rejected the

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324 Hobbs and Williams, *The Noongar Settlement*: 23.

claim but sent a memorandum to the McMahon Government and Whitlam Opposition outlining how Aboriginal land rights were morally 'beyond question'.[325] As Hobbs and Williams elucidate, after nine months McMahon announced that no native title provision would be legislated and declared that Aboriginal people could apply for leases.[326] This prompted the establishment of the tent embassy in Canberra.[327]

Native title gained momentum two decades later as the Hawke/Keating government passed native title legislation in response to Mabo's action undertaken in the High Court. The High Court had established that the common law recognises that Indigenous people have certain rights pertaining to land or waters held by them under their traditional laws and customs.[328] While the decision marked progress for Indigenous peoples, the government's response mediated its impact. The legislative response was complicated by competing lobbying interests, including those of Indigenous groups, the mining industry, state governments, international observers as well as limitations associated with financial constraints.[329] The Keating Government finally passed its Native Title legislation in 1993 only after reaching compromise with state premiers, the Greens and the Democrats, the National Farmers Federation, and Aboriginal leaders.[330] From these negotiations emerged a suite of native title policies that primarily protected the interests of the settler state.[331]

3.2.3.1 Native Title as a Function of Settler Hegemony

Native title as it emerged in Canberra can be viewed as the product of colonial structures of power. These colonial power structures have faced very little opposition. Resistance from Indigenous peoples has been marginalised, and settler hegemony remains largely uncontested.[332] Wolfe argues that native title legislation 'constitutes a state strategy for

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325 Frank Brennan, *No Small Change: The Road to Recognition for Indigenous Australia* (Brisbane: The University of Queensland Press, 2015): 137 – 138.

326 Hobbs and Williams, *The Noongar 'Treaty',* 23 – 24.

327 Hobbs and Williams, *The Noongar 'Treaty'*, 24.

328 WA Government. Aboriginal Policy and Coordination Unit (available at: https://www.dpc.wa.gov.au/LANTU/WHATISNATIVETITLE/Pages/FAQs.aspx).

329 Diana Perche, "Cabinet papers 1992-93: Keating government fights for Indigenous rights on multiple fronts," *The Conversation*, 1 January 2017 (available at: https://theconversation.com/cabinet-papers-1992-93-keating-government-fights-for-indigenous-rights-on-multiple-fronts-70059).

330 Perche, "Cabinet papers 1992-93".

331 See also the *Wik v Queensland* 1996, another landmark native title decision.

332 Antonio Gramsci outlines how political functionaries operate as 'subaltern functions of social hegemony and political government'. Indigenous policy can be seen as the product of the settler/Indigenous relationship

containing Indigenous resistance'.[333] Seen retrospectively, the purpose of native title legislation was to provide a normative framework for the settler state to contain and functionally eliminate Indigenous sovereignty. Unsurprisingly, numerous native title court cases have found in the setter state's interest or, if they did find in favour of the claimant, settler state interests were nonetheless protected through an assemblage of devices like 'extinguishment qualifications' and land agreements.[334]

The Australian legal system and native title specifically is a forum for the expression of settler sovereignty anchored in assertions of Indigenous 'incapacity'. For example, summarising the Federal Court's determination of the Yorta Yorta Native Title case, Buchan refers to Justice Olney's finding that 'the title of the original occupiers had been effaced by the "interruptions" caused by colonization leading to an irreparable loss of Indigenous traditions and customs'.[335] However, that recognition was contradicted in the same text by the observation that the interruption (of colonial violence) voided the claim. Native title legislation requires ongoing traditional connection to land to establish native title, but Indigenous people that pursue native title following illegal dispossession see their claim disallowed by … dispossession. They have no recourse.

Continuous connection to land is a key provision of native title legislation reflecting a neoliberal Indigenous policy that apportions blame to the colonised for colonisation. As Wolfe outlines, to qualify for native title 'Aborigines have to prove "traditional connection" with the claimed land, a requirement that displaces the burden of history from the fact of expropriation to the character of the expropriated'.[336] This displacement of the burden of history from *the fact of expropriation to the character of the expropriated* is established throughout all neoliberal formations of Indigenous policy.

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simultaneously constituting and constituted by an unequal power structure. See Antonio Gramsci, *The Prison Notebooks, Volume I-III*, Trans. Quentin Hoare and Geoffrey Nowell-Smith (New York: International Publishers, 1971): 339.

333 Wolfe, *Settler Colonialism and the Transformation of Anthropology*: 212.

334 In the case of the Noonger decision, the state responded with legislative amendments. See Joshua Robertson "Noongar who won federal court challenge only to have it reversed vow to fight on," *The Guardian*, 22 June 2017 (available at: https://www.theguardian.com/australia-news/2017/jun/22/noongar-who-won-federal-court-challenge-only-to-have-it-reversed-vow-to-fight-on).

335 Bruce Buchan, "The 'Tides of History': The Yorta Yorta, Native Title, and Colonial Attitudes to Indigenous Sovereignty," *Journal of Australian Indigenous Issues* 7, no. 2, (June 2004): 4.

336 Wolfe, *Settler Colonialism and the Transformation of Anthropology*, 202.

In the context of native title, the burden applied to the expropriated is intensified, as Indigenous people are tasked with providing evidence of connection. In Yorta Yorta, Justice Olney ruled that Indigenous oral testimony was inferior to the written evidence of European settlers. This hierarchy of evidence afforded eminence to settler views of Indigenous people and culture that cast Indigenous communities as defective and inauthentic. Buchan notes that the Yorta Yorta case 'represents an illustration of the persistence of colonial assumptions about the nature of the collective life of Australia's Indigenous inhabitants and the authority of the observations made of them by outsiders, specifically European colonists.'[337] By establishing a hierarchy in the value of admissible evidence, Justice Olney's ruling inferred that Indigenous culture was inferior to settler culture. The inferiority of Indigenous occupation followed. The outcome of the Yorta Yorta case illustrates how the Australian legal system shows partiality to settler values and norms. This reflects a colonial structure of domination that perpetuates a negative view of Indigenous capacity, a view formalised in law.[338]

3.2.3.2 Native Title Amendments

Native title legislation illustrates how perceived threats to settler sovereignty are aggressively countered by the settler state. In 1998 the Howard Government introduced a Ten Point Plan ('the Plan') that later become the Native Title Amendment Act of 1998 (NTAA). The Plan formalised Howard's response to the High Court *Wik Peoples v Queensland 1996* decision. *Wik* was perceived as a threat because it determined that pastoral leases did not confer exclusive possession and did not extinguish native title.

The Howard Government's response to *Wik* emphasised the 'inconsistencies' and 'inadequacies' of the Native Title Act, 1993. However, the intent of the government's response was to limit native title and ensure private interests. Mining and pastoral leases could co-exist.[339] As Barry Attwood and Andrew Markus have argued, the Plan (and subsequent legislative amendment) saw the Howard Government essentially ignore the *Wik*

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337 Buchan, "The Tides of History," 4.
338 Buchan, "The Tides of History," 4.
339 Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Canberra: Aboriginal Studies Press, 2009): 6 – 7.

decision.[340] As Lisa Strelein also notes, the amendments contained in the NTAA introduced an ILUA scheme designed to provide 'certainty' for settler interests. This drew international attention to Australia's two-tiered citizenship and its preferential treatment of non-Indigenous interests.[341] The NTAA applies a rationale of 'sameness' to privilege non-Indigenous interests, confirming a two-tiered citizenship without the benefits of formal Indigenous recognition.

3.2.4 Treaty

Talk of Indigenous recognition began in earnest among Federal policymakers in 1995, when ATSIC raised the prospect of formal recognition and a treaty in response to a Keating Government request to ATSIC for it to inform the government as it developed its legislative and policy response to *Mabo*.[342] While a treaty did not materialise under Keating, the future prospect of one did. This prospect was subsequently dashed by Howard, who held a no-tolerance stance toward the possibility of a treaty between the Australian state and its first nation's peoples.

3.2.4.1 Howard's Treaty: 'No Deal'

Howard referred to international law and the Vienna Convention definition of treaty: treaties are negotiated between sovereign states. Howard also exploited fears among non-Indigenous Australians that a treaty would lead to the existence of a 'nation' within a nation.[343] For Byrne this position is untenable; indeed a treaty envisages a negotiation process that should have occurred before British settlement.[344] However, this is the point. As neoliberal Indigenous policy consigns colonial injury irretrievably to the past, colonial injury cannot be renegotiated today. This is the response of a state that is conscious of the tenuousness of its own sovereignty. The Howard Government ostensibly argued that Indigenous peoples were a conquered people to the extent that they could no longer be

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340 Barry Attwood and Andrew Markus, *The struggle for Aboriginal rights: a documentary history*. (St Leonards: Allen & Unwin, 1999): 280.
341 Strelein, *Compromised Jurisprudence*, 7.
342 Recognition, Rights and Reform: A report to Government on Native Title Social Justice Measures. *ATSIC* (Canberra: ATSIC, 1995).
343 Byrne, *Reconciliation since 2000*, 107.
344 Byrne, *Reconciliation since 2000*, 107.

recognised as bearers of any form of sovereignty. The sovereignty of the Indigenous nation had been dissolved – there was nothing to finalise via a treaty.

3.2.5 Representation

While Indigenous sovereignty was and is denied, the state's sovereignty is legitimised by Indigenous recognition, a recognition that takes the form of acquiescence – consent. Accordingly, the settler state attempts to acquire the acquiescence of the dominated Indigenous group in order to legitimise its own claim to sovereignty (all hegemonies need subaltern consent).[345] In a neoliberal context, consent reinforces the relationship between values and free-market economics as the dominated internalise each. Neoliberal Indigenous policy solicits Indigenous consent so that it can encroach upon the Indigenous estate and ultimately transform it. The state employs commissioned advisory bodies to convey Indigenous peoples' endorsement of settler occupation.

3.2.5.1 Hawke/Keating and Consent: ATSIC

The Hawke/Keating government sought Indigenous consent by establishing Indigenous advisory bodies in the same manner as previous Whitlam and Fraser governments had. Where Whitlam established the NAC and Fraser created the NACC and ADC, the Keating Government established ATSIC in 1990 as a means for providing Indigenous people the opportunity to participate in the governance of Aboriginal policy.[346] However, ATSIC only had a semblance of autonomy, as representation was limited and controlled. ATSIC was accountable to the Minister for Indigenous Affairs and was therefore beholden to the principles and norms of the settler state. ATSIC was an Indigenous organisation but a subjected one. Like other dismantled Indigenous bodies before it, ATSIC's demise was predicated upon a discourse of Indigenous incapacity. However, Indigenous representation was increasingly perceived as a threat to settler values and norms. This may have been the real reason for its demise

3.2.5.2 Howard's dismantling of ATSIC

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345 Gramsci, *Prison Notebooks*.
346 Jane Robbins, Policy, Populism and Public Opinion: Indigenous issues in the Howard decade." *Journal of Australian Indigenous Issues* 9, no. 2 – 3, (June – September 2006): 86.

The Howard Government dismantled ATSIC in 2005 following allegations of misappropriation.[347] This was not long after ATSIC started to champion formalised recognition. This dismantling of Australia's primary Indigenous representative body bought an International rebuke. In 2006, the Howard Government had to report to the United Nations Committee for the Elimination of Racial Discrimination (CERD Committee) that an 'independent review of ATSIC, completed in November 2003, found that ATSIC had lost touch with the concerns of Indigenous people and no longer had the confidence of the Indigenous community'.[348] While the United Nations agency does not have the power to intervene, it held the Howard Government accountable to a degree. The Howard Government's rationale for this executive decision is telling: the Government suggested it could know and understand Indigenous opinion, while disestablishing an organisation that had been commissioned in the first place to provide that very service. It is a curious paradox that ATSIC's suppression exacerbated Indigenous exclusion from the political process while the organisation was created to ensure Indigenous representatives could participate in the processes of government in the first place.[349]

With its closure of ATSIC the Howard Government utilised the neoliberal tactic of sustaining a deliberately manufactured moral panic to achieve a desired outcome. It would do so repeatedly. Jane Robbins argues the closure of ATSIC represented a symbolic act by a Howard Government that exaggerated 'the threat of social disunity in order to remove an institution that it did not support on ideological grounds'.[350] Howard had long opposed Indigenous representation and argued that the creation of ATSIC threatened the unity of the Australian people.[351] The disestablishment of ATSIC was an ideological act that relied on allegations of financial incompetence/corruption. Specifically, the state inferred that Indigenous people were not up to the task of self-managing their affairs. Again, an argument of Indigenous incapacity was used to justify a policy shift. These references to Indigenous

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347 Tim Rowse, *Obliged to be Difficult* (New York: University of Cambridge, 2000), 221 – 222.
348 "Comments by the Government of Australia on the concluding observations of the Committee on the Elimination of Racial Discrimination," *United Nations Committee on the Elimination of Racial Discrimination*, 2006, CERD/C/AUS/CO/14/Add.1, paragraph 7.
349 Robbins, *Populism and Public Opinion*, 86.
350 Jane Robbins, "The 'failure' of ATSIC and the recognition of Indigenous rights.' *Journal of Australian Indigenous Issues* 7, no. 4 (December 2004): 15.
351 The Hon. John Howard, Ministerial Statement: Administration of Aboriginal Affairs, House of Representatives*, Debates* (11 April 1989): 1328.

incapacity fed into a discourse that enabled Indigenous policies premised on individual 'responsibility' to correct Indigenous incapacity as the neoliberal age arrived.

3.3 Settler Responsibility: Response to Resistance

Throughout the neoliberal age, Australian governments have exploited the ideological construct of Indigenous 'incapacity' as the catalyst for the reformation of the Indigenous estate. The state presents the outsourcing of administrative responsibility to Indigenous individuals and organisations as an expression of Indigenous autonomy while asserting its responsibility to push through corrective measures that address Indigenous incapacity. It is a vicious cycle.

3.3.1 The Royal Commission into Aboriginal Deaths in Custody

In 1987 the Hawke Government established the RCADC to address the disproportionate number of Aboriginal people who were dying while in police custody. The RCADC concluding report adopted a capacity narrative that conflated disadvantage and individual agency. It concluded that

> the life styles of the Aboriginal people who died in custody, along with the procedures adopted by custodians and others, are the central determinants of their deaths (rather than foul play on the part of custodial officials).[352]

In its response, the government agreed that Indigenous 'life styles' contributed most to deaths in custody, and subsequently focussed its efforts on correcting Indigenous social behaviour. However, the Minister for Aboriginal and Torres Strait Islander affairs Robert Tickner explained that incarceration was a product of social, cultural and economic exclusion that required a much more committed policy response than previously provided.[353] Tickner proposed the appointment of an Aboriginal and Torres Strait Islander Commissioner to the Human Rights and Equal Opportunity Commission. The Commissioner would report to the government annually on social justice and human rights issues affecting

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352 National Report Volume 1, Australasian Legal Information Institute. Indigenous Law resources, Reconciliation and Social Justice Library (available at:
http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/54.html).
353 Perche, *Cabinet papers 1992-93*.

Indigenous people. Tickner also committed the government to better coordination of services arguing that better coordination of government activities would enable the implementation of an economic development model that would correct Indigenous behaviour. Tickner proposed to expand Community Development Employment Projects (CDEP) to provide improved services and opportunities.[354] By engaging with the Indigenous 'problem' as an administrative task and promoting economic development as a means for social transformation the Keating Government firmly established neoliberal Indigenous policy in Australia.

Keating's neoliberal Indigenous policy was transformative. But it was nevertheless limited to economic transformation, and ranked relatively low in the government's priorities. Citing cabinet papers from 1992-93. Diana Perche notes that while funding of $ 540 million dollars was proposed for policies enacted post-RCDAC, funding was then reduced to $ 150 million dollars due to Treasury and Finance demands. Perche also remarks that the Keating Government's response to the RCADC Report is still criticised today for its short sightedness, as Indigenous incarceration rates have notably increased.[355]

3.3.2 The Apology to the Stolen Generations

Following the RCADC, HREOC's *Bringing them Home Report of the National Enquiry into the Separation of the Aboriginal and Torres Strait Islander Children from their Families* (the Stolen Generations Report) was first tabled in the Federal Parliament in 1997. It was hoped at the time that the report would contribute to the achievement of meaningful reconciliation before the centenary of federation in 2001.[356]

These hopes were dashed however, as the Howard Government refused to apologise to the Stolen Generations, a move seen by John Host and Jill Milroy as one indicator that the Howard Government was reluctant to consider meaningful reconciliation.[357] Howard's refusal is yet another example of a settler state's attempt to displace the burden of history

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354 Perche, *Cabinet papers 1992-93*.
355 Perche, *Cabinet papers 1992-93*.
356 Janet Wilson, "(Not) Saying Sorry: Australian Responses to the Howard Government's Refusal to Apologise to the Stolen Generations," in *The Cross-Cultural Legacy: Critical and Creative Writings in Memory of Hena Maes-Jelinek*, eds. Geoffrey V. Davis, Marc Delrez, Benedicte Ledent and Gordon Collier (Leiden: Brill, 2016).
357 John Host and Jill Milroy, "The Stolen Generations: John Herron and the Politics of Denial," *Studies in Western Australian History* 22, (2001): 167.

from the fact of expropriation. Howard applied a neoliberal notion of responsibility to argue that Australians 'today were not responsible for the actions (and guilt) of the past'.[358] He consigned colonial injury to the past and reinforced the neoliberal responsibility-driven argument: it is the Indigenous person that must take responsibility for their recovery from the experience of colonialism.

Even where acknowledgment of injury has occurred, it is conditional. For example, in 2008 the Rudd Government reversed the Howard Government policy and issued an apology (the Apology) to members of the 'Stolen Generations'.[359] While well received, and undoubtedly well-meaning, the Apology placed colonial injury into an historical context and posited that healing could be achieved without meaningful reparation. Importantly, Rudd's apology did not come with any compensation.[360] Behrendt argues that while Rudd was extolling his use of a research-based policy approach, he retained some of the Howard Government's ideology.[361] Rudd argued that the Apology was intended as a statement toward further reconciliation, however, two fundamental elements of reconciliation, reparation and justice remained elusive. Andrew Gunstone suggests that Rudd's failure to establish a compensation scheme following his apology meant that Indigenous peoples continued to suffer – victims were again denied justice.[362] Dirk Moses rejects critiques of the efficacy of the Apology on compensatory (and sovereignty) grounds claiming they take a 'non-falsifiable' position that '*presumes* the persistence of colonial domination' while dismissing legal and policy changes and assert that colonialism cannot tolerate Indigenous alterity.[363] However, in response Short contends that Indigenous sovereignty is not recognised or respected within Australia and that legal and policy changes such as Native Title are *inherently* colonial. Short illustrates this point by highlighting how Rudd offered the

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358 Isabelle Auguste, "On the significance of saying "sorry" – politics of memory and Aboriginal Reconciliation in Australia," *Coolabah* 3 (2009).
359 Kevin Rudd, "Kevin Rudd's sorry speech, Text of Prime Minister Kevin Rudd's speech to Parliament," *The Sydney Morning Herald*, 13 February 2008 (available at:
http://www.smh.com.au/articles/2008/02/13/1202760379056.html).
360 Behrendt, *What comes after 'sorry'?* 31.
361 Behrendt, *What comes after 'sorry'?* 31.
362 Andrew Gunstone, "The politics of saying sorry," *Journal of Australian Indigenous Issues* 11, no. 2, (June 2008): 3 – 10.
363 A. Dirk Moses, "Official apologies, reconciliation, and settler colonialism: Australian Indigenous alterity and political agency." *Citizenship Studies* 15, no 2 (2011): 146.

Apology while simultaneously endorsing the NT Intervention.[364] Short outlines how symbolic acts of official acknowledgement and remembrance such as the Apology are diminished by the contemporary 'colonial and arguably genocidal' political context in which they are made.[365] An apology without acceptance of responsibility (reparation) is certainly cheaper and less 'controversial' while the NT Intervention provides a political context that emphasises Indigenous incapacity. This is a constant feature of neoliberal Indigenous policy.

3.4 Neoliberal Indigenous 'Responsibility': Evaluation, Intervention, Negotiation

Indigenous 'capacity' is invariably settler-driven and defined. In the neoliberal era, 'responsibility' has a different meaning for the state and for Indigenous peoples. A structural power imbalance that exists as a legacy of colonisation means that the settler state expresses responsibility as sovereignty while simultaneously articulating Indigenous responsibility as incapacity. Yet colonial power structures fundamentally limit how Indigenous people express their own responsibility. As the state holds power, Indigenous people are forced to adjust to the imposition of the state's definition of responsibility. Ongoing structural inequality shapes both acquiescence and non-compliance.

The state responds to non-compliance through a policy framework that 1) highlights Indigenous 'incapacity', 2) intervenes to correct, and 3) obtains/demands Indigenous consent for intervention. The three components of this neoliberal framework materialise notably through three neoliberal policies that were implemented with bipartisan support by the Howard and Rudd governments: Closing the Gap, the NT Intervention, and Mutual Obligation. All three policies are current and part of a neoliberal reconciliation paradigm.

3.4.1 Closing the Gap

Neoliberal Indigenous policy promotes responsibility as a means to justify dispossession through settler encroachment upon the Indigenous estate. Instigated after the NT Intervention, Closing the Gap is an important part of the neoliberal policy framework

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364 Damien Short, "When sorry isn't good enough: Official remembrance and reconciliation in Australia." *Memory Studies* 5 (2012): 301.
365 Damien Short, "Burying Genocide: official Remembrance and Reconciliation in Australia," in *Remembering Genocide – Remembering the Modern World*, eds. Nigel Eltringham and Pam Maclean (London: Routledge, 2014): 194.

because it legitimises the state's argument that Indigenous incapacity requires intervention (and the suspension of Indigenous rights) to address Indigenous disadvantage. It showcases Indigenous incapacity.

Introduced by the Rudd Government in 2008, Closing the Gap emerged from a COAG agreement of that same year. The policy followed a commitment by Rudd to develop a new national effort to reduce the 'gap' between Indigenous and non-Indigenous Australians in health, housing, education opportunity and employment.[366] Similar to Howard Government policy on native title and reconciliation, Closing the Gap treated the effects of colonial injury as an historical event best approached as an administrative 'problem'. Indigenous wellbeing was reduced to a series of targets that, if reached, would eliminate (or close) the gap between Indigenous and non-Indigenous Australians.[367] The state argued that free-market engagement would finally solve the Indigenous problem, and the free-market became the ultimate means of dispossession.[368]

Closing the Gap's grafting of market engagement and community wellbeing is quintessentially neoliberal, as it identifies Indigenous peoples as quantifiable entities and then postulates the market as a means of 'mainstreaming' for ending disparity. This transformation of actually existing Indigenous individuals and communities into numeric equations is not new. Altman notes that five-yearly census data has been used to identify Indigenous peoples every five years from 1971, as governments have expressed their commitment toward eliminating disparity.[369] Altman pinpoints the simplistic formula that underscores the thinking of the approach 'both in financial input and statistical outcome terms'; it is 'all just a simple equation, dollars in, statistical gap-closing outcomes out'.[370] Altman argues that statistics and the way they are used in Closing the Gap 'turn people into numbers divorced from their social and cultural contexts, and all too often fail to recognise

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366 "Kevin Rudd's Closing the Gap report speech to parliament." *The Australian*, 26 February 2009 (available at: http://www.theaustralian.com.au/archive/apology/kevin-rudds-closing-the-gap-speech/news-story/5ed69819ecb6a42f4fd28e76dceb02a6?sv=2f253a1ec9e8048ae943b87bf5647eb0).
367 Closing the Gap, Department of Prime Minister and Cabinet. *Australian Government* (available at: https://www.pmc.gov.au/indigenous-affairs/closing-gap).
368 Altman, *What future for remote Indigenous Australia*, 271.
369 Altman, *Indigenous Policy,* 118 – 119.
370 Altman, *What future for remote Indigenous Australia,* 269.

that these numbers are actually people demeaned by talk of gaps and deficiencies'.[371] Such reduction of Indigenous peoples to quantifiable entities represents an effort on behalf of the settler state to reduce Indigenous peoples and welfare to administrative equations. Indigenous Australians are problems, not people.

This tendency is strategic as it permits the settler state to mainstream and attempts the ultimate assimilation of Indigenous people. Altman contends that Closing the Gap assumes that the adoption of Western economic institutions and norms 'will erase socioeconomic and health inequalities as measured by statistical social indicators [which have been] dominant in Indigenous policy thinking for 50 years'.[372] For Altman the Closing the Gap policy forms part of the current and 'new' paradigm in Indigenous policy: 'mainstreaming, integration, normalisation, and Closing the Gap'.[373] These policy proscriptions conspire to define disadvantage and wellbeing in a contemporary empirical context despite the violent effects and impacts of colonisation and its multigenerational legacies. Once again, we see how Closing the Gap displaces the burden of history away from the fact of expropriation.[374] Considering Indigenous disadvantage without an appraisal of the consequences of a violent colonial history links Indigenous social emancipation solely to economic development.

While this corporatisation of the Indigene appears inconsistent with the perceived threat of Indigenous sovereignty, it actually serves to negate sovereignty. The Closing the Gap policy exacerbates a settler/native binary by contrasting an incapable and inferior Indigenous culture with a 'mainstream' culture that is 'egalitarian and meritocratic'.[375] Confirming Hage's argument about nationalism within Australia, Closing the Gap therefore invigorates settler identity and citizenship.[376] Then again, as Lucas Bessire posits while talking about Indigenous peoples globally, Indigenous peoples stripped of valuable commodities such as territory and tradition are seen as a 'cautionary object' that is

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371 Altman, *Indigenous Policy,* 125.
372 See Altman, *Indigenous policy*, 118.
373 Altman, *Indigenous policy*, 118.
374 Wolfe, *Settler Colonialism and the Transformation of Anthropology*, 212.
375 Robyn Moore, "Whitewashing the Gap: The Discursive Practices of Whiteness," *International Journal of Critical Indigenous Studies* 5, no. 2 (2012): 10.
376 Ghassan Hage, *White Nation fantasies of white superiority in a multicultural society* (New York: Routledge, 2000), 53.

'required for evoking the revitalization, expiation, or salvation of more powerful others'.[377] The demise of someone else's culture reminds the dominant culture of its own vitality.

As a neoliberal policy, Closing the Gap's primary function is to formally record Indigenous incapacity. In turn, the formal recognition of Indigenous inferiority legitimizes state intervention. Under the Howard Government, forcible correction became an overt government policy: the NT Intervention. Howard's NT intervention came earlier, but the Closing the Gap rationale had been articulated previously.

3.4.2 The NT Intervention

The NT Intervention represents a watershed in the history of Australian neoliberal Indigenous policy. This characterisation of the NT Intervention as a neoliberal policy is not uncontested. The NT Intervention can indeed be seen as neoliberal: a deliberate attempt to radically reconstitute Indigenous communities. The NT Intervention highlighted and claimed to be correcting Indigenous incapacity, imposed participation requirements, and facilitated the economic development of the Indigenous estate. All these measures can be viewed as neoliberal methods to enact social transformation.

The NT Intervention commenced in 2007, when the Howard Government identified Indigenous incapacity in parts of the NT and reasserted its responsibility for the welfare of Indigenous people following publication of the Northern Territory Government's *Little Children are Sacred* report 2007 (the NT Report).[378] The Howard Government contrasted its responsibility to its citizenry with the failure of Indigenous peoples to take responsibility for their communities, a failure exemplified by allegations of child abuse and neglect. In that same year, the Howard Government passed a suite of legislation to undertake its transformative agenda regarding the Indigenous estate.[379] The Howard Government

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377 Lucas Bessire, (2014) "The Rise of Indigenous Hypermarginality: Native culture as a neopolitics way of life," *Current Anthropology* 55, no. 3 (June 2014): 278.

378 See James Roffee, "Rhetoric, Aboriginal Australians and the northern Territory Intervention: A Socio-legal Investigation into Pre-legislative Argumentation," *Crime Justice Journal* 5, no.1 (2016): 143. Roffee notes that the recommendations of the report and the approach to the intervention did not align.

379 See Northern Territory National Emergency Response Act 2007. *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination) Act* 2007. *Families, Community Services and Indigenous Affairs and Other Legislation Amendment Act* (Northern Territory National Emergency Response and Other Measures) 2007. *Appropriation (Northern Territory National Emergency Response) Act No.1,* 2007-08; *Appropriation (Northern Territory National Emergency Response) Act No.2* 2007-08.

contended that as citizens of a sovereign Australia, Indigenous and non-Indigenous peoples had a responsibility toward each other as 'one' people. Howard articulated this 'responsibility' in a speech to the Sydney institute in 2007, where he emphasised the 'moral crises within Indigenous communities'. Howard warned: 'Tonight, in our rich and beautiful country, there are children living out a Hobbesian nightmare of violence, abuse and neglect. Many are in remote communities in the Northern Territory'.[380] Howard argued that the state had an obligation to address the crisis and to suspend human rights legislation in order to do so. As former head of ATSIC, Pat Turner argues, this emphasis on child sexual abuse was a 'Trojan' horse argument employed to take control of Indigenous lands.[381] The Trojan horse was demonstrably unfounded. In neoliberal fashion, the state had manufactured a moral crisis to enact its transformative project.

The conflation of a moral panic with economic development cast blame for perceived Indigenous dysfunction upon Indigenous culture. As Elizabeth Povinelli has noted, the NT Intervention rearranged Indigenous culture, 'inverting the relationship between culture as an agency of care and a cause of crisis'.[382] A moral crisis argument allowed the successful implementation of a policy that suspended the rights of an entire segment of society. In yet another apparent paradox, the state pressed an argument that human rights were denied to Indigenous people. It was the catalyst for intervention; meanwhile, the state suspended human rights legislation through that very intervention.

This suspension drew international condemnation. The United Nations CERD Committee quizzed the Howard Government over its suspension of human rights, specifically over its proposal to suspend racial discrimination protections within its NT Intervention legislation. CERD Committee representative Ion Diaconu could not justify the suspension of protection against racial discrimination, especially considering Australia's

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380 John Howard, "To Stabilize and Protect," *Address to the Sydney Institute*, Four Seasons Hotel, Sydney, 25 June 2007.

381 Pat Turner, "Government accused of trying to take back Aboriginal land," *Sydney Morning Herald*, 26 June 2007 (available at: http://www.smh.com.au/news/national/government-accused-of-trying-to-take-back-aboriginal-land/2007/06/26/1182623879590.html).

382 Povinelli, *Indigenous politics*, 28.

international obligations.[383] In its response, the Howard Government reiterated that it had a duty to protect Indigenous children.

This claim was predicated upon the findings of the NT Report, which revealed abuse in remote Indigenous communities. But as James Roffee points out Howard and the Minister for Families and Community Services and Indigenous Affairs Mal Brough employed a 'synthetic necessary truth' about child abuse.[384] In their arguments 'the Ministers constructed a reality centring on the use of the metaphor of "emergency". The emotive moral capital associated with vulnerable children amplified the need to render help and assistance'.[385]

The government may have been genuine in its concern for Indigenous children. However, its use of subsequent moral panic and its view of Indigenous capacity shaped by defective evidence did not adequately reflect the truth about Indigenous culture. Ali Lakhani and Kym Macfarlane argue government policy develops from a body of knowledge about Indigenous people that then becomes a justification for intervention.[386] In this context, this body of knowledge was distinctly prejudicial to Indigenous alterity, as the government attempted to identify an antiquated and defective culture before using that identification as a means to fundamentally and irrevocably alter it. Sarah Maddison suggests that Howard Government policy recasts Indigenous culture as the source of social ills.[387] Cowlishaw argues that interventionist policies were constructed with the express aim of 'chang[ing] the everyday practices, internal social organisation and structural position of a whole people'.[388] The state represents Indigenous culture as incapacity while its intervention is aimed to irrevocably transform it (and to access the Indigenous estate).

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383 United Nations Committee on the Elimination of Racial Discrimination, Fifteenth to seventeenth periodic reports of Australia. *Committee on the Elimination of Racial Discrimination*, Seventy-seventh session, (10 August 2010), *U.N. Docs* CERD/C/AUS/15-17; CERD/C/AUS/Q/15-17; HRI/CORE/AUS/2007, paragraph 70.
384 Roffee sees 'synthetic natural truth' as a constructed 'truth' that is not a fact or a priori reality yet is deemed 'necessary' by an agency or actor to justify a political action or legislative response. See Roffee, *Rhetoric and the NT Intervention,* 118.
385 Roffee, *Rhetoric and the NT Intervention,* 137.
386 Ali Lakhani and Kym Macfarlane, "The Stronger Futures Act: Economic Productivity and Correct Behaviour," *Journal of Australian Indigenous Issues* 18, no. 4 (December 2015): 83.
387 Sarah Maddison, *Beyond White Guilty: The real challenge for black-white relations in Australia* (Crows Nest: Allen & Unwin, 2011): 92.
388 Gillian Cowlishaw, "Helping the anthropologists, still," *in Culture Crisis: Anthropology and Politics in Aboriginal Australia*, eds. Jon Altman and Melinda Hinkson (Sydney: University of New South Wales Press, 2010): 52.

Some Indigenous leaders legitimised this transformative agenda by espousing similar neoliberal approaches. Altman contends that Pearson's endorsement of neoliberal concepts played a significant role in neoliberalism's influence upon government policy. He suggests that Pearson's notion of a 'real economy' and his argument that full citizenship rights have had detrimental impacts on Indigenous people has heavily influenced policymakers in Canberra.[389] Altman also notes that Pearson's 'real economy' was carefully undefined. It represented a 'code for the free market', and appealed to policymakers because neoliberalism dominated the public sphere.[390] In response to this critique, Indigenous leader and advocate of free-market engagement Marcia Langton confirms that her approach (and that of Pearson) is consistent with attempts to bring the Indigenous person to the market. Specifically referring to Altman's alternative of a Hybrid Economy, Langton asserts that Hybrid Economy does not apply neatly or evenly to programs aimed at reducing welfare dependency and poverty and therefore does not go far enough.[391]

Indigenous leaders that embrace the neoliberal approach are valuable to the settler state. Pearson is an Indigenous leader and an advocate of a turn toward neoliberal in Indigenous policy (even though in later years his stances changed). Altman argues that Pearson 'opportunistically engaged with neoliberal perspectives' and 'strategically aligned with dominant views in Canberra and so has managed to garner significant support for his vision for Cape York'.[392] Pearson was a crucial supporter of the Howard Government, as it sought Indigenous support for its intervention policy. Raymond Gaita has noted Pearson's prominent role in promoting Howard's policy, noting that Pearson's justification for the NT Intervention (i.e., 'that the girl who will be raped tonight and tomorrow night cannot wait until a better policy for her protection') was repeated by Howard and Brough.[393] Ideologically, the NT Intervention resonated well with Pearson, who was receptive to the idea of paternalistic intervention as a means for tackling pervasive welfare dependency (the

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389 Altman, *In the Name of the Market*, 307.
390 Altman, *In the Name of the Market*, 309 – 310.
391 Marcia Langton, "The shock of the new: A postcolonial dilemma for Australianist anthropology," in *Culture Crisis: Anthropology and Politics in Aboriginal Australia,* eds. Jon Altman and Melinda Hinkson (Sydney: University of New South Wales Press, 2010): 91 – 115, at 106.
392 Altman, *Indigenous Policy,* 124.
393 Raymond Gaita, "The Moral Force of Reconciliation" In *coercive reconciliation: Stabalise, Normalise, Exit Aboriginal Australia*, eds. Jon Altman and Melinda Hinkson (North Carlton: Arena Publications Association, 2007): 298.

'welfare poison' proposition). Pearson's view of welfare reinforced the government's argument that intervention designed addressing a dire social crisis affecting remote Aboriginal communities was urgent.

Gaita goes further, explaining that Pearson's support for the NT Intervention and its moral justification helped hide the contempt that the policy showed toward Indigenous peoples and contributed silencing voices within the broader Indigenous community suggesting that it was racism that had made the policy possible.[394] Coupled with bipartisan political support, the NT Intervention faced very little opposition. Howard's NT Intervention was supported by then Opposition Leader Kevin Rudd, for example (someone, later, may offer an apology). Roffee ascribes this success to the support garnered by Howard and Brough's 'synthetic necessary truth'. This 'truth' helped secure the support of the Australian Labor Party. Labor shared the government's moral panic, rhetoric, and conviction that the NT Intervention was the only plausible policy response.[395] When Labor took power, Rudd and then Gillard administrations repackaged the policy but continued it.[396] After the Apology, the Rudd government continued to invoke Howard's rhetoric of 'emergency' and 'urgency'.[397] In an Indigenous policy context as well, there was no alternative to neoliberal proscriptions.

Indeed, Rudd extended the NT Intervention in 2009. Minister for Indigenous Affairs Jenny Macklin assured the Australian people that the Rudd Government was committed to the NT Intervention, presenting the Prime Minister's appointment of a Coordinator General as evidence of this commitment.[398] The NT Intervention took a bureaucratic-administrative form under Rudd, as a number of legislative measures were also introduced beyond the emergency. The Rudd Government passed minor changes to the NTNERA in 2008 and

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394 Raymond Gaita, "The Moral Force of Reconciliation" In *coercive reconciliation: Stabalise, Normalise, Exit Aboriginal Australia*, eds. Jon Altman and Melinda Hinkson (North Carlton: Arena Publications Association, 2007): 300.
395 Roffee*, Rhetoric and the NT Intervention,* 143.
396 Matthew Franklin and Milanda Rout, "No retreat by Julia Gillard on Northern Territory intervention," *The Australian*, 23 June 2011 (available at: http://www.theaustralian.com.au/national-affairs/no-retreat-by-julia-gillard-on-northern-territory-intervention).
397 Altman, *What future for remote Indigenous Australia,* 268.
398 Patricia Karvelas and Paul Thooey, "Labor is 'destroying' NT Intervention," *The Australian*, 3 March 2009 (available at: http://www.theaustralian.com.au/archive/news/labor-is-destroying-nt-intervention/news-story/f52d61101e14fe0911082564ea4e591d).

introduced the Basics Card, a type of income management in 2009.[399] Later, in 2010, the Rudd Government altered the NFTERA again to include development measures and started to focus on the cycle of passive welfare.[400] In 2011, Gillard told the media in Darwin: 'I believe the intervention is working', though she did suggest some minor changes would occur.[401] Later, the *Stronger Futures in the Northern Territory Act* (Commonwealth) 2012 replaced the NTERA in a legislation package that contained various legislative updates.[402] The Parliamentary Joint Committee on Human Rights evaluated the Stronger Futures legislation in their 11th report and recommended that the legislation retain three key elements: alcohol restriction; land reform; and food security. Other major changes to the 2012 package included: income management expansion through the Basics Card; increased penalties relating to pornography and alcohol consumption; expansion of policy linking school attendance and welfare payments; introduction of licenses for community stores; and Commonwealth power to make regulations pertaining to town camps.[403]

While Rudd's changes weren't insignificant, the intent of the policy remained the same. Stephan Gray notes that Rudd essentially re-framed the NT Intervention through the implementation of the 'Closing the Gap in the Northern Territory National Partnership Agreement' 2009 policy.[404] Rudd's NT Intervention policy was more focussed on reforming the way that Indigenous issues were administered. Critically, like other neoliberal policy methods, the NT Intervention continued to enjoy bipartisan support and protected settler interests where it mattered: it encroached upon the Indigenous estate, and imposed neoliberal values, norms and structures.

3.4.3 Agreement-making

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399 Stephan Gray, "The Northern Territory Intervention: An evaluation," Castan Centre for Human Rights Law, (2015): 4 (available at: https://www.monash.edu/__data/assets/pdf_file/0008/406943/Caitlin-edit-of-NT-Intervention-page-1.pdf).
400 Stephan Gray, "The Northern Territory Intervention", 4 – 5.
401 "Gillard says NT intervention is working," *The Courier Mail*, 10 June 2011 (accessed: http://www.couriermail.com.au/ipad/gillard-says-nt-intervention-working/news-story).
402 *Stronger Futures in the Northern Territory* Act 2012; *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act* 2012; and *the Social Security Legislation Amendment* Act 2012. See also Gray, *The Northern Territory Intervention*, 5.
403 Gray, *The Northern Territory Intervention*, 5.
404 Gray, *The Northern Territory Intervention*.

Intervention is not the only method the settler state currently employs to transform the Indigenous estate. Other methods solicit Indigenous consent for state encroachment and have been critical to the overall implementation of neoliberal Indigenous policy. Consent is sought as the state encourages Indigenous people to address their disadvantage by assuming responsibility and embracing 'opportunities' afforded by economic development and participation. The state claims that it is fulfilling its responsibility by providing funding and administrative or bureaucratic tools that aid in economic development and increased participation. For example, the Howard Government announced in April 2004 (building on a 2000 COAG agreement) that it would employ a 'whole of government' approach to ensure COAG stakeholders worked together to improve coordination and delivery of services to Indigenous communities.[405] 'Responsibility' was defined by COAG as follows:

> responsibility for the condition and wellbeing of Indigenous communities is one shared by the community, its families and individuals and with governments - this is being called Shared Responsibility.[406]

While the policy promoted 'shared' responsibility, it was Indigenous people who gave the most concessions. This shared responsibility links welfare payments to education and job training and incentivised projects that developed Indigenous land. These projects emphasise 'reciprocal obligation' and formalise Indigenous consent for development and participation policies aimed at transforming the Indigenous estate.

This reciprocal obligation means the state commits to addressing Indigenous disadvantage only by recalibrating its bureaucratic intervention. While the state undertakes administrative 'reform', Indigenous people are required to assume responsibility for their own welfare and to participate in the transformation of the Indigenous estate. Responsibility is nominally shared, but Indigenous people carry the burden of transforming their lives (and for relinquishing claims to self-determination) in exchange for services that other citizens receive as a right. This reciprocal obligation employs a definition of responsibility that is akin to economic/bureaucratic accountability. SRA's represent a

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405 Rae Norris, "Evaluating Shared Responsibility Agreements: Whose Responsibility," a paper presented at the *Maintaining Independence in Program Evaluation Fact or Fiction?* Conference. Australasian Evaluation Society, Darwin (2006): 1 – 2.
406 Norris, "Evaluating Shared Responsibility Agreements", 2.

tangible product of neoliberal responsibility they provide tacit evidence of unequal negotiations between a powerful state actor and a less powerful Indigenous individuals or polities.

The unequal distribution of burden under these reciprocal (mutual) obligation policies is the product of a colonising structure that ensures Indigenous people remain disempowered. The disadvantage of Indigenous people in negotiating SRAs and Regional Partnership Agreements (RPAs) was and is significant. Like neoliberalism more generally, reciprocal obligation emphasises Indigenous incapacity and yet fails to recognise the link between disadvantage and colonial structures of power. As Behrendt notes, 'by rejecting the structural and systemic, the policy (mutual obligation) only focuses on problems as they occur. It is reactive and aimed at interventions rather than proactive and aimed at prevention'.[407] Alison Mclelland likewise suggests that 'the current application of mutual obligation puts most of the focus on capacity building on the development of the individual and not sufficiently also on the development of the capacity of institutions and organizations to ensure that they are relevant and effective'.[408] This power imbalance is also illustrated by the heavy burden placed upon the Indigenous party to the negotiations. As Behrendt observes, governments have attached requirements to ILUA's where Indigenous people have been forced to negotiate for essential services that the government should be providing anyway. This has serious human rights implications.[409] The government provides these services to mainstream society, yet demands that Indigenous people negotiate for them. This is evidence of a two-tiered citizenship.

Many Indigenous people are discriminated against because of their remote location where they are disproportionally reliant on welfare and government services.[410] Remote location Indigenous people in particular are therefore more vulnerable to the impact of policies that emphasise individual responsibility.[411] Non-compliance penalties are acutely

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407 Larissa Behrendt, "Nothing mutual about denying Aborigines a vote," *Sydney Morning Herald*, 8 December 2004 (available at: http://www.smh.com.au/news/Opinion/Nothing-mutual-about-denying-Aborigines-a-voice/2004/12/07/1102182295283.html).
408 Alison Mclelland, *Mutual Obligation*, 218 – 219.
409 Larissa Behrendt, "Rights, Responsibilities and Indigenous Disadvantage," *Impact* (Summer 2006): 7.
410 Ruth McCausland and Marc Levy, "Indigenous Policy and Mutual Obligation: Shared or Shifting Responsibility Agreements?," *Australian Journal of Social Issues* 41, no. 3 (March 2006): 277 – 294.
411 McCausland and Levy, "Indigenous Policy and Mutual Obligation", 282.

felt in remote areas. However, residency is a crucial demand of native title provisions; they often cannot leave without penalty. Indigenous people cannot win.

The remote and disperse location of Indigenous populations, along with cultural practices related to clan identity, also have an impact on Indigenous solidarity and group identity. Indigenous resistance has historically been divided. The pressure that settler encroachment causes through inter- and intra-community division means that Indigenous communities have little choice but to acquiesce to state demands. Ruth McCausland and Marc Levy have suggested that there is evidence that demonstrates SRAs favour individuals and communities that acquiesce.[412] Similarly, Behrendt remarks that mutual obligation rewards those who meet certain standards of behaviour and punishes those who do not.[413] The state rewards acquiescence and punishes opposition.

While Indigenous peoples face enormous pressure to consent, the agreement-making process that formalises reciprocal obligations emphasise an unfettered Indigenous consent to the transformation of the Indigenous estate. This consent is coerced; however, the administrative function of agreement-making sanitises colonial conquest as it renders Indigenous culture/alterity a 'problem' that can be remedied through administrative means – a process Indigenous people ostensibly submit to wilfully. Agreement-making has become a critical part of Australian government Indigenous policy as Indigenous people are negotiated into submission, a submission that the settler state promotes as reconciliation. This is a neoliberal project.

3.4.3.1 A Brief History of ILUAs

Supporters claim agreement-making is emancipatory for Indigenous peoples. Cathryn Timms outlines how ILUAs can provide a number of benefits to Indigenous communities, including recognition of native title interests, education, employment, heritage protection of sites of cultural significance, some compensation, business opportunities and royalties.[414] The state promotes ILUAs as an alternative (and voluntary) remedy for settling contested

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412 McCausland and Levy, "Indigenous Policy and Mutual Obligation", 289.
413 Behrendt, *Nothing Mutual*.
414 Cathryn Timms, "Negotiation and Agreement-Making: Providing the Way Forward in Australian Native Title," *University of Notre Dame Australia Law Review* 8 (December 2006): 129.

native title.[415] The state also argues that the creation of ILUAs facilitate a 'voluntary' agreement between a native title group and stakeholders: flexible solutions regarding the use and management of land and waters.[416]

ILUAs featured within the Howard Government's Native Title Amendment Act (1998) as point ten of its 'ten-point' plan that ensured settler interests would not be jeopardized by Indigenous claims proceeding through the judicial system. Consistent with this amendment, Commonwealth and state ministers responsible for native title met to devise protocols for resolving contested native title claims outside of the courtroom. In 2008 the Ministers agreed that 'a flexible and less technical approach to native title' was needed.[417] They also agreed to implement a Joint Working Group on Indigenous Land Settlements to 'develop innovative policy options for progressing broader and regional native title settlements'.[418.] Subsequently, Victoria became the first state to pass settlement legislation with the *Traditional Owner Settlement Act 2010* (Vic). This Act provided settlement for native title claims with a provision that the settlement terminates forever any claim that local Indigenous communities have on the land where 'traditional owners [were told they] must withdraw native title claims and agree not to make a claim in the future'.[419] This Act was the catalyst for the Gunaikurnai Settlement Agreement (2010) and the Dja Dja Wurrung Clans Settlement and Recognition Agreement (2013).[420] Elsewhere, states implemented their own settlement-based legislative alternatives. South Australia undertook regional settlement negotiations, while Queensland investigated an approach similar to the Victorian model.[421]

The settler state promotes these land use agreements as benevolent and equal negotiations aimed at improving the material conditions of Indigenous Australians.

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415 Not all Native Title claims are litigated. As of 3 January 2017 there have been 372 Native Title determinations. Of those 296 were granted by consent, 40 were litigated and 36 granted unopposed. National Native Title Tribunal, *Native Title Register*.
416 Timms, *Negotiation and Agreement-Making*, 132.
417 Eric Ripper, "Native Title Ministers Meeting Communique," *West Australian Government*, 2008 (available at: https://www.mediastatements.wa.gov.au/Pages/Carpenter/2008/07/Native-Title-Ministers'-Meeting.aspx).
418 Ripper, "Native Title Ministers Meeting Communique".
419 "Context for Reform Proposals: Alternative Settlement," *Review of the Native Title Act* (1993), Discussion paper, October 2014 (Sydney: Australian Government Australian Law Reform Commission): 67.
420 "Agreements with Traditional owners," Department of Environment, Land, water and Planning. *Victoria Government* (available at: https://www.depi.vic.gov.au/forestry-and-land-use/managing-land/indigenous-land-management/agreements-with-traditional-owners#GunaikurnaiSettlementAgreement).
421 *Context for Reform Proposals*, 67 – 68.

Promoting the Commonwealth's position, Macklin noted that 'Agreements under the NTA are the major means of engagement between Indigenous people, industry and governments, and enable Indigenous people to plan and make decisions on a range of issues affecting their lives and their environments'.[422] However, ILUA's enable the state to impose a reified definition of responsibility that serves the interests of settler colonialism. Invariably, outcomes involve administrative practices associated with mining and economic activity. It is a promising and cheap avenue for the state to pursue and advance economic development of Indigenous land. Agreement-making as it is used today advances a neoliberal economic imperative that invariably espouses the 'emancipatory' power of economic development and market participation argument.

3.4.3.2 Agreement-making and Settler Colonialism

ILUA's are a contemporary iteration of settler-colonial power structures. ILUAs form part of an agreement-making regime that embeds a long-standing power imbalance and perpetuates settler interests to ensure that a subaltern relationship between settler and Indigenous Australia is perpetuated. The term 'agreement' should imply that both negotiating parties have consented to the terms of a negotiated outcome. As David Wishart argues, 'the ethical status of consent to imagined futures, efficient transactions, law, foundations of political ordering and treaties between peoples, to name just those that spring to mind, are implicated by "agreement"'.[423] And yet, as a product of colonial power relations, the agreement-making process itself can be seen as oppressive – it formalises and perpetuates colonial arrangements.

In considering these three policy orientations I have attempted to outline how neoliberal-era Indigenous policy is predicated upon three interrelated postulations stated in the previous chapter: *evaluation* (Closing the Gap), *intervention* (the NT Intervention), and *negotiation* (ILUA's, SRA's) to develop a form of reconciliation. 'Practical' reconciliation is a neoliberal form of reconciliation.

3.5 Reconstituting Reconciliation

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422 Jenny Macklin, "Can native title deliver more than a modicum of justice?" *Reform* 93 (2009): 14 – 15.
423 David Wishart, "Contract, oppression and agreements with Indigenous peoples," *University of New South Wales Law Journal* 28, no. 3 (2015): 819

Neoliberal influence has turned the reconciliation process into a hegemonic tool for ensuring settler sovereignty. This reconciliation is invested in the transformation of the Indigenous estate. Under Howard, this form of reconciliation became known as 'practical' reconciliation; a form if not a formulation that now directs Australian government Indigenous policy. Practical reconciliation incorporates the neoliberal policy strategies of evaluation (recognition), intervention (the NT Intervention), and negotiation (consent and agreement-making) in order to deny Indigenous sovereignty.

Practical reconciliation emphasises 'sameness' and is hostile to any form of sustained Indigenous alterity. As Dominic O'Sullivan has outlined, practical reconciliation stems from a form of liberalism whereby 'equality as sameness, frowns upon difference, and views Indigenous Australians as competitors in a "them and us" political conflict'.[424] Practical reconciliation envisages a form of assimilation: it seeks to eliminate expressions of Indigenous alterity that threatens state sovereignty.

Indigenous sovereignty is disallowed within practical reconciliation policies as the state treats the Indigenous community as an 'other' and employs reconciliation strategies to eliminate differences. For example, in a comparative analysis of Indigenous gambling, Nicoll identifies how white possessiveness and the refusal of Indigenous sovereignty are supported ideologically by a focus on the Indigenous 'other' as 'the subject of pathological difference requiring the "intervention" of practical reconciliation measures'.[425] Practical reconciliation attempts to eradicate the 'Other' from the public space and is therefore inconsistent with the ethos of true reconciliation: identifying and facilitating a space for the exercise of substantive Indigenous sovereignty and settler contrition. As Gunstone similarly notes, Howard's practical reconciliation negates the intent of true reconciliation, a process that requires acknowledgment of wrongdoing and a commitment to discontinue

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424 O'Sullivan, *John Howard and the Politics of Reconciliation*: 40.
425 Fiona Nicoll, "On Talking about Indigenous Gambling and Economic Development in Australia, the US and Canada: Rights, Whiteness and Sovereignties," *International Journal of Critical Indigenous Studies* 2, no. 1 (2009): 57 – 58.

reprehensible practices in the future.[426] Australian governments have ultimately refused to take responsibility for colonial injury. They did so by mobilising a suite of neoliberal tropes.

Favouring practical reconciliation, Australian governments throughout the neoliberal era (from Keating and beyond) have only recognised Indigenous incapacity: while committing to addressing that incapacity through social transformation. They have not been prepared to acknowledge the colonising structures that maintain incapacity, or address injury associated with Indigenous dispossession. Practical reconciliation has focussed on agency not injury. Primarily, it claims that inequality can be mitigated by addressing poverty while deliberately ignoring unique challenges associated with indigeneity. Megan Davis has argued that 'philantrocapitalism' is at the heart of 'the current reconciliation milieu, and the exceptionalism that is bestowed upon Indigenous success stories'.[427] Reconciliation is run as a business in the neoliberal era it contains winners and losers. Those who acquiesce, the state claims are winners, those who do not 'lose'. As O'Sullivan also contends, Howard's practical reconciliation policy addressed the needs of 'poor' people rather than the rights of indigenous peoples.[428] Behrendt identifies how practical reconciliation institutes a false division between immediate issues associated with capacity, such as family violence, substance abuse, socio-economic disparity, and human rights. Similar to Hage, Behrendt suggests this division was unhelpful as the two were pitted against each other as if they were mutually exclusive concepts.[429] Practical reconciliation promotes sameness and Indigenous incapacity in order to wage a campaign against Indigenous rights. In this way, practical reconciliation is dichotomous.

The appeal to sameness imbued a populist element into reconciliation. Howard courted populist attitudes when he refused to issue an apology.[430] Within this framework, reconciliation is permissible only as a symbolic, meaningless gesture. In a longitudinal survey of attitudes towards reconciliation in East Gippsland in 2005 and 2010, Gunstone found

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426 Andrew Gunstone, "The impact of the Howard Government upon the formal Australian reconciliation process," *Journal of Australian Indigenous Issues* 9, no. 2 – 3 (June – September 2006): 65.
427 Megan Davis, "Australia's Reconciliation process in its International Context: Recognition and the Health and Wellbeing of Australia's Aboriginal & Torres Strait Islander Peoples." *Australian Indigenous Law Review* 18, no.2 (2014/2015): 62.
428 O'Sullivan, *John Howard and the Politics of Reconciliation*, 40.
429 Larissa Behrendt, "Vision and Realism: Moving to a Reconciled Australia," *Journal of Australian Indigenous Issues* 8, no. 3 – 4 (September – December 2005): 12 – 13.
430 O'Sullivan, *John Howard and the Politics of Reconciliation*, 40.

many respondents had a limited understanding of reconciliation and held a negative and racist attitude towards both the reconciliation process and Indigenous peoples generally. Gunstone found that nearly all of the respondents had a 'shallow' understanding of reconciliation viewing it merely as 'symbolic' or as 'practical' reconciliation. Respondents mentioned 'apology', 'unity' and 'socio-economic conditions' on numerous occasions, while 'sovereignty', 'self-determination', 'land rights', 'institutional racism', and 'treaty' were rarely mentioned.[431] Indigenous sovereignty was not a feature of reconciliation for those respondents.

Practical reconciliation is paternalistic and designed mainly to nurture settler nationhood. Yet, as Gunstone identifies, an emphasis on symbolic and practical reconciliation, along with its corresponding nationalist discourses and a restricted notion of justice actually limits the effectiveness of the reconciliation process.[432] Practical reconciliation is not necessarily designed to reconcile, it is designed to maintain a settler position of power. Neoliberal-era practical reconciliation sustains a colonising power structure that permits the state to impose settler interests through transformation of the Indigenous estate.

3.6 Current Indigenous Policy

Neoliberal era policy of Indigenous transformation continues. Commonwealth Coalition governments of Abbott/Turnbull/Morrison have extended earlier policies through the continuation of the Closing the Gap policy and NT Intervention specifically in alcohol bans in the Northern Territory and income management trials. Policies that solicit Indigenous consent for the expropriation of Indigenous lands through partnership agreements continue in a range of development and participation programs. Whereas the Abbott/Turnbull/Morrison governments have focussed on participation, a continuous neoliberal policy agenda can be traced back to the Howard, Keating and Hawke periods.

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431 Andrew Gunstone, "Reconciliation in East Gippsland," *Journal of Australian Indigenous Issues* 10, no 1 (March 2007): 15.

432 Andrew Gunstone, "Unfinished Business: the Australian reconciliation process from 1991 to 2000," *Journal of Australian Indigenous Issues* 8, no 3 – 4, (September – December 2005): 26 – 27.

Indigenous policy reform over the last five years has been mostly administrative with the exception of former prime minister Tony Abbott's symbolic gesture of spending a week each year while in office 'consulting' with Indigenous people in the bush.[433] The 'administratisation' of the Indigenous 'problem' continues in recent and current government policy. For example, in 2015, the Abbott Government consolidated 150 Indigenous programs into five broad-based initiatives through its Indigenous Advancement Strategy (IAS). The strategy was dedicated to an increase in Indigenous participation and the development of Indigenous land through programs that focussed on: 'Jobs, Land and Economy; Children and Schooling, Safety and Wellbeing; Culture and Capability; Remote Australia Strategies'. The 4.9 billion dollar (over four years) policy was designed to achieve value for money through tangible outcomes where 'the Australian Government [worked] to improve the way that the Government does business with Aboriginal and Torres Strait Islander peoples to ensure funding actually achieves outcomes'.[434] Like some of its predecessors including Howard and Gillard governments, the Abbott Government Indigenous policy was predicated upon the postulation that the development of the Indigenous estate would correct Indigenous incapacity and that government responsibility would be met through reform that would be limited to administrative tinkering and measured by quantifiable outcomes.

The Turnbull/Morrison governments' Indigenous policy contains no majorly discernible differences, apart from very minor changes. For example, in 2017 the Turnbull government announced an overhaul of Indigenous business support programs. The Indigenous Entrepreneurs Package dedicated 90 million dollars to an Indigenous Entrepreneurs Fund. It refocussed Indigenous Business Australia's development and assistance programs and committed the government to developing the Indigenous business sector. The package was developed with the expressed intent of improving 'the lives of Indigenous Australians and ensuring they are supported to fully participate in work and the

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433 Michael McKenna, "Tony Abbott goes bush to visit home of land rights," *The Australian*, 24 August 2015 (available at: https://www.theaustralian.com.au/nation/tony-abbott-goes-bush-to-visit-home-of-land-rights/news-story).
434 "Indigenous Advancement Strategy," Department of Prime Minister and Cabinet, *Australian Government* (available at: https://www.pmc.gov.au/indigenous-affairs/indigenous-advancement-strategy).

Australian economy'.[435] Indigenous responsibility remained wedded to the development of the Indigenous estate while the government fiddled. The neoliberal mantra identified by Altman, where funds go in, and 'tangible results' come out, defines Indigenous policy throughout the neoliberal era and remains in vogue. Participation and development remain the foundations of neoliberal Indigenous policy.

3.7 Conclusion

While neoliberalism's influence on Australian government Indigenous policy nominally commenced through a transition period as the Hawke/Keating governments ushered in the neoliberal era, as they floated the dollar, deregulated labour laws, embraced a multicultural Australia, and sought greater economic and cultural ties with Asia, it had begun earlier. In an Indigenous policy context, neoliberal patterns had emerged already during the Whitlam and Fraser governments, when they sought to develop the Indigenous estate through the establishment of the ALF, and procured Indigenous consent by promising greater Indigenous representation through the NAC, NACC and ADC. Indigenous peoples were encouraged to participate in the economy while Indigenous occupied lands were marked for development. These two aspects of Indigenous policy feature in contemporary Indigenous policy.

The neoliberal influence on Indigenous policy accelerated through the 1980s and 1990s, as Hawke talked up treaty and Keating ushered in Native Title legislation after *Mabo*. The Hawke/Keating governments continued the experiment of limited (controlled) Indigenous representation that had begun when Whitlam commissioned ATSIC. The neoliberal flame burned brighter as Keating developed his 'working nation' policy directive and instigated the reciprocal obligation mantra. This mantra, predicated upon a neoliberal notion of responsibility, is experienced differently by the settler collective and the Indigenous ones. For the former, responsibility is expressed as sovereignty, for the latter, it is imposed as incapacity. This distinction formed the basis of a neoliberal mode of elimination characterised by the initial recognition of disparity, intervention, and the pursuit of assimilation through practical reconciliation that features reciprocal obligation.

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435 "Supercharging Indigenous Business – Comments open on the Draft Business Strategy," Department of Prime Minister and Cabinet, *Australian Government* (available at: https://www.pmc.gov.au/indigenous-affairs/economic-development/supercharging-indigenous-businesses-indigenous-business-sector-strategy).

Reciprocal obligation agreements formalise Indigenous consent for this transformation through the co-optation of sympathetic Indigenous leaders and ILUAs, RPAs, and SRAs. These contractual arrangements compel Indigenous individuals and communities to embrace settler values, norms and structures in exchange for welfare payments and services. These agreements have become a key feature of neoliberal Indigenous policy and have permitted the settler state to obtain ostensible Indigenous acceptance of neoliberal economic imperatives.

The Indigenous policies of the Australian government throughout the neoliberal era have applied a notion of responsibility that is better represented as accountability, whereby an administrative burden has been placed upon 'contracting' Indigenous people. An administrative/governmental focus identifies Indigenous culture as antiquated and flawed, to be consigned to the memory of history. The violence of colonial intervention finds legitimacy in a seemingly benign 'care' for Indigenous welfare, and through an agreement-making process that sanitises colonial injury.

Chapter four illustrates this how neoliberal-era 'reciprocity' is conducted within an agreement-making regime through a case-study analysis of the ground-breaking Noongar Agreement. Hobbs and Williams have called the Noongar Agreement Australia's 'first treaty'.[436] It was negotiated against the backdrop of neoliberal logics as the state used its position of power to seek Indigenous 'permission' to exploit their resources (land) while wholly extinguishing Indigenous demands. The Noongar Agreement explicitly denies the possibility of reparation and includes the neoliberal precepts of responsibility, opportunity, participation and development. Contra the neoliberal mantra and Thatcher, however, Noongar resistance to 'the Noongar Agreement' suggests that there is an alternative.

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436 Hobbs and Williams, *The Noongar 'Treaty'*.

4. The Noongar Native Title Settlement Agreement

The Noongar Agreement is an example of public Indigenous policy that uses a neoliberal notion of responsibility-as-accountability to obtain Indigenous compliance to the transfer of the Indigenous estate to the 'real economy'. The negotiation process provides settler institutions with a means for marginalising Indigenous people and communities who object. Yet, simultaneously, Indigenous resistance to the Noongar Agreement represents a defiant assertion and reclamation of a different type of 'responsibility'. This resistance sustains an Indigenous alterity that threatens the domination and legitimacy of settler occupation.

This chapter will explore the Noongar Agreement as a public policy formation that employs a neoliberal notion of responsibility. The foundation of this analysis is three-fold and focuses on structure, agency and identity. The chapter begins with an overview of the Noongar Agreement, followed by analysis of each constitutive part. The first part describes how the Noongar Agreement developed as a political process following two High Court native title determinations (Mabo and Wik). As a product of native title, the Noongar Agreement fuses colonial structures with a neoliberal notion of responsibility by emphasising accountability and free-market participation. The second part outlines how fraught assessments of Indigenous 'capability' and agency were central components of the settlement negotiation. In addition, the agreement was negotiated by the state and an unrepresentative Noongar representative body in a fundamentally biased agreement-making process that occurred as a process shaped by existing colonial power structures. Negotiations were undertaken within a 'third' space, but this space was entirely dominated by the settler state.

It will be suggested in the chapter that negotiated agreements represent the most recent means for the setter state to pursue a logic of elimination. Resistance to the Noongar Agreement, however, highlights an authentic Noongar 'responsibility' and so responsibility (settler-defined and indigenous-driven) also becomes a battleground. Where this Indigenous assertion of responsibility constitutes an assertion of Indigenous capacity and sovereignty, where some parts of the Noongar community have worked to preserve a fundamental Indigenous alterity and a robust public space against the pressing tide of neoliberal

Indigenous public policy. This responsibility therefore sustains a practical repudiation of the neoliberal view of responsibility that defines the Noongar Agreement.

4.1 Structure of the Noongar Agreement: History, Administrative Accountability and Participation

The Noongar Agreement is a response to a native title claim that progressed (and continues to progress) through the Federal Court of Australia in the early part of this century. The history of the claim provides an outline of the political process that shaped the Agreement and gives context to its effect – a 'negotiated' transfer of land rights from native title jurisdiction to the purview of corporate law instruments as responsibility was imposed upon the Indigenous (Noongar) estate as fiscal accountability. This transfer is symptomatic of a wider policy approach, where the Indigenous estate transitions to the 'real' economy. This transfer is facilitated by the imposition of administrative responsibility onto the Noongar community and its representatives. This administrative responsibility is principally realised through the creation of the Noongar Boodja Trust and six regional corporations that ensure accountability and participation through the Community Development Framework (CDF) and the Economic Participation Framework (EPF). These instruments form the basis of the Noongar Agreement. These are all measures dedicated to the transformation of the Noongar estate. A transformation negotiated through the normative native title framework.

4.1.1 History

The Noongar Agreement was negotiated between the Western Australian Government and the South West Aboriginal Land and Sea Council (SWALSC) representing the Noongar peoples of South West Western Australia. The settlement covers 200,000 square kilometres of the Western Australian South West and affects approximately 30,000 Noongar people.[437] The settlement is the final legal act in a native title contest decided in the Federal Court of Australia that commenced in 2003, when six Noongar claimant groups lodged a single native title claim over the Perth metropolitan area (Yued, Gnaala Karla Boodja, South West Boodja, Wagyl Kapi and Southern Noongar, Ballardong and the Whadjuk people). The claim was

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437 "Settlement Agreement," South West Aboriginal Land and Sea Council (available at: http://www.noongar.org.au/settlement-agreement/).

opposed by the Labor Gallop and, later, the Barnett Coalition Western Australian governments. On 19 September 2006 Justice Murray Willcox affirmed 'proof of connection' over part of the claim area in *Bennell v State of Western Australia* (2006). The decision granted native title to six Noongar claimant groups and represented the first successful native title claim over a metropolitan area in Australian history. Even though the decision did not explore the question of extinguishment, the West Australian Government rejected it and issued a statement to that effect. Deputy Premier, Treasurer and Minister for State Development Eric Ripper stated:

> The state government does not accept today's ruling. We argued at trial that the Nyoongah community has experienced too much disruption for it to have survived as a single society with a normative system of law and custom, and for it to have maintained a continuous connection to the metropolitan area since sovereignty. The evidence clearly supported this argument.[438]

Ripper's argument was not a new one; it reflected sentiments previously expressed in a legal judgment by Justice Olney in the Yorta Yorta case heard in the Federal Court discussed in the previous chapter. In *Yorta Yorta Aboriginal Community v Victoria* (2002) Justice Olney found that European settlement had discontinued Indigenous connection to land.

On 29 September 2006 Ripper announced that the WA Government would appeal *Bennell v State of Western Australia* (2006).[439] On 5 October 2006 Federal Attorney General Phillip Ruddock announced that the Commonwealth would join the appeal.[440] It was also joined by Christopher Bodney and the Western Australian Fishing Industry Council. In *Bodney v Bennell* [2008] Federal Court Justices Finn, Sundberg and Mansfield upheld the appeal of the Western Australian Government, the Commonwealth, and the Western Australian Fishing Industry Council.

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438 Eric Ripper, "Nyoongah Native Title Claim – Federal Court Decision," Hansard, *West Australia Government*, 19 September 2006: 6197.

439 Eric Ripper, "Government will appeal Native Title decision," Media Statements. *West Australian Government*, 29 September 2006 (available at: https://www.mediastatements.wa.gov.au/Pages/Carpenter/2006/09/Government-will-appeal-native-title-decision.aspx).

440 "Govt to appeal Noongar court decision," Australian Associated Press, 5 October 2006 (available at: http://www.theage.com.au/news/National/Govt-to-appeal-Noongar-court-decision/2006/10/05/1159641453022.html).

The Noongar Agreement emerged following the Bodney decision as an ILUA negotiated between the Western Australian State Government and SWALSC, representing the six Noongar claimants. The 1.5 Billion settlement featured:

- Recognition through an Act of Parliament.

- Establishment of the Noongar Boodja Trust (A perpetual trust where the Western Australian Government would make 12 yearly funding instalments of $50 million).

- Establishment of six Noongar regional corporations.

- Establishment of a Noongar Land Estate (featuring the transfer of 320 000 hectares of Crown land into the Noongar Boodja Trust).

- Join Management of the South West Conservation Estate (The establishment of joint management arrangements).

- Land and Water Access (Licensing for access to Crown land for customary purposes).

- Noongar Standard Heritage Agreement alterations (improved process for the preservation of heritage that applies to land development and activities).

- Noongar Heritage Partnership Agreement (A partnership between the Dept. of Aboriginal Affairs and Regional Corporation for identifying, recording, protecting and managing national heritage values and sites).

- A Noongar Housing Program.

- Creation of a Noongar Economic Participation Framework (aimed at improving economic participation outcomes for Noongar peoples).

- Creation of a Community Development Framework (aimed at providing greater government department communication with the Noongar community).

- A Capital Works Program (the establishment of offices for the six regional corporations as well as the development and construction of a cultural centre).

- Funding for a land fund (aimed at achieving objectives related to land management, ownership and heritage protection).[441]

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441 "Settlement Package," Land, Approvals and Native Title Unit, Western Australia Government (available at: https://www.dpc.wa.gov.au/lantu/south-west-native-title-settlement/settlement-package/Pages/default.aspx).

The overall economic focus of the settlement mandates and formalises Noongar recognition of the 'sovereignty' of the 'real' economy and its constitutive elements: land development and participation. These elements are measured and realised in the Noongar Agreement through an imposition of administrative responsibility upon the Noongar community. Accountability becomes a key instrument for ensuring the transformation of the Indigenous estate.

4.1.2 Administrative Accountability

The Noongar Agreement formalises Indigenous responsibility and assigns responsibility for the success or failure of the transformation to the Noongar community through the creation of the Noongar Boodja Trust (the Trust), the establishment of the six regional corporations, and the transfer of Noongar land rights from the jurisdiction of the Federal Court (native title) to a function of 'corporate' law. In the Noongar Agreement native title becomes a corporate matter.

4.1.2.1 Six Regional Corporations and the Noongar Boodja Trust

The Noongar Agreement establishes six Noongar regional corporations to manage six ILUAs as subsidiaries of the Trust. The six regional corporations will be responsible for ensuring that the Noongar community fulfils its obligations under the settlement, primarily facilitating activities focussed on the development of land and ensuring an increase in Noongar participation within the 'real' economy. Each corporation must encourage Noongar participation and will establish a Communication, Consultation and Participation Strategy to ensure the achievement of that goal.[442]

As the 'peak' controlling organisation (in terms of representation this means little as peak organisations often self-proclaim themselves), the primary function of the Trust is land development. The Trust works with the State to determine the status of land 'given' to the Noongar community under the terms of the Settlement. The Trust is managed by an independent professional trustee who will also oversee the creation of the six regional corporations. As a key aspect of the Noongar Agreement, land will be transferred to the

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[442] "South West Native Title Settlement Transition Program: Establishment of the Regional Corporations," South West Aboriginal Land and Sea Council (2016): 12.

Trust as freehold, leasehold, or reserve land.[443] Freehold will be land that the Trust owns (just like any other landowner). This land can 'be developed, used for commercial purposes, used as security against loans, or to be sold'. [444] Leasehold land makes land available for mining or other activities. Reserve land allows Noongar peoples to decide the purpose of the land that is available for 'acceptable' cultural purposes. Meanwhile, the Western Australian Government retains the power to determine what is 'acceptable cultural purposes' under the *Land Administration (South West Native Title Settlement) Act 2016*, in accord with s. 103A of the *Conservation and Land Management Act* 1984 (WA:

> Aboriginal persons may do certain things for Aboriginal customary purposes. These purposes include consuming food, using medicine, engaging in artistic, ceremonial or other cultural activities and any activities incidental to those activities.[445]

The State sanctions 'permissible' Noongar cultural activities! By formally sanctioning permissible activities, the Noongar Agreement entrenches colonising practices. This is an instance of deep colonising, which occurs, as Deborah Bird Rose insightfully notes, when institutions (and/or policies) designed to 'decolonise' actually conceal and naturalise ongoing colonial practices.[446] By allowing the State to determine what constitutes 'appropriate cultural activities', the Noongar Agreement ensures that Noongar peoples are not permitted to express their own radical alterity on their own terms. Indigenous alterity is conscribed within terms that the settler state finds acceptable.

This deep-colonizing process is enacted through the Trust, which becomes a colonising instrument that simultaneously sanitises Indigenous alterity and transforms the physical terrain, applying a proprietary model. The Trust is part of a neoliberal project of radical transformation.

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443 *Summary Guide to the Noongar Native Title Settlement documents* (Cannington: South West Aboriginal Land and Sea Council, 2014): 9.
444 *Summary Guide to the Noongar Native Title Settlement documents*, 9 – 10.
445 "Response to questions arising in the Second Reading Debate of the *Land Administration (South West Native Title Settlement) Bill 2016*," West Australian Government (available at: http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3913987a347d4b422630f0894 8257f7e004dbf90/$file/397.pdf, 10).
446 See Deborah Bird Rose, "Land rights and deep colonising: the erasure of women [online]". *Aboriginal Law Bulletin* 3, no. 85 (October 1996): 6.

4.1.2.2 Land Development and Indigeneity

Land development is a key focus of the Noongar Agreement. Development of Indigenous land shifts an Indigenous relational emphasis on communal living towards a Western concept of private property that fundamentally alters the nature of the Indigenous space. This shift has implications for the nature of Noongar Indigenous alterity. As La Donna Harris and Jacqueline Wasilewski note, Indigeneity is 'rooted in core values based on communal life handed down from our many grandfathers and many grandmothers. Indigenous peoples see everything through the filter of Community'.[447] As a colonisation process, changes to the Indigenous estate bring difference 'back to the (white) norm'.[448] This alters the nature of Noongar social organisation 'conceptually' and 'practically' and facilitates what Short has called 'social death'.[449] The Noongar Agreement brings the Noongar 'in' from the other side of the frontier and closer to the settler norm as it alters the physical landscape. The frontiers are safely contained in the past and intractable diversity is discontinued.

Land occupied by Noongar peoples prior to settlement ceases to be intractably 'Noongar', as the State and members of the Noongar community develop the Indigenous estate according to a settler (neoliberal) proscription. While this transition is offered as a remedy to the consequences of the settler colonial invasion, the mainstreaming effect is profoundly assimilationist and actually furthers the settler project of dispossession and elimination. Indigenous exceptionalism (on Indigenous terms) is ignored and denied, and the Indigenous estate is understood as being no different from other forms of settler-colonial tenure – it is a form of settler-colonial tenure. This is explicit, and the SWALSC *Summary Guide to Noongar Native Title documents* even outlines how the settlement ensures that the Noongar land estate is treated no 'differently from land held by anyone else'.[450] Land occupied by Noongar peoples is 'reclaimed' by the State and then turned over to the Noongar community. By claiming authority to determine the status of land, the settler state exercises its power and sovereignty.

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447 La Donna Harris and Jacqueline Wasilewski, "Indigeneity, an alternative worldview: Four R's (Relationship, Responsibility, Reciprocity, Redistribution) vs. two P's (power and profit). Sharing the journey towards conscious evolution," *Systems of Research and Behavioural Science* 21, no. 5 (September – October 2004): 495.
448 Kowal, *The Politics of the Gap*: 346.
449 Short, *Redefining Genocide*, 36.
450 *Summary Guide to the Noongar Native Title Settlement*, 9.

As the body responsible for determining the status and use of land 'given' to the Noongar community in the Noongar Agreement, the Trust acts as a formal instrument for ensuring the seamless transfer of the Indigenous estate to the 'real' economy. Broadly, the Noongar Agreement represents the materialisation of a colonial power structure constituted in a neoliberal notion of responsibility that places responsibility for the successful transfer of the Indigenous estate into the hands of Noongar people through the Trust and the regional corporations. By 'involving' the Noongar community in the administration of the settlement, the State obtains Noongar acquiescence to the 'emancipatory' potential of the neoliberal economic imperative. This includes a Noongar commitment to increase participation in the 'real' economy formalised through a series of partnerships/agreements.

4.1.3 Participation through Partnerships

The Noongar Agreement contains two partnership strategies that encourage Noongar participation in the 'real economy': the Community Development Framework (CDF) and the Economic Participation framework (EPF). Both frameworks focus on employment and education outcomes for the Noongar community.

As another example of the deep-colonizing process, the CDF conflates economic outcomes with cultural expressions. The sanitisation of those expressions reduces difference to a 'white' norm. While the stated objective of the framework is cultural 'recognition', similar to the Land Administration Act, the CDF only permits expressions of alterity that do not hinder or challenge the development of the Indigenous estate.[451] Expressions of Indigenous alterity authorised within the CDF remain subordinate to economic benchmarks. The CDF synergises with the EPF to ensure Noongar acquiescence to neoliberal values and economic development.

451 This cultural recognition is to be pursued through a series of measures that include: 'improved and sustainable social and economic outcomes for the Noongar community; a strengthening of Noongar culture, language, traditional knowledge, values and identity in a continuation with a greater understanding and celebration of Noongar culture and society throughout Western Australia; increased capacity for government and other service providers to work more effectively, and partner with Noongar people in the design and delivery of human and community services; and improvements in economic independence, leadership and governance, and self-esteem across the Noongar community'. See "Ballardong People Indigenous Land Use Agreement," Annexure T: Community Development Framework, 810 (2015; available at: https://www.dpc.wa.gov.au/lantu/Claims/Documents/Ballardong%20People%20Indigenous%20Land%20Use%20Agreement.pdf).

The EPF gives the Noongar Agreement a free-market emphasis that complements the land development focus of the document as a vehicle for Indigenous social transformation. It sanctions a mutual commitment between the Western Australian State and Noongar community to 'a shared set of development oriented principles and priorities'.[452] One of the stated purposes of the framework is to increase 'Noongar participation and representation in employment and the broader economy'.[453] In addition, the 'State acknowledges the Noongar community's desire to participate more fully in the economy of the South West region of Western Australia'.[454] Like the intent and purpose of the Noongar Agreement generally, the EPF reinforces the notion that Noongar people have freely consented to the transitioning of the Indigenous estate to the 'real' economy. The EPF also reiterates the neoliberal tenets that underpin the Noongar Agreement; according to it, Noongar emancipation is wholly reliant upon notions of private property, land development and broad engagement with the free market, in turn these are gifted by the settler state to an Indigenous community that would otherwise lack the capability to engage.

While participation is the focus, land development is a crucial element of the EPF and the Noongar Agreement more broadly. The terms of reference establishing the Noongar Economic Participation Steering Group state that the key objectives of its activity are the facilitation of 'early engagement with Noongar representatives covering government land use and development activities planned in the South West', while a second key objective aims to 'Identify opportunities for greater Noongar participation in South West development, including specific employment, contracting and investment opportunities, upcoming projects and tenders'.[455] In addition, the EPF will continue the 'Landcorp' program devised under 'Future Act incentives for release of Unallocated Crown Lands in town-sites'.[456] The program provides a payment equivalent to 5 percent of the sale price of land 'to facilitate the release of town-site land for residential, commercial or light industrial

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452 "Ballardong People Indigenous Land Use Agreement".
453 "Noongar Economic Participation Framework," South West Native Title Settlement, Annexure S, Department of Prime Minister and Cabinet, Western Australia Government, 801 (2013; available at: https://www.dpc.wa.gov.au/swnts/Documents/Annexure%20S%20-%20Noongar%20Economic%20Participation%20Framework.pdf).
454 "Noongar Economic Participation Framework".
455 "Noongar Economic Participation Framework".
456 "Noongar Economic Participation Framework".

development'.[457] While the payment is usually applicable to developments associated with the native title future act system, the payments would be made to unallocated Crown land developed by Land Corp as part of the Settlement.[458]

The EPF is a core element of the Noongar Agreement. It further illustrates how the Indigenous estate is to be colonized by the imposition of a settler-defined notion of responsibility (to develop, to participate) - a strategy that the State claims is freely embraced by the Noongar community. The Noongar Agreement thus formalizes Noongar submission; responsibility is framed as accountability.

While the state imposes its definition of responsibility, it absolves itself of responsibility at the same time. This is a core element of neoliberal Indigenous policy. For example, as part of the Noongar Agreement, the Noongar community assumes administrative responsibility for issues related to Aboriginal heritage through the six regional corporations. The Noongar Heritage Partnership Agreement (NHPA) exists 'to ensure that such activities are carried out in a way that minimizes the impact on Aboriginal heritage'.[459] Prior to the Noongar Agreement, Noongar heritage issues were managed under the Western Australia *Aboriginal Heritage Act* (1972), and that Act made management of Noongar heritage issues a State responsibility. On the surface, the NHPA gives Noongar people a greater involvement 'in how Noongar heritage and heritage values are managed'; in practice, however, no decision-making abilities are transferred.[460] It is an administrative burden placed on the Noongar regional corporations that will manage the agreements.

Similarly, under the NHPA, 'leasehold land' will privilege mining interests. The only change that occurs is that, from 8 June 2015, the Department of Mines and Petroleum is bound to apply the heritage condition prescribed by Clause 18 of Schedule 10 (of each ILUA) before mining can proceed. This condition requires mining concession holders to enter into a heritage agreement or a Noongar Standard Heritage Agreement (NSHA) with the relevant

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457 "Noongar Economic Participation Framework".
458 "Noongar Economic Participation Framework".
459 *Summary Guide to the Noongar Native Title Settlement*, 22.
460 *Summary Guide to the Noongar Native Title Settlement*, 25.

ILUA group, but *the Minister retains ultimate responsibility*.[461] Section 28 of the Western Australia *Aboriginal Heritage Act* (1972) already provides for an Aboriginal Cultural Material Committee to provide advice to the Minister on any activity that might breach or infringe upon Aboriginal heritage rights. Ultimately, the provisions of the NHPA (and NSHA) do not give greater powers to the Noongar peoples. The NHPA burdens Noongar organisations and communities with responsibility-as-accountability, expecting them to administer heritage issues with no resources and without any significant increase in the authority to make decisions.

4.2 Representation, Land Use Agreements and the Agreement-making Regime

The Noongar Agreement was negotiated by the Western Australian Government and SWALSC in six ILUAs formalising Noongar acquiescence to a neoliberal notion of responsibility. In a broader Australian Indigenous public policy context, the agreement-making regime that facilitates the neoliberal doctrine of responsibility that underscores contemporary Australian government Indigenous policy provides the state with an instrument to control an Indigenous alterity that threatens its legitimacy. Indigenous occupation of land threatens settler sovereignty and therefore the settler state employs agreement-making to neutralise expressions of Indigenous alterity. The settler state co-opts Indigenous agents to help facilitate the negotiation.

4.2.1 Representation

In the case of the Noongar Agreement, Noongar consent to state its terms was negotiated through representation mechanisms that did not reflect the diversity of Noongar views. This is partly due to systemic state attempts to weaken Indigenous representation. The State partnered with Indigenous leaders prepared to negotiate while it marginalised other stakeholders and more militant voices. The 'representative' groups were never representative.

4.2.1.1 The South Western Aboriginal Land and Sea Council

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461 "South West Native Title Settlement," Department of Mines and Petroleum, Western Australia Government (available at: http://dmp.wa.gov.au/Minerals/South-West-Native-Title-12821.aspx).

As outlined in the previous chapter, Indigenous representation institutions over the last twenty-five years have been seriously undermined by governmental intervention. Where Indigenous representation is available, pre-existing colonial power structures rendered it unrepresentative. The SWALSC provides an example of this problematic.

SWALSC represented the six Noongar claimants throughout the Noongar Agreement negotiations. SWALSC took a pragmatic approach to the native title status of the Noongar community in the region and insisted that the community should accept what was on offer, warning it risked receiving nothing from native title litigation if it did not. Given the power differential between the settler and the indigenous negotiating parties, this position is understandable. The State's advantage was insurmountable and SWALSC's calculated response was conscious of prevailing power relations.

The State maintained a position of dominance and asserted that domination by determining the terms of negotiation. For example, the State informally advised SWALSC that it would rescind its offer to all of the claimant groups if any of the six claimant groups rejected what was on offer. In addition, without legal recognition of entitlement, the Noongar community had nothing tangible to negotiate with, no collateral. In a context of real politic, the State had all the power. Yet, as Peter Read has noted in another context, it is like saying, '[w]e cannot share the land with Aboriginals until they have the land to share with us'.[462] Negotiating from a position of profound inequality, the Noongar Agreement reflects a broader disempowerment experienced by Indigenous groups that fight for recognition and compensation around the world.

Three factors reduced SWALSC's capacity and therefore shaped SWALSC's diminished role in the negotiations as the peak Noongar representative group. The first factor that reduced SWALSC's capacity was the systematic disempowerment of Indigenous representative groups (a policy that dates back, as we have seen, some twenty-five years). As Stuart Bradfield notes, there has been a lack of resources allocated by government to develop representational structures that underpin agreements, and this is 'particularly

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462 Peter Read, *Belonging: Australians, Place and Aboriginal Ownership* (Cambridge: Cambridge University Press, 2000): 223.

objectionable after the unilateral abolition of elected Indigenous representation'.[463] The second factor that diminished SWALSC's capacity was accountability measures that the state imposes on Indigenous representative groups through widgets and bureaucratic datasets that reduce Indigenous representative groups' capacity to focus on advocating for Indigenous rights. The emphasis is on corporate management structures. Seen as corporate entities, Indigenous organisations cease to exist as 'Indigenous'. The Indigenous Corporation lives and breathes as a 'settler' corporation. Finally, the nature of Indigenous representation shapes negotiations. Where representational bodies do exist, pragmatism shapes outcomes as organisations are usually reliant on government funding and lack independence. The proximity of these organisations to government inevitably affects the nature of their advocacy.

SWALSC is a 'corporatized' Indigenous representation group that viewed the Noongar plight through the prism of the dominant culture. SWALSC spokesperson Glen Kelly noted that a 'lot of the native title in the South West has been extinguished and what this deal does is it makes sure that the most number of Noongar people secure customary rights to their country and a whole lot of other positive things as well'.[464] Kelly fatalistically added that 'I and SWALSC could very easily take the more popular path and gee people up for a fight against the State in the Court, however if we won, people would soon realize they have won nothing'.[465] SWALSC advocated surrendering native title claims in perpetuity. It endorsed the neoliberal argument: market engagement would ensure Indigenous emancipation through recognition, self-management, and through engagement with the 'real' economy.

Kelly's assessment also suggests that SWALSC's position was not popular among the Noongar community. The unpopularity of the Settlement option is reflected by poor voter turnout. Only 1,578 people voted out of a potential voting cohort that various estimates

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463 Stuart Bradfield, "The political context in which we find ourselves: Linking the 'practical' and the 'symbolic' in Indigenous affairs," *Journal of Australian Indigenous Issues* 9, no. 1 (March 2006): 40.
464 "Noongar elders slam native title deal 'sham,'" ABC News, 8 February 2012 (available at: http://www.abc.net.au/news/2012-02-08/premier-to-meet-noongar-over-settlement/3817738).
465 Gerry Georgatos, "Noongar Tent Embassy – story up to 3 March 2012," *Sovereign Union – First nations Asserting Sovereignty* (2012; available at: http://www.nationalunitygovernment.org/content/nyoongar-tent-embassy-story-3-march-2012).

have placed at 15,000,[466] 20,000,[467] and 30,000.[468] At the Ballardong regional meeting on 14 March 2015 for example, the vote was 166 to 132 in favour of Settlement. In another claimant group area, the Wagyl Kaip region, 207 were in favour and 200 against.[469]

While these low vote counts have some significance on their own, it is also notable that the system of ballot conspicuously departed from traditional decision-making protocols. Specifically, there were was an absence of proxy voting that would have enabled more Noongar peoples to participate. On 13 March 2017, some of the McGlade claimants, including Margaret Culbong (along with Mingli McGlade, Kevin Morgan, Naomi Smith and junior council Simona Gory) appeared before the Australian Parliament, Legal and Constitutional Affairs Legislation Committee. The McGlade claimants argued that Noongar law and culture made provision for a proxy system where 'Somebody can go and speak on behalf of somebody else, but they have to be authorized by the clan group to do that'.[470] When the Chair of the Legal and Constitutional Affairs Committee Ian Macdonald asked Aboriginal Woman Margaret Culbong what that process was called and whether it had been successful, she replied 'Well, we lived with it for 60,000 years—what do you reckon?'[471] The McGlade claimants contended that they had approached SWALSC and asked that the

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466 Peter Collier stated in the WA Parliament that there were 30 000 – 40 000 people who could claim Noongar ancestry in Western Australia and that approximately half of them would be of adult age. See Peter Collier, "Noongar Indigenous Land Agreement," Parliament of Western Australia, Western Australia Government (26 February 2014; available at: http://www.parliament.wa.gov.au/parliament/pquest.nsf/969994fcf861850d4825718d002fe7fb/acef2633392 93d9048257c8d00294a5a?OpenDocument).

467 Nicolas Perpitch, "Noongar people to vote on $1.3 billion native title settlement with WA Government," *ABC* News (24 January 2015; available at: http://www.abc.net.au/news/2015-01-24/ballot-for-south-west-native-title-next-week/6043966).

468 Gerry Georgatos, "How many Noongars actually voted for the extinguishing of their rights?" *The Stringer Independent News* (1 April 2015, available at: http://thestringer.com.au/how-many-noongars-actually-voted-for-the-extinguishing-of-their-rights-9989#.WHcVf_8w-Uk).

469 James Fogarty. "No sugar, no recognition," *Overland* (20 March 2015, available at: https://overland.org.au/2015/03/no-sugar-no-recognition/).

470 McGlade v Native Title Registrar (2017). On 2 February 2017, the Federal Court held that four of the Noongar ILUAs were invalid as they had not been signed by all of the registered claimants. This overturned an earlier decision in the Federal Court by Justice Reeves in QGC Pty Ltd v Bygrave (No 2) that found ILUAs could be registered if one or more of the authorised claimants sign. See *McGlade v Native Title Registrar (2017)* FCAFC 10.

471 Legal and Constitutional Affairs Legislation Committee, Native Title Amendment (Indigenous Land Use Agreements) Bill 2017, Australian Parliament, 13 March 2017, available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommsen %2Fae2b2561-be9d-4904-aa13-8f8664e8c7ab%2F0001;page=6;query=(Dataset%3Acommsen,commrep,commjnt,estimate,commbill%20Searc hCategory_Phrase%3Acommittees)%20Decade%3A%222010s%22;rec=8).

authorization process employ a system of proxy or absentee voting. However, SWALSC replied that 'the act did not permit a matter of law proxy or absentee voting and, in fact, required that the authorization take place at a meeting on country'.[472] However, junior council Gory noted that the Native Title Act 'provides that where there is no traditional decision making process the native title rights holders can adopt whatever decision making process they wish to authorize an ILUA'.[473] The McGlade submission shows that there was a traditional option though. SWALSC effectively applied a decision-making process that was exclusionary and alien to traditional systems of representation and decision-making.

Questions about the integrity of the process did not trouble the State. On 30 March 2015 WA Premier Colin Barnett announced that the Noongar people in the six claim areas had voted to accept the Settlement: 'This is the largest Native Title settlement in Australian history and I am very pleased the Noongar groups have voted to accept it'.[474] Nowhere was there acknowledgement of the low ballot turnout, the questionable integrity of the voting process, or an indication that an overwhelming number of eligible Noongar had not voted. The ballot process provided the State with the possibility of claiming that Noongar people had 'universally' accepted the conditions of the Noongar Agreement (and the neoliberal notions of free-market engagement and individual responsibility that underscored it). The ballot provided the State with the consent that was critical for establishing the credibility of the Noongar Agreement.

The same power difference and its consequences can be seen in the legislative changes that followed the McGlade decision that found the ILUAs required signatures of all parties. The subsequent Native Title Amendment (Indigenous Land Use Agreements) Act 2017 (Cth) effectively overturned the McGlade decision. The Federal Government argued that the legislative amendment was required as the McGlade decision put over 100 ILUA's at

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472 Legal and Constitutional Affairs Legislation Committee, Native Title Amendment (Indigenous Land Use Agreements) Bill 2017.
473 Legal and Constitutional Affairs Legislation Committee, Native Title Amendment (Indigenous Land Use Agreements) Bill 2017.
474 Colin Barnett, "Noongars vote to accept historic offer," 30 March 2015 (available at: https://www.mediastatements.wa.gov.au/Pages/Barnett/2015/03/Noongars-vote-to-accept-historic-offer.aspx).

risk.[475] The McGlade group vowed to continue its resistance, returning to Federal Court in May 2019. As scholar and daughter of one of the co-claimants Hannah McGlade has argued, the Act 'is arguably yet another incursion into Noongar life that undermines a history of Noongar people's resistance to colonisation in favor of extinguishment, commercial benefits, and economic "certainty"'.[476] Where Indigenous resistance was successful within the rules, the state simply changed the rules.

4.2.2 The Noongar Agreement as Six Individual Land Use Agreements

The Noongar Agreement sees an unequal power differential was translated into six agreements, six separate ILUAs. These agreements more broadly have become a powerful tool for settler oppression of Indigenous alterity. The emergence of ILUAs specifically provides a resolution to native title matters that emerged contemporaneously with the Noongar native title claim.

Through these ILUAs, the Noongar Agreement makes provision for private interests (predominantly, though not necessarily limited, to mining) to exploit Indigenous resources through a conflation of economic development and 'reconciliation'. These agreements are critical for settler state expansion during the neoliberal era. Rio Tinto Mining Executives Bruce Harvey and Simon Nish have referred to agreements between mining companies and Indigenous groups as 'Benefit Impact Agreements'. For Harvey and Nish, mining offers a basis (the *only* basis) for sustainable economic development in regions inhabited and claimed by Indigenous peoples.[477] Harvey and Nish argue that agreements 'represent a more business-oriented and community empowered approach than the social impact analyses and mitigation responses commonly required by statute'.[478] This envisages the creation of a hybrid business/community empowerment model that is developed with Indigenous consent (and presumably enthusiasm). Yet, as the Noongar experience

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475 Wendy Caccetta, 2017 "McGlade team may contest 'unjust' govt ruling," *National Indigenous Times*, 28 June 2017 (available at: https://nit.com.au/mcglade-team-may-contest-unjust-govt-ruling/).
476 Hannah McGlade, "The McGlade Case: A Noongar History of Land, Social Justice and Activism," *Australian Feminist Law Journal* 43, no. 2, (2017): 209 – 210.
477 Bruce Harvey and Simon Nish, "Rio Tinto and Indigenous Community Agreement Making in Australia," *Journal of Energy & Natural Resources Law* 23, no. 4, (November 2005): 510. Harvey works for Rio Tinto; Nish works for Argyle.
478 Harvey and Nish, "Rio Tinto and Indigenous Community Agreement Making in Australia".

illustrates, the Indigenous community is diverse and often reluctant to endorse the commodification of natural resources and land development.

Claims about Indigenous 'consent' serve a specific political purpose. 'Consent' suggests Indigenous acquiescence to the edicts of the dominant settler culture. However, Noongar apathy evidenced at the ballot box may also reflect a defiant political posturing, as it points to a Noongar suspicion of the political process. A minuscule minority of votes cast also suggests a high degree of apathy within the Noongar community towards political engagement (and the Noongar Agreement specifically). This apathy may also be an expression of Noongar frustration at the lack of historical and contemporary decision-making capability. It also suggests resistance, a perhaps unintended consequence of the agreement-making process. Katherine Trebeck notes that Indigenous disenchantment overall has increased, as governments pursue economic development in Indigenous communities while ignoring the concerns of Indigenous residents, 'undermin[ing] Indigenous influence in decisions that impact them'.[479]

Apathy, however, has attracted criticism from certain Indigenous leaders. Michael Dodson has argued that social justice is about more than just land, and that it requires Indigenous people to become involved across all levels of decision-making. Dodson also argues that Indigenous decision-making should be facilitated in the development of strategies and recommendations to achieve social rights, stating that '[e]conomic and social development and recognition of our rights can only be achieved where Indigenous peoples are involved in decision-making in all forums which impact on the region'.[480] If agreement-making is offered as a panacea for Indigenous disadvantage, then agreements must incorporate greater Indigenous autonomy. After all, agreements are regarded in public discourse as the most likely avenue for Indigenous emancipation. As Dodson argues, the negotiation of regional agreements could increase Indigenous access to decision-making as those agreements offer 'an approach whereby Indigenous peoples are regrouping, or grouping together in new units, in order to solve their own problems in the context of this

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479 Katherine Anne Trebeck, "Tools for the Disempowered? Indigenous Leverage Over Mining Companies," *Australian Journal of Political Science* 42, no. 4 (2007): 543.
480 Michael Dodson, "Indigenous Social Justice – Strategies and Recommendations," *Human Rights and Equal Opportunity Commission* (1995): 12.

cultural identity'.[481] Seen in this context, agreements can serve as a catalyst for Indigenous solidarity though as the Noongar Agreement and even the Adani mine development indicate they seldom are.

The Noongar Agreement incorporates the spirit of Dodson's recommendations by providing for Noongar involvement in heritage surveys and the staffing of various resource management roles. However, these roles serve to implement what is ostensibly a settler-defined program by assigning the administrative capabilities of Noongar actors (who have, however, very limited opportunities to dissent). Decision-making and autonomy do not feature in the Noongar Agreement – an increased administrative burden does. Such recognition of Indigenous alterity therefore is tokenistic. As a product of a 'postcolonial logic', Kowal argues, this difference 'can be brought into the norm' (and yet Indigenous peoples are never truly brought entirely into the norm; they remain suspended as 'Other').[482]

This indicates a contradiction of sorts. Where expressions of Indigenous difference go beyond the settler norm and Indigenous people contest neoliberal responsibility. Indigenous resistance contributes to reinforcing the settler narrative emphasising irresponsibility. Meanwhile, the state's failure or refusal to meet *its* responsibility to *all* citizens goes unchecked. For example, the Noongar Agreement states that the State will provide funds for community services and infrastructure, yet the provision of the same services is a core and fundamental responsibility of government. The State's 'offer' of services and benefits exposes a failure to provide services in the first place. Subsequently, some remote mining companies developed ILUAs that provided services because the State had not. They were willing to fill a whole left by government. This in turn makes Indigenous communities susceptible to accepting proposals from mining companies specifically because mining companies offer to provide services not provided by the government. In this context, the State's inaction compels Indigenous acquiescence to substandard terms. As reiterated by Wishart, 'circumstances that spur Indigenous communities to seek outcomes from

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481 Dodson, "Indigenous Social Justice".
482 Emma Kowal, "The proximate advocate: improving indigenous health on the postcolonial frontier," PhD thesis, Department of Public Health, University of Melbourne (2006): iii.

mining companies are sometimes the result of inadequate government delivery'.[483] Moreover a power differential undermines reciprocity. Obviously, agreements reached in genuine negotiations can carry more meaning and be more successful as they are supported by greater Indigenous commitment. Yet Trebeck argues that if governments properly upheld and delivered citizenship rights, Indigenous communities would not have to accept a corporate presence in the first place.[484] The state is not reciprocating. By withholding services the state reduces the bargaining ability of Indigenous communities.

4.2.3 Agreement-making, Structural Imbalance and Reciprocity

A lack of reciprocity fundamentally defines many of the agreements. The state's position within the settler/Indigenous relationship means that dominant settler perceptions regarding space and occupancy remain dominant, accommodating Indigenous standpoints is discretionary. From the settler perspective, the Indigenous community enters settler-occupied space to negotiate and not the other way around. Decolonizing colonial relations requires a critique of the settler colonial relations that imbues this 'systematic lack of reciprocity'.[485] The Noongar Agreement casts 'reciprocity' as funds in exchange for development but a radically differing attitude to reciprocity is expressed by Noongar leader Richard Wilkes, who argued that Noongars were not getting enough in return.[486]

Wilkes' observation prompts a reconsideration of the term reciprocity in this context, as resistance represents a challenge to neoliberal logics associated with individual agency and private property. Pat Dodson and Noel Pearson argue that reciprocity and mutual obligation are interchangeable terms linked to participation. Reciprocity

> works normally in functional societies. We believe that mutual obligation is a natural principle of human society, where people give and take, where they enjoy rights and exercise responsibilities in a more-or-less balanced way. When people are active participants in economic life, whether as hunter-gatherers or as employees in the

483 Wishart, *Contract, Oppression and Agreements.*
484 Trebeck, *Tools for the disempowered*, 547, 558.
485 Veracini, *On Settlerness*, 7.
486 *Noongar elders slam native title deal*.

modern economy, mutual obligation is a natural principle. You work, you get paid. You hunt, you eat. Each has a responsibility to contribute, and each has rights.[487]

However, this neoliberal individual focus is incompatible with communal relationships prominent within many Indigenous groups. Behrendt argues that the 'notion of reciprocity within Indigenous communities implies that those with resources should share them with those who do not have them, that those who receive this generosity have the same duty to provide for and share with others'.[488] Both of these definitions of reciprocity suggest a common duty on both parties; the two definitions diverge on whether duty or responsibility is understood as individual property. In the former (Dodson and Pearson), the emphasis is on individual reward, in the latter (Behrendt) there is an emphasis on community. They are incompatible. This emphasis is why neoliberal logics do not easily fit within an Indigenous worldview. Its enforcement within a relational Indigenous community can only result in rejection or imposition.

4.2.4 Settler Colonial Implications of Agreement-making in a 'Third' Space

The Noongar Agreement demonstrates how colonial power structures shape an unfair and biased agreement-making process. Negotiations occur in a third space where Indigenous sovereignty (i.e., the second space) meshes with the precepts of the dominant culture (i.e., the first space). The term 'third space' is borrowed from the field of health services. Eileen Willis, Judith Dwyer, Janet Kelly and Tamara Mackean identify a 'hybrid' or 'third' space as 'a particular set of interactions between Aboriginal health professionals, carers and patients with non-Aboriginal hospital and community based workers that seemed to create a recognizable set of norms, values, ethic and actions, and indicated the realization of a hybrid space'.[489] Agreements represent a formalization of the norms, values, ethics and actions realised in this 'hybrid' space that is negotiated between the two collectives. Advocates such as Langton view the 'third' space as a means for creating, recognising and protecting Indigenous alterity through hybridisation. Langton understands the Argyle Agreement as an

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487 Pat Dodson and Noel Pearson, "The dangers of mutual obligation," 15 December 2004 (available at: http://www.theage.com.au/news/Opinion/The-dangers-of-mutual-obligation/2004/12/14/1102787075763.html).
488 Behrendt, *Nothing Mutual*.
489 Willis et al, *Hybrid Cultures*, 16.

example of an agreement conducted in this third space where Indigenous and non-Indigenous interests converged in a win-win outcome achieved through culturally sensitive and pragmatic negotiation.[490] Proponents of agreement-making such as Langton also suggest 'hybridized' agreements can accommodate Indigenous interests.[491] Power difference, however, may undermine the third space. 'Third' space agreement-making can merely be a platform for settler demands, Indigenous acquiescence, and the perpetuation of a dialectic of domination.

Advocates of agreement-making conceive of the third space as a settler/Indigenous negotiation of a mutually beneficial outcome. Kim Doohan notes that the Argyle Agreement worked because both negotiating parties 'gain[ed] from these cultural approaches. In situ, [different cultural approaches] can become integrated into the wider context of country and resource management practices'.[492] However, from a settler colonial perspective this process is a continuation of colonialization as 'third' space outcomes invariably restate settler sovereignty and power. These 'third space' agreements constitute a risky proposition for Indigenous alterity. Domination renders negotiated third space outcomes such as the Noongar Agreement and the Argyle Agreement remedial at best and assimilationist at worst, either way perpetuating settler interests. The Noongar Agreement does provide for recognition of Indigenous exceptionalism through legislative reform and formalises recognition while permitting cultural expressions in specified areas, but Indigenous alterity is reduced to a factor that ultimately reinforces the domination of the settler party. Recognition is limited to symbolism, a traditional Indigenous alterity that is insubstantial and non-threatening.

And yet there are potential opportunities. While agreement-making constitutes a third space that can be threatening to Indigenous alterity, interaction and negotiation nevertheless facilitate the decolonization process. They can formalise an Indigenous alterity. Agreement-making remains indispensable for achieving a genuinely decolonising third space that incorporates Indigenous sovereignty. I will explore this opportunity later in chapter six.

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490 Langton, *From Conflict to Cooperation*, 62.
491 Willis et al, *Hybrid Cultures*, 16.
492 Kim Doohan, "Transformative Practices: Imagining and enacting relationships in the context of resource development, the Argyle case," *Asia Pacific Viewpoint* 54, no. 2 (August 2013): 229.

4.3 Identity: Resistance as Assertion of Indigenous Responsibility

A settler colonial study provides a lens to view the Noongar Agreement as a deep-colonising public policy document constituting a third space for the purpose of eliminating intractable Indigenous alterity. However, as Wolfe argues an existent Indigenous 'other' is an existential characteristic of the settler colonial situation, where an Indigenous antithesis remains a critical feature of settler discourse.[493] For Wolfe, a contrasting binary of virtuous settler and dysfunctional Indigenous person reinforces settler identity and domination.[494] This dialectical proposition is engaged by Hage as an accumulation of 'national capital', where a collection of 'dominant linguistic, physical and cultural dispositions' forms a 'practical nationality' that reinforces existing power relations through group identity binaries.[495] The settler/Indigenous binary legitimises settler sovereignty where Indigenous presence on land represents a political challenge to the sovereignty of the settler state.[496] Irene Watson identifies this as 'political difference' that the settler state attempts to eliminate.[497] Agreement-making facilitates the achievement of this objective by bringing difference back to the 'white [settler] norm'.[498] As Lawrence and Gibson point out, having lost 'traditional ways but not yet equipped with personal skills to participate in western society, the problem becomes one of how to equip Aboriginal people with the liberal capacity of responsibility'.[499] The Noongar Agreement equips Noongar people by transferring the Indigenous estate into the realm and jurisdiction of private proprietary relations, and by encouraging participation in employment and education. Noongar people are equipped with fiscal responsibility and employed as agents of their own colonisation.

The Indigenous response to this capacity building is either acquiescence (as in the case of SWALSC pragmatism) or rejection (or a mix of both). Some Noongar community

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493 Wolfe, "Elimination of the Native," 389.
494 Wolfe, "Elimination of the Native," 389.
495 Hage, "White Nation Fantasies," 53.
496 Naama Blatman-Thomas discusses urban reclamation where Indigenous dispossession, enhanced by a settler notion of proprietorship that requires immobilisation as a precondition of ownership occurs as a reciprocal (as opposed to legal) repossession that challenges the hereto dominant settler model of private proprietorship. See Naama Blatman-Thomas, "Reciprocal Repossession: Property as Land in Urban Australia" *Antipode* (September 2019).
497 Irene Watson, "Northern Territory Emergency Response: Who Is Saved or Rescued and at What Cost?" *Cultural Studies Review* 15, no. 20 (2009).
498 Kowal, *The Politics of the Gap*, 346.
499 Lawrence and Gibson, *Obliging Indigenous Citizens*, 662.

members expressed rejection through the establishment of a 'no' campaign that opposed the Noongar Agreement. They firmly asserted an Indigenous voice that constituted an alternative, 'third' space. Proponents of the 'no' campaign saw the Settlement as a land grab. Prominent Aboriginal Elder Wilkes argued that 'the Premier is going to take the land of Perth away from us'.[500] He called the proposed Noongar Agreement a 'sham', whereby 'the State Government really, in many ways, is offering us peanuts'.[501] Wilkes concluded that the agreement offered nothing that Noongar people did not already have, except money.[502] To assert its protest, the 'no' campaign strategically occupied public space, erecting a tent embassy at Mattagarup (subsequently pulled down by police) and at Goonininup. Noongar protestors asserted Indigenous custodianship (rights) while also expressing the notion that the state was illegally occupying Indigenous land. This placed an emphasis on the Noongar relationship to land; the state's offer was unable and unwilling to accommodate (or even comprehend) it.

While Wilkes referred to 'peanuts', opposition was not limited to financial considerations. Shapan Cox and others illustrate how the Mattagarup and Gooninup protests reflected 'the challenges inherent in reconciling Indigenous concepts of land as country to be protected and maintained by its original inhabitants and colonial and postcolonial concepts of land as property and therefore for its use to be optimised as seen fit by its public or private owners'.[503] By organising and then occupying public space the Noongar resistance emphasised an alternative and relational view of land. Devising their response, Indigenous peoples expressed a different type of responsibility.

In a broader context, a neoliberal notion of responsibility predicated upon private property is inconsistent with the relational ontology espoused by Indigenous communities and defined by Datta as 'encapsulat[ing] people's everyday practices, where meanings of nature, land and sustainability are considered relational, part of the social order, and

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500 Laura Murphy-Oates and Murray Silby, "1.3 billion native title settlement proposed for WA," *SBS*, 26 February 2014 (available at: http://www.sbs.com.au/news/article/2014/02/26/13-billion-native-title-settlement-proposed-wa).
501 "Noongar elders slam native title deal."
502 "Noongar elders slam native title deal."
503 Shapan Cox et al, "Indigenous persistence and entitlement: Noongar occupations in central Perth, 1988-1989 and 2012," *Journal of Historical Geography* 54 (2016): 22.

connected to traditional experiences, one's own body, dreams, and spirituality'.[504] From a settler colonial perspective, Vimalassery argues, Indigenous relational engagement with land and each other 'raises a basic contradiction in capitalism', as 'Indigenous work of relationality rubs against relations of colonialism that fuel the development and continued reproduction of a market economy'.[505] This relational attitude towards land is a fundamental ideological challenge to the neoliberal form of capitalism that informs the Noongar Agreement and underpins the transfer of the Indigenous estate to the 'real' economy more broadly.

In response to the challenge of Noongar resistance/responsibility, SWALSC addressed Noongar concerns by arguing that surrendering native title rights in perpetuity would not involve surrender of any land, culture, language, or society. SWALSC continued:

> [it] could be said that the Settlement provides for everything promised by either native title or land rights, with plenty more as well', and that in 'establishing the Noongar Corporations, the Noongar community will be able to create a system of self-governance in relation to lands, culture and community', which will effectively 'provide for a substantial level of self-determination over those matters, and this is something that generations of Noongars have long fought for.[506]

And yet the Noongar Agreement explicitly disallows the possibility of future claims. This neoliberal encroachment has broader implications, as Noongar resistance provides a rallying point for Indigenous solidarity that attracts non-Indigenous support. Neoliberalism, unsustainable development, and threats to the public space are resisted across cultural boundaries henceforth assisting a rich and vigorous Indigenous presence in the third (dialectical) space.

This could be enhanced by a further incorporation of Noongar resistance that could also focus on denying consent and the legitimacy it offers to settler legitimacy. Unable to seek legal recourse, Noongar opposition at Mattagarup and Goonininup asserts an Indigenous responsibility that opposes the neoliberal notion responsibility as accountability.

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504 Datta, "A Relational Theoretical Framework," 111.
505 Vimalassery, "The wealth of the Natives," 297.
506 *Summary Guide to the Noongar Native Title Settlement*, 48.

In resisting the Noongar community expresses its own responsibility founded on an unsurrendered Indigenous alterity.[507] This opposition may constitute one of what Sarah Keenan refers to as 'moments of decolonization'.[508] Resistance indicates how Indigenous society and Western (settler) societies can 'have separate and often contradictory conceptions of what justice demands'.[509] This separation emphasises the urgent need for a robust public space and a different type of citizenship model – differentiated citizenship as the very embodiment of the 'third' space.

4.4 Conclusion

This chapter explored the practical implications of neoliberal responsibility and outlines how a reified notion of responsibility has been applied in Western Australian Government Indigenous policy through the Noongar Agreement. The chapter began with a brief overview of the history of the Noongar Agreement, a compact that had its genesis in the *Bennell v Western Australia* (2006) native title case. The Noongar Agreement can be viewed as an administrative process that reduces Noongar alterity to bureaucratic mechanisms that recognizes native title as it downgrades it to the realm of corporate law. This case study demonstrated how the current agreement-making regime facilitates and reflects a settler colonial structure of power. Agreement-making has become a way for the settler state to obtain Indigenous acquiescence to a neoliberal economic imperative and its assimilatory design. An example of this, the Noongar Agreement is thus consistent with what Wolfe terms a logic of elimination.[510]

Agreement-making processes occur in a third space that purports to incorporate Indigenous alterity but instead dissolves it through an unequal negotiation process that irrevocably alters relational Indigenous relationships with land and country. The process leading to the Noongar Agreement also illustrates a double-bind situation: the Noongar collective is offered recognition through legislative reform, but as the Indigenous collective

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507 Cox et al, *Indigenous persistence and entitlement*, 22.
508 Sarah Keenan, "Moments of decolonization: Indigenous Australia in the here and now", *Canadian Journal of Law and Society* 29 (2014): 163 – 180.
509 Meredith Gibbs, "Justice as reconciliation and restoring mana in New Zealand's Treaty of Waitangi settlement process," *Political Science* 58, no. 2 (2006): 17.
510 Wolfe, "Recuperating Binarism," 257.

is cast as different, it is also simultaneously assimilated into the neoliberal mainstream and the real economy.

SWALSC pragmatically encouraged the surrender of native title rights in exchange for financial benefits, administrative responsibility, and token recognition. SWALSC submitted to State pressure to accept responsibility for administering the transformation of the Indigenous (Noongar) estate through development and participation programs that encouraged engagement with the real economy. The Noongar Agreement is therefore an unfair and settler-centric agreement. It epitomises the challenges faced by Indigenous groups around Australia as they seek reparation and recognition for the damages inflicted on them under settler colonialism. However, while a 'third' space is constituted and then immediately colonised the Noongar Agreement offers an opportunity to celebrate Indigenous resistance. Noongar leaders such as Richard Wilkes indicate how the third space can be decolonised – through resistance.

Threats to the formation of the third space can be seen elsewhere as the settler state encroaches upon the Indigenous estate and uses neoliberal logics to do so. ILUA's in general are a novel way to access and incorporate the Indigenous estate while obtaining Indigenous consent and closure. In this context, the settler state may represent ILUA's such as the Noongar Agreement as treaties. Indeed, Hobbs and Williams have boldly claimed that the Noongar Agreement is Australia's first ever 'treaty'.[511] The Agreement therefore has implications for treaty potentialities elsewhere.[512] Victoria is currently undertaking treaty negotiations; the Victorian State might look at the Noongar Agreement as a template for privatised self-government and Victorian Aboriginal people might look at it as a cautionary tale of appropriation.

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511 Hobbs and Williams, *The Noongar 'Treaty'*.
512 Bertus De Villiers, "Chasing The Dream – Self-Determination on a Non-territorial Basis for the Noongar Traditional Owners in the South West of Australia," *International Journal on Minority and Group Rights* (July 2019).

5. Treaty and Recognition in Victoria

Formal 'Agreements' between the state and Indigenous peoples have become a feature of Australian Government Indigenous policy in the neoliberal era. Hobbs and Williams argue that the Noongar Agreement is a treaty. They argue that the Noongar Agreement encapsulates three key aspects of Indigenous sovereignty – recognition, negotiation and self-determination.[513] This claim is significant, as the Noongar Agreement was negotiated at the state level. 'Treaty' used to be a federal matter.

This critical shift in treaty practice has occurred nationally, as Victoria and South Australia have also taken serious steps toward enacting formal 'treaties' with Indigenous peoples. Federal government inertia may be the catalyst for this shift. Referring to the Victorian example, Murial Bamblett argues that the movement for a treaty in Victoria was born out of concern for the failing constitutional recognition process and the feeling of disenfranchisement felt by many Aboriginal people. For Bamblett, some Aboriginal people felt the process was more focused on non-Indigenous needs and in particular on the need for settler governments to 'settle the issue of Aboriginal rights'.[514] Negotiated outcomes such as the Noongar Agreement, for good or for bad, aim at a permanent settlement of the issue of Indigenous rights.

This shift to a second-tier State government-led treaty solution faces unique challenges and limitations. State-based (provisional) treaties face a problem of legitimacy and authority as Australia's federal political structure restricts the States' capacity to formalize Indigenous self-determination in any meaningful way. Put simply, the States do not have the constitutional power to recognize Indigenous sovereignty. This means that any treaty negotiated by these parties is non-binding. For example, a recent change of government in South Australia saw its treaty process shelved, as the newly elected Coalition Government under Steven Marshall argued that treaties with Indigenous peoples were a federal concern.

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513 Hobbs and Williams, *The Noongar 'Treaty'*.
514 Muriel Bamblett, "A Victorian treaty?" *Arena Magazine* 145 (December 2016 – January 2017): 11.

Before engaging with the current Victorian treaty process I probe the meaning of 'treaty'. What is a treaty and who can negotiate it? In this chapter I will explore this question in two parts. The first part provides a brief outline of the history of treaties within Australia and focuses on constitutional recognition and the central role it has played in discussions between the state and Indigenous peoples on the notion of Indigenous sovereignty (especially discussions surrounding the Uluru Statement). The chapter then details the history of treaty in Victoria through an overview of the current Victorian treaty process. An adaptation of Hobbs and Williams' definition of 'treaty' is then applied to evaluate the Victorian process as a treaty process.

Like the case of the Noongar Agreement discussed in the previous chapter, colonial structures of power also shape the Victorian treaty process. Similar to the Western Australian Government, the Victorian Government attempts to influence a) who it will negotiate with, and b) how those negotiations will take place. The Victorian Government's involvement in determining the Aboriginal partners it will negotiate with illustrates how the settler state exploits an unequal distribution of power to select its counterparts and this perpetuates its own (settler) sovereignty. This chapter emphasizes this power disparity by establishing how the priorities of each party differ according to their different conceptualization of Indigenous self-determination. This distinction is explored throughout the chapter as the product of a uniquely settler-colonial dialectic of domination.

The chapter then postulates that colonial power structures shape both the Noongar Agreement and the Victorian treaty process in a similar way: both are predicated upon a notion of development where individual economic competence is recoded as Indigenous self-determination. During the neoliberal era, Indigenous responsibility has increasingly become an administrative device that renders the Indigenous person accountable for the transformation of the Indigenous estate. The Victorian experience confirms this pattern.

The Noongar Agreement and the Victorian Treaty process provide an opportunity to think about decolonizing alternatives. This chapter explores how constitutional recognition, though rigorously opposed by some Indigenous peoples, can challenge colonial power structures by forcing the settler state to formally recognize Indigenous sovereignty. The

chapter concludes with a brief analysis of options for Victorian Aboriginal self-determination.

5.1 History of Treaties within Australia

Momentum for a treaty in Australia began in the 1970s. In 1971, the Larrakia peoples sent a petition to Queen Elizabeth II, calling for land rights and political representation.[515] In 1979, the Indigenous body advising the Fraser Government, the *National Aboriginal Conference*, called for a Makarrata (a 'coming together'). An NGO, the Aboriginal Treaty Committee, comprised prominent non-Indigenous Australians and was established with the express aim of fostering non-Indigenous public support for a treaty.[516] These efforts found political traction in 1983, as the Senate Standing Committee on Constitutional and Legal Affairs produced a report that recommended constitutional reform, and subsequently issued a compact regarding a treaty.[517] In 1988, Hawke adopted the Barunga Statement and pledged to negotiate a treaty that recognized Aboriginal sovereignty before the end of the 35th Parliament.[518] Treaty plans were shelved in 1991 after the opposition argued that the move would amount to a 'recipe for separatism' and because 'a nation […] does not make a treaty with itself'.[519] This argument would feature in later Coalition Government policies regarding Indigenous recognition and treaty.

The Howard Coalition Government was vehemently opposed to Indigenous self-determination. Indeed, as Gunstone has outlined, the Howard Government attacked the notion of Indigenous self-determination on several occasions by abolishing ATSIC and, in 1998, demanding that 'self-determination' be removed from the United Nation's Draft

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515 Hobbs and Williams, *The Noongar 'Treaty',* 24.
516 Hobbs and Williams, *The Noongar 'Treaty'.*
517 "Senate Standing Committee on Constitutional and Legal Affairs," *Two Hundred Years Later – Report by the Standing Committee on Constitutional and Legal Affairs on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People* Australian Federal Parliament, (1983): xii.
518 Lorena Allam, "NT signs historic Barunga agreement to begin Indigenous treaty talks," *The Guardian*, 8 June 2018 (available at: https://www.theguardian.com/australia-news/2018/jun/08/nt-signs-historic-barunga-agreement-to-begin-indigenous-treaty-talks). For Howard's dismissal of the possibility of a treaty see also Byrne, *Reconciliation since 2000.*
519 John Howard, "Interview with John Laws, 2UE Radio,". PM Transcripts: Transcripts from the Prime Ministers of Australia, Government of Australia, 29 May 2000 (available at: https://pmtranscripts.pmc.gov.au/release/transcript-22788).

Declaration of the Rights of Indigenous Peoples.[520] Howard maintained his hostility toward treaty and championed mainstreaming policy throughout his time as leader. On 29 May 2000 then Prime Minister Howard responded to a question by radio host John Laws on the status of the treaty process by suggesting that 'an undivided united nation does not make a treaty with itself. I mean to talk about one part of Australia making a treaty with another part is to accept that we are in effect two nations'.[521] Another Coalition former Prime Minister, Tony Abbott restated this position in 2016 after Labor Opposition Leader Bill Shorten floated the idea of a treaty. Abbott claimed that he never supported a treaty and suggested: 'A treaty is something that two nations make with each other, and obviously Aboriginal people are the first Australians, but in the end we're all Australians together, so I don't support a treaty'.[522] Considering that historically, the settler state has been opposed to Indigenous sovereignty; and policies that appear receptive to this idea; it is prudent to ask if Shorten's overture was really a major departure?

Opposition leader Shorten has tried to couch an Indigenous treaty within an overall move toward an Australian Republic.[523] On ABC Television's *Q & A* program Shorten argued that this 'is Aboriginal land; it is and always will be' and that 'we need to move beyond just constitutional recognition' and to talk 'about what a post-constitutional recognition settlement with Indigenous people looks like'.[524] This commitment, of course, is untestable, but as National Chair of the Australian Monarchist League Philip Benwell points out, nearly a third of Labor voters are monarchist 'traditional conservatives', and 'support for a treaty and support for a republic derive from two entirely different sectors of the community'.[525] Turnbull similarly argued that Shorten's desire for a treaty could hamper efforts to achieve

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520 Andrew Gunstone, "These Blokes Are Reinventing the 19th Century: The Howard Government's Record on Indigenous Affairs 1996 – 2006." *Journal of Indigenous Policy* 7 (August 2007), 42.

521 Howard*,* "Interview with John Laws."

522 Anna Henderson and Eliza Borrello, "John Howard, Tony Abbott lock in against treaty with Indigenous Australians," *ABC News*, 9 September 2016 (available at: https://www.abc.net.au/news/2016-09-08/conservatives-lock-in-against-treaty-with-indigenous-australians/7825298).

523 AAP, "Bill Shorten wants Australia to vote on Indigenous treaty and republic together," *The Guardian*, 10 June 2018 (available at: https://www.theguardian.com/australia-news/2018/jun/10/bill-shorten-wants-australia-to-vote-on-indigenous-treaty-and-republic-together).

524 Timna Jacks, "Bill Shorten backs treaty, but won't call British settlement an 'invasion,' *The Sydney Morning Herald*, 14 June 2016 (available at: https://www.smh.com.au/politics/federal/shorten-backs-treaty-but-wont-call-british-settlement-an-invasion-20160613-gpi8vu.html).

525 AAP, "Bill Shorten wants Australia to vote".

the consensus required for constitutional change.[526] Notably, Shorten refused to call European arrival an invasion.[527]

In 2016, Howard responded to Shorten's treaty announcement and joined Abbott in again asserting hostility to the notion of treaty and calling talk of a treaty 'appalling'.[528] He also added that treaty was actually a threat to symbolic constitutional recognition as it 'risked over-complicating' it.[529] Conservative Coalition governments over the last two decades have favoured talk of a symbolic form of constitutional recognition, perhaps as a response to, or diversion from, increasing calls for Indigenous self-determination. Federally, Indigenous self-determination remains in a state of paralysis.

5.1.1 Treaty in Victoria

Efforts to achieve self-determination at the federal level were stalled by the Coalition Government under Howard, Abbott and Turnbull. With this rejection, States and Territories have increasingly committed to a treaty processes with Indigenous peoples. The Northern Territory, South Australian and Victorian governments have all, at some stage, commenced work on treaty negotiations.[530] Their motivations for this may vary. They may express an earnest commitment for healing, they may be responding to political pressure (or both) or treaty may represent a means for appropriation of the Indigenous estate. Indeed, the pursuit of treaties at this level may be more concerned with resolving the status of Indigenous land rather than recognising Indigenous sovereignty. The added gravitas of a treaty may provide the settler state with improved access to the Indigenous estate in exchange for notional recognition of Indigenous sovereignty. Notwithstanding this, as noted

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526 Tom McIllroy and Michael Koziol, "Federal Election 2016: Indigenous leaders push for treaty negotiations as Malcolm Turnbull agrees with 'invasion,'" *The Sydney Morning Herald*, 14 June 2016 (available at: https://www.smh.com.au/politics/federal/federal-election-2016-indigenous-leaders-push-for-treaty-negotiations-as-malcolm-turnbull-agrees-with-invasion-20160614-gpiwqg.html).
527 Jacks, "Bill Shorten backs treaty".
528 Henderson and Borrello, John Howard, "Tony Abbott lock in against treaty."
529 Tom McIllroy, "Tony Abbott and John Howard warn against a treaty with Indigenous Australians," *Sydney Morning Herald*, 8 September 2016 (available at: https://www.smh.com.au/politics/federal/tony-abbott-and-john-howard-warn-against-a-treaty-with-indigenous-australians-20160908-grbc5x.html).
530 With a change of government South Australia has since announced it will shelve its plans to pursue an Indigenous treaty. See "SA Government decides not to go ahead with Aboriginal treaties." *ABC News*, 8 June 2018 (available at: http://www.abc.net.au/news/2018-06-08/sa-govt-decides-not-to-go-ahead-with-aboriginal-treaty/9851166). See also Shani Wellington, "Aboriginal treaty with Northern Territory one step closer with historic signing," *ABC News*, 7 June 2018 (available at: http://www.abc.net.au/news/2018-06-07/aboriginal-treaty-with-northern-territory-one-step-closer/9841374).

earlier, while the States have increasingly sought to advance treaty negotiations, their capacity to do so in a meaningful way remains limited. Sarah Madison, Kirsty Gover and Coel Kirkby illustrate the limitations of treaties negotiated by the states:

1. Parties must agree to what is necessary and just.

2. The constitution limits what States can agree to.

3. States can only advocate for what is included within a national treaty.[531]

Maddison, Gover and Kirkby also note that Victoria already has legal capacity to undertake negotiations leading to a Noongar Agreement-style agreement in the *Traditional Owners Settlement Act 2010* (Vic) (TOSA).[532] TOSA provides for an overarching settlement agreement that includes four sub-agreements relating to land, land use funding, and natural resources along with an ILUA that makes it legally binding.[533] Similar to the Noongar Agreement, TOSA agreements require traditional owners to relinquish all current and future native title claims.[534]

Victoria has entered several TOSA agreements including the Gunaikurnai Settlement Agreement and the Dia Dia Wurrung Settlements. Hobbes and Williams apply their three element test to determine if TOSA's are an agreement or a treaty. They explain that TOSA permits acknowledgement of past injustices, a recognition of traditional Indigenous ownership of land, and transfers Crown land as freehold (or Indigenous) title where land use and access rights are granted to Indigenous peoples over wider areas managed and administered through a local trust funded by the state.[535] However, their capacity to make decisions is severely limited. For example, according to Hobbs and Williams, the Gunaikurnai and Dia Dia Wurrung bodies lack meaningful decision-making powers and they remain service delivery organizations with a communication channel to government.[536] Under TOSAs, the government remains in control, while Indigenous peoples surrender all current and future claims in exchange for capital and limited management devolution. TOSA

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531 Sarah Maddison et al, "Treaty Fact Sheet," *Aboriginal Victoria* (available at: https://www.vic.gov.au/system/user_files/Documents/av/Aboriginal_Treaty_Fact_Sheet.pdf).
532 They argue that the TOSA combined with the Native Title Act 1993 (Cth) provides a useful starting point for negotiating a treaty.
533 Hobbs and Williams, *The Noongar 'Treaty'*, 24.
534 Hobbs and Williams, *The Noongar 'Treaty'*, 24.
535 Hobbs and Williams, *The Noongar 'Treaty'*, 24.
536 Hobbs and Williams, *The Noongar 'Treaty'*, 29.

agreements thus facilitate a familiar pattern of devolved Indigenous responsibility, yet do not appear to yield meaningful self-determination. For this reason Hobbs and Williams argue they are not treaties. TOSAs are merely local agreements. For States, however, treaties could be better suited to provision of a state-wide resolution to the question of Indigenous sovereignty. Treaties could potentially make large swathes of land available for development. This may be the reason why a treaty is preferred over existing TOSA arrangements. In the neoliberal era, broader access to the Indigenous estate may be the real value of provisionally negotiated treaties.

5.2 The Uluru Statement

Indigenous nation-wide mobilisation for recognition of sovereignty has forced a state government response. Conservative governments in Australia have promoted constitutional recognition to assuage calls for Indigenous sovereignty. In 2007, Howard announced to ABC PM's Mark Colvin that he would hold a referendum with 18 months 'to formally recognise Indigenous Australians in our Constitution, their history as the first inhabitants of our country, their unique heritage of language and culture, and their special, though not separate, place within a reconciled indivisible nation'.[537] Amid increasing pressure to progress the reconciliation project, recognition was nevertheless viewed merely as a symbolic (yet significant) move.

Indigenous people pressed on. The Indigenous statement on Indigenous sovereignty and recognition – the 'Uluru Statement' (the Statement) – was released in May 2017 while the Turnbull Government was in power. It resulted from recognition and treaty discussions at the First Nations Constitutional Convention held at Uluru earlier that month. The First Nations Constitutional Convention saw over 200 Aboriginal and Torres Strait Islander people come together from all over Australia to jointly assert an 'ancient and enduring sovereignty'.[538] The convention followed a six-month process of deliberation and consultation conducted through a number of First Nations Regional Dialogues that

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537 Mark Colvin, "Howard plans constitutional recognition of Aborigines," *PM*, 11 October 2007 (available at: http://www.abc.net.au/pm/content/2007/s2057317.htm).
538 Dylan Lino, "The Uluru Statement: Towards Federalism with First Nations," *Australian Public Law*, 13 June 2017 (available at: https://auspublaw.org/2017/06/towards-federalism-with-first-nations/).

culminated with the Statement. It called for constitutional reform that would feature constitutional recognition of Indigenous peoples.[539] Specifically, the Statement calls for 'the establishment of a First Nations Voice enshrined in the Constitution'.[540] The Statement represents an important expression of a heterogeneous Indigenous pluralism. It is intended to lead to Indigenous sovereignty and operates as forerunner to treaty negotiations.

While some have questioned its significance (and representative nature), the Statement expresses a unified Indigenous body politic and formalizes its view on constitutional recognition and treaty.[541] The Statement expresses a form of solidarity and asserts the possibility of heterogeneous Indigenous kinship. The Statement also pushes the Federal Government to develop a treaty resolution process that formalizes Indigenous sovereignty.

5.2.1 The Uluru Statement and Differentiated Citizenship

The Statement also identifies problems Indigenous people suffer at a disproportionate rate, such as high incarceration (the highest proportional representation on the planet), and 'children aliened from their families at unprecedented rates'. It illustrates the structural nature of the problem faced by Indigenous peoples (the present legacies of a colonial past), and emphasises structural powerlessness, where incarceration and aliened children are identified as representing '*the torment of our powerlessness*' (emphasis in original).[542] The Statement clarifies that Aboriginal and Torres Strait Islander peoples seek constitutional reforms 'to empower our people and take a *rightful place* in our own country' (emphasis in original).[543] A third point refers to reconciliation, where a 'Makarrata' – a 'coming together after a struggle' – is defined as the culmination of the Indigenous resistance.[544]

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539 Lino, "The Uluru Statement".
540 "Uluru Statement from the Heart," *Referendum Council* (available at:
https://www.referendumcouncil.org.au/sites/default/files/2017-
05/Uluru_Statement_From_The_Heart_0.PDF).
541 Adam Carey, "Treaty must acknowledge Aboriginal sovereignty Greens MP says," *The Age* 6 June 2018
(available at: https://www.theage.com.au/politics/victoria/treaty-must-acknowledge-aboriginal-sovereignty-
greens-mp-says-20180606-p4zjw0.html).
542 Referendum Council. "The Uluru Statement."
543 Referendum Council. "The Uluru Statement."
544 Referendum Council. "The Uluru Statement."

These emphases are critical. The first refers to structural oppression (the 'torment of our powerlessness'), the second refers to recognition ('a rightful place') and the third emphasizes reconciliation ('coming together after a struggle'). Here the Statement identifies criteria for a treaty that extends the definition offered by Hobbs and Williams (recognition, negotiation and self-determination). The Uluru criteria establish that a treaty must address the powerlessness of Indigenous peoples. It must provide constitutional reforms that ensure recognition and a Makarrata to ensure reconciliation based upon a fair and truthful relationship with non-Indigenous Australia.[545] Addressing structural power differentials *before* treaty and reconciliation is probably its most significant innovation. As Dylan Lino has identified, the Statement 'can be understood as a call for a form of federalism between First Nations and the Australian state'.[546] Accordingly, the Statement identifies what amounts in practice to a differentiated citizenship model as a viable avenue for reconciliation.

The Statement also proposes a pathway to differentiated citizenship by establishing a Makarrata Commission – an Indigenous political organization that will oversee a process of agreement making between governments and First Nations. The Makarrata Commission importantly features a 'truth-telling about our history'.[547] As political representation provides political power, the architects and signatories to the Statement have made it clear that for reconciliation to occur there must be a shift in how power shapes the settler/Indigenous relationship. One way of ensuring this is to develop an Indigenous-defined understanding of self-determination. The Statement provides a blueprint for this, and represents an example of Indigenous people increasingly taking responsibility for reconciliation by declining to be charged with neoliberal accountability.

5.2.2 Government Response to the Statement

The Indigenous call for reform detailed within the Statement progressed primarily through creation of the Referendum Council (a Commonwealth agency) established In December 2015 with bipartisan support. The Referendum Council was established to provide advice to the Australian Parliament on the potential for Indigenous recognition within the

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545 Referendum Council. "The Uluru Statement."
546 Lino, "The Uluru Statement."
547 Referendum Council. "The Uluru Statement."

Constitution. The organization emerged from a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples co-chaired by Indigenous Senators Ken Wyatt and Nova Peris, the legacy of a movement for constitutional recognition that stretches back to Gough Whitlam.[548]

The Statement was the basis of the Referendum Council's *Final Report of the Referendum Council*, a report that focused on constitutional recognition. The Turnbull Government's response to the Statement and *The Final Report* was unsupportive. Echoing the mainstreaming sentiments of Howard, Turnbull argued that establishing an Indigenous-only elected body (the Makarrata Commission) was 'contrary to principles of equality and citizenship'.[549] He recognized that the Statement was a call for differentiated citizenship. In a joint response, Turnbull was joined by Indigenous Affairs Minister Nigel Scullion and Attorney General George Brandis to argue that the Indigenous representation called for in the Statement and subsequently, in the Referendum Council's report, would see the creation of a 'third' chamber of Parliament that would be inaccessible to non-Indigenous peoples (a truly 'third' space). Turnbull and his ministers affirmed that the government did 'not believe such a radical change to our constitution's representative institutions has any realistic prospect of being supported by a majority of Australians in a majority of States'.[550] While the Federal Government continued to resist reconciliation and self-determination, Indigenous peoples were already pursuing other avenues.

5.3 Victorian Treaty: The Process

The States have defined and limited powers under the Australian Constitution. Under Australia's Federal system the States are responsible for service provision and therefore

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548 The Gillard Government conducted an expert panel; John Howard committed to a referendum for national recognition of Indigenous people in 2007; Bob Hawke made overtures toward Indigenous self-determination in his response to the Barunga statement; Paul Keating gave hope to Indigenous people in his Redfern Address; Malcolm Fraser established a Senate inquiry; and Gough Whitlam made overtures toward greater Indigenous sovereignty. See "Final Report of the Referendum Council," *Referendum Council*, 30 June 2017 (available at: https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf).
549 Fergus Hunter, "Malcolm Turnbull's Indigenous referendum response condemned," *The Sydney Morning Herald*, 6 November 2017 (available at: https://www.smh.com.au/politics/federal/malcolm-turnbulls-indigenous-referendum-response-condemned-20171106-gzfezh.html).
550 Malcolm Turnbull et al, "Response to Referendum Council's report on Constitutional Recognition," Media release, Department of the Prime Minister and Cabinet, *Australian Government*, 26 October 2017 (available at: https://ministers.pmc.gov.au/scullion/2017/response-referendum-councils-report-constitutional-recognition).

their approach to treaty negotiations remain somewhat pragmatic – they are agreements. Nevertheless, Victoria considers these agreements 'treaties'.

5.3.1 Treaty Defined

The term 'treaty' has many different meanings. It is applied variedly in different contexts. Exploring the composition of treaty as a concept, Hobbs and Williams begin with the *Vienna Convention on the Law of Treaties* that define a treaty as an 'international agreement concluded between States in written form and governed by International law' – this definition exempts many agreements between Indigenous and non-Indigenous peoples in settler colonies.[551] Hobbs and Williams contend that the Vienna definition and the approach of scholars who base their work on it, is limited because European (colonial) powers have often entered formal agreements that acknowledged the legal capacity (a form of sovereignty) of Indigenous groups, even though they were not formal state actors.[552] They suggest a more holistic approach to understanding treaties is warranted. For Hobbs and Williams three criteria stand out: the recognition of Indigenous polities; 'fair' negotiation; and settlement of claims.[553]

The Victorian State government has employed such an approach to treaty, even though it did not conform to in a clear linear fashion. First, there is an attempt to identify an Indigenous body politic; second, the Victorian Government commits to ensuring a 'fair' negotiation by providing authority to that representative body as a negotiating partner; and finally, the Victorian Government aims to reach a settlement of claims. This framework provides a useful standard to outline the Victorian process as an authentic 'treaty' process albeit a potentially limited one when considering the jurisdictional limitations of State based treaties.

5.3.2 Representation: In Pursuit of a Homogenous Aboriginal Polity

The Victorian treaty process began with a series of consultations designed to acquire Indigenous consent and engagement with the treaty process. The Aboriginal Treaty Interim

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551 Hobbs and Williams, *The Noongar 'Treaty'*, 4 – 5.
552 Hobbs and Williams, *The Noongar 'Treaty'*, 5.
553 Hobbs and Williams, *The Noongar 'Treaty'*, 7 – 10.

Working Group (the Working Group) and the Victorian Treaty Advancement Commission (the Advancement Commission) were established in 2016 and 2018 to support the treaty process, predominately through the development of an Aboriginal Representative Body. The purpose of the Aboriginal Representative Body was to provide a homogenous Aboriginal Victorian negotiating body to negotiate a treaty.[554] A series of consultations were undertaken to obtain community consent. This commenced with Phase One Consultations that discussed the fundamentals of treaty. For example, participants discussed what self-determination would mean and what representative structures would look like. Phase Two Consultations were then undertaken to determine and develop a representative structure – specifically they sought to establish a path toward the establishment of the Aboriginal Representative Body.

Consultation Phase 1

The treaty process in Victoria began in earnest on 1 December 2015 when Victorian Aboriginal Affairs Minister Natalie Hutchins announced that the Office of Aboriginal Affairs Victoria would be renamed Aboriginal Victoria. The Minister also announced that the Victorian Government would provide improved resources and support to deliver services and to advance the pursuit of Indigenous self-determination in Victoria.[555] The Minister further announced that a new Aboriginal Victoria Forum would be established, and that it would include Traditional Owners, Registered Aboriginal Parties, Aboriginal community organisations, peak bodies, state-wide agencies, and other representative groups, as well as the Minister.[556] The Forum was held on 3 February 2016 at Federation Square in Melbourne with over 100 people attending. Also at the Forum, the Victorian Government formally received advice from the Aboriginal community on self-determination and constitutional

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554 Australian governments prefer to negotiate (though their true commitment to negotiations remains questionable) with 'Indigenous peoples' as a single homogenous group. See Michael Owen, "Aboriginal people failed by 'expensive gesture' treaties," *The Weekend Australian*, 11 June 2018 (available at: https://www.theaustralian.com.au/national-affairs/indigenous/aboriginal-people-failed-by-expensive-gesture-treaties/news-story).
555 Natalie Hutchins, "Aboriginal Victoria to Advance Self-Determination," Media release, Minister for Aboriginal Affairs, Victorian Government, 1 December 2015 (available at: https://www.premier.vic.gov.au/aboriginal-victoria-to-advance-self-determination).
556 Hutchins, "Aboriginal Victoria."

recognition.[557] At the forum, Aboriginal people formally called for a treaty or series of treaties. Acknowledging this call, on 26 March 2016 the Minister released a statement announcing that for the treaty process to begin it would have to start with Aboriginal Victorians. It was the State that assigned this responsibility.

The Victorian Government subsequently held four regional community forums and conducted a two-day meeting in 2016 during Reconciliation Week in Melbourne to discuss the way forward. These forums discussed the meaning of self-determination, the fundamentals of a treaty, the relationship between constitutional recognition and treaty, and the potential creation of a representative structure.[558] Forums were held in Shepparton, Mildura, Bairnsdale and Horsham before a state-wide forum held in May 2016. At that venue, 'self-determination' was confirmed as a key component of a treaty.[559] The Victorian Government (Aboriginal Victoria) summarised the main messages coming out of the May forum as follows:

- Self-determination requires a commitment to work together and the self-determination agenda requires input from, and negotiation with, the Aboriginal community;

- Aboriginal representation should be included and reflect the Aboriginal communities' diversity;

- Communication should be open and transparent;

- The Aboriginal community should be resourced to ensure negotiations are fair;

- Domestic and international examples would be considered during the process;

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557 Michael Graham and Alice Petrie, "Advancing the Treaty Process with Aboriginal Victorians Bill 2018," Treaty Series 5, Parliamentary Library & Information Service, Department of Parliamentary Services, *Parliament of Victoria* (5 May 2018): 10.
558 Natalie Hutchins, "Statement on Self Determination," Media Release, Minister for Aboriginal Affairs, Victoria Government, 26 March 2016 (available at: https://www.premier.vic.gov.au/statement-on-self-determination).
559 Graham and Petrie, "Advancing the Treaty Process," 12.

- Bipartisan support would be crucial.[560]

Following the regional forums, the Victorian Government established the Working Group in July 2016. The Working Group was originally designed to include 16 members from various Indigenous corporations and councils, with a number of representative members appointed by the Minister.[561] Group membership was then reduced to 12, as the Minister reduced her appointed quota to four. Aboriginal woman Jill Gallagher was appointed Advancement Commissioner.[562] Between October and November 2016 a series of ten workshops were held with the purpose of developing options for self-determination. These would be discussed at the later Aboriginal Victoria Forum held in December 2016.[563]

Consultation Phase 2

Following on from the Phase One consultations, In March 2017 another round of consultations was held, 'Phase 2 Consultations'. The purpose of these further consultations was to involve communities with a view to developing an Aboriginal representative structure that would negotiate a treaty with the Victorian Government.[564] The legal structure of the representative body was also discussed, with the Working Group deciding that a Company by Limited Guarantee model would best fit with the design principles that would define the representative body (these were determined through earlier consultations). The Working Group argued that this type of governance structure would meet the design requirements of the Aboriginal Representative Body ensuring it would be 'independent, practical and inclusive' and, importantly, allow 'for cultural elements to be designed into the entity'.[565] It was decided that the Company by Guarantee model would allow for an inclusion of Aboriginal culture.

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560 "Summary of the Aboriginal Victoria Forum, 26 – 27 May 2016," *Aboriginal Victoria Forum* (available at: https://www.vic.gov.au/aboriginalvictoria/treaty/treaty-consultations/aboriginal-victoria-forum-26-27-may-2016.html).
561 Graham and Petrie, "Advancing the Treaty Process," 14.
562 Graham and Petrie, "Advancing the Treaty Process," 15.
563 Graham and Petrie, "Advancing the Treaty Process," 15.
564 Graham and Petrie, "Advancing the Treaty Process," 15.
565 Aboriginal Treaty Interim Working Group, *Aboriginal Community Consultations*, 19.

Another Forum was held during April 2017 to summarise what had previously occurred and to plan for future development.[566] In May 2017 Minister Hutchins announced that the Victorian Government would spend $ 28.5 million over four years to support the treaty process. The money was specifically earmarked for developing the new representative body, as well as a self-determination plan.[567] Development was central to the government's plans with an additional $ 5.4 million allocated to a program that would remove first mortgages from Aboriginal organisation-owned properties. This would allow properties to be 'more effectively used for the economic and social benefit of the community'.[568] The First Mortgage and Community Infrastructure Program was designed to free assets legally owned by Aboriginal corporations and groups from the first mortgage held by the Minister (the State). The Victorian Government argued that mortgages were preventing organizations from accessing capital for development purposes.[569]

The Working Group's report on Phase 2 Consultations included a variety of responses from Aboriginal individuals as they voiced their views on the representative design in face to face consultations and online.[570] Responses were varied, as Michael Graham and Alice Petrie note, and included distrust of the process and government actions, along with more positive approaches. While there were diverse views on the process, there was overwhelming support for the creation of an elected representative body that would represent all Victorian Aboriginal peoples: clans, languages and nations.[571] The report also found that some Aboriginal stakeholders wanted the representative body to be independent from government (financially and politically), so that it would remain unaffected by future changes in administration.[572] Inclusion and independence were important to most individuals and communities engaged in the process.

Phase 2 Consultations led to the creation of the Aboriginal Community Assembly (the Assembly) in 2017. The Assembly was established to facilitate community consultation on

566 Graham and Petrie, *Advancing the Treaty Process*, 16.
567 Natalie Hutchins, "More support for self-determination," Media Release, Minister for Aboriginal Affairs, *Victoria Government* (2 May 2017).
568 Hutchins, "More support for self-determination".
569 "First Mortgage and Community Infrastructure Program Guidelines," *Victorian Government* (April 2018): 4.
570 Aboriginal Treaty Interim Working Group, "Aboriginal Community Consultations," 8 – 12.
571 Graham and Petrie, "Advancing the Treaty Process," 16 – 17.
572 Graham and Petrie, "Advancing the Treaty Process," 17. See also, Interim Report, Aboriginal Treaty Interim Working Group, *Aboriginal Community Consultations,* 48 – 56.

the design of the representative body. Membership was selected through an Expression of Interest process in September-October 2017. Later in 2017, the Assembly issued its final report. It proposed a model for the Aboriginal Representative Body and stated that the body would be independent of government, and elected by Aboriginal people. Crucially, the Aboriginal Representative Body would not negotiate a treaty, but would work with the Victorian Government primarily to establish:

- A Treaty Authority as an independent umpire;

- A negotiation framework that sets up 'ground rules' for negotiations;

- A self-determination fund designed to ensure a level playing field in negotiations.[573]

In January 2018 the Advancement Commission commenced its operations, to establish the Aboriginal Representative Body and to support the treaty process. The Advancement Commission is scheduled to cease operations when the Aboriginal Representative Body commences its activities in 2019.[574]

While the Advancement Commission is designed to offer independent (Aboriginal) advice it remains an arm of the Victorian Government. Its powers and scope are defined by the Victorian Government. It is not independent of it. Yorta Yorta man Jason Tamiru, for example, expressed consternation and questioned the legitimacy of the entire process.[575] This reflects a widespread concern regarding independence and State motivations. A co-relationship is explicitly laid out in *the Instrument to Create the Office of the Victorian Treaty Advancement Commissioner*. The office bearer (currently Jill Gallagher) is appointed by the Premier and Minister for Aboriginal Affairs and is 'responsible to the Minister for their performance'.[576] Even though the instrument (Office of the Commissioner) is to be revoked

573 "Aboriginal representative Body," *Victorian Treaty Advancement Commission* (available at: http://victreatyadvancement.org.au/aboriginal-representative-body).
574 Graham and Petrie, "Advancing the Treaty Process," 18.
575 Kate Munro, "Treaty talks in Victoria", *Guardian*, 15 June 2016, 4.
576 "Instrument to Create the Office of the Victorian Treaty Advancement Commissioner," *Victorian Treaty Advancement Commission*, 12 December 2017 (available at: http://victreatyadvancement.org.au/sites/default/files/inline-files/Instrument.PDF).

upon creation of the Aboriginal Representative Body, the primary Indigenous steering organisation remains an organ of the Victorian Government.[577]

5.3.2.1 Blueprint for an Aboriginal Representative Body

The design of the Aboriginal Representative Body progressed as the Working Group produced its final report in March 2018. Addressing 12 recommendations made by the Assembly, the Working Group adopted seven recommendations (along with an additional two Assembly recommendations related to the need for further consultations and clarification of contested terms), accepted four in principle, and earmarked one for further consideration.[578] The Working Group also endorsed a proportional representative structure and the *Company Limited by Guarantee* legal structure for the representative body. Notably, the Working Group also adopted a final report suggestion that the role of the representative body should be to develop a negotiating framework and not operate as the sole body to negotiate treaty. In fact, despite Andrews Government desire otherwise, the Working Group emphatically stated that the Aboriginal Representative Body could not be the sole negotiating body and '*will not negotiate treaty or treaties for Country*' (original emphasis).[579] Other recommendations adopted in that document refer to support for self-determination, development of a framework that underpins treaty negotiations, incorporation of community-designed principles, the employment of a legal structure that ensures independence and accountability, and a democratic representative body accountable to the whole of the Aboriginal Victorian community.[580]

In June 2018 the Victorian parliament passed the *Advancing the Treaty Process with Aboriginal Victorians* bill 2018. The bill established a framework for negotiating treaty/treaties with traditional owners in Victoria.[581] The legislation represents the latest development in a dispute resolution process within Victoria that has seen the State commit to finding agreement with its Indigenous peoples. So far conflict has been managed. This may not remain so, as different views of the function of the representative body may

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577 Victorian Treaty Advancement Commission, "Instrument".
578 Graham and Petrie, "Advancing the Treaty Process," 19.
579 "Final Report on the Design of the Aboriginal Representative Body," *Aboriginal Treaty Working Group*, (2018): 8.
580 "Final Report on the Design of the Aboriginal Representative Body," 8 – 9.
581 Wahlquist, "Victoria Passes Historic Law."

emerge. The Victorian Government typically favours negotiating with a homogenous negotiating party, yet Aboriginal Victorians favour Independent clan-based negotiations. The representative body may yet offer significant challenges to the Andrews Government.

Despite some criticism of the process by Aboriginal leaders such as Thorpe, who claim it is not representative, the Victorian Government remains committed to creating the Aboriginal Representative Body and to facilitating negotiation (and subsequently, resolution) with Aboriginal Victorians. On 3 July 2018, assent was given to the *Advancing the Treaty Process with Aboriginal Victorians Act* 2018. The Act's only function is to advance the treaty-making process. It provides a mechanism for recognition of the Aboriginal Representative Body as the sole representative of traditional owners and Aboriginal Victorians for the purposes of treaty negotiations. The Treaty Process Act also enshrines the guiding principles of the treaty process while requiring the Aboriginal Representative Body and State to work together.[582] Again, intimating potential problems going forward, the Andrews Government wants the representative body to negotiate on behalf of all Aboriginal Victorians. Not unlike SWALSC in the Noongar Agreement.

In September 2018 the Advancement Commission proposed a model for the Aboriginal Representative Body that would see it constituted as follows: 28 representatives selected from state-wide elections with several seats reserved for traditional owner groups, with more to be added as other Traditional owner groups are recognised. Of the 28 seats, 17 are designated 'General Seats' – all Aboriginal people living in Victoria are eligible to vote for these members. 11 seats are 'reserved' seats to be appointed by each recognised Traditional Owners group.[583] An Executive and Chair would then be elected by the representatives.[584] In addition, an 'Elders Voice' would be designated. The specifics of that role are yet to be provided, though it is to be an advisory role with parameters of its operation to be drawn from an Elders Gathering.[585]

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582 "Treaty Process with Aboriginal Victorians Act."
583 "Treaty Statewide Gathering," *Victorian Treaty Advancement Commission*, 25 September 2018 (available at: https://victreatyadvancement.org.au/sites/default/files/inline-files/Treaty.pdf), 8.
584 "Treaty Statewide Gathering", 6.
585 "Treaty Statewide Gathering", 7.

The Advancement Commission's model would see the 17 general seats voted upon in-person, online, or by post. Absentee votes would also be included. Voters could vote once within one of six designated regions. The six regions were drawn to avoid intersection with Traditional Owner boundaries and loosely follow local government area boundaries (the Advancement Commission stresses they are not representative of regions where treaties are to be negotiated).[586] A minimum of two representatives are to be allocated per region, with the number of representatives determined by the number of votes received.[587] A quota system was recommended to ensure at least 40% female representation with a 'bump-up' proposed to apportion seats to women where they received less votes, though the quota has not yet been filled.[588]

In relation to the 11 reserved seats the Advancement Commission controversially determined that Clans and language groups should not be the basis for determining what constitutes eligibility for the reserved seats. Instead, 'formally recognised Traditional Owner groups with Native Title, Traditional Owner Settlement Act or Registered Aboriginal Party status' were deemed the most suitable groups for reserved seating.[589] In summary, these groups were deemed most appropriate for the following reasons:

- They constitute a clearly defined list of recognised groups;

- The list can adapt as groups are recognised;

- These organisations have existing structures and decision-making processes;

- The groups are inclusive of clans and languages; the groups build upon Traditional Owner structures and institutions;

- The Traditional Owner groups comprise members with skills in negotiation, governance, land, cultural and organisational management;

- Using these groups would ensure the body is consistent with formally recognised Traditional Owner boundaries; and

- Groups would ensure a diversity of views in the representative body.[590]

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586 "Treaty Statewide Gathering", 10.
587 "Treaty Statewide Gathering", 10.
588 "Treaty Statewide Gathering", 11.
589 "Treaty Statewide Gathering", 10.
590 "Treaty Statewide Gathering", 9.

Primarily, these groups were convenient for the Andrew's Government because they were already known to the State. While overall community reaction has been mixed, it is this decision that has sparked the most significant backlash from some Aboriginal individuals who claim that it is not democratic and excludes some Victorian Aboriginal people from the process. Similar to the Noongar Agreement this is representation on the state's terms.

5.3.2.2 Community Reaction to the Model

The Commission's recommendations have not been widely endorsed by the Victorian Aboriginal community. The consultation process was met with concern relating to Aboriginal diversity and inclusion in representative processes generally and the Advancement Commission's proposed model specifically. For example, Co-Chair of the Victorian Land Justice Group Uncle Bobby Nicholls told a rally in Melbourne:

> We are insulted by the suggestion that because we have chosen not to become a corporation or be formally recognised in a few bits of legislation by the colonising force in the Victorian government, that we do not have the right to a seat on the ARB and have our voices represented in the treaty process […]. There must be 38 seats on the ARB to reflect culture and the 38 nations.[591]

The Victorian Government's view of a wholly integrated Aboriginal community (one negotiating bloc) does not cater for a significant proportion of Aboriginal stakeholders who may have been left out. As Nicolls points out, and as Christine McGinn has also reported, there are 38 Aboriginal Nations in Victoria and yet only 11 language groups have been included.[592] Similarly, former MLA Thorpe has questioned how representative the body would be when 'only 11 nations could be chosen out of the 38.'[593] Similar to the integrity issues that befell the Noongar Agreement discussed in the previous chapter; serious questions regarding representation have risen in Victoria too.

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591 Christine McGinn, "Vic Aboriginals may not have a voice on body," *Australian Associated Press*, 26 October 2018 (available at: https://www.msn.com/en-au/news/australia/vic-aboriginals-may-not-have-voice-on-body/).
592 McGinn, "Vic Aboriginals may not have a voice on body.""
593 McGinn, "Vic Aboriginals may not have a voice on body.

Indigenous representation has become a key focus of the Victorian treaty process. While the Victorian Government has been transparent in its desire to negotiate with an 'inclusive' Aboriginal representative structure, the stakeholders engaged in the process are far from representative of the entire Aboriginal population of Victoria.[594] Gunditjmara activist and May Forum speaker Richard Frankland has estimated that some 400 people attended the regional forums. While it was not clear if those attendees represented other Indigenous peoples, other interests, or themselves as individuals the Aboriginal population of Victoria is reported to be approximately 40,000 – 50,000 people.[595] Critics of the Victorian treaty process have subsequently questioned whether enough consultation (and inclusion) occurred.[596] The representation model and the consultation process more broadly risks excluding some Aboriginal people an exclusion that threatens the legitimacy of the treaty process.

Another source of exclusion relates to Aboriginal Victorians living outside Victoria. While expressing her own view (and the views of the Working Group and Assembly) on the need for clan-based treaties, Commission Chair Jill Gallagher has noted that the suggested model 'leaves open the question of who will represent the stolen generations and interstaters – one which the negotiating framework will have to address'.[597] This points to a broader problem, where a tension exists between the need to establish a single negotiating body and a process that 'capture[s] all the voices of the different communities'; indeed, Minister Hutchins notes that this is 'part of the difficulty and complexity'.[598] For Thorpe the selection criteria employed in the recommended structure of the representative body amount to the State ascribing an Indigenous identity as it seeks an outcome suitable to its own interest. Thorpe notes: '[w]e are dealing with the consequences of government being in control of our affairs again, choosing 11 nations, making us all row amongst each other

594 Graham and Petrie, "Advancing the Treaty Process," 13.
595 Graham Murray suggests that three hundred appearing in 10 forums, when there are tens of thousands of Aboriginal Victorians, casts aspersions on the process. See Jack Latimore, "Victoria on the path to a treaty," *The Guardian*, 25 Jan 2017: 3.
596 Graham and Petrie, *"Advancing the Treaty Process,"* 12.
597 Kathy Marks, "Trick or Treaty: Will states redress founding flaw?" *Griffith Review* 60 (2018): 172.
598 Marks, "Trick or Treaty", 177.

about why you got included and we didn't'.[599] If the State defines whom it will negotiate with, it is defining Indigeneity.

Thorpe and others also noted that the Aboriginal Representative Body may constitute an instrument of power. The urgency of this argument was highlighted by Thorpe walking away from the Working Group (along with the Traditional Owner Land Justice group and later Gary Murray) after Minister Hutchins added six additional members to the working group.[600] For Thorpe, the Victorian Government's appointment of members to the Working Group and later the Community Assembly was undertaken to streamline the process and negotiate the treaty process on the Victorian Government's terms.[601] Arguing that the process was excluding Aboriginal people, Thorpe suggested that many Indigenous Elders were not aware or able to attend the forums, due to a lack of transport options.[602] This was viewed by Thorpe as a 'White' imposition of 'white'.[603]

Other Aboriginal Victorians have expressed a similar view. As commentator and reporter Massimo Amerena outlines, Aboriginal woman Meriki Onus is likewise sceptical of any political process that empowers a 'few handpicked people and lets them sign-off on things we have no say in'.[604] Onus is fearful that the fledgling treaty process resembles Victoria's cultural heritage system, which has consistently failed the Djab Wurrung (her Clan). For some Aboriginal people, representation remains an exertion of settler power and dominance.

5.3.3 'Fair' Negotiation

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599 Christine McGinn, "Vic Aboriginals may not have a voice on body."
600 Lidia Thorpe, "Business of the House," Debates, *Victoria Legislative Assembly*, 27 March 2018 (available at: https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13861-advancing-the-treaty-process-with-aboriginal-victorians-bill-2018). See also, Lidia Thorpe, "Address by Aboriginal community members,' Debates, Victoria Legislative Assembly, 28 March 2018 (available at: http://hansard.parliament.vic.gov.au/?IW_INDEX=Hansard-2018-1&IW_FIELD_TEXT=SpeechIdKey%20CONTAINS%20(28-03-2018_assembly_82)%20AND%20OrderId%20CONTAINS%20(7)&LDMS=Y
601 Thorpe, "Business of the House".
602 Thorpe, "Business of the House".
603 Thorpe, "Business of the House".
604 Massimo Amerena, "Destroying the romance of treaty': Victoria vs the Djab Wurrung Embassy," *Overland*, 20 July 2018 (available at: https://overland.org.au/2018/07/destroying-the-romance-of-treaty-victoria-vs-the-djab-wurrung-embassy/).

Issues pertaining to representation affect the fairness of subsequent negotiations. Thorpe claims that the current negotiation process is bureaucratic and that the bureaucrats do not comprehend that a clan-based approach reflects 'how the clans connect us to country and to our ancestors and Elders'.[605] In October 2016 Thorpe was joined by fellow Working Group member and Dja Dja Wurrung Aboriginal Elder Murray, who argued that the appointment of corporate firm Ernst & Young to manage the consultancy process implied a privatisation of the treaty process. For Murray, the consultations should have been clan-based, so that every clan would be at the table when treaty negotiations started.[606] Murray also noted that if the process does not prove to be successful, 'then the clans will sue the state'.[607] These early signs of discord belie the Andrew's Government's desire for one homogenous Indigenous negotiation body.

Increasingly loud calls for clan-based representation by Aboriginal peoples involved in the process reflects concerns held by some that the recommended model does not cater for diverse Indigenous voices. Though the forum encompassed significant differences in attendees' perceptions of the treaty process, it is unclear how dissenting views will be accommodated. Ignoring these voices could perpetuate further distrust towards both the government and the treaty process (especially a perceived lack of financial support to manage the self-determination features of the process).[608]

The Andrews Government has attempted to ease some of this mistrust by reassuring the Victorian Aboriginal community that it would 'act in good faith'. However, these reassurances have been undermined by other government policies that have caused distress to some Aboriginal peoples. For example, a freeway extension project near Ararat that will destroy sacred trees has enraged many Aboriginal people. Indeed, as Amerena has outlined, Thorpe and other Aboriginal activists argue that the breaking up of a tent embassy established to protest the destruction of the sacred trees undermines 'the government's line that their treaty is based on good faith'.[609] Standing on the steps of Victoria's Parliament, Thorpe summarised this inconsistency in one sentence 'a treaty means stop

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605 Marks, "Trick or treaty," 166.
606 Marks, "Trick or treaty," 161 – 162.
607 Marks, "Trick or treaty," 162.
608 Graham and Petrie, "Advancing the Treaty Process," 12.
609 Amerena, "Destroying the Romance of Treaty."

logging our country, stop destroying our country and leave our 800-year-old ancestor trees alone'.[610] Aboriginal spokespersons such as Thorpe have placed significant pressure on the Andrews Government to back its words with actions.

5.3.3.1 Negotiations and Power

The Victorian State negotiates from a position of power due to inherited neo-colonial structures of oppression that are embedded within the settler/Indigenous relationship to the extent that outcomes following negotiations invariably favor the settler party. Yet, as Hobbs and Williams note, if a treaty is to be reached by negotiation, negotiations must be fair and comprise principles such as good faith, reasonableness and trust.[611] Appealing to these principles should be paralleled by a determination to address ongoing colonial structures of power. Hobbs and Williams do acknowledge that negotiations will never occur on a level playing field, and note therefore that 'some level of sovereignty or self-government must be recognized and provided for'.[612] Here Hobbs and Williams identify the preeminence and overriding sovereignty of the state. Despite this power imbalance, Hobbs and Williams insist that Indigenous peoples can be party to 'fair' negotiations without identifying the means for compelling the settler party to remain 'fair'.[613]

So, how does the Andrews Government addresses this power imbalance? It assures Aboriginal Victorians that it is acting in good faith. Here the Victorian Government implies it is committing to not taking advantage of the power it yields in treaty negotiations. Gallagher contends that the treaty process is a means for addressing Aboriginal powerlessness where Aboriginal Victorians can engage with the Victorian Government as equals and 'not as a problem to be managed, or as stakeholders to be consulted once and then ignored'.[614] While this is plausible, it places Aboriginal people in a precarious position – they must trust the settler state. As Amerena points out, the disadvantaged side of the negotiations must 'trust' that the stronger will not abuse its power while negotiating. However, Australia's

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610 Amerena, "Destroying the Romance of Treaty."
611 Hobbs and Williams return to UNDRIP (Articles 15, 17, 19, 32 and 38) to undertake consultation and cooperation on matters that affect them as part of an overall operation of acting in good faith. See Hobbs and Williams, "The Noongar 'Treaty'", 9.
612 Hobbs and Williams, "The Noongar 'Treaty'", 10.
613 Hobbs and Williams, "The Noongar 'Treaty'", 10.
614 Jill Gallagher, "Correspondence," *Dead Right : How Neoliberalism Ate Itself and What Comes Next*; Richard Denniss, *Quarterly Essay* 70 (2018): 77.

history of colonisation and its effects, exclusion, and ongoing disadvantage mean that 'faith in governments and promises of justice may be understandably low'.[615] While the Andrews Government espouses its commitment to 'act in good faith', the protest voiced by Thorpe indicates some Victorian Aboriginal people are sceptical. Amerena contends that policy decisions such as the decision to proceed with the Ararat highway extension undermine trust. To build trust Andrews 'must ensure that his policies match his aspiration of good faith negotiations'.[616] Some Victorian Aboriginal people are not fully convinced that the state would act in 'good faith' and have implored their kin to be more assertive in negotiations.

Measures can be undertaken by Aboriginal people to manage the risk that the state will not do as it says it will. For example, the National Indigenous Youth Movement of Australia (NIYMA) suggests that Aboriginal negotiators should assume a posture whereby certain demands are not-negotiable arguing that in 'negotiating with white Australia, we must stick to our own agenda, and identify the parts we are flexible with and the parts that are not up for negotiation'.[617] Substantive sovereignty must not be negotiable.[618] In this context, an Indigenous-defined form of self-determination should be the focus of any treaty. It is its final outcome and its origin. Aboriginal activists such as Frankland have asserted that treaty must be binding, and also tell the truth about the past, as well as provide a future for communities. The treaty should be controlled by Aboriginal communities.[619] Ensuring an Indigenous-defined self-determination is a crucial step in the Victorian treaty process and remains critical for obtaining a 'Settlement of Claim'.

5.3.4 Settlement of Claim (Self-Determination)

Calls by some Indigenous peoples for clan-based treaties reflect an intrinsic aspect of Indigenous identity. Clan-based recognition is important to any outcome that permits

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615 Massimo Amerena, "Can Daniel Andrews maintain good faith through the treaty process?" *Crikey*, 23 July 2018 (available at: https://www.crikey.com.au/2018/07/23/can-dan-andrews-follow-through-on-his-treaty-promises).
616 Amerena, "Can Daniel Andrews Maintain Good Faith?"
617 Gregory Phillips et al, "A Story of Emergence: Niyma's View on a Treaty," in *Treaty: Let's Get it Right!* (Canberra: Aboriginal Studies Press, 2003): 107 – 117, at 116.
618 That NIYMA's voice is heard is significant. Consultations highlighted the need to give a voice to Aboriginal communities and ensure young leaders are part of self-determination.
619 Richard Frankland, "Handover Ceremony: Richard Frankland", cited in Graham and Petrie, *Advancing the Treaty Process*, 13.

Indigenous sovereignty because Indigenous peoples are asking for it. As Rachel Hocking has noted, clan recognition and identity is important for some Indigenous peoples and therefore 'sovereignty and each of our language groups and our Clans must be clearly recognised in the government's treaty advancement legislation'.[620] This need for clan recognition has been acknowledged by some within the Victorian Parliament. The Victorian Greens are strong advocates of the treaty process (previously spearheaded by Thorpe when she was an elected member). The Greens and have committed to upholding clan-based treaties. They have committed to a treaty model that would see a series of agreements that would acknowledge approximately 100 Clans in Victoria, each with a unique language and culture.[621] The Andrews Government has been more ambiguous.

While a clan based treaty model is advocated by many Aboriginal people, even with clan recognition, a treaty without self-determination is not a treaty at all. This remains Hobbs and Williams' position, and a proposition supported by Thorpe, who has argued that the Victorian 'process so far has completely failed to support self-determination by the clans, despite the government's attempts to brand it that way'.[622] Aboriginal sovereignty is the central concern of any settlement of claim. The nature of Aboriginal self-determination in a state-negotiated setting, however, remains contentious because of the constitutional limits placed on Australian States' powers. This means that the Victorian treaty process risks settling nothing, even if a settlement is negotiated. This lack of jurisdiction, especially pertaining to sovereignty means that the Victorian treaty process may better resemble a settlement agreement in the tradition of the Noongar Agreement (which I claim in the next chapter is not actually a treaty as Hobbs and Williams claim but rather a broader land agreement). As a final settlement of land ownership and native title, the Victorian treaty process risks unwittingly becoming a tool for the transformation of the Indigenous estate.

5.4 Constitutional Recognition and Sovereignty in the Victorian Treaty Process

Potentially flawed representation and legal uncertainty regarding treaty and constitutional powers are serious challenges to the Victorian treaty process. Added to this is the clan-

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620 Rachel Hocking, "Victorian Elders."
621 Rachel Hocking, "Victorian Elders."
622 Thorpe, "Business of the House."

based social organisation of the Victorian Aboriginal body politic, whereby the state is not negotiating with one sovereign, but a series of sovereigns that it does not have the power to recognise. Clan-based identity is an especially significant challenge because it means that the Victorian treaty process must acknowledge the sovereignties of Indigenous peoples – something that it has been reticent to do. However, constitutional recognition may provide a means for recognising sovereignties offering a starting point for negotiations. But constitutional recognition has been rejected by some Indigenous spokespersons such as Thorpe who argue for a treaty or treaties without constitutional recognition (negotiation, they argue, is already an acknowledgment of ongoing Aboriginal sovereignties constitutional recognition, they say, is bestowed by the colonising power).[623] However, constitutional recognition can formalise recognition of Indigenous sovereignties and bind that recognition in a formal document. First, Constitutional recognition gives the settler state a starting point for negotiating a divestment of colonial power structures. Second, it provides legal protection to the treaty process. Currently, State-based treaties have no normative legal protections and are non-binding. They are subject to political whim and change. Their status therefore remains uncertain. Constitutional recognition holds value.

5.4.1 Treaty without Recognition?

State-based treaties are precarious. The Victorian treaty process was opposed by the Victorian Coalition opposition, who rehearsed Howard's argument that a treaty can only involve sovereign states.[624] If sovereignty is central to any treaty, this stance by the Victorian Coalition opposition leaves the Victorian treaty exposed. Indeed, the conservative opposition is not the only political threat to a Victorian treaty. The Andrews Government too has been somewhat ambiguous about recognition of Aboriginal sovereignties. This can be detected in the Andrew's Government shaping the treaty process through its representative proscriptions. Moreover, when there is a change of government, or even a change of heart within government, a treaty can be abolished. Sovereignty is not subject to such machinations. If Indigenous sovereignty can be dismissed with the stroke of a pen, as it was in South Australia, was it sovereignty?[625] Yawuru elder Peter Yu from Western Australia

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623 Carey, "Treaty must Acknowledge."
624 Wahlquist, "Victoria Passes Historic Law."
625 Owen, "Aboriginal People Failed."

has pointed to the South Australian example to argue that treaties can be undone unless they are constitutionally protected.[626] Treaty is final, not temporary.

Constitutional recognition is a means for protecting a State-negotiated treaty and offers a means to address the question of sovereignty. Howard may have a point regarding nations and their proprietorship over treaty negotiation. Echoing Howard, Macdonald argues that states and territories cannot enter treaties with sovereign nations.[627] If we are limited to a treaty framework that employs the Vienna convention (as the Australian Government does), and not the stateless or differentiated citizenship offered by Tully and O'Sullivan respectively, then, to that extent, Howard and Premier Marshall are right: paradoxically, for Indigenous peoples to be granted sovereignty, they need a treaty of some sort, yet to enact a treaty they need sovereignty. Constitutional recognition may provide the circuit breaker.

5.4.1.1 All Treaties are Agreements, yet not all Agreements are Treaties

Some scholars argue that a treaty is in essence an agreement. Citing examples from overseas Williams points out that treaties have been negotiated elsewhere at the State/Provincial level. He suggests that, indeed, they should be negotiated at the State level, as local governments are better positioned than Federal Government in many respects. However, Williams argues that, ideally, a treaty would be negotiated across the three tiers of government, as 'as broad a settlement as possible' is preferable to other arrangements.[628] Representative of the Queensland Indigenous Labor Network Darren Godwell argues that treaties can be negotiated at State level as long as those negotiations are limited to areas outlined within the constitution, specifically: health, housing, justice, land management, education, policing, and employment.[629] However, treaties negotiated within these parameters do not provide for sovereignty, they therefore do not fulfil their primary function.

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626 "230 Years later, Australia's states offer to make treaties with Aboriginals: Something the federal government has long refused to do," *The Economist* (5 July 2018).
627 Gaynor Macdonald, "Indigenous treaties are meaningless without addressing the issue of sovereignty," *The Conversation*, 15 June 2018 (available at: https://theconversation.com/indigenous-treaties-are-meaningless-without-addressing-the-issue-of-sovereignty-98006).
628 Cited in Marks, "Trick or Treaty," 171.
629 Marks, "Trick or Treaty," 170.

Sovereignty lies at the heart of all treaties. As Amerena notes, sovereignty 'recognises the power and authority of parties', yet the Victorian Government has tacitly acknowledged that it cannot legally recognise Aboriginal sovereignty.[630] Thorpe claims that this structurally undermines the treaty process.[631] A treaty without sovereignty is merely an agreement – a contract whereby Indigenous peoples may cede their claims to native title as Indigenous sovereignty and reconciliation become bureaucratic features. This raises the question, why do it then? The Victorian State Government's motivation for calling the prospected agreement a 'treaty' may be political. The added gravitas implied by the term can aid a project of transformation. As Mansell warns, 'It would be disappointing if the treaty debate degenerated into an excuse to hurry up and cement the assimilation of the indigenous peoples into Australia's political, economic and social systems'.[632] If assimilation is the ultimate intent, the Victorian Treaty process, along with the Noongar Agreement, may also expedite the settler appropriation of the Indigenous estate, a form of 'ecocide' or 'social death'.[633] Both fail to sustain a substantive form of Indigenous sovereignty and self-determination.

5.5 Treaty as Agreement-making: Neoliberalism Transforming the Indigenous Estate

Like the Noongar Agreement, neoliberalism has influenced the Victorian treaty process. This is best identified by the Victorian Government's attempt to control the treaty process, primarily through its attempts to shape the Aboriginal Representative Body with whom it will negotiate access to the Indigenous estate. Similar to the Noongar Agreement, the Victorian treaty process applies a potentially flawed representation model to gain a form of Aboriginal acquiescence for the State's development agenda. This garnering of a semblance of Indigenous consent for development obtained through a potentially flawed representation and negotiation process reflects key elements of the neoliberal project. A process employed by the settler state to enact appropriation/transformation of the Indigenous estate that was explored in the previous chapter.

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630 Amerena, "Can Daniel Andrews Maintain Good Faith?"
631 Amerena, "Can Daniel Andrews Maintain Good Faith?"
632 Michael Mansell, "Citizenship, Assimilation and a Treaty," in *Treaty: Let's Get it Right!* (Canberra: Aboriginal Studies Press, 2003): 16
633 Short, *Redefining Genocide*, 36.

5.5.1 Neoliberal Representation

The Victorian Government's management of Aboriginal representation through a colonial representative body homogenizes Indigenous culture and identity. This is a feature of Australian Indigenous public policy in various contexts. Gillian Cowlishaw has identified how 'Aboriginal Culture' in a general sense becomes a 'master signifier' where aspects of Indigenous cultural identity including 'totems, dreaming stories, clans, Aboriginal dancing and painting' are given a generalized meaning.[634] For Cowlishaw, signifiers that once had a different meaning 'are now meaningful as subordinate to the signifier "Aboriginal Culture"'.[635] The settler state perceives and articulates the Indigenous community as one homogenous culture, one 'master signifier'. However, the reality of Indigenous identity, as opposed to the identity imposed by the settler state, is very different. The Indigenous community is comprised of a series of clans spread across the continent. Some Aboriginal people in Victoria are simply asking that treaty negotiations reflect this identity. A treaty can only be negotiated effectively when Indigenous people can self-identify and negotiate on their own terms and not according to a crude, settler-state ordained form of their social organisation.

The state prefers a form of Indigenous representation sympathetic to its neoliberal proscriptions. Aboriginal representation within the Victorian treaty process is restrictive and does not adequately reflect the broader Aboriginal community. Indigenous consent remains a challenge to the settler state. The specific challenges to the Victorian process reflect similar challenges encountered in the Noongar Agreement too, when the Western Australian Government employed a specific model to acquire Indigenous consent without becoming inclusive. Kathy Marks has referred to the Federal Court action by the McGlade group that argued against the procedural fairness of the voting process used to finalise the Noongar Agreement. The Federal Court upheld the validity of the process before legislation was passed effectively cancelling the decision. Marks contends that the state's subsequent intervention occurred because the court action threatened the future of development

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634 Gillian Cowlishaw, "Culture and the absurd: the means and meanings of Aboriginal identity in the time of cultural revivalism," *Journal of the Royal Anthropological Institute* 18, no. 2 (June 2012): 397 – 417, at 405.
635 Cowlishaw, "Culture and the absurd".

projects such as the Adani mine in Queensland.[636] It is not surprising that the state subsequently legislated to ensure that meaningful Indigenous consent is no longer required.

Consequently, similar to the Noongar Agreement, the Victorian Treaty process risks becoming little more than a large land use agreement. As Marks points out, land use agreements permit mining and development in exchange for 'compensation, protection of cultural sites, and economic and employment opportunities, [even though they] amount to de facto treaty-making'.[637] Sutton argues a similar point, suggesting that Indigenous land use agreements 'look very much like a treaty in the American or Canadian sense'.[638] Following legislative intervention, Indigenous land use agreements are increasingly less likely to be contingent on broad Indigenous consent; they are instead given legitimacy because they are called 'treaties'.

5.5.2 Neoliberal Development

The Victorian treaty process operates within a broader neoliberal development ethos promoted and employed by the settler state (i.e., the Victorian Government) to transform the Indigenous estate. In a Victorian context, this development ethos is realised in development policies under the umbrella of the *Victorian Aboriginal Economic Strategy 2013 – 2020* (the Strategy), a document that 'reflects the aspirations of Aboriginal people to take up the opportunities that the Victorian economy provides for long term economic prosperity'.[639] The Victorian Treaty process must be read in conjunction with this policy agenda. The strategy is dedicated to participation and development. Its key ideas are gleaned from the *Aboriginal Victorians in the Economy, New Conversations Economic Development Summit* document that emphasises education, training and fostering relationships between Aboriginal people and employers. One important point to come out of the Summit was a desire to pursue 'economic development outcomes from native title settlements'.[640] Indigenous self-determination from the Victorian Government's perspective

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636 Marks, "Trick or Treaty," 172.
637 Marks, "Trick or Treaty," 172.
638 Marks, "Trick or Treaty," 172.
639 "Victorian Aboriginal Economic Strategy: 2013 – 2020: Building Opportunity and Economic Prosperity for all Aboriginal Victorians," *Victoria Government*, 9.
640 Victorian Government*,* "Victorian Aboriginal Economic Strategy," 9.

reflects a neoliberal view of self-determination understood as individual economic advancement.

The Strategy stems from the Victorian Government's *Victorian Aboriginal Affairs Framework 2013 – 2018* (VAAF), a document that outlines an overarching framework for improving the quality of life of Aboriginal Victorians.[641] As outlined within the Strategy, one of the 'key priorities' in the VAAF is 'building prosperity through economic participation'.[642] The VAAF and the Strategy work in concert with *Closing the Gap* policy and the *National Indigenous Reform Agreement* that suggests economic solutions for ensuring Indigenous wellbeing.[643] In addition, Victoria has also established an Aboriginal Economic Board to ensure '[c]ommercially focused governance arrangements [that] are needed for commercial activities'.[644] Victoria is committed to development. The goals of the Strategy participation and development driven:

1 - Build foundations and aspirations for jobs and business throughout life;

2 - More job opportunities across the economy;

3 - Grow Aboriginal enterprise and investment.[645]

The third goal is critical, as it illustrates the state's agenda. It aims to grow Aboriginal enterprise and investment; the Strategy aims for 'Growth in the number of sustainable Aboriginal community and social enterprises', which encourages home ownership.[646] This underscores the State's commitment to 'Enhancing economic development outcomes from native title settlements'.[647]

The Victorian Treaty process is also consistent with a Victorian State Government commitment to 'redirect[ing] funding from legal transaction costs into an economic base for Traditional Owner corporations to enable the corporations to achieve financial

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641 Victorian Government, "Victorian Aboriginal Economic Strategy," 13.
642 Victorian Government, "Victorian Aboriginal Economic Strategy," 10.
643 Victorian Government, "Victorian Aboriginal Economic Strategy," 10.
644 Victorian Government, "Victorian Aboriginal Economic Strategy," 16.
645 Victorian Government, "Victorian Aboriginal Economic Strategy," 15.
646 Victorian Government, "Victorian Aboriginal Economic Strategy," 35.
647 Victorian Government, "Victorian Aboriginal Economic Strategy," 37.

independence over a 20 year time horizon'.[648] The Strategy also outlines five points for achieving this aim as part of a broader (neoliberal) agenda dedicated to transformation of the Indigenous estate. These five points include:

1 - Early grant funding to build the capacity of corporations;

2 - Establishing a core operations annuity through creation of a 'trust';

3 - Providing seed capital (in land or cash) that would be conditional upon the achievement of capacity and investment planning milestones;

4 - Leveraging economic opportunities from other parts of the settlement package and finally;

5 - Setting a basis for partnerships between the corporation (as the administrator of the Indigenous estate) that may assist with the development of business.[649]

This establishes a Victorian Government commitment to transforming the Indigenous estate via business development that leverages 'community controlled assets to build enterprises, wealth and jobs'.[650] Here the Victorian Government has identified that '[m]any Aboriginal community organisations have access to land and assets, which could be leveraged to build business ventures and generate revenue and build wealth'.[651] Similar to the Noongar Agreement, this policy proscription also represents an attempt to allocate responsibility for the transformation of the Indigenous estate to the Indigenous community through already corporatized Indigenous community organisations.

As development and participation become synonyms for self-determination, the Victorian Government echoes the same (settler) rhetoric employed by the Western Australian Government in the Noongar Agreement. It is part of broader pattern in the neoliberal age where Indigenous self-determination has been interpreted solely as economic independence and prosperity. It establishes a universal economic imperative. For

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648 Victorian Government, "Victorian Aboriginal Economic Strategy," 37.
649 Victorian Government, "Victorian Aboriginal Economic Strategy," 37.
650 Victorian Government, "Victorian Aboriginal Economic Strategy," 38.
651 Victorian Government, "Victorian Aboriginal Economic Strategy," 38.

example, the Strategy states that 'Aboriginal communities participated in economic activity and trade, with emphasis on tools, food and services' and that the 'concept of a trading economy was common across different communities and varied according to the local environment'.[652] The Victorian Government suggests that traditional Indigenous economic development has been thwarted by European settlement and proscribes development of the Indigenous estate as a realisation of self-determination and potential remedy to degradation. The actors responsible for this reclamation of 'authentic' Indigenous culture and identity must be Aboriginal free-marketeers.

This reflects a symbolic recognition of Indigenous alterity though it serves a radically transformative agenda included within the Strategy as a fourth priority action that 'Realise[s] more economic opportunities from recognition of Traditional Owners'.[653] A neoliberal transformation project the Strategy claims that '[a]ccess to land and resources is a key aspect of wealth generation', and adds that native title settlements 'and the recognition of Aboriginal people's cultural heritage', which 'can play a role in providing new economic opportunities for Traditional Owner corporations and Registered Aboriginal Parties'.[654] As the primary actor, the Victorian Government ties development to culture before subsequently capturing and mining it. Culture itself becomes a site for development.

The State insists this Indigenous led development as a form of self-determination that can be realised through Partnership Agreements. This offers a method for realising a settler state-endorsed Indigenous sovereignty. The Tharmba Bugheen Victorian Aboriginal Business Strategy 2017 – 2021 for example centres on building 'relationships' and 'partnerships' to foster Aboriginal 'enterprise and entrepreneurship'. Partnerships are a crucial step toward what Minister Hutchins and The Minister for Small Business, Innovation and Trade Philip Dalidakis conceive of as an Aboriginal self-determination, where the 'economic advancement of Aboriginal Victorians is critical for self-determination'.[655] Throughout the treaty process, the Victorian Government has carefully employed *this* notion of self-determination. While Indigenous people may think of a very different self-

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652 Victorian Government, "Victorian Aboriginal Economic Strategy," 13.
653 Victorian Government, "Victorian Aboriginal Economic Strategy," 40.
654 Victorian Government, "Victorian Aboriginal Economic Strategy," 40.
655 "The Tharmba Bugheen Victorian Aboriginal Business Strategy 2017 – 2021," Victorian Government (March 2017): 5.

determination, a self-determination that represents their sovereignty, the Victorian State definition is used to reify an economic imperative.

While the Victorian Government has pursued this economic imperative, there has been some resistance from non-Indigenous sources. In their submission to the *Closing the Gap and Victorian Aboriginal Affairs Framework Refresh,* the Victorian Council for Social Service identifies 'that a prosperity lens may over-emphasise economic factors, and not give adequate attention to entrenched inequality and the underlying drivers of disadvantage'. In addition, VCOSS submitted that the Framework provided 'a limited definition of community, and fails to recognise the diversity of the Aboriginal and Torres Strait Islander population'.[656] Pressing self-determination as individual economic independence applies a different understanding of self-determination to that espoused by many Indigenous activists. They are expressing an Indigenous type of responsibility.

5.6 Constitutional Recognition: A Lesson from Victoria

The Victorian experience provides an example of the settler state applying a definition of Indigenous self-determination that centres on the achievement of individual economic independence as a mechanism for transforming the Indigenous estate. Part of a self-serving agenda of land acquisition, this bureaucratisation understands Indigenous peoples as individual economic entities and not as members of a body politic expressing a uniquely Indigenous alterity. In this way, as Mansell has outlined, the government's insistence that Indigenous citizens negotiate with government as individual citizens and not clans critically undermines the position of Indigenous peoples.[657]

This risk is mitigated to some extent by incorporating the Victorian treaty in a legally binding act – constitutional recognition. As Bambett notes, '[w]e should not be at the mercy of the decisions of other parties according to the shades of their political thinking every three to four years'.[658] The purpose of this constitutional recognition would be to ensure that Indigenous peoples retain a capacity to shape their own self-determination, which is

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656 Brooke McKail, "Closing the Gap: Where to for Victoria?" Victorian Council for Social Service, 15 June 2018 (available at: https://www.vcoss.org.au/policy/closing-the-gap-where-to-for-victoria).
657 Mansell, "Citizenship, Assimilation and a Treaty," 17
658 Bamblett, "A Victorian Treaty," 11

exactly what the term means. As Mansell notes, the nature of 'treaty' in the context of the Indigenous/non-Indigenous relationship should be decided by Indigenous peoples. Sovereignty is about the right to make that choice.[659]

Some Indigenous peoples have resisted constitutional recognition on the grounds that it risks ceding sovereignty and that it legalises the occupation of Indigenous land. Indeed, Thorpe and Onus argue that Indigenous people do not need the formal recognition of a foreign occupying nation.[660] Constitutional recognition also risks consigning Indigenous sovereignties to the past. As Glenn Loughrey and Brooke Prentis have pointed out, constitutional recognition 'continues to recognise these people only as the "previous custodians of this country"—as I recently read on a plaque in the grounds of a school'.[661] Constitutional recognition can be symbolic and is viewed by some Indigenous spokespersons as an instrument of oppression. However, constitutional recognition also offers opportunities for addressing colonial structures of power, as it can formalise the recognition of a contemporary and enduring Indigenous sovereignty.

Constitutional recognition also provides the basis for dismantling colonial structures that disempower Indigenous peoples. As Davis has pointed out, after ten years of Closing the Gap reports, the status quo remains. It is not working for Indigenous communities: 'Structural reform – power – in Australia's constitutional framework is the only way to ameliorate the powerlessness'.[662] Power redistribution can be formalised in the Australian Constitution. Michael Dodson outlines how the content of treaties can be agreed within a constitutional mandate whereby both parties reach agreement on the 'principles that would underpin the negotiations'.[663] For this reason, many Indigenous elders endorsed the call for constitutional recognition formalised within the Uluru Statement.

The exact nature of constitutional recognition differs. Dodson provides two options, each involving insertion of a new section 105B. The insertion would amount to 'legally

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659 Mansell, "Citizenship, Assimilation and a Treaty," 17
660 Onus, "De-colonise."
661 Glenn Loughrey and Brooke Prentis, "Christian perspectives on treaty," *Arena Magazine* 146 (February 2017): 18 – 19.
662 Megan Davis, "Correspondence," in *Dead Right: How Neoliberalism Ate Itself and What Comes Next, Richard Denniss, Quarterly Essay* (2018).
663 Mick Dodson, "Unfinished Business: A Shadow Across Our Relationships [online]," in *Treaty: Let's Get it Right!* (Canberra: Aboriginal Studies Press, 2003): 39.

securing a treaty', as it 'involves including the entire text of the document in the Australian Constitution'.[664] As Dodson notes, this proposal could then provide the basis of relationships between the Federal Government and Indigenous people, as well as providing instruction on how they would be conducted in the future.[665] Dodson cautions, however, that obtaining approval for this proposal would be difficult and doubts that Indigenous peoples would support the approach.[666] A 'bare statement of principles' that may provide a framework for any future relationship would be nearly impossible to approve, given Australia's history of failed referenda. For Dodson, finding agreement on how the provision would work and what it would contain remains difficult, as it requires support from Indigenous peoples before the creation of a law that then needs support from a majority of settlers in a majority of settler states. Dodson concludes that it may be easier to appeal to existing constitutional law and insert a special clause that gives 'a broad enabling power to the Commonwealth Parliament in terms of negotiating a treaty or treaties with representatives of Aboriginal and Torres Strait Islander peoples'. This clause could be modelled on the existing section.[667]

The value in this approach to constitutional recognition (should it pass in a referendum) is that it gives the Commonwealth absolute power to enter treaties and would not require the support of the States.[668] The new section would provide an automatic validation of existing treaties, and States may be given power to pass laws that ensure their application. This would mean that the Commonwealth could authorise the States to exercise a power typically reserved by the Commonwealth.[669] Treaties negotiated under this constitutional reform could therefore be tailored to the unique needs and requirements of Australia's Indigenous peoples. A treaty endorsed federally is also leant greater certainty and authority by a series of 'international norms and standards' to which Australia is party.[670] Here sovereignty is realised at the federal level against the backdrop of International law before responsibility for applying the specifics of the treaty are deferred to State actors.

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664 Dodson, "Unfinished Business", 35.
665 Dodson, "Unfinished Business", 35.
666 Dodson, "Unfinished Business", 35 – 36.
667 Dodson, "Unfinished Business", 36.
668 Dodson, "Unfinished Business", 36.
669 Dodson, "Unfinished Business", 36.
670 Megan Davis, "International Human Rights Law and the Domestic Treaty Process," in *Treaty: Let's Get it Right!* (Canberra: Aboriginal Studies Press, 2003): 150.

5.7 Decolonisation: Addressing Colonial Power Structures

There are a number of other options for countering the bureaucratisation of Indigenous sovereignty. Many are associated with recognising the inevitability of development projects. They seek ways to protect the Indigenous estate. For example, hybrid models such as Altman's Hybrid Economy theory provide a means for Indigenous peoples to assert a degree of independence through a partial engagement with the 'real' economy. Foley's reclamation of Indigenous entrepreneurship similarly encourages Indigenous participation in the economy. These options offer a pragmatic attempt to conceptualise Indigenous peoples as independent economic actors. However, unless they are preceded by significant structural reform of colonial power structures, like the Noongar Agreement and the Victorian treaty they also risk further Indigenous dispossession. In these cases too, engagement is used to encroach upon and then change the Indigenous estate.

Constitutional recognition provides one option for addressing the colonial power structures that facilitate the neoliberal effort to transform the Indigenous estate; federalism provides another. The federal model can incorporate diverse Indigenous identities in a 'grand' treaty that ensconces a series of smaller clan-based treaties. As Hobbs and Williams emphasize in a slightly different context, recognition of the Indigenous polities establishes the capacity for Indigenous peoples to acquire citizenship within an Indigenous nation *and* within the settler state.[671] This form of treaty would enact a form of differentiated citizenship.

5.8 Conclusion

Indigenous peoples have never ceded sovereignty. Even in accordance with the Vienna definition favoured by current and past federal governments a treaty may therefore be warranted. While talk of a treaty is not new in Australia and calls for constitutional recognition have also been issued throughout Australian history, only recently have some States assumed responsibility for negotiating treaties.

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671 Specifically, UNDRIP Article 33. See Hobbs and Williams, "The Noongar 'Treaty,'" 8.

The Victorian treaty negotiation is a contemporary example of this shift. The Victorian government is pursuing a treaty with Aboriginal Victorians in areas where it holds jurisdiction (such as health and education). While some, such as Former Prime Ministers Howard and Abbott, have argued that States have no jurisdiction, the process continues in Victoria and other jurisdictions (e.g. the Northern Territory). Yet the Victorian process has resulted in the development of a model for Aboriginal representation that some Indigenous leaders have called the model exclusionary and pointed out how it remains controlled by the state. Indigenous leaders have argued for treaties with clans and expressed frustration that the Victorian Government is excluding Aboriginal peoples through a designation that only acknowledges 11 clans.

These are important criticisms as they highlight a tendency of the settler state through the neoliberal era to handpick negotiating partners and subsequently portray that group as representative of a wider, homogenous Aboriginal community. In a context of treaty, absence of widespread Indigenous support (i.e. a treaty without sovereignty) means the absence of treaty at all but a form of agreement-making instead that is merely given added gravitas by a specific term.

A lack of sovereignty is a common theme in the Noongar Agreement and the Victorian treaty. Also common is emphasis of an economic imperative where the state offers Indigenous 'self-determination' as the realisation of economic independence – a realisation only possible through development of the Indigenous estate. This bureaucratisation of Indigenous sovereignty is indeed a neoliberal tradition is common to both.

The Victorian treaty risks legitimising the authority of the settler state. It is therefore critical that structural inequalities that perpetuate settler-colonial domination be addressed. Constitutional recognition may provide this function, as it offers a treaty process protected by the Australian Constitution. While some Indigenous leaders such as Thorpe and Onus argue that constitutional recognition is a settler issue and Indigenous people do not need to have their sovereignty 'bestowed' through a document designed and applied by an 'illegally occupying' force, other Indigenous leaders such as Professor Dodson see it as an opportunity for Indigenous people to gain increased autonomy.

Many of the Indigenous leaders who gathered at the National Conference in Uluru to endorsed constitutional recognition as a means for protecting treaties from changes in government. Constitutional recognition can offer a means for addressing colonial structures of power. It forms the basis for negotiations where the settler state is forced to recognise the sovereignty of historical and contemporary Indigenous communities. This would avoid the pitfalls of the Noongar Agreement, where an agreement was enacted that may facilitate the transformation of the Indigenous estate and signal 'social death'. Like the Noongar Agreement, the Victorian Treaty process threatens the 'third' space by potentially asserting settler domination of that space. In addition to constitutional recognition that can protect this third space, several Indigenous responses and policy alternatives that simultaneously protect and yet threaten an Indigenous-occupied third space are discussed in the next chapter. I will explore if human rights-based policies that assert and protect the third space can offer a higher likelihood of success in preserving both Indigenous alterity and the third space where they are expressed.

6. Hybrid Spaces, Responsibility, Resistance: Redefining the Public Space

The Noongar Agreement and the Victorian treaty process are two examples of neoliberal Indigenous policy. They demonstrate how the settler state accesses the Indigenous estate and transforms Indigenous communities and realise the objective of a neoliberal project in a settler-colonial dress. This encroachment constitutes an existential threat to both Indigenous alterity and the public space more broadly.

Threats to Indigenous alterity are not new; they are part of a logic of elimination that has defined Indigenous history in Australia since European arrival. Combining an appeal to universal values and reverence for free-market capitalism, neoliberalism represents the latest mode of Indigenous dispossession. The evolution of this neoliberal project was outlined in chapter three. The Noongar Agreement exemplifies this trend while the 'good faith' negotiation ethos extolled by the Victorian Government likewise potentially transforms the Indigenous estate. In both cases the Indigenous 'problem' is met with an administrative 'fix'. The Noongar Agreement in particular provides an example of how the settler state pursues this administrative 'fix' to the Indigenous 'problem', where, as Mounk notes, responsibility becomes accountability.[672] This responsibility-as-accountability features in the Noongar Agreement and the Victorian treaty process, albeit to a lesser extent. In the case of the Noongar Agreement, the settler state offered financial compensation and self-management in exchange for a commitment to increased development and participation within the 'real' economy. In exchange, the Noongar nation surrendered all future legal recourse and claims to land. In the case of the Victorian Treaty process, the State offers a notion of responsibility-as-accountability through limited recognition in exchange for development, though to what extent that will be realised, we do not know.

Both amount to the irreversible transformation of the Indigenous estate. This chapter explores the implications of neoliberal spatial transference for Indigenous expressions of alterity. This chapter explores a theme inferred throughout the previous two chapters: any expression of Indigenous alterity in the public space asserts a dialectically

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672 Yascha Mounk, "Responsibility Redefined," *Democracy a Journal of Ideas* 43, Winter 2017 (available at: https://democracyjournal.org/magazine/43/responsibility-redefined).

negotiated form of hybridity that challenges the status quo. The chapter emphasises public spaces as barricades against settler-colonial encroachment upon the Indigenous estate. Hybridity emerges as a bulwark against neoliberal claims to 'universality'. How the state justifies social transformation.

The first part of the chapter explores self-fulfilling 'universal' neoliberalism as a transformative project dedicated to turning public space into private property. Neoliberal ideology is expressed through the 'universal' concept of private ownership, whereby private proprietorship becomes synonymous with wellbeing. In this context, wellbeing is realised through the auspices of individual 'responsibility'. The settler state utilises colonial power structures as it applies responsibility/accountability as administrative tools. Here, mutual obligation and ILUAs have become, and in the case of the Victorian treaty, risks becoming, contemporary tools of settler-colonial dispossession. Part two explores how hybrid spaces can operate as sites of resistance against neoliberal dispossession. The hybrid space provides a place for an Indigenous expression of autonomy that is supportive of an existent (yet informal) Indigenous sovereignty. While hybrid spaces are challenged by colonial structures and under constant threat of assimilation, their existence in the context of a dialectical relationship offers an opportunity for Indigenous peoples to express an Indigenous form of responsibility. These expressions can effectively challenge disempowering discourses surrounding Indigenous 'capacity'.

The risks of assimilation are explored in part three where the possibility that neoliberalism may further encroach upon the Indigenous estate and threaten public spaces by exploiting hybrid projects is countenanced. Primarily it explores how economic anthropology approaches, such as the work of the Centre for Aboriginal Economic Research (CAEPR), Altman's Hybrid Economy, and Foley's Indigenous Entrepreneurship that aim to protect Indigenous alterity by formalising an Indigenous presence in the market through partial commodification of the Indigenous estate actually risk further appropriation. However, a lack of Indigenous negotiating power may expose aspects of Indigenous culture previously beyond the reach of the market. The chapter then concludes with an outline of how Indigenous resistance in a third (public) space may mitigate these risks and can simultaneously protect the space by finding an authentic expression of Indigenous

responsibility in a robust form of hybridity supportive of Indigenous sovereignty. This resistance and subsequent hybridity encapsulate and promote Indigenous resilience along with an Indigenous victimhood that can mobilise white (settler) guilt and hold the settler state accountable for colonial injury.

The value of this resistance-oriented hybridity is illustrated by highlighting an Indigenous protest that occurred in early 2018 following a television panel discussion on Channel Seven's *Sunrise* program. The panellists condoned the prospect of taking Aboriginal children away from their parents and communities. Ensuing Indigenous protests against *Sunrise* indicate how discourses of domination can be challenged by assertions of Indigenous resistance and victimhood as an Indigenous assertion of responsibility. They serve as decolonising tools for challenging the neoliberal notion of responsibility employed by the settler state to transform the Indigenous estate. The *Sunrise* affair and its consequences represent a critical illustration of how Indigenous resistance invigorates the public space. Indigenous resistance is thus an *Indigenous* form of responsibility that evokes an intangible form of sovereignty. In turn, this intangible sovereignty can be a precursor to a differentiated citizenship model. Formalised sovereignty requires a healthy hybrid public space.

6.1 Universal Neoliberalism: Responsibility and the Transformation of Space

Coming together in the public space, the settler and the Indigenous person form a dialectical hybrid space that provides a forum for Indigenous expressions of alterity. These hybrid spaces are shaped by colonial power structures. As Paul Havemann has identified, the core project of colonisation in the neoliberal period is the imposition of free-market capitalism on Indigenous lands – a project that eliminates difference. This elimination of difference is an outcome pursued in 'Anglo-Commonwealth' settler-colonial states such as Australia, Canada and New Zealand through assertions of state hegemony.[673] The settler state does not merely aim to extinguish Indigenous peoples' capacity to express difference;

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673 Paul Havemann, "Indigenous Peoples, the State and the Challenge of Differentiated Citizenship," in *Indigenous Peoples' Rights In Australia, Canada and New Zealand*, ed. Paul Havemann (Oxford: Oxford University Press, 1999), 470.

its collusion with neoliberalism also means that it attempts to extinguish the very forum that facilitates that expression – the public space.

As a transformative project, the neoliberal project aims to turn public space into private hands, thus instigating 'social death'. Asserting proprietary rights as a fundamental human right, the neoliberal project of spatial transference is the legacy of neoliberalism's ideological aversion to difference. Over the last twenty-five years, neoliberalism has provided governments with a means to address difference by subjugating, reducing, and appropriating its expression. The neoliberal universal maxim that happiness and wellbeing are intrinsically linked to free-market capitalism must be upheld; any opposition, the relational social organisation of some Indigenous communities in particular, is seen as a hostile act to be remedied through appropriation or further marginalisation.

6.1.1 Neoliberal Universality and Difference

Neoliberalism promotes a universal justification for social transformation that denies difference and denies culture. However, as Povinelli suggests neoliberalism itself can be seen in a dialectical context. As a theoretical concept, it is partly a response to anti-colonial (and other) critiques of liberalism. A form of hyper-economic liberalism, neoliberalism resolved (to some degree) a global liberal government legitimation crisis over how to accommodate difference within liberalism, or as Povinelli puts it, the 'meaning and ends of difference'.[674] Difference, including cultural difference, as a concept and practical reality sits uneasy within liberalism. Neoliberal thinkers have provided governments with a means to reduce difference through assertions of capitalist democracy as an omnipotent, universal right. This has constituted a hyper, all-encompassing, and profoundly transformative form of capitalism.

Drawing from Michel Foucault, Povinelli asserts that in its contemporary working, neoliberalism aims to transform society by asserting the market as the ultimate measure of all social activities and values.[675] Neoliberalism promotes market eminence as the eminent universal 'value'. The universal eminence of the market imperative, however, is also

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674 Povinelli, *Indigenous politics*, 23.
675 Povinelli, *Indigenous politics*, 21.

founded in human rights discourses. During the neoliberal era access to the market as a 'human right' has become the foundational principle of public policy. Conversely, the traditional cultivation of a public space has been discontinued.

6.1.2 Universalism and Australian Indigenous Policy

The process that solidified the neoliberal project in an Australian Indigenous policy context as a doctrine of sameness, or what Altman and others, including Foley, refer to as 'mainstreaming' Government programmes under Howard in particular were organised to be delivered in a 'mainstreaming' fashion.[676] Kowal argues that a triumph of the universalised individual-centred human right finds expression in the assertion that Indigenous people desire the same things as non-Indigenous people.[677] Mandating that Indigenous people adapt to dominant (neoliberal) culture, the state has moved away from the prospect of granting *political* rights to Indigenous peoples, *individual* rights would suffice.[678] In this Indigenous context, adaptation operates as a type of assimilation, as Lindroth and Sinevaara-Niskanen note. Indigenous people need to adapt, settlers do not. Assumptions and ideas relating to adaptation provide a means for governing the life, subjectivity and 'being' of Indigenous peoples. Indigenous adaptation becomes pervasive, and the Indigenous subject becomes primarily an adaptive subject.[679] The Indigenous person is constantly required to accept the universal superiority of the settler state and to adapt.

There are two competing emphases in demands to adapt, the first acknowledges the importance of culture and the second resists that importance.[680] Kowal explores the former in a context of Indigenous health, conceptualising three competing diagnoses that explain ill health where culture is foregrounded. These competing diagnoses include cultural adaptation, cultural loss, and cultural rigidity.[681] These concepts provide a framework for

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676 Altman, *Indigenous Policy,* 116; Dennis Foley, "Indigenous content in education: a dichotomy, *Indigenous Content in Education Symposium* 1, no. 1 (2015). See also, Michelle Grattan, "Aboriginal affairs may go full circle with $1bn switch," *The Age* (5 April 2004), 1.
677 Kowal, "The Proximate Advocate," 71 – 72.
678 Andrew Lattas and Barry Morris, "The politics of suffering and the and politics of anthropology," in *Culture Crisis: Anthropology and Politics in Aboriginal Australia*, eds. Jon Altman and Melinda Hinkson (Sydney: University of New South Wales Press, 2010): 85.
679 Marjo Lindroth & Heidi Sinevaara-Niskanen, "Adapt or Die? The Biopolitics of Indigeneity—From the Civilising Mission to the Need for Adaptation*," Global Society* 28, no.2 (2014): 192 – 193.
680 Kowal, "The Proximate Advocate," 69 and 75.
681 Kowal, "The Proximate Advocate," 69.

understanding how neoliberal logics simultaneously recognise culture all the while dismissing its importance. Neoliberalism harnesses the first of these diagnoses, cultural adaptation, to justify assimilation. This cultural adaptation proscription occupies the focus of government Indigenous policy throughout the neoliberal era as policies such as the NT Intervention and Closing the Gap are dedicated to ensuring that Indigenous people adapt to their surrounding circumstances.[682]

Cultural adaptation can be oppressive as it perpetuates a settler-colonial project of Indigenous elimination and neoliberal social transformation. The justification for cultural adaptation is not just that one culture (the settler) is superior to another (the indigenous one), it is that settler culture has triumphed to become *the* universal culture. Indigenous culture becomes a relic of the past and the unequivocal loser in a war of cultures where Western liberal democracy (free-market capitalism) has won. As Francis Fukuyama concluded, liberal democracy represented 'the end of history'.[683] This notion has had important iterations as Australian Indigenous policy has evolved in the neoliberal era.

The cultural adaptation argument posits that Indigenous culture remains trapped in pre-colonial time and is not suited to the modern world. Elements of Indigenous culture that were once positive have now become dysfunctional and polluted to the extent that the Indigenous person must evolve to survive. Kowal refers to elements of relational community organisation as an example of how culture is now viewed as inadequate in the context of the changes prompted by colonisation and modernisation. Kowal suggests that the cultural adaptation thesis remedies problems through what Kowal refers to as 'gentle cultural adaptation'.[684] Cultural adaptation does not mandate the end of culture; it establishes causal links between particular cultural expressions and specific, potentially undesirable, outcomes. Summarising her findings with reference to Aboriginal health, Kowal contends that cultural adaptation means 'not the *loss* of Aboriginal culture', but the 'continuation of culture causing ill health'.[685] Here cultural adaptation advocates link Indigenous culture with

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682 Kowal cites Noel Pearson's 'welfare dependency' argument as an example of cultural maladaptation. See Kowal, "The Proximate Advocate," 69.
683 Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).
684 Kowal, "The Proximate Advocate," 71.
685 Kowal, "The Proximate Advocate," 71.

poor health, inferring that the continuation of particular aspects of Indigenous alterity is unsustainable and hindering Indigenous progress – Indigenous cultural survival.

The adaptation thesis associates engagement with the real economy and wellbeing and is oppressive; it measures wellbeing in culturally insensitive ways and mandates a course of action that may perpetuate disadvantage, loss of alterity and ultimately, loss of sovereignty. Anthropologist Diane Austin-Broos mandates adaptation, noting that very few contemporary Aboriginal people experience a hunter-gatherer economy, and posits that Indigenous institutions such as kinship are only reproduced because Indigenous peoples now live in a 'cash and commodity world', and in 'permanent settlements of a scale unknown in hunter-gatherer life'.[686] Austin-Broos contends that while Indigenous relationships and social organisation were once oriented toward a hunter-gatherer lifestyle those relationships may have changed as the nature of that lifestyle for most Indigenous peoples no longer exists.[687] An embrace of 'modern' culture requires acceptance of the 'reality' that the market can provide emancipation. Deferring to the market as the primary means for Indigenous emancipation, Austin-Broos employs a pragmatism favoured by some Indigenous leaders who have promoted adaptation discourses in health, education and employment.

Austin-Broos, expects to improve Indigenous wellbeing and to find a means to reconcile Indigenous and settler Australia through the auspice of an economic-centric sameness argument that resonates with the mainstreaming ethos dominant during the Howard era (and beyond). Austin-Broos perceives Indigenous culture through a neoliberal lens of material inequality associated with disinclination to engage with the real economy. She applies such categories as 'poverty' and 'inequality' in an abstract way to denote the relationship linking Indigenous poverty and non-Indigenous wealth. In this same context, Pearson raises inequality as the eminent threat to the future of Indigenous peoples.[688] Pearson's remedy for this inequality is to ensure 'that our people eventually get our fair

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686 Diane Austin-Broos, "On the subject of politics; response to Ghassan Hage," *The Australian Journal of Anthropology* 23 (2012): 414.
687 Austin-Broos, "On the subject of politics".
688 Noel Pearson, "Aboriginal Disadvantage," in *Essays on Reconciliation*, edited by Michelle Grattan (Melbourne: Black Inc., 2000).

share'.[689] However, while poverty and Indigeneity are often concomitant, they do not necessarily share an inherent relationship. As Hage has argued, these approaches confuse symptom for cause.[690]

On the contrary, Hage suggests that while wealth among non-Indigenous and Indigenous peoples is (generally) tilted significantly in the favour of the former, and this represents a social and moral problem, Indigenous and non-Indigenous experiences of poverty are analogous, but they are not the same.[691] Indigenous poverty is unique. While an Indigenous poor person can be poor *and* Indigenous a non-Indigenous poor person cannot be Indigenous. For Hage, it is ongoing conditions of dispossession, specifically colonial and historical structures that shape the relationship between the wealth of non-Indigenous society and Indigenous poverty.[692] It is these conditions that function as barriers to Indigenous participation and wellbeing, not a lack of participation with the real economy. Advocates of the cultural adaptation thesis invoke a sameness argument to transform Indigenous culture in the hope that it will improve wellbeing. This sameness argument and the cultural adaptation thesis more generally are consistent with the neoliberal project of spatial transformation. They both promote settler culture as the only one offering status.

Distracting away from the underlying causes of Indigenous disadvantage, sameness (mainstreaming) arguments perpetuate Indigenous suffering and provide justification for further encroachment upon the Indigenous estate. Sameness or mainstreaming transforms the Indigenous estate and accordingly the public space. The relationship between Indigenous disadvantage and the eradication of the hybrid public space through cultural adaptation is critical: the hybrid public space provides the forum where Indigenous disadvantage can be identified and resisted.

6.1.3 Neoliberal Transformation of the Public Space

The neoliberal colonisation of public space is particularly harmful for Indigenous cultures because it is there that Indigenous people most effectively express their sovereignty and

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689 Pearson, "Aboriginal Disadvantage," 165.
690 Ghassan Hage, "Truncating anthropology's political imagination," *The Australian Journal of Anthropology* 23 (December 2012): 408.
691 Hage, "Truncating anthropology's political imagination," 408.
692 Hage, "Truncating anthropology's political imagination," 409.

resist colonisation. This was one reason why the West Australian and Victorian State Governments have been keen to enter into agreement with local Indigenous peoples, (accessing resources such as land is of course another). Indigenous occupation of land, resistance and survival are a threat to the legitimacy of the settler state.

Sites of Indigenous resistance within Australia are concentrated in regional communities. These regional communities are critical public spaces because they are locations where Indigenous people experience an unrivalled and in many cases unchallenged occupation of land. In some ways, these communities lay beyond the reach of the settler state. Settler laws, customs and general values have a diluted presence in these areas. These regional communities represent places and spaces of Indigenous sovereignty where their visible occupation provides a powerful rebuke to settler sovereignty. These communities thus become the focus of the settler state's attempts to showcase its domination and sovereignty. This is where constructions of Indigenous alterity in crude and incomplete characterisations are most vulnerable for settler-colonial purposes.

Altman convincingly contends that these communities are colonial constructs, a consequence of 'invasion, land alienation, warfare and colonial incarceration'.[693] As discussed in chapter three, protection-era Indigenous policy saw Indigenous people shepherded onto remote communities in an attempt to segregate Aboriginal people from settler Australia. Aboriginal survival was a problem for the setter state and anathema to its project of land acquisition and occupation. Remote communities constituted environments designed to ensure Indigenous separation. These communities have now become visible sites of Indigenous resistance and are a visible reminder of the tenuousness of settler sovereignty. They are third spaces.

The stubborn survival of these communities and their spaces are evidence that the colonial project of Indigenous dispossession remains incomplete. The state thus attempts to control or erase the public space occupied by Indigenous people. The technique employed for this dispossession in the neoliberal era is different from techniques deployed previously. Neoliberal-era dispossession is pursued through the imposition of accountability framed as responsibility, and via other administrative tools – Indigenous mainstreaming being the

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693 Altman, *What future for remote Indigenous Australia,* 265.

overarching goal. One example of such a technique is epitomised by ubiquitous references to 'feasibility'. Altman emphasises that the settler state judges the viability of Indigenous communities through quantitative measures that are rarely applied to non-Indigenous remote communities (neoliberalism has its settler limits).[694] Remote Aboriginal communities must adapt; their incapacity to adapt is ultimately used to perpetuate further dispossession.

6.2 Third Space/Hybridity

The intersection between settler interest and Indigenous interest occurs in a public space that forms a hybrid space that is fluid and changing. This space is not necessarily equal, though at its most basic it represents shared ground. As Havemann has outlined, Indigenous peoples exist within this 'shared ground', a ground comprising indiscrete boundaries and a heterogeneous Indigenous body.[695] Indigenous existence and alterity is shaped within this shared space taking a negotiated hybrid form. This hybrid space accommodates Indigenous difference in a mutable space constituted by claim and counter claim rather than a fixed axis of power.[696]

The hybrid space provides a means for transformation not just of space, but identity; the hybrid space can therefore shape not just Indigenous identity, it can also shape settler identity. This reinforces Haggis' postulation that 'postcolonial theorists claim hybridity as the motif of transgressive identities'.[697] An important aspect of this reconstitution of identity is the assertion of Indigenous knowledges. As Sally Babidge, Shelley Greer, Risita Henry and Christine Pam have noted, Indigenous knowledge is critical in a context of building postcolonial relationships between the settler state and Indigenous people because Indigenous knowledge has 'efficacy as a political tool'.[698] The hybrid space is a dynamic political space that facilitates the expression of these knowledges.

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694 Altman, *What future for remote Indigenous Australia,* 265.
695 Havemann, *Indigenous Peoples*, 474.
696 Jane Haggis (2004) "Thoughts on a Politics of Whiteness in a (Never Quite Post) Colonial Country: Abolitionism, Essentialism and Incommensurability," in *Whitening Race: Essays in Social and Cultural Criticism*. (Canberra: Aboriginal Studies Press): 52.
697 Haggis, *Politics of Whiteness*, 52.
698 Sally Babidge et al, "Management Speak: Indigenous Knowledge and Bureaucratic Engagement," *The International Journal of Social and Cultural Practice* 51, no. 3 (2007): 151.

Colonial power structures are an impediment to the flow of Indigenous knowledges into this transformative hybrid space. For example, Samantha Muller, in her analysis of a Yolungu resource management project, has emphasised the invisibility of dominant cultures and how this invisibility has significant implications in environmental management. Indigenous knowledges are ignored or unseen as the dominant culture pursues 'scientifically verifiable facts'. Yet there is a close relationship between ontological recognition and subsequent resource extraction. For Indigenous knowledges to be included, they must be recognised as 'non-transferable, tacit and unquantified'.[699] Hybridity offers opportunities for including Indigenous knowledges, yet colonial structures of power remain a barrier. They must therefore be countered in order to protect the hybrid space.

Hybridity provides possibilities that include development of alternative alliances and collaborations, reforming powerful binaries, and challenging colonial discourses that subjugate indigenous culture and people. Crucially, hybrid models can challenge colonial power structures. As Leitner and her collaborators argue, 'there are clearly non-neoliberal social and spatial imaginaries, alternative forms of subject formation, and newly emerging practices of contestation-including alternative economic and social practices and innovative alliances across multiple axes of social difference'.[700] Hybrid alternatives challenge the colonial status quo; they are part of a decolonizing public space.

Hybridity also enables the inclusion of complex identities, alterities and relationships. As Altman has illustrated, the richness of hybridity and its emancipatory potential can be identified through its inclusion of complexity and diversity; simplifying binaries such as modern/primitive, metropolitan/remote, white/black are rarely inclusive.[701] Hybridity thus enables the *traversing* of binaries in the formation of new identities. For example, Altman develops his Hybrid Economy concept after contending that a significant challenge facing anthropologists is to look beyond the domination of discourses that focus on the capitalist economy and quantitative measurement in order to 'reintegrate people

699 Samantha Muller, "Two Ways': Bringing Indigenous and Non-Indigenous Knowledges Together," in *Country, Native Title and Ecology*, ed. Jessica K. Weir (Canberra: ANU Press, 2012): 76.
700 Helga Leitner and others, "Contesting Urban Futures: Decentering Neoliberalism," in *Contesting Neoliberalism Urban Frontiers*, eds. Helga Leitner, Jamie Peck and Eric Sheppard (New York: Guilford Publications, 2006): 22.
701 Altman, *What Future for Indigenous Australia*, 277.

and differing cultural strata into anthropological analyses and interpretation'.[702] In this context Altman envisages hybridity as a way to insert culture into anthropological studies and shift them away from neoliberal parameters and methodologies.

Offering Hybrid Economy as an alternative to dominant neoliberal free-market capitalism discourses, Altman aims for a greater Indigenous capacity to shape the market through commodification of only certain aspects of the Indigenous estate. This is the purport and intent of the emancipatory free-market engagement basis of Hybrid Economy. Altman employs hybridity because it resists the neoliberal colonisation of space, hybridity facilitates the incorporation of discourses that employ different notions of wellbeing and market practices, and because it challenges the universalist proscriptions of neoliberal sameness and cultural adaptation arguments. This is an important endeavour. However, as will be explored later, this hybridity comes with risks.

6.2.1 The Hybrid 'Other'

Hybridity accommodates difference and is inclusive of difference, of alterity. This relationship is drawn from colonial studies, and specifically from Bhabha, who conceives of 'difference' as 'alterity'.[703] Gerd Baumann argues that identity and alterity 'describe two faces of the same process'.[704] Nigel Rapport and Joanna Overing define alterity as 'the concept and treatment of the alien objectified other'.[705] Alterity is difference and domination.

Hybridity, however, remains susceptible to the need for reaching consensus. It needs to find agreement, a synthesis. This can mean the mitigation of difference, where the desire to find resolution can incentivise capitulation. However, hybridity must accommodate the other as 'Other', meaning that difference should be an irreducible difference. This notion of the 'Other' is crucial to hybridity as a 'true' hybrid requires the overlap of two separate yet coexisting sovereign agents. The incorporation of difference as 'Other' within hybridity

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702 Altman, *What Future for Indigenous Australia*, 277.
703 See Homi Bhabha, (1984) "Representation and the colonial text: a critical exploration of some forms of mimeticism," *The Theory of Reading*, ed. Frank Gloversmith (Brighton: Harvester Press, 1984).
704 Gerd Baumann, "Grammars of Identity/Alterity: A Structural Approach," in *Grammars of Identity/Alterity: A Structural Approach*, ed. Gerd Baumann and Andre Gingrich (New York: Berghahn Books, 2006): 19.
705 Nigel Rapport and Joanna Overing, *Social and Cultural Anthropology: The Key Concepts* (London: Routledge, 2000): 9.

requires a distinction between alterity as difference easily reconciled (difference as 'other'), and difference not easily reconciled (difference as 'Other'). Terence Evens makes the distinction clear:

> Whereas the other constitutes an-other self and therefore, in at least this respect, can be assimilated to one's own self, the Other cannot — it is ontologically other, to the point that it is ultimately irreducible, an alterity that stays undisclosed to quotidian human understanding.[706]

In a context of Indigenous sovereignty, irreducible difference defines a sovereign Indigenous alterity; it defines Indigenous sovereignty as an irreducible 'Other'. This Indigenous difference represents a particular difference that is unique to Indigenous peoples – leading to Indigenous exceptionalism. As Hage also argues, Indigenous difference is not just difference: 'Indigenous cultural difference is not just any kind of difference: it is a colonial one. It is not only a "different inequality"; it is also a "different difference"'.[707] A true post-settler hybrid must assume this distinction and remain safe against appropriation as hybridity can lead to assimilation.

While hybridity offers opportunity for Indigenous expression and realisation of sovereignty, it remains a contested and fraught playing field. The state draws from neoliberalism in an attempt to transform the Indigenous alterity and casts the Indigenous 'problem' as an administrative problem, ultimately solvable through the development of the Indigenous estate (an Indigenous 'other'). Neoliberalism as a global orthodoxy that combines with existing colonial power structures gives the settler state considerable scope and potentially the ability to appropriate, incorporate and reduce. Hybrid models risk becoming a tool for this appropriation, as the settler state finds ways of accessing what was previously beyond its reach.

6.2.2 Challenges to Hybridity

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706 Terence Evens, "Anthropology as Ethics," ed. Terry Evens, (New York: Berghahn Books, 2008): xxi.
707 Hage, "Truncating Anthropology's Political Imagination," 409.

While hybrid models offer new pathways for asserting and protecting Indigenous alterity, they can also be a conduit for the appropriation of the Indigenous patrimony. Stephen Hugh-Jones has focused on historical instances of such appropriations:

> One cannot help feeling that there is something deceptively straightforward about the oft-repeated story of forest Indians, seduced by worthless trinkets, pressured to accept unwanted and unwarranted goods, turned into indiscriminating consumers forced to sell their labor and produce on a ruthless market, who begin by losing its head, and end up losing their autonomy and culture as well.[708]

Market engagement can lead to cultural appropriation, as Indigenous culture is subsumed and is shaped by market forces. The subsequent transformation of social organisation leads to a loss of autonomy and ultimately to a loss of culture. Hugh-Jones indicates that Indigenous peoples have historically faced an encroaching settler state armed with significant power and often a desire for Indigenous assimilation. Hybrid models aim to protect Indigenous alterity and address this reality. They have had varying degrees of success. The key challenges to hybridity are thus entrenched colonial structures of power and the settler state's desire for appropriation.

6.2.2.1 Colonial Power

Within settler-colonial states, colonisation is ongoing. As Wolfe observed, 'invasion [colonialism] is a structure, not an event'.[709] Similarly, Willis and collaborators have drawn from post-colonial theory to recognise that colonialism has not ceased; it continues.[710] This continuing colonial reality is maintained through colonial structures that the settler state inherits and perpetuates. Colonial power thus shapes hybridity and its formation, potentially contributing to further colonisation. Willis and collaborators recognise this risk, and note that post-colonial theory suggests (in a context of power relationships) that cultural and evolutionary (hybrid) forms may not be decolonial. Highlighting a lack of reciprocity and resembling the cultural adaptation thesis discussed earlier, they remind us that Indigenous

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708 Stephen Hugh-Jones, "Yesterday's luxuries, tomorrow's necessities: business and barter in northwest Amazonia," in *Barter, Exchange and Value: An anthropological approach*, eds. Caroline Humphrey and Stephen Hugh-Jones (Cambridge: Cambridge University Press, 1992), 51.
709 Wolfe, *Settler Colonialism and the Transformation of Anthropology*.
710 Willis et al, *Hybrid Cultures*.

accommodation of dominant culture in hybrid iterations is not necessarily reciprocated by non-Indigenous participants.[711] While Indigenous culture changes and accommodates, settler culture may not. When accommodation is borne by the Indigenous person and not the settler, Indigenous culture may be 'hidden, trampled upon or simply disregarded'.[712] Willis and collaborators also acknowledge that where hybridity is measured only through Indigenous compliance, there is a real danger that the hybrid model may function as 'code for assimilation'.[713] Critically, these concessions allude to a disheartening paradox: interventions designed to find new means for ensuring Indigenous cultural survival risk providing new ways for endangering it. Drawing from Bhabha, Willis and collaborators conclude that hybridity can result in 'new forms of domination'.[714] Hybridity becomes 'liminality' when dominant ideas prevail, little structural change occurs, and when Indigenous peoples are disempowered in the negotiation process that subtends hybrid formations.

If colonisation is a structure dedicated to domination, true co-production of the public space as a forum dedicated to the development of a hybrid culture becomes instable. Indigenous culture expressed in hybrid public spaces becomes supressed under the weight of the dominant imperative of the settler state – now a neoliberal emphasis on free-market capitalism and responsibility. When underlying structures of domination are not addressed and challenged, the hybrid project dedicated to protecting Indigenous expressions of sovereignty actually risks lending itself to co-option, appropriation and assimilation.

6.2.2.2 Appropriation

In an Indigenous policy context, it is not uncommon for Indigenous difference to be incorporated within settler culture, especially where expressions of Indigenous alterity do not challenge neoliberal logics. For example, outlining a hybrid model trialled within the Victorian Justice system, Kate Auty argues that a Koori Court created a place for active Aboriginal participation as a right and not as a concession, where Aboriginal kin and

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711 Willis et al, *Hybrid Cultures*, 16.
712 Willis et al, *Hybrid Cultures*, 17.
713 Willis et al, *Hybrid Cultures*, 17.
714 Willis et al, *Hybrid Cultures*, 17.

extended family were granted a voice in proceedings.[715] The Koori Court saw non-Aboriginal participants (police, lawyers, community justice workers, court staff and judicial officers) develop a new means of 'doing' justice. Auty contends that as state hierarchy (hegemony) was challenged, participants dissolved into the process and became increasingly reflective about their roles as they adopted and adapted to a 'circular rather than linear court process'.[716] One non-Aboriginal court registrar, Kerri Thomson, described her involvement with the Koori Court as an 'empowering journey', while non-Aboriginal prosecutor Sergeant Gordon Porter described a number of 'poignant moments' during the hearing process.[717] For Auty, these reflections indicate how multiple threads of knowledge interwoven in a new 'fabric' constitute a 'new' creation that can be observed in the 'centrality, certainty and inflexibility' of authoritative non-Aboriginal actors being slowly replaced by 'counter-intuitive refrains' promoting flexibility.[718] Auty detected a 'shifting axes of power, both Aboriginal and non-Aboriginal' in discussions surrounding the establishment of the Koori Court.[719] And yet, while this incorporation of a hybrid 'other' Indigenous alterity within the legal system may exemplify a positive hybrid model, it should be noted that this alterity was grafted to existing practice. Koori expressions of alterity were consistent with the value and legal requirements of that practice; the non-indigenous participants did not have to sacrifice anything of note. Indigenous sovereignty was not necessarily expressed and the settler state-maintained jurisdiction. This facilitated the 'other' as opposed to the 'Other'. It embraced a type of Indigenous difference that is non-threatening. Aboriginal people still went to jail.

6.3 Hybrid Alternatives: Redefining the Public Space

There have been numerous attempts to develop new ways to preserve an Indigenous presence in hybrid public spaces. These hybrid approaches all acknowledge the immense power of global neoliberalism and its unrelenting imposition of an economic (free market engagement) imperative. They attempt to reconcile Indigenous alterity to that power. For

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715 Kate Auty, "'Growing up' in the Koori Court (gerund), Shepparton: Development discourse and innovation in courts of summary jurisdiction," *Journal of Australian Indigenous Issues* 7, no. 4 (December 2004): 19.
716 Auty, "'Growing up'", 19.
717 Auty, "'Growing up'", 19.
718 Auty, "'Growing up'", 19 – 20.
719 Auty, "'Growing up'", 21.

example, Altman's Hybrid Economy envisages cordoning off a space for Indigenous culture and then introducing that culture to the 'real' economy through a selected commodification of specific Indigenous activities. The Hybrid Economy, along with work supported by CAEPR, and Foley's attempt to reclaim a notion of 'Indigenous entrepreneurship'; aim to save indigeneity in the face of a neoliberal bulldozer. These proposals are part of a concerted drive aimed at preservation of an unsurrendered authentic Indigenous alterity through the development of new or hybrid spaces. But this engagement crucially subsumes Indigenous difference, and moderates this difference by rendering irreducible Indigenous alterity a malleable resource subject to possible exploitation.

6.3.1 The Development of the Indigenous Estate and Indigenous Cultural Preservation

Neoliberalism shapes broader public discourse to the extent that alternatives become illegitimate when they do not espouse its (neoliberal) core values. Think-tanks designed to develop alternatives accept neoliberal precepts and operate within the bounds of an inherently neoliberal ideological scope. As they look for innovative ways to lessen the impact of neoliberal encroachment upon the Indigenous estate they do so while incorporating a neoliberal vocabulary. The CAEPR at the Australian National University is a think-tank that epitomises this trend. CAEPR advocates the development of the Indigenous estate as a means of Indigenous cultural preservation. Established in 1990, CAEPR was a response to the 1985 *Report of the Committee of Review of Aboriginal Employment and Training Programs*. Following on from recommendations detailed in the report, CAEPR aimed to increase economic policy research in the area of Indigenous (Aboriginal) affairs, and to undertake 'social science research on Indigenous policy and development that is excellent by the best international and disciplinary standards and that informs intellectual understanding, public debate, policy formation and community action'.[720] The 'economy' entered Indigenous policy analysis and CAEPR supported research consistently argued for Indigenous engagement with the 'real' economy as a way to address disadvantage.[721]

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720 "Centre for Aboriginal Economic Research," *Australian National University* (available at: http://caepr.cass.anu.edu.au/).
721 Tim Rowse, *Indigenous Futures: Choices and Development for Aboriginal and Islander Australia* (Sydney: UNSW Press, 2002). See also Scambary*, My Country, Mine Country*.

CAEPR adopted a neoliberal definition of wellbeing. While CAEPR may be earnestly committed to the preservation of Indigenous alterity, it does so within the purview of neoliberal strictures and may consequently provide the settler state with arguments for encroaching upon, and subsequently transforming the Indigenous estate. It is not a question of whether the Indigenous estate should be developed; it has become a question of how.

6.3.2 Hybrid Economy Theory

Altman recognises the threat that neoliberalism poses to Indigenous existence. He has dedicated much of his career to the preservation of Indigenous alterity in the face of relentless assault. Altman's Hybrid Economy may signal, however, that a degree of neoliberal encroachment through development is inevitable. Hybrid Economies are comprised of three sectors: the state, the market and the customary element. Altman contends that his approach is distinct from the usual focus on the market and the state (or the private and the public).[722] He also remarks that economic development within the context of an Indigenous hybrid economy is already occurring.[723] In Altman's analysis, the state is present within the Indigenous estate through welfare and service provision.[724] The market is present via industries that include mining, tourism, commercial fisheries, wildlife harvesting, arts production and land management.[725] Finally, the customary sphere is present through domestic hunting, fishing and gathering.[726]

Altman proposes to protect Indigenous alterity and interests via, on the one hand, the partial commodification of the Indigenous estate, and, on the other, through increased Indigenous control of market engagement. He acknowledges that the customary sphere is not 'regarded as part of the "real" economy according to dominant market ideology', but posits that via hybrid economies, it can be made to interact. That engagement is preferable to cultural extinguishment.[727] Altman cites carbon abatement and carbon trading programs as examples of 'emerging opportunities' for the Indigenous estate where the 15-18% of

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722 Altman, *Economic Development and Indigenous Australia*: 514.
723 Jon Altman, "Aboriginal Economy and Social Progress," Arena Magazine (December 2001 – January 2002): 39.
724 Altman, "Aboriginal Economy and Social Progress".
725 Altman, "Aboriginal Economy and Social Progress", 38 – 39.
726 Altman, "Aboriginal Economy and Social Progress".
727 Altman, "Aboriginal Economy and Social Progress", 39.

Australia constituting the Indigenous land base 'might prove a valuable resource, especially where undegraded'.[728] Moreover, the Indigenous estate may provide the settler state with ways of compensating for development elsewhere. Development, even if development of a particular type remains the only hope Indigenous people have for preserving their culture.

Central to Altman's Hybrid Economy is a process of commodification. A distinction between partial and full commodification is made clear by its proponents. Katherine Curchin distinguishes between partial and full commodification, noting that '[p]artial commodification depends upon a willingness to acknowledge domains of human pursuit with intrinsic value regardless of their market value'.[729] Curchin also adds that 'partial commodification suggests a continuum between no commodification and full commodification'.[730] Critically, Curchin warns that at some point the commodification of Indigenous culture can go too far, though Curchin does not define precisely when this may occur. Nevertheless, commodification appears inevitable even when mitigated through Indigenous management of activities not formally covered by the 'real' economy. Hybrid Economy deliberately exposes the Indigenous estate to market forces.

Champions of this type of commodification point to a few successful outcomes. Altman identifies the Nuwul Environmental Services in East Arnhem Land ('The Nuwul project') as a successful hybrid project. For Altman, the project indicates how creation of new business ventures in remote areas can offer value to Indigenous communities. The Nuwul project exemplifies how a flexible policy that caters to different business models and encompasses activities outside the bounds of the formal economy can be successfully implemented. As Altman notes that while projects such as Nuwul are far from perfect, they should be appraised for the contribution they make in their current form and the costs associated with normalisation.[731]

Like the Nuwul project, the purpose of Hybrid Economy is to bring activities that occur outside of the monetised sector within the monetised sector – subsumption in the

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728 Altman, "Aboriginal Economy and Social Progress", 39.
729 Curchin, "If the Market is the Problem," 72.
730 Curchin, "If the Market is the Problem," 73.
731 Martin Brueckner, Rochelle Spencer, Gareth Wise and Bundak Marika, "Indigenous entrepreneurship: Closing the Gap on local terms," *Journal of Australian Indigenous Issues* 17, no. 2 (June 2014): 19 – 20.

'real' economy. Altman makes this clear, noting that the 'hybrid economy framework properly complexifies contemporary Aboriginal economies by including what happens in the non-monetised sector'.[732] The intent and purpose of the framework is to transform everyday choices into a lifestyle that can be placed within the overlapping segments of the model.[733] Hybrid Economy identifies the economic agency of Indigenous actors and harnesses that agency in a way that makes it permissible within the dominant culture, while still maintaining a degree of cultural integrity.

The economic success and failure of such programs is yet to be determined, the process of commodification that underpins them is problematic without structural reform. While Hybrid Economy pursues the inclusion of only a few Indigenous activities currently outside the 'real' economy in order to preserve them, we should consider that there is real value in their current location beyond the bounds of the formal economy. Their location outside of the real economy is their power. There is resistance from outside the capitalist economy. This is an argument that may suit some Indigenous people who remain unconvinced by capitalism. Some aspects of Indigenous culture may simply not be conducive to economic development in the market. Moreover, sovereignty *before* integration in the real economy may imply that when integration comes, it is one result of a meaningful negotiation, articulation rather than subsumption.

6.3.3 Indigenous Entrepreneurship

Approaches such as Hybrid Economy draw from the discipline of Economic Anthropology by grappling with economic precepts that dominate current public policy. Advocates of these approaches accept that economic notions such as development are applicable (and desirable) for all peoples, Indigenous peoples included. As attempts to find common ground these approaches risk underwriting the mainstreaming of Indigenous difference. Foley's 'Indigenous Entrepreneurship' straddles this boundary.

Foley refers to historical instances of Indigenous intra-clan trading to argue that modern economic activities are consistent with traditional forms. He argues that this can

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732 Altman, *What Future for Indigenous Australia*, 272.
733 Altman, *What Future for Indigenous Australia*, 272.

redefine common understandings of Indigenous lifestyles and the multiple forms of land use management practices they have historically adopted.[734] Foley identifies 'Indigenous entrepreneurship' specifically as an enterprise existing within Aboriginal culture prior to European arrival, an enterprise that could and should be revived. Foley draws from the work of Archaeologist Heather Builth to contend that there are multiple examples of Indigenous entrepreneurship: eel farming techniques practiced by the Gunditjmara people illustrate an ancient Indigenous industrial complex that employed a notion of entrepreneurship to cultivate and marketing eels.[735] Foley highlights the Gunditjmara and other instances of Indigenous entrepreneurship, such as the white ochre and shells traded by the Gai-maqriagal, and the oyster cultivation of the Yolngu. He argues that there is evidence of this Indigenous entrepreneurship

> Aboriginal participation in enterprise and entrepreneurial activity [that] is not a modern occurrence. Aboriginal involvement in a structured, orderly and industrious society could arguably be deemed entrepreneurial.[736]

Critically, Foley argues that Indigenous peoples have an historical disposition toward entrepreneurship, a disposition and familiarity only halted by European arrival. Foley argues that disruption caused by colonial domination does not alter the fact that Aboriginal entrepreneurs today '[stand] on the shoulders' of their ancestors, utilising resources, skills and talents Indigenous peoples provided for their kin', adapting to 'changing circumstances' and the impositions of 'misinformed newcomers'.[737] Foley extends his argument to suggest that a remedy to Indigenous injury and suffering is to provide equal opportunity: 'It is the acquisition of a level playing field for the Indigenous entrepreneur that is the societal challenge. Australia has at the very least 8,000 years of Aboriginal involvement in enterprise. More people need to recognise and value this history'.[738] Foley's recognition that opportunity can provide better outcomes for Indigenous wellbeing has obvious merit, it is a decolonising move, and Foley is careful to refrain 'from adopting a mainstream

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734 Dennis Foley, "Enterprise and Entrepreneurship and Australian Aborigines," *Journal of Australian Indigenous Issues* 13, no. 4 (2010b): 86.
735 Foley, "Enterprise and Entrepreneurship and Australian Aborigines," 87 – 90.
736 Foley, "Enterprise and Entrepreneurship and Australian Aborigines," 85.
737 Foley, "Enterprise and Entrepreneurship and Australian Aborigines," 91.
738 Dennis Foley, "Aboriginal Entrepreneurship in Australia: eight thousand years of continuous enterprise.' *Journal of Australian Indigenous Issues* 15, no. 4 (December 2012): 106 – 107.

academic definition of enterprise and/or entrepreneurship'.[739] He espouses enterprise with tradition, not without it along with a determined effort to counter negative 'stereotypes, myths and misinformation'.[740] This is useful as it challenges the universalism of neoliberal settler colonial discourse. However, Foley's Indigenous entrepreneurship must face current colonial structures of power that dominate the settler-Indigenous relationship. Enterprise *before* sovereignty reproduces subsumption.

Foley's contention that entrepreneurship equates with an emancipatory Indigenous identity resonates with neoliberal arguments promoting cultural adaptation. Critically, Indigenous entrepreneurship can actually be exploited by the settler state as a tacit recognition of the universal application of free-market engagement. Actions that negotiate Indigenous difference to fit within settler standards are aimed at the amelioration of difference through appeal to sameness. Structures of Indigenous oppression will not disappear even when attempts are made by Indigenous peoples to display Indigenous agency. Similar to 'welcome to country' ceremonies, now officially endorsed and part of state-sanctioned protocols which can be viewed as 'neutered statements of Indigenous ownership',[741] negotiating an Indigenous form of entrepreneurship with the settler state may risk the creation of a settler state-sanctioned form of Indigenous identity. An identity shaped by entrepreneurship where the entrepreneurship is no longer radically and intractably 'Indigenous' as it is effectively 'whitewashed'. Indigenous entrepreneurship was once sovereign; it needs to be sovereign again. Without sovereignty, Indigenous entrepreneurship can become co-optation, a means for the colonisation of unchartered territory.

The proposals addressed here are committed to protecting Indigenous alterity and yet they are also symptomatic of the neoliberal hegemony over Indigenous policy. They recognise that neoliberal policies are exposing the Indigenous estate and seek to develop new and pragmatic ways to alleviate injury. They mobilise economic development as a

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739 Foley, Foley, "Enterprise and Entrepreneurship and Australian Aborigines," 91.
740 Foley, "Enterprise and Entrepreneurship and Australian Aborigines," 91.
741 Emma Kowal, "Welcome to Country?" *Meanjin* 69, no.2. (2010): 16. Kowal draws from Kristina Everett.
See Kristina Everett, "Welcome to Country … Not," *Oceania* 79, no.1 (March 2009): 53 – 64.

possible alternative to neoliberalism. However, the world is understood only in economic terms – is there no alternative?

6.4 Indigenous Responses: Resilience

CAEPR, Hybrid Economy and Indigenous Entrepreneurship are amenable they provide a type of Indigenous social transformation that place an emphasis on Indigenous agency without a parallel deconstruction of the pervasiveness of settler-colonial power. As Lindroth and Sinevaara-Niskanen argue, Indigenous agency assumes Indigenous responsibility.[742] Yet as outlined earlier, this is by default a responsibility defined in neoliberal terms, where responsibility takes the form of accountability and Indigenous people are expected to adapt. Responsibility in this context makes Indigenous people liable for administering the transformation and commodification of the Indigenous estate. Yet the Indigenous person is not permitted to define the terms of her adaptation. Lindroth and Sinevaara-Niskanen identify this as the structural essence of adaptation, further noting that the 'power of the requirement of adaptation thus lies in the indigenous peoples not being the ones to set the terms of adaptation'.[743] Colonisation becomes a project of Indigenous adaptation, an adaptation Indigenous people have little control over. When does adaptation become assimilation?

Indigenous adaptation as an assertion of neoliberal responsibility requires the resilient Indigenous individual to adapt to the values and requirements of the dominant (settler) group. Here Lindroth and Sinevaara-Niskanen suggest that a notion of resilience embraces the Indigenous person as an adaptive subject and not as agent of change, they 'who will react and accommodate themselves – yet again – to existing or forthcoming events'.[744] For Lindroth and Sinevaara-Niskanen, there are three simultaneous ways to perceive this Indigenous resilience: adaptation, vulnerability and care.[745] Indigenous adaptation to an encroaching settler state is a procedure of biopower. Lindroth and

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742 Marjo Lindroth and Heidi Sinevaara-Niskanen, "At the Crossroads of Autonomy and Essentialism: Indigenous Peoples in International Environmental Politics," *International Political Sociology* 7, no. 3 (2013).

743 Marjo Lindroth and Heidi Sinevaara-Niskanen, "The biopolitics of resilient indigeneity and the radical gamble of resistance," *Resilience* 4, no. 2 (2016): 7.

744 Lindroth and Sinevaara-Niskanen, "The biopolitics of resilient indigeneity and the radical gamble of resistance," 6.

745 Lindroth and Sinevaara-Niskanen, "The biopolitics of resilient indigeneity and the radical gamble of resistance," 5.

Sinevaara-Niskanen identify limitlessness in adaption, claiming that settler biopower operates via an eternal demand for adaptation. Where adaptation is predicated upon Indigenous resilience the neoliberal settler state can then engage with Indigenous occupation of land merely as a problem to be resolved, or as Lindroth and Sinevaara-Niskanen put it, as an 'uncertainty' that is not a 'natural condition'.[746] The settler requirement for Indigenous to forever adapt requires Indigenous resilience. Resilience is both a prerequisite of Indigenous resistance and settler oppression.

6.4.1 Victimhood, Reclamation, Settler Accountability

For Lindroth and Sinevaara-Niskanen the simultaneous co-existence of vulnerability, adaptation and care in a context of resilience is puzzling. While the three aspects of resilience are seen as positive features that many Indigenous peoples identify with, they result from a neoliberal endeavour to govern, they are a reaction to an imposition. Lindroth and Sinevaara-Niskanen ask: how does resistance work when power operates 'through something that is embodied within indigeneity itself?'[747] However, there is a unique power within Indigeneity, a power shaped and constituted by Indigenous resilience. This can offer a potent rebuke of the settler state as Indigeneity expresses resilience as sovereignty. Lindroth and Sinevaara-Niskanen explore this unique form of Indigenous resistance, positing that Indigenous peoples' refusal to entertain the 'loving concern that bio power occasions' requires a mobilisation of victimhood.[748] Indigenous victimhood can therefore be reclaimed as a form of resistance; this way, Indigenous resilience invokes settler accountability rather than requiring Indigenous adaptation.

This form of resistance requires the reclamation of victimhood at the site of negotiation/contestation – the hybrid space where the settler-colonial imposition of resilience is embedded within Indigenous culture.[749] Victimhood asserts a counter discourse; it is an expression of Indigenous sovereignty through its definitive anti-settler

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746 Lindroth and Sinevaara-Niskanen, "The biopolitics of resilient indigeneity and the radical gamble of resistance," 6.
747 Lindroth and Sinevaara-Niskanen, "The biopolitics of resilient indigeneity and the radical gamble of resistance," 10.
748 Lindroth and Sinevaara-Niskanen, "The biopolitics of resilient indigeneity and the radical gamble of resistance," 10.
749 Lindroth and Sinevaara-Niskanen, "The biopolitics of resilient indigeneity and the radical gamble of resistance," 10.

character. The status of victim demands a response to the violence of colonialism as well as the violence of neoliberal discourses. Victimhood posits an irreducible difference that challenges the structures of colonial domination. As such it is a decolonising move.

While this embrace of victimhood retains Indigenous agency, it also maintains the settler state's accountability for the injury it has caused. That the Indigenous person should move beyond victimhood is a frequently encountered trope, and yet victimhood is a powerful tool for undoing resilience as adaptation. Indigenous victimhood does not mean acquiescing to ongoing subjugation. A focus on injury asserts that the settler state was and is responsible. It represents a reversal of the neoliberal imposition of responsibility as accountability. It halts Indigenous adaptation where Indigenous people are constantly asked to bear the burden for healing. It is true this reclamation of Indigenous victimhood risks marking indigeneity as disempowered.[750] However, settlers must take responsibility. Responsibility is a battleground.

6.4.2 *Sunrise*: An Indigenous reclamation

The power of victimhood as resilience is demonstrated in an Indigenous people's protests following a discussion regarding the Stolen generations aired on Channel Seven's morning breakfast show '*Sunrise*' in March 2018. Host Samantha Armytage suggested that post-Stolen Generations there had been a reluctance to remove Aboriginal children from abusive homes and that white families could no longer adopt Indigenous children. Discussion participant Prue MacSween offered no apology for the Stolen Generations arguing that it is a 'no-brainer' to remove children from dysfunctional environments. McSween argued instead that children were removed for their own wellbeing, stating that 'we need to do it again, perhaps'. Discussion participant Ben Davis added that widespread concerns regarding Federal Assistant Minister for Children and Families David Gillespie's proposal for white families adopting Indigenous children were 'politically correct madness'.[751] Armytage then

750 Lindroth and Sinevaara-Niskanen, "The biopolitics of resilient indigeneity and the radical gamble of resistance," 11.

751 Emma Reynolds ,"You should know better, Sunrise: Breakfast show slammed over Aboriginal adoption segment," *News*, 15 March 2018 (Available at: http://www.news.com.au/entertainment/tv/morning-shows/you-should-know-better-sunrise-breakfast-show-slammed-over-aboriginal-adoption-segment/news-story/).

ended the discussion: 'let's hope some sense prevails there'.[752] This discussion was notable for its racial dimension. Indigenous reactions to this expression of settler aggression reclaimed Indigenous victimhood and demonstrated Indigenous responsibility. These responses illustrate an invigorated public space amid assertions of an Indigenous sovereignty.

Only days after the *Sunrise* discussion aired, over 100 people protested outside Channel Seven's Martin Place studio in Sydney to demand a change to the way Indigenous issues were covered. While Channel Seven obscured the backdrop so that protesters could not be seen on air, other media covered the event and showed protesters dismayed that a discussion about Indigenous peoples had no Indigenous representation.[753] The protests gained momentum. In April protestors interrupted a *Sunrise* Commonwealth Games broadcast, protestors could be heard calling for Armytage to apologise, resign and/or for her sacking.[754] Indigenous people demanded settler accountability. *Sunrise* did not try again.

Hybridised forms of Indigenous resistance such as the *Sunrise* protestors' reclamation of victimhood can invigorate the public space through assertions of an Indigenous sovereignty that inverts the neoliberal notion of accountability and holds the settler state accountable for colonial injury. This is a crucial decolonising move. Assertions of resistance as Indigenous responsibility (sovereignty) reject the neoliberal state's encroachment and constitute a challenge that is only possible where a public sphere permits its expression. The two share a symbiotic relationship.

6.5 Benefits of Hybrid Approaches

Hybrid approaches that occur in the public space are inclusive. As Altman notes, hybridity enables the inclusion of complexity and diversity.[755] Hybridity is dynamic, complex, fluid and dialectical. Hybridity is thus critical for Indigenous autonomy and reconciliation within Australia, as it asserts Indigenous alterity and subsequently self-determination while holding

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752 Reynolds ,"You should know better, Sunrise".
753 Riley Stuart and Jordan Perry, "Sunrise debate about Indigenous children sparks large protest in Sydney's Martin Place," *ABC News* (available at: http://www.abc.net.au/news/2018-03-16/sunrise-protest-held-in-martin-place/9554832).
754 "Indigenous activists protest Sunrise's Comm Games broadcast," *SBS News* (available at: https://www.sbs.com.au/news/indigenous-activists-protest-sunrise-s-comm-games-broadcast).
755 Altman, *What future for remote Indigenous Australia*, 277.

the settler state to account. Key to hybrid approaches is a capacity for Indigenous peoples to develop new ways to think about economic endeavours and the means of self-sufficiency.

Hybridity can be the embodiment of self-determination. O'Sullivan contends that Hybrid Economy 'proposes defining relationships and opportunities in ways that remove the narrative of failure from policy discourse'.[756] Hybrid models can alter the very nature of discourse. Thus O'Sullivan suggests that Hybrid Economy enables Indigenous peoples to identify their own forms of enterprise and economic activities (as opposed to those decided by the market).[757] As Curchin also notes, 'Altman wants Aboriginal people to have livelihood opportunities that allow them to resist full immersion in the market economy'.[758] O'Sullivan also sees value in hybrid approaches for resisting the neoliberal tendency to reduce Indigenous sovereignty to an accounting problem. O'Sullivan contends that Hybrid Economy may allow avoiding the 'reductionist conceptualisation of indigenous policy to statistically measurable points of distinction with other citizens'.[759] An alternative *distinction* between citizens is needed.

6.6 Sovereignty before Development

Indigenous sovereignty must first be assured. While development and Indigeneity are not antithetical, and the development of the Indigenous estate could offer tangible benefits to Indigenous peoples, development should occur on Indigenous terms. While espousing the merits of *partial* commodification, Curchin concedes that the conditions that may enable it are fragile and threatened by market fundamentalism.[760] Once Indigenous people have greater control over these conditions, the liberatory potential of the Hybrid Economy may be fully realised.

For now, colonial power largely defines the Indigenous/settler relationship. Therefore, as Fiona MacDonald suggests, culture and identity are central to the pursuit of

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756 Dominic O'Sullivan, *Indigeneity: a Politics of Potential: Australia, Fiji and New Zealand* (Bristol: Polity Press, 2017): 127
757 O'Sullivan, *Indigeneity*, 127.
758 Katherine Curchin, "Two visions of Indigenous economic development and cultural survival: The 'real economy' and the 'hybrid economy,'" *Australian Journal of Political Science* 50, no.3 (2015): 424.
759 O'Sullivan, *Indigeneity*, 130.
760 Curchin, "Two visions of Indigenous economic development."

Indigenous autonomy.[761] The dominant actor in the settler/Indigenous dialectical relationship remains the settler state; it will not readily devolve power to Indigenous people. As Glen Coulthard notes with reference to Canada, '[c]olonial powers will only recognise the collective rights and identities of indigenous peoples insofar as it does not throw into question the background legal, political and economic framework of the colonial relationship itself'.[762] Coulthard argues that colonial powers only recognise rights and identities that do not threaten the legal, political and economic framework that underpin the colonial relationship.[763] It follows that the state will be reluctant to afford legal protections and recognition of Indigenous sovereignty.

Indigenous sovereignty must precede the development of the Indigenous estate o risk appropriation. Land rights are the ultimate expression of Indigenous sovereignty. Gary Foley notes this sequence in his analysis of the Aboriginal movement for land rights: 'demands were for Land Rights that would provide Aboriginal communities with an economic base for future economic development that would create local employment and spawn community resources under the control of Aboriginal community people themselves'.[764] Likewise, but in a North American Native Indian context, Steven Cornell and Joe Kalt, of the Harvard Project on American Indian Economic Development, assert that Indigenous sovereignty must precede development of Indigenous lands.[765] If settler colonialism is a denial of Indigenous sovereignty, Indigenous sovereignty is the key to undoing settler colonialism.

6.7 Conclusion

The neoliberal transformation of the public space has seen the degradation of Indigenous sovereignty with difference mediated by accountability-as-responsibility. Here, a conflation of neoliberal rhetoric and colonial power is the catalyst for settler demands to access (and

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761 Fiona Macdonald, "Indigenous Peoples and Neoliberal "Privatization" in Canada: Opportunities, Cautions and Constraints," *Canadian Journal of Political Science* 44, no.2 (2011): pp 257 – 273. 268
762 Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014): 42.
763 Coulthard, *Red Skin, White Masks*, 42.
764 Gary Foley, "Liberation through Acquisition," *Tracker Magazine*, April 2013 (available at: http://www.kooriweb.org/foley/essays/tracker/tracker22.html).
765 See "The Harvard Project on American Indian Economic Development" (available at: https://hpaied.org/about).

transfer) the Indigenous estate. As a distinct mode of Indigenous elimination, neoliberal Indigenous policy, and specifically its imposition of individual responsibility, has seen a steady decrease in the integrity of public space inhabited by Indigenous peoples. The Indigenous capacity for resistance has been tested by a negotiated ILUA regime. A gradual transformation of the Indigenous estate has become a common feature of the neoliberal era. The Noongar Agreement and the Victorian treaty process discussed in previous chapters exemplify this trend.

Alternatives to the neoliberal project seek to devise new ways to resist encroachment upon the Indigenous estate and preserve an authentic Indigenous presence in the public space. They reclaim terms such as 'enterprise', 'participation' and 'entrepreneurship' to transcend neoliberal encroachment, but in the absence of a sovereign determination potentially expose Indigenous peoples to further appropriation. Deconstructing structures of power should therefore come first. Indigenous sovereignty first. In part, Indigenous sovereignty is realised by holding the settler state accountable for the colonial injury it inflicts. The *Sunrise* protests show how the structures of domination can be challenged by employing a notion of victimhood to hold the settler state accountable and assert an Indigenous sovereignty.

Along with opposition to the Noongar Agreement, opposition to the Andrew's Government's consultation process in Victoria, the *Sunrise* protests also highlight the potency of the 'third space'. Without a public space to negotiate, there is no Indigenous alterity. The protection of a 'radical' form of Indigenous alterity is a prerequisite for maintaining a hybrid public space and challenging ongoing structures of colonial power. This space can then be a precursor to a formalised differentiated citizenship model.

7. Conclusion: Differentiated Citizenship

In this thesis I have aimed to show how Australian Government Indigenous policy applies a reified neoliberal notion of responsibility and uses it to dispossess Indigenous people from their land. This has been explored through a series of case studies that features the Noongar Agreement and the Victorian Treaty process. The case studies have provided an opportunity for a grounded analysis of the ways in which a neoliberal notion of responsibility has been employed by the settler state to gain access to, and then transform the Indigenous estate. In the previous two chapters specifically, I explored two questions asked at the start of the thesis regarding neoliberalism in Australian Indigenous policy and its implications for reconciliation as the settler state attempts to solve its 'Indigenous problem' by transforming the third space and appropriating of the Indigenous estate. Addressing the third question, I now probe differentiated citizenship as an alternative policy response, a potential pathway for meaningful reconciliation within Australia.

Reconciliation cannot occur without a robust public space. This public space is a critical point of interaction between the Indigene and the settler. Indigenous existence in the public space reminds the settler state that Indigenous people survive while asserting an Indigenous sovereignty that highlights the defective nature of settler sovereignty. While the settler state employs neoliberal logics to colonise the public space and turn it into private space, the Indigenous occupation of that space represents a stubborn rejection of both the settler state's encroachment and the neoliberal logic of elimination that underscores it. In particular, remote Aboriginal communities provide the settler state with a visible reminder that its project of dispossession and, ultimately, elimination remains incomplete. For this reason, remote communities act as critical sites of Indigenous resistance where the settler state concentrates resources and efforts to develop Indigenous land and induce an Indigenous engagement with the 'real' economy. They are important components of any response to settler appropriation.

Indigenous resistance to settler encroachment and subsequent transformation is obscured by the state's invocation of universalist (and ultimately assimilationist) arguments about market engagement. Subsequently, 'incapacity' and 'disadvantage' come to characterise and define Indigenous identity, while quantitative evaluation imposes distinctly

colonial structures of oppression upon Indigenous people. Noting a series of assumptions made within political science regarding Indigenous politics, Sana Nakata and Sarah Maddison have identified how Indigenous political systems are considered invisible while the settler institutions' intrusion into Indigenous lives is seen as 'appropriate and unproblematic'.[766] Moreover, the settler state portrays opposition as naïve[767], recalcitrant,[768] and unpatriotic.[769] The market is pronounced as an unfettered arbitrator of Indigenous wellbeing. In summary, these are the key implications of neoliberal policy proscriptions for reconciliation and therefore Indigenous sovereignty.

Even approaches designed to resist this neoliberal encroachment risk further dispossession. As outlined in chapter six, neoliberalism has provided the settler state with an ideological apparatus to colonise dissent to the extent that approaches designed to combat neoliberal encroachment upon the Indigenous estate are unable to fully challenge its hegemony. This chapter addresses question three asked at the start of this thesis, it offers differentiated citizenship as a response to neoliberal/settler hegemony. It outlines how neoliberal encroachment is resisted by assertions of Indigenous alterity that create a climate of settler discomfort and assert an Indigenous sovereignty that must be recognised by the settler state. Enacted within the public space, this Indigenous resistance also functions as a bulwark against the neoliberal transformation of the public/third space. The chapter details how decolonisation occurs through the application of an Indigenous resistance that deconstructs the structures of colonial oppression. I argue that this decolonising practice must occur before the projects associated with economic development discussed in the previous chapter can proceed. Only substantive Indigenous

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766 Nakata and Maddison, *New Collaborations*, 418.

767 For example, Marcia Langton has argued that opposition to the Adani coal mine in Queensland was high jacked by Green environmentalists for political purposes, while Warren Mundine likened the protestors to colonial oppressors intervening without Indigenous consent – a claim rejected by Indigenous native title lawyer Tony McAvoy who noted that claims that external groups were intervening on behalf of Indigenous peoples were 'wildly off the mark' and disrespectful to the families opposing the mine. They were the 'best informed groups in the country'. See Joshua Robertson, "Leading Indigenous lawyer hits back at Langton over Adani," *The Guardian*, 9 June 2017 (available at:
https://www.theguardian.com/environment/2017/jun/09/leading-indigenous-lawyer-hits-back-at-marcia-langton-over-adani).

768 Langton, *From Conflict to Cooperation*.

769 Toula Nicolacopoulos and George Vassilacopoulos identify a 'hypothetical' white nationhood that acts as though land was not occupied before settler arrival. See Toula Nicolacapoulos and George Vassilicopoulos. *Indigenous Sovereignty and the Being of the Occupier: Manifesto for a White Australian Philosophy of Origins* (Melbourne: re.press, 2014): 32.

sovereignty can protect Indigenous interests and the integrity of the public space. Differentiated citizenship is one possible enactment of this sovereignty.

This response countenances several aspects of resistance canvassed throughout the thesis: Hybridity and the public space; Human Rights; Indigenous resilience (victimhood) and to an extent, Indigenous nationhood. Part one of the chapter briefly revisits how Indigenous resistance requires a robust public space for expressions of an Indigenous alterity. This is the first step toward Indigenous sovereignty: placing the protection of the public space at the forefront of attempts to develop hybrid endeavours. Indigenous alterity can then exist and evolve. Part two of the chapter draws from human rights discourse and a liberal theory of Indigeneity to sketch a framework for Indigenous sovereignty. Part three offers a practical application of victimhood as resilience. It refers directly to an Indigenous occupation of space. It will also briefly touch on Federal and a Western Australian Government policy of remote community closures to illustrate how remote communities are at the centre of a showdown over the meaning and ownership of responsibility in Australia. While Indigenous people seek services as citizens, the state argues that provision is too expensive. Conversely, mobilising notions of Indigenous victimhood and resilience can shift emphasis from Indigenous accountability-as-responsibility to settler responsibility. Here Indigenous resistance expresses an Indigenous sovereignty that provides an impetus for progress by making the settler the object of study. In this scenario, decolonising tools such as 'white guilt' provide a means to develop decolonising practices.

The final part of the chapter identifies how a differentiated citizenship model that accommodates Indigenous sovereignty through treaty as the actualisation of a truly hybrid space and a prerequisite for meaningful reconciliation where Australia's colonial past and present is acknowledged, and where settler guilt is turned into a vehicle for the formalised preservation of Indigenous alterity. This differentiated citizenship model does not require a major intellectual leap, as Australia already embraces a differentiated citizenship (many Australians, some in parliament, even though the Constitution would proscribe it, have dual citizenship).

There are various citizenship models available. Some have already been surveyed, Tully's statelessness, for example, focuses on multi-citizenry. The model of Indigenous

recognition discussed here draws from International experience in Canada where Joyce Green articulates a distinctly 'Indigenous' nationhood that emerges from a human rights approach.[770] This Indigenous nationhood can be formalised within a multinational state has been articulated by Native American scholar Champagne who envisages a multi-nation state that provides for Indigenous sovereignty.[771] This model is used in an Australian context by Henry Reynolds who draws from Anthony Smith to develop a framework for an Australian differentiated citizenship model articulated through federal and confederal arrangements.[772] Confederal arrangements invigorate the public space, protect Indigenous alterity, provide meaningful reconciliation, and promote solidarity between Indigenous and non-Indigenous peoples. This shows there really is an alternative to neoliberalism.

7.1 Hybridity in the Public Space: Harnessing Difference

As outlined in the previous chapter, the public space is critical for the creation and integrity of the hybrid space where models such as Hybrid Economy can develop through Indigenous stewardship and meaningful consent. The public space thus precedes the hybrid space, even though it is the hybrid space that formalises a radical form of Indigenous alterity. It offers opportunity for the Indigenous estate to alter the constitution of colonial structures and discourses through this public sphere that is inclusive and yet autonomous. Hybridity negotiated in the public space provides a means for Indigenous resistance. Where neoliberalism insists on sameness, resistance invigorates hybridity; without resistance, hybridity takes the shape of liminality, unable to challenge settler hegemony.

Establishing and protecting difference becomes the object of hybridity. The recognition of difference and then asserting difference in the formation of a hybridised space are decolonising moves. Decolonising efforts that focus on the creation of counter-hegemony discourses can resist settler attempts to dispossess and dominate, they offer crafted critiques of the neoliberal notion of responsibility as accountability. Decolonising can include critique of policy. Drawing from Hage we see how critical writing can formalize Indigenous exceptionalism and facilitate the formation of hybridized alternatives that

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770 Joyce Green, "The Complexity of Indigenous Identity Formation and Politics in Canada: Self-Determination and Decolonisation," *International Journal of Critical Indigenous Studies* 2, no. 2 (2009): 43.
771 Champagne, *Rethinking Native* Relations, 20.
772 Reynolds, *Aboriginal Sovereignty*, 185 – 186.

counter the (universal) neoliberal impetus for transformation.[773] In an Indigenous context, hybridity is an opportunity for exercising a constituent power in a third space shaped by decolonisation In this context, critical writing formalizes an Indigenous determined Indigenous exceptionalism and facilitates the formation of alternatives that counter the neoliberal impetus for transformation. Hybridity represents an opportunity for exercising a constituent power in a third space shaped by decolonisation. This Indigenous hybridity then offers an alternative to neoliberal Indigenous policy; it deconstructs colonial structures, and emphasises Indigenous alterity while protecting and promoting Indigenous difference.

As a decolonising project, Indigenous hybridity also asserts unique aspects of Indigenous alterity such as communal kinship and relation to land. Here hybridity shapes resistance against neoliberal settler incursions by drawing from discourses that promote the core values of Indigenous culture: kinship and land custodianship. Human rights theory and a liberal theory of Indigeneity can support this effort. Liberalism is not neoliberal.

7.2 Human Rights

Indigenous peoples across the globe are fighting for the protection of their human rights relating to discrimination, poverty, land rights and cultural life.[774] Human rights approaches promote and formalize subjective Indigenous needs as fundamental human rights while human rights theory provides a framework that is both subjective and objective, particularist and universalist. Differentiated citizenship can likewise be both at once. Ruth Lister outlines how citizenship rights are simultaneously universalist and particularist and take the form of 'differentiated universalism'.[775]

While human rights approaches can inform the process leading to Indigenous sovereignty, they come with a caveat. Where Indigenous sovereignty is the goal, Watson has noted that a human rights model alone will not suffice. Human rights are a surprisingly malleable category. For example, the Howard Government employed human rights to justify the NT Intervention, and Watson contends that native title and human rights discourses

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773 Hage, *Alter-politics,* 4.
774 Corrine Lennox and Damien Short. "Introduction." In *Handbook of Indigenous Peoples Rights* (London: Routledge, 2016): 1 – 2.
775 Ruth Lister, "Citizenship and Difference: Towards a Differentiated Universalism," *European Journal of Social Theory* 1, no. 1 (1998): 84.

have represented a smokescreen that was previously used to undermine Indigenous relationships to country.[776] If human rights are a tool, it all depends on who is yielding it.

Watson notes that the settler state previously commandeered human rights discourses to dominate Indigenous peoples. Watson adds that to understand what is 'right' in a context of Indigenous emancipation, several colonial layers need peeling back.[777] In order to accommodate different (i.e., Indigenous) understandings more spaces for conversations need to be made available. These do not need to be about the 'other', or even about alterity, though the 'Other' must lead them. For Watson the voices of all Indigenous people, not just those perceived as leaders, matter.[778] Structural reform, decolonization, will facilitate greater Indigenous inclusion.

The need for structural reform is clear. Human rights alone do not alter colonising structures; they do not address the relationship between rights, property and justice.[779] Richard Barcham agrees, arguing that the human need (i.e., a human right) framework provides a useful tool for engaging in dialogue and exploring individual choices while also creating organizations that are able to construct and sustain an 'autonomous space in which Indigenous people can fulfil their potential and aspirations'.[780] The latter is a vehicle for structural reform. Barcham recognizes the need to create institutions that protect spaces for Indigenous assertions of alterity:

> Dialogue, participation and empowerment are terms that have been used for decades to describe a set of techniques for coming to terms with the question of difference – difference of culture, of experience, of knowledge, of resources and of power. A basic human need framework can be a useful tool to help us consciously engage in a dialogue needed to explore individual choices and develop organizations

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776 Hage, *Alter-politics*, 4. See also Nicola Perugini and Neve Gordon, *The Human Right to Dominate* (Oxford: Oxford University Press, 2015). Perugini and Gordon argue that human rights provide a moral and legal framework to give meaning to historical events and policies.

777 Irene Watson, "Settled and Unsettled Spaces: Are we free to roam?" in *Sovereign Subjects: Indigenous Sovereignty Matters*, ed. Aileen Moreton-Robinson (Crows Nest: Allen & Unwin, 2007).

778 Watson, "Settled and Unsettled," 31.

779 Janet Dine and Andrew Fagan, *Human Rights and Capitalism: A Multidisciplinary Perspective on Globalization*, eds. Janet Dine and Andrew Fagan (Cheltenham, Edward Elgar Publishing, 2006): 25 – 26.

780 Richard Barcham, "Basic Human Need: A Framework for Dialogue on Indigenous Social and Emotional Wellbeing," *Journal of Australian Indigenous Issues* 16, no 1 (March 2013): 17.

capable of constructively sustaining an autonomous space in which Indigenous people can fulfil their potential and aspirations.[781]

Human rights approaches therefore have the capacity to facilitate decolonizing structural reform, but only as part of a broad recognition of Indigenous sovereignty. In this way they offer an alternative to the universal proscriptions of neoliberalism.

7.3 Indigenous Resistance as a Pathway to Differentiated Citizenship

Differentiated citizenship is an alternative to neoliberal inspired practical reconciliation in the sense that it formalizes Indigenous sovereignty. It enables meaningful reconciliation.[782] Here Indigeneity finds expression in a liberal theory of indigeneity. According to O'Sullivan differentiated liberal citizenship requires shared citizenship where Indigenous peoples and settlers 'recognise the other's right to be present'.[783] Following this recognition, Indigenous alterity can be anchored to a liberal theory of indigeneity as 'a politics of distinctiveness, [that is] necessarily dependent on group rights – such as the rights to land, language, and culture – as inescapable constituents of individual liberty'.[784] Differentiated citizenship is the culmination of a process whereby notions of Indigenous victimhood and resilience operate as catalysts for a decolonizing transformation that constitutes a truly hybrid model of inclusion.

While differentiated citizenship as a model for Indigenous sovereignty achieves formal recognition and reconciliation, it can only be enacted *following* a shift in power. By holding the settler state to account for the impact of colonial injury, Indigenous victimhood mandates a critical engagement with Australia's colonial past and 'shocks' the settler into an awareness of colonial injury. As the Indigenous person cannot assume responsibility for healing until the settler assumes responsibility for colonial injury this shock is an important aspect of reconciliation. It is a rebuke of settler state attempts to consign colonial injury to the annals of history. It prompts structural reform.

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781 Barcham, "Basic Human Need", 17.
782 A Differentiated Citizenship model borrows from a liberal theory of indigeneity. See O'Sullivan, *Maori Self-determination*.
783 Dominic O'Sullivan, "Whose politics and which science: beyond the colonial in liberal political theory," *Australian Journal of Political Science* 54, no.3 (2019): 404.
784 O'Sullivan, *Maori Self-determination*, 65.

7.3.1 Structural Reform

Throughout the neoliberal era Indigenous alterity has faced increased threats, as the settler state delegated the management of alterity to the operation of free market mechanisms. The Indigenous estate has faced constant pressure to engage with the 'real' economy, land must be developed; native title and ILUAs have become vehicles for this assault. In this context, the settler logic of elimination has been invigorated and perpetuated.

There may be a racial motivation for this policy setting. Wayne Atkinson argues that Australian government Indigenous policy has been entirely dedicated to maintaining white possession. For example, the Australian legal system marginalises Indigenous people and culture by inflexibly viewing Indigenous identity, traditions and relation to land through Western constructs. Atkinson argues that the Australian legal system, through the native title process, keeps 'Indigenous peoples and cultures in an ambivalent, if not oppressed place'.[785] Native title solidifies and reifies white (settler) possession. While native title purports to reflect shared negotiations between the state and Indigenous peoples and is predicated upon a partnership approach, its results are ambivalent at best. Similarly, Bradfield offers that SPAs lack any meaningful commitment toward negotiated co-existence.[786] Government legislation and policy is wholly dedicated to ensuring the continuity of settler possession. Reforming these institutions must precede Indigenous sovereignty, indeed reform must constitute it.

As outlined in our discussion of the Noongar Agreement in chapter four, native title is just one example of how the settler logic of elimination becomes institutionalized and employed in public policy as an apparatus of domination. Employment programs that feature in the Noongar Agreement and the Victorian Treaty process are also examples. Zoe Gordon refers to Indigenous employment programs to argue that Howard's underscoring of mutual obligation deflected attention from the structural causes of Indigenous unemployment.[787] The programs work to ensure the preservation of the status quo.

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785 Wayne Atkinson, "Constructing Indigenous Identity through Western Eyes: The Yorta Yorta Case," *Journal of Australian Indigenous Issues* 9, no. 4 (December 2006): 35.
786 Stuart Bradfield, "The Political Context", 40.
787 Zoe Gordon, "Deconstructing 'Aboriginal Welfare Dependency': Using Postcolonial Theory to Reorientate Indigenous Affairs," *Journal of Australian Indigenous Issues* 14, no. 2 – 3 (June – September 2011): 26 – 27.

Howard's neoliberal approach enabled the state to avoid responsibility for repairing damage caused to Indigenous political autonomy by its singular focus on market incorporation as a universal value. Gordon persuasively identifies neoliberal expectations of Indigenous conformity to Western values as a continuation of colonialism.[788]

This is also a feature of neoliberalisation. Yasmine Musharbash provides an example of how settler values combine to form a discourse of structural domination in an Indigenous context. Citing the provision of housing services in rural settings, and the significant challenge they pose to expectations held by government and the broader mainstream community, Musharbash outlines how government provision of housing in the Yuendumu community did not cater for the specific characteristics of Indigenous culture. Instead, dwellings reflected settler values. Public consternation followed, as Indigenous *uses* of housing in rural communities did not reflect settler expectations. Musharbash argues that the prevalent view of Western people towards housing is consistent with Martin Heidegger's understanding of the continuum linking structures and lived experience. The Yuendumu challenged fundamental settler views about habitation:

> houses reflecting the Western series of building-dwelling-thinking have been provided. At no point in time has there been any consideration for accommodating Yapa practices of dwelling in the provision of houses; building thus cannot be said to have happened by Yapa in Heidegger's sense. Houses are 'built for' not 'built by' Warlpiri people. [789]

Musharbash details how the community built its own structures every night in the form of camps in and around the houses that were built 'for' them. Criticism ensued.[790] In the context of housing provision, the Yuendumu experience demonstrates how some Indigenous communities may prioritize mobility, immediacy, and intimacy over values which underpin Western perceptions of a dwelling (i.e., stability, privacy and future-

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788 Gordon, "Deconstructing 'Aboriginal Welfare Dependency'", 26 – 27.
789 Yasmine Musharbash, *Yuendumu everyday: contemporary life in a remote Aboriginal settlement* (Canberra: Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2008): 151, 152.
790 Musharbash, *Yuendumu everyday*, 153.

orientation).[791] There is a direct link between values, structures and discourses of domination. Indigenous expressions of alterity that do not reconcile with settler result in situational conflict. Indigenous expressions of intractable alterity such as the example outlined above at Yuendumu can identify colonial power structures and highlight their import as part of a systematic attempt at settler domination. However, these points of conflict expose settler values as ideological impositions rather than universal rights. The different ways that settlers and Indigenous peoples understand and engage with land and property constitute a battleground.

7.3.1.1 Settler Colonialism: Structures of Oppression Relating to Land

Structures of Indigenous oppression are everywhere even though they are more visible in remote public spaces. Where Indigenous peoples occupy land and assert their own control, cultural difference is more noticeable, the legitimacy of settler controls appears most questionable. Land is the main point of contestation in settler-colonial contexts. It is where colonial structures of elimination are paradoxically at their most transparent and yet also at their weakest.

Indigenous peoples' relationship with land and kin is a core aspect of Indigenous alterity. Without Indigenous occupation of public spaces in rural communities the integrity and recognition of that alterity is weakened. Land has a formative and primary role in Indigenous culture, just as it does in settler culture. As Sheree Cairney and Tammy Abbott argue, Indigenous culture in remote areas is expressed through relationships with land and family; these relationships are fundamental to Indigenous being as well as wellbeing. These authors identify this relationship as the 'Red Dirt Economy', whereby the 'foundation to thrive comes from the earth'.[792] Cairney and Abbott express this relationship as 'strong connections to land, family, law, language and spirituality [that] are necessary to achieve optimal health and wellbeing'.[793] The impact of the state's attempts to alter this relationship are more pronounced (and visible) in regional settings where damage associated with endeavours to fundamentally alter the relational nature of Indigenous culture are most

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791 Musharbash, *Yuendumu everyday*, 155.
792 Sheree Cairney and Tammy Abbott, "Aboriginal Wellbeing in a 'Red Dirt Economy'," *Journal of Australian Indigenous Issues* 17, no. 4 (December 2014): 5 – 23, at 20.
793 Cairney and Abbott, "Aboriginal Wellbeing in a 'Red Dirt Economy,'" 19.

intense. It is the nature of these communal social relationships that prompts Short to argue that their systematic transformation of these relationships amount to genocide.[794] Over the last twenty-five years thus is precisely what neoliberal Australian Government Indigenous policy has pursued. If remote communities cannot be transformed they must be terminated. Universal values have become instruments of elimination.

7.3.2 Indigenous Land Occupation: WA Remote Community Closures

Remote communities have become battlegrounds in a contest between neoliberal settler attempts to dispossess Indigenous peoples and Indigenous efforts to remain on their land. For example, in 2015 the Western Australian Barnett and Federal Abbott governments announced plans to close over 150 remote communities because they were not economically 'viable'.[795] The Remote Indigenous Community Closure policy ('the Closures' policy) is the culmination of a decade-long negotiation between State of Western Australia and Commonwealth governments over whom had ultimate 'responsibility' for the welfare of Indigenous people. The Barnett Government initially blamed the Commonwealth for the policy, arguing that a lack of Commonwealth funding could potentially 'force' community closures.[796] Federal Minister for Indigenous affairs Nigel Scullion denied culpability and indicated that discussions between the Federal and State governments regarding closures had taken place before the transfer of responsibility for the communities was announced.[797] Accordingly, services would no longer be available to many of the '1,309 Aboriginal people

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794 Short, *Redefining Genocide*, 36. See also Jon Altman, "Raphael Lemkin in Remote Australia: The Logic of Cultural Genocide and Homelands", *Oceania*, 88, 3, 2018, 336 – 359.

795 Calla Wahlquist, "Colin Barnett shrugs off protests against WA's remote community policy," *The Guardian*, 1 May 2015 (available at: https://www.theguardian.com/australia-news/2015/may/01/colin-barnett-shrugs-off-protests-against-was-remote-community-policy); Paige Taylor, "Colin Barnett pulls back on indigenous community closures," *The Australian*, 1 May 2015 (available at: http://www.theaustralian.com.au/national-affairs/colin-barnett-pulls-back-on-indigenous-community-closures/news-story/4cf01a9d2e67ab0669a5385ba3938748); Colin Barnett, "Remote Indigenous Communities – Closures," *WA Hansard*, 13 November 2014 (available at: http://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/9e74936192fd463d48257d9600076bbd/$FILE/A39+S1+20141113+p8126b-8128a.pdf); Colin Barnett, "Remote Indigenous Communities – Closures," *WA Hansard*, 12 November 2014 (available at: http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/5c8d9d6df49c8e3b48257d960006b949/$FILE/A39%20S1%2020141112%20p8030b-8031a.pdf).

796 Verity Edwards, "Indigenous communities have no rights to fight closures," *The Australian*, 3 December 2014 (available at: http://www.theaustralian.com.au/national-affairs/indigenous/indigenous-communities-have-no-rights-to-fight-closures/news-story).

797 Helen Davidson, "WA plan to close 100 remote and Indigenous communities 'devastating'," *The Guardian*, 18 November 2014 (available at: https://www.theguardian.com/australia-news/2014/nov/18/wa-plan-to-close-100-remote-and-indigenous-communities-devastating).

in 174 of the smallest' communities.[798] The state was avoiding its responsibility to its (Indigenous) citizens apparently for economic reasons.

Negotiations commenced in 2006 with the formalization of a bilateral agreement between Western Australian and Commonwealth governments that established the Western Australian Government would assume responsibility from the Commonwealth for housing and essential services in remote communities from 2008.[799] The agreement was finally realized in 2014 when the Barnett Government announced it would 'accept responsibility providing a $90 million payment to cover essential services during a two-year transition'.[800] The transition culminated in a Commonwealth funding cut that meant the cessation of essential services provision to a number of regional communities. The Barnett Government then embraced the Abbott Government's invocation of neoliberal 'responsibility' to argue that many of the communities were not sustainable.[801]

Following Indigenous resistance to the closures, the Barnett Government started to publicly rationalise a moral justification for intervention. In March 2015 Barnett announced in the Western Australian Parliament that he felt a responsibility to 'guarantee the safety of little boys and girls'.[802] Barnett cited 39 cases of sexually transmitted disease in children aged from 10 to 14 compared to none in the wider community. Barnett argued that the State had a responsibility to intervene and 'not abandon those children'.[803] Labor Opposition Aboriginal affairs spokesperson Ben Wyatt argued that reform was a cover for an ulterior motive – a desire to close remote Indigenous communities.[804] Similar to the Howard Government's moral crisis discourses that precipitated the NT Intervention, the Western

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798 Jacob Kagi, "Plan to close more than 100 remote communities would have severe consequences, says WA Premier," *ABC News*, 12 November 2014 (available at: http://www.abc.net.au/news/2014-11-12/indigenous-communities-closures-will-have-severe-consequences/5886840).
799 Andrew O'Connor, "Leaked document reveals 192 WA Aboriginal communities deemed unsustainable in 2010," *ABC News*, 25 March 2015 (available at: http://www.abc.net.au/news/2015-03-24/federal-review-reveals-192-communities-deemed-unsustainable/6343570).
800 O'Connor, "Leaked Document."
801 Barnett, "Remote Indigenous Communities."
802 Colin Barnett, "Remote Aboriginal Communities – Closure," *WA Hansard*, 19 March 2015 (available at:: http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/f4212dc24b3a408848257f3e00205102/$FILE/A 39%20S1%2020150319%20p1888b-1889a.pdf).
803 Barnett, "Remote Aboriginal Communities".
804 Andrew O'Connor, "WA's remote community reform process faces 'very challenging issues'," *ABC News*, 5 May 2016 (available at: http://www.abc.net.au/news/2016-05-05/remote-community-reform-process-faces-challenging-issues/7385020).

Australian Government emphasised a moral argument to justify the closure of remote communities after its economic justification argument failed.

The remote closures policy attracted significant resistance. Barnett was hit with 'wave after wave of criticism from Indigenous groups, with national protests against the proposed closure of communities the Government considered unviable'.[805] Subsequently, the Barnett Government changed tact. WA Nationals Leader Terry Redman acknowledged the initial approach represented a faux pas and 'recognized that Mr. Barnett's demand to close communities was disrespectful and caused great anger across Aboriginal Western Australia'.[806] Pursuing a more neoliberal policy postulation and similar to the approach it took while working with Noongar leadership (SWALSC) in the Noongar Agreement, the Barnett Government then infused a greater emphasis on consultation by talking 'with elders, community members and organizations, and people from all levels of government— local, State and Commonwealth— to understand the issues more comprehensively'.[807] The 'issue' that the Barnett Government seemed most unable to explore was the relationship linking Indigenous communities and country.

As the determined resistance that followed the Western Australian remote community closures indicates, Indigenous connection with land is critical to Indigenous identity and wellbeing. Indigenous people will mobilise to maintain possession. Protest is not only about specific relationships to country; Indigenous occupation of land also creates a physical space that unmasks structures of colonisation and makes injustices visible. This Indigenous presence and space represents an alternative with decolonizing potential, as Indigenous occupation expresses an Indigenous alterity the settler state cannot disavow.

7.3.3 Indigenous Resistance

Victimhood and land occupation can elicit Indigenous solidarity. While the Indigenous body politic is fragmented and the meaning of what Indigenous sovereignty means is also

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805 O'Connor, "WA's Remote Community Reform."
806 Calla Wahlquist, "Fears Western Australia will close remote Indigenous communities by stealth," *The Guardian*, 14 July 2016 (available at: https://www.theguardian.com/australia-news/2016/jul/14/fears-western-australia-will-close-remote-indigenous-communities-by-stealth).
807 "Resilient Families, Strong Communities: A roadmap for regional and remote Aboriginal communities," Regional Services Reform Unit, WA Department of Regional Development, *Western Australia Government* (July 2016): 5.

disputed there remains a convergence as well. Even avowed political opponents can agree on key aspects of the Indigenous lived experience. For example, Langton and Pearson may agree with Noongar Agreement opponent Margaret Colbung that the settler state has inflicted injury upon the Indigenous estate. This solidarity can form the basis of an Indigenous resistance. The assertion of Indigenous victimhood as a form of resistance can force the settler state to take responsibility for injury associated with colonisation. Couched within an Indigenous resilience, victimhood expresses a form of resistance that in turn sustains sovereignty.

Remote communities are meeting places, a coalescing point where resistance becomes an expression of Indigenous sovereignty. While the settler state expresses its sovereignty through occupation and an appeal to the neoliberal universal of economic development, the Indigenous polity expresses its sovereignty through land occupation and presence in the hybrid public space. Resistance, in turn, forces a reformation of settler structures and an acknowledgement of Indigenous exceptionalism on Indigenous terms.

7.3.4 Action: Mobilising White (Settler) Guilt and Formal Recognition

Neoliberal inspired Indigenous policy is thwarted by formalisation of Indigenous sovereignty. Yet, Indigenous sovereignty cannot occur without recognition of Indigenous exceptionalism. Constitutional recognition is solid. It may be uncomfortable but it can offer a circuit breaker. Progress toward Indigenous recognition within Australia has been hampered by settler attempts to retain power; rejections of Indigenous exceptionalism are part of this pattern. These strategies are borne out in policies such as Howard's practical reconciliation and steadfast refusal to entertain the possibility of a treaty. While Indigenous people are forced to first express a sovereignty to achieve sovereignty, their mobilisation holds power in their reclamation of victimhood and very presence issues a threat to the settler state.

Being able to issue a forceful challenge has historically been a crucial catalyst for social change. The civil rights movement in the United States during the 1960s provides a clear example of this. One of the most prominent American civil rights activists, Saul Alinsky, once noted in an interview with William F. Buckley Junior: 'All progress comes as a response

to a threat and the reaction to that threat is where you get progress'.[808] In his seminal work *Rules for Radicals* Alinsky developed tools for minority groups to obtain power for change: these tools 'make the difference between being a realistic radical and being a rhetorical one who uses the tired old words and slogans'.[809] Alinsky contends that change could only be achieved by working within the system to eventually arrive at a point where 'reformation means that masses of our people have reached the point of disillusionment with past ways and values'.[810] He worked in black ghettos and in impoverished areas such as Chicago's 'Back of Yards' to unite poor, disadvantaged African Americans and develop protest techniques that included civil disobedience and ridicule designed to achieve better social outcomes. Setting up the Industrial Areas Foundation to train community organisers to pursue and enact change, Alinsky used techniques such as practical disobedience to successfully force the state to negotiate.

While Alinsky's methods may not be translatable to the Australian context, his contention that discomfort can lead to political progress has application in the Australian setting. The *Sunrise* protests, Noongar and Victorian Indigenous resistance along with opposition to remote community closure are examples of effective Indigenous resistance. They assert an Indigenous responsibility that challenges the notion of responsibility imposed by the settler state. They also can expose white guilt and provide an Australian application of Alinsky's notion that threat can lead to change. This may take the form of white guilt emanating from Indigenous victimhood. As Maddison contends, the acknowledgment of collective guilt may 'goad us towards change'.[811] White (settler) guilt can therefore provide the catalyst for undoing settler structures of power.

Settler (white) guilt can be a powerful tool for progressing toward a greater recognition of Indigenous exceptionalism and Indigenous sovereignty. As discussed in chapter three, 'white guilt' has been temporarily suspended (throughout the neoliberal era) due to practical reconciliation and antiblack armband history that asserts settler domination

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808 "Firing Line with William F. Buckley Junior: Mobilizing the Poor (Interview with Saul Alinsky)" (available at: https://youtu.be/OsfxnaFaHWI?t=3).

809 Saul Alinsky, *Rules for Radicals: A Pragmatic Primer for Realistic Radicals* (New York: Vintage Books, 1989): xviii.

810 Alinsky, *Rules for Radicals*, xxii.

811 Maddison, *Beyond White Guilt*, 179.

and consigns colonial injury to the past. As Maddison outlines, Australian reconciliation discourse 'founders' on collective guilt, and on attempts to avoid acknowledging this guilt. Its avoidance has seen the settler state assert its sovereign legitimacy while committing to the improvement of Indigenous (neoliberal-defined) wellbeing. Maddison parodies a benevolent settler state committed to assuaging its collective guilt for colonisation whereby the patriarchal state claims to have the answers to fix the Indigenous 'problem'.[812] For Maddison, this is problematic because a patriarchal response limits discussion regarding reconciliation, and potentially erases the conditions for possible reconciliation. Solutions and remedies become the exclusive domain of the state.[813] Maddison suggests that the settler state should move beyond guilt, however mobilising settler guilt offers potential for recognition of Indigenous exceptionalism.[814] Linking white guilt to reconciliation, Maddison argues that collective guilt cannot provide the catalyst for social action and change because it only perpetuates inequality, feeds an ugly nationalism, and 'starves us of a moral presence in the world'.[815] However, white guilt can form the basis for settler accountability. Reversing the neoliberal discharge of responsibility through accountability where accountability for colonial injury becomes the settler's responsibility. Guilt is a tool, even if it should not be the only tool.

White guilt is an honest recognition of responsibility. It provides a cathartic *mea culpa* that has symbolic, yet meaningful value to the Indigenous community. As Moreton-Robinson has pointed out, reconciliation requires an 'open and honest admission that the patriarchal white nation state is predicated on retaining the spoils of colonial theft on the one hand, while exalting a national sense of tolerance and fair play on the other'.[816] White guilt acknowledges a truth that should not be avoided. While Maddison recommends moving beyond white guilt, confronting the cause and motivation of that white guilt can be emancipatory for settlers and Indigenous people alike. Victimhood is cathartic.

The settler state currently attempts to control expressions of Indigenous sovereignty through practical reconciliation because Indigenous alterity remains a threat and the target

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812 Maddison, *Beyond White Guilt*, 179. See also Nakata and Maddison, *New Collaborations*, 408.
813 Maddison, *Beyond White Guilt*, 94.
814 Maddison, *Beyond White Guilt*, 180.
815 Maddison, *Beyond White Guilt*, 22.
816 Moreton-Robinson, *Patriarchal Whiteness*, 71.

of neoliberal spatial transformation. Yet, paradoxically, this recognition of a threat confirms that negotiating substantive sovereignty is the only way to recover sovereignty.[817] Decolonisation is a new sovereignty for *all*.

7.4 Differentiated Citizenship: Indigenous Nationhood

Australia has a ready framework for rebuffing the mainstreaming agenda of the neoliberal/settler project. Differentiated citizenship already exists within Australia. Many dual citizens call Australia home. Moreover, up until 1966 Indigenous people were not counted, they were citizen and non-citizen at the same time. Australia therefore already has the framework to recognise dual citizenship. Reynolds articulates Green's vision of an Indigenous nationhood placing it as a form of citizenship within an Australian context. Reynolds, drawing from Anthony Smith, argues it is possible to 'de-link' ethnic and national aspirations from statehood and sovereignty by highlighting federal and confederal arrangements.[818]

Champagne has also outlined the case for a multinational state that recognizes and includes Indigenous sovereignty. Champagne is an advocate of the multi-nation state model. For Champagne, who speaks in an Indigenous recognition context, a nation state's stability:

> rests upon the social and political powers inherent within the peoples who compose that national community. Indigenous peoples who compose those communities and yet have significantly different cultures, religions, institutional formations, governments and territorial claims must be recognized and brought within a consensual and mutual institutional framework within an inherently multinational nation-state.[819]

This differentiated citizenship model, predicated upon a particular notion of nationhood, allows ethnic groups (in this case Indigenous groups) that have historically been denied social and political recognition, with a capacity for achieving broad cultural and economic autonomy within joint or overarching states. National identities are then protected by

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817 Rowse, *Obliged to be Difficult*, 221.
818 Reynolds, *Aboriginal Sovereignty*, 185 – 186.
819 Champagne, *Rethinking Native* Relations, 20.

umbrella states.[820] While Smith was sceptical about the feasibility of this model, Reynolds considers Smith's 'worst fear' of a state within a state in a more positive light and concludes that it offers emancipatory potential. For Reynolds, 'more than most societies Australia has a chance to pursue it.[821] Australian Federation and even the British Commonwealth of nations incorporate to some degree aspects of a differential citizenship model, giving salience to how it may work.

While a framework for recognising a differentiated citizenship already exists in dual citizenship, the process promises a new form of statehood, a new form of nationhood. Green outlines (in a Canadian context) how Indigenous nationalisms develop political cultures that feature opposition to the state and a commitment to Indigenous culture, language, social and political organisation. This Indigenous nationhood draws from the human rights approach and demands that Indigenous rights be protected and promoted.[822] International law forms the backdrop for the formalisation of an authentic treaty process. Here, Indigenous sovereignty is not merely symbolic recognition.

7.4.1 The Need for Formal Recognition

Differentiated citizenship requires formal recognition. As outlined earlier, formal recognition and specifically the nature of Indigenous citizenship, has been the basis for arguments that a treaty is impossible. However, as Byrne has outlined, the Howard government merely 'sidestepped the issue by claiming that a treaty can only be made between sovereign states', and raising 'fear among settler Australians of a "nation within a nation"'.[823] There is *already* a nation within a nation. As Tully has effectively argued, there is merit in a treaty between states and 'stateless' polities.[824]

Moreover, other polities have successfully enacted treaty documents that formalize recognition of Indigenous peoples in a quest for reconciliation. In his discussion of South African post-apartheid creation of a new constitution, Dodson has highlighted the advisability of a broad document that formalizes rights between separate racial and cultural

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820 Reynolds, *Aboriginal Sovereignty*, 185 – 186.
821 Reynolds, *Aboriginal Sovereignty*, 186.
822 Green, *The Complexity of Indigenous Identity*, 43.
823 Byrne, *Reconciliation since 2000*, 107.
824 Tully, *Public Philosophy in a New Key*.

groups in a colonial setting.[825] The South African post–apartheid constitution highlights how a treaty can include tolerance, justice and human values in a decolonizing project that envisages a progressive and inclusive society. Australia's differentiated citizenship would be similar to South Africa's constitutional transformation – a treaty recognizing Indigenous sovereignty and a new reality.

7.4.2 Differentiated Citizenship as Formal Reconciliation

Differentiated citizenship would necessitate a series of formal treaties between the owners of the Indigenous estate and the settler state. While differential citizenship is formal recognition, it would be protected within the Australian constitution. The reality of the settler colonial relationship within Australia is that, along with the Indigenous person, the settler is here to stay. This is not to dismiss the critique of demands for constitutional recognition argued by Thorpe and others – they are critical interventions, yet constitutional recognition offers an important starting point for decolonising passages. If sovereignty must come first, recognition can be the circuit breaker.

This recognition will need to be negotiated, though the tools identified here – victimhood and other assertions of Indigenous-defined responsibility that can help ensure negotiations are conducted away from the dialectic of domination that still defines the settler/Indigenous relationship.

7.4.2.1 Engaging Australia's Colonial History

Truthful engagement with Australia's past means moving beyond the 'whitewashed' version of national history espoused by (neoliberal) practical reconciliation. As Buchan puts it, Australian sovereignty can become a sovereignty predicated upon an honest acknowledgement of the past and an expression of hope that sovereignty might mean more than imperial 'residue that washed ashore in 1788 on the blank and nullifying "tides of history"'.[826] Terry Dunbar and Lorna Murakami-Gold also argue that to begin the process of reconciliation

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825 Dodson, *Nulungu Lecture*, 44.
826 Buchan, "The Tides of History," 21.

there needs to be recognition and acknowledgement that Australia's history has been built on dispossession; Indigenous people are willing to work with settler people to reconcile differences and finding mutually beneficial solutions requires an Indigenous-led process incorporating Indigenous worldviews across many cultural language groups.[827]

To a small degree, this process has already begun. Cowlishaw contends that changing or remaking prevailing attitudes regarding the history of Australia has had an impact upon Indigenous people as well as constituting a challenge to 'the basis of rural Anglo-Australians' hegemony'.[828] Cowlishaw argues that paying attention to the complex of social relations linking Indigenous and settler peoples can improve understandings of the past:

What these people have meant to each other has surely immense and lasting significance. Personal and structural, negative and positive, the stories of the intimacies and interdependencies between Indigenous and invaders can do more to reconnect all of us with the past than the moral binaries that have tended to mar our understanding of what made us who we are.[829]

Differentiated citizenship can employ this history to forge a new relationship in a hybrid formation that recognises the contemporary and historical nature of Indigenous alterity. Emma Barrow and Barry Judd outline how this requires the dismantling of 'old, imperial, colonial and nationalist ideas about Australian history'.[830] Barrow and Judd note the importance of deconstructing the view that Indigenous people are 'alien' and constitute an inferior 'other'; the Indigenous 'Other' was always part of history and 'Self'.[831]

7.4.2.2 Abandoning Practical Reconciliation, Abandoning Neoliberal Assumptions

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827 Terry Dunbar and Lorna Murakami-Gold, "Introduction: Indigenous Critiques About the Cultural Security Continuum as Applied in Australia," *Journal of Australian Indigenous Issues* 13, no. 3 (September 2010): 8.
828 Gillian Cowlishaw, "Collateral Damage in the History Wars," in *Moving Anthropology: Critical Indigenous Studies*, eds. Tess Lea, Emma Kowal and Gillian Cowlishaw (Darwin: Charles Darwin University Press, 2006): 132.
829 Cowlishaw, "Collateral Damage in the History Wars," 142.
830 Emma Barrow and Barry Judd, "*Whitefellas at the Margins: The politics of going native in post-colonial Australia,*" *International Journal of Critical Indigenous Studies* 7, no. 2 (2014): 1 – 15.
831 Barrow and Judd, "*Whitefellas at the Margins,*" 11 – 12.

Discomfort is never an easy sell, and there are limited incentives for the settler to surrender his dominant position. Indeed, this is one reason reconciliation has proven relatively unsuccessful within Australia: the settler state has always been reticent; in the neoliberal era it has renewed its attack. Reconciliation has been reduced to trivial measures, and whereas no meaningful concession was ever seriously contemplated, settler self-gratification remained a priority. As Christopher Pearson has ruefully commented, reconciliation over the last twenty-five years can be viewed sceptically as a means for 'holier-than-thou Sea of Hands mums from Hunters Hill and Camberwell', privileged suburbs in metropolitan settings, and for white Australia more broadly to feel good about itself.[832] Pearson's admonishment should not be ignored – practical reconciliation assuages white guilt at minimal personal cost to settlers. Practical reconciliation perpetuates a racial divide and the continuing privilege of 'whiteness' in a 'celebration' of the absorption of Indigenous alterity by the dominant settler culture. This practical reconciliation is the product of the neoliberal/settler relationship. It is the culmination, the implication and the impact of neoliberal responsibility in Australian Indigenous policy over the last twenty-five years.

A racial component is possibly resident within practical reconciliation therefore has an exclusionary and prejudicial purport. Indeed, while rhetorically asking why Indigenous sovereignty cannot be accommodated within the state, Phillip Falk and Gary Martin ask: is it possible that 'the real reason for government and judicial inaction continues to be the very same racism that has permeated white and Indigenous relations since invasion?'[833] Similarly, Moreton-Robinson contends that there is an element of racism in opposition to Indigenous sovereignty and formal treaty. She refers to the Howard Government's 'deployment of the discourse of security' is a discourse that 'is inextricably linked to an anxiety about dispossession shaped by a refusal of Indigenous sovereignty with clear roots in white supremacy'.[834] 'Security', 'national interest', 'equality', and other neoliberal rhetorical tropes perpetuate the superiority of settler culture over Indigenous culture. Neoliberal racialisations continue to feature in contemporary Australian government Indigenous policy. It is a constant feature of neoliberal policy across Anglophone nations.

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832 Christopher Pearson, "The Need for Skepticism," In *Essays on Reconciliation* (Melbourne: Black Inc., 2000): 262.
833 Falk and Martin, "Misconstruing Indigenous Sovereignty," 46.
834 Moreton-Robinson, "Writing off Indigenous sovereignty," 101.

Reconciliation demands a critical engagement with this racism and identity. A differentiated citizenship informed by Indigenous victimhood provides for this engagement. As realization of an Indigenous responsibility, it asserts an Indigenous sovereignty.

Differentiated citizenship is only one potential resolution to the Indigenous 'problem'. It reflects what Ernesto Verdaia recognises as a new relationship: past identities shaped through conflict no longer operate as the primary political cleavage; instead, an invigorated identity is employed, enabling the citizenry to cut across earlier 'fault lines'.[835] This may take the shape of what Kevin FitzMaurice describes in a Canadian context as an Indigenizing of whiteness, where reconciliation provides 'for the possibility of meaningful alliances through the revealing, challenging, and the transgression of overarching and deeply embedded structures of colonial advantage and racial ideology as a process of giving up colonial advantage through the coming together on the Other's terms'.[836] The primary responsibility of the settler state is to acknowledge its accountability for colonial injury. Indigenous victimhood invigorates the public space as an assertion of Indigenous responsibility that can provide this function.

7.5 Conclusion

This thesis is a response to neoliberal responsibility and its impact on reconciliation within Australia. It offers an alternative to the neoliberal schema. It expresses an alternative reconciliation framework that requires a grappling with latent racism and shifts the way the coloniser and colonised recognise each other. An invigorated form of Indigenous solidarity can provide this function. In her discussion of white guilt, Maddison argues that the tension between the colonizers and the colonized must be resolved while a new way of thinking about history and how Indigenous peoples' and settlers can live together in the future must be crafted.[837] Indeed, along with Sana Nakata and others, Maddison provides an edited volume of multi-disciplinary essays that attempt to offer different ways to envisage settler-

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835 Ernesto Verdeja, *Unchopping a tree: reconciliation in the aftermath of political violence* (Philadelphia: Temple University Press, 2009): 3.
836 Kevin FitzMaurice, "Are White People Obsolete? Indigenous Knowledge and the Colonizing Ally in Canada," in *Alliances: Re/envisioning Indigenous – non-Indigenous Relationships*, ed. Lynne Davis (Toronto: University of Toronto, 2010): 364.
837 Maddison*, Beyond White Guilt,* 5.

Indigenous relations in Australia.[838] I have attempted likewise, through a formalized differentiated citizenship model to identify how a hybrid public space offers the potential for lasting reconciliation.

Indigenous sovereignty is the fulfilment of an evolving hybrid space predicated upon structural reform and an Indigenous reclamation of victimhood as a means to hold the settler state accountable. Differentiated citizenship is grounded in a public space that must be protected; only then hybrid models such as Altman's Hybrid Theory and Foley's Indigenous Entrepreneurship can fulfil their potential. Alternatives that realize Indigenous sovereignty will likely build upon recognition, and upon a critical analysis of the structures of power that constitute ongoing settler colonialism as a 'dialectics of domination'. Differentiated citizenship is a response to the structural limitations of neoliberal Indigenous policy. Differentiated citizenship is proof that there are indeed alternatives to neoliberalism.

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838 Sarah Maddison and Sana Nakata, *Questioning Indigenous-Settler Relations: Interdisciplinary Perspectives*, eds. Sarah Maddison and Sana Nakata (Singapore: Springer Books 2020).

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