

REPARATIONS AND FIRST NATIONS' LEGAL RIGHTS IN AUSTRALIA

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This article explores concepts of loss and reparations under the Australian legal system, examining whether either conceptualisation adequately attends to First Nations' experiences of intangible loss. Using two case studies – the Stolen Generations and dust disease – this article critiques the typical approaches taken by the Australian legal system in response to injustices inflicted on First Nations Peoples. This article advocates for the Australian legal system to approach reparations and compensation by centring intangible loss. This will allow for a framework to be developed that can cater for First Nations' distinctive experiences of loss, in contrast to the current system which has limited consideration and understanding of such experiences and losses.

Please be aware this article contains the names of deceased First Nations Peoples and reproduces some of their expressions in written format. We pay our respects to them and their stories, which contribute to improving conditions for present and future First Nations Peoples. We also acknowledge that when First Nations Peoples thrive, all of society, including non-Indigenous people, benefit.

I INTRODUCTION

This article considers ways in which the Anglo-Australian legal system¹ can better position itself to address intangible loss more adequately through considering reparations in the context of the legal system's restriction of First

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1 The Anglo-Australian legal system is inclusive of Anglo-Australian laws, policies, and structures, which include local, state, and federal governments, which ultimately derive from the invasion by England. References to 'the law', 'Australian law', 'legal system' or 'Australian legal system' within this article specifically refer to the Anglo-Australian legal system and laws. The authors recognise the Anglo-Australian legal system is not the only legal system within Australia and the authors recognise the authority of First Nations Laws. The focus of this article is on reforming the Anglo-Australian legal

Nations' rights. The *Northern Territory v Griffiths* ('*Timber Creek*') decision of 2019 brought increased attention to compensating for intangible losses associated with land dispossession.² This recognition of a need to compensate for intangible loss needs to translate across all interactions between the Anglo-Australian legal system and First Nations Peoples.³ This is because all interactions which have restricted or violated First Nations' rights have inflicted significant intangible social and cultural damage. The relationship between the law, intangible loss, and reparations is currently under explored, thus, this repositioning will fill a gap in literature. More broadly, the implications of establishing a more accurate understanding of intangible loss will facilitate the legal system's ability to offer reparations which extend beyond only serving non-Indigenous interests. This article is part of a larger project concerned with the provision of reparations for intangible losses, particularly under the native title system. This article provides the foundation for this project through conceptualising loss generally, addressing how the Anglo-Australian legal system tends to define and respond to loss, and examines specific case studies to elucidate the disconnect between First Nations Peoples' experiences of loss and the legal protections afforded by Anglo-Australian law, subsequently touching on reasons for this. The broader project aims to develop a framework to address this disconnect, with subsequent articles focusing on the intangible losses associated with land dispossession and the native title system;⁴ international comparisons with other 'colonial-settler' nations;⁵ and the failures, successes and missed opportunities for reform throughout the development of native title law in Australia. The scope of this article is extensive but is restricted by excluding discussions of land dispossession and international comparative law. Ultimately, this article will be valuable through analysing the disconnect between the current approach to reparations and conceptualisation of

system which is why any shortened reference to laws or a legal system is limited to the Anglo-Australian legal system created by the colonising state.

2 (2019) 269 CLR 1 ('*Timber Creek*').

3 'First Nations Peoples' is used to refer to Aboriginal and Torres Strait Islander People collectively when discussing broad legal issues. Specific language groups are used in preference to the terms 'Aboriginal People' and 'First Nations Peoples' when referencing a specific Aboriginal or Torres Strait Islander group or person, to avoid homogenising distinct cultural groups. The use of 'nations' asserts a sovereign standpoint and challenges the constraints of colonisation and othering. People who do not identify as Aboriginal and/or Torres Strait Islander are referred to as 'non-Indigenous' to detract from the hegemonic norm of White Australia: Irene Watson, 'First Nations and the Colonial Project' (2016) 1(1) *Inter Gentes* 30 ('Colonial Project'); Karl Quinn, 'Are All White People Racist? Why Critical Race Theory Has Us Rattled', *Sydney Morning Herald* (online, 7 November 2020) <<https://www.smh.com.au/culture/books/are-all-white-people-racist-why-critical-race-theory-has-us-rattled-20201105-p56bwv.html>>.

4 This will develop the depth of analysis on loss and potential reparations through focusing on the one area of law: the native title sphere.

5 This will draw on international human rights law developed under the United Nations ('UN'), specifically the *United Nations Declaration on the Rights of Indigenous Peoples* and the United Nations Committee on the Elimination of Racial Discrimination ('UNCERD'), assessing compliance and effectiveness: *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('*UNDRIP*').

loss, and the losses experienced by First Nations Peoples, emphasising the need to centre intangible loss in models of reparations.

Following this Introduction, Part II provides a holistic definition of loss, inclusive of intangible loss. Part III explains how loss is characterised within the Anglo-Australian legal system. Part IV explores the legal system's response to loss, considering concepts of reparations and compensation. Part V examines the major shortfall of this: the inability to provide adequate reparations for First Nations' intangible losses. Part VI explores two case studies, 'the Stolen Generations' and 'dust diseases' which illustrate a limiting and devaluing approach to these intangible losses – an approach that has been slow to respond and static in prevention.

The two case studies illustrate a broader trend in the Australian legal system's interactions with First Nations Peoples; the legal system facilitates or directly sanctions immense intangible loss, eventually acknowledges the existence of this loss, but fails to engage with its role in inflicting it or provide a pathway to justice. The first case study – the Stolen Generations – considers an area that has been heavily examined in literature. There is a strong understanding that the legal system has failed to provide adequate reparations in this area. The second case study – dust disease – is a more novel one, minimally considered to date in the context of First Nations' experiences of loss and damage. Yet both case studies echo the same theme – the legal system is currently ill-equipped to recognise, understand, address, and prevent certain kinds of loss, such as the cultural losses that follow removal from family and the environmental losses that impact First Nations Peoples in a unique way. Centring intangible social and cultural losses in discussions about reparations will facilitate an approach to justice which values First Nations Peoples and protects their rights. This article recognises the potential of the Uluru Statement from the Heart⁶ to instigate this necessary shift in focus and guide future efforts to provide adequate reparations.

II DEFINING LOSS

The term 'loss' denotes any change to circumstances by way of removal or reduction. It can be temporary or permanent. Loss describes no longer having something or having less of it than before.⁷ Loss can therefore cover anything in existence, be it physical, financial, emotional, mental, spiritual, social, situational, cultural, or legal. Loss can happen in relation to rights to something (including legal and human rights)⁸ and even encompasses possibilities (for example, certain

6 The call to action, gifted in 2017 by First Nations Peoples, to join the journey to a better Australia for everyone. The statement was fashioned following a series of dialogues between First Nations Peoples from across Australia: 'History is Calling', *Uluru Statement* (Web Page) <<https://ulurustatement.org/>>.

7 *Collins English Dictionary* (online at 5 December 2022) 'loss' (def 1).

8 The latter of which are said to be inherent to all people, meaning any human rights violation will constitute a loss. The *UNDRIP* is of particular importance in outlining specific rights inherent to Indigenous Peoples and subsequently their right to reparations for a breach of these rights. See, eg, *UNDRIP* (n 5) arts 8, 10, 11, 20, 28, 32.

opportunities that are tied to circumstances).⁹ In light of this, often intangible loss occurs in tandem with tangible loss.¹⁰

Causes of loss are also varied. Loss can occur organically (such as a natural death), be caused by an individual's own actions (for instance, a person accidentally leaving their phone in a taxi), or can arise due to the intervention of another person or entity (for example, a person opening their car door into the neighbouring vehicle, scratching the paint). Loss is also possible because of a lack of required intervention by another, for instance, if a beverage makes someone sick because it contains a snail, this should have been identified and removed from the market.¹¹ Arguably, losses that are suffered because of the actions (or inactions) of another person or entity are those that should be afforded legal protections.¹² However, unfortunately, this is not always the case.¹³ For instance, the Anglo-Australian legal system (like other legal systems influenced by capitalism) struggles to afford protection to intangible losses because they do not have a readily available parallel within the market, making them difficult to measure in an economic sense.¹⁴

A First Nations Peoples' Unique Experiences of Loss and the Prevalence of Intangible Losses

A physical place, object, person or entity can carry unobservable intangible characteristics. Therefore, when a physical element is impacted, so too are its associated immaterial aspects. These are often the social, cultural, spiritual, or mental elements tied to tangible objects, peoples, or places. Extensive intangible practices, knowledge, and values are foundational to First Nations' cultures. First Nations' complex cultural, social, and legal systems contain certain traditions and

9 Such as lost earning capacity: *LexisNexis Concise Australian Legal Dictionary* (4th ed, 2011) 'pecuniary loss' ('*LexisNexis*').

10 Federico Lenzerini, 'Reparations for Indigenous Peoples in International and Comparative Law: An Introduction' in Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008) 3, 22; Ana F Vrdoljak, 'Reparations for Cultural Loss' in Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008) 197, 200.

11 *Donoghue v Stevenson* [1932] AC 562.

12 *LexisNexis* (n 9) 'loss'; 'Damages and Loss', *LawRight* (Web Page, 2022) <<https://www.lawright.org.au/legal-information/personal-injuries/damages-and-loss/>>; 'Damages and Loss', *Legalpedia* (Web Page, 1 May 2015) <https://web.archive.org/web/20220303153049/http://www.legalpediaqlid.org.au/index.php/Damages_and_loss/>.

13 This is particularly evident when assessing protection of human rights in Australia because international standards have not been codified into Australian law: 'How Are Human Rights Protected in Australian Law?', *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/our-work/rights-and-freedoms/how-are-human-rights-protected-australian-law/>>. At present, investigation into and advocacy for the *UNDRIP* (n 5) to be implemented into Commonwealth legislation in Australia is underway. See, eg, Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, 'Submissions', *Inquiry into the UN Declaration on the Rights of Indigenous People* (Web Page, 2022) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Aboriginal_and_Torres_Strait_Islander_Affairs/UNDRIP/Submissions/>.

14 Additionally, Australia's record in relation to protecting First Nations Peoples' human rights is poor, despite the development of international laws, treaties, and bodies in this area (such as the *UNDRIP* (n 5) and UNCERD) which adds to its struggle in addressing intangible losses.

living expressions.¹⁵ Connection with kin (family and community),¹⁶ and Country (inclusive of all creation; lands, waters, skies, and everything in between)¹⁷ is integral, and at the core are specific, shared, place-based social and environmental practices.¹⁸ These practices and knowledges are inherited from ancestors and passed onto descendants.¹⁹ Practices and knowledges are entwined and include things such as the skills to produce traditional crafts, dance, corroboree, celebration, ceremony, song lines, music, language, storytelling of Creation/Dreaming stories and ways of sustainable living through caring for Country and each other.²⁰ This derives from a symbiotic relationship with the land. As Dr Galarwuy Yunupingu shared:

For Aboriginal people there is literally no life without the land. The land is where our ancestors came from in the Dreamtime, and it is where we shall return. The land binds our fathers, ourselves and our children together. If we lose our land, we have literally lost our lives and spirits, and no amount of social welfare or compensation can ever make it up to us.²¹

Consequently, when loss is inflicted on First Nations Peoples, the harder to measure effects are particularly predominant. Breaches of First Nations' human and cultural rights exemplify this notion. For instance, breaching the right to health

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- 15 *Convention for the Safeguarding of the Intangible Cultural Heritage*, opened for signature 17 October 2003, 42671 UNTS 2368 (entered into force 20 April 2006); 'What Is Intangible Cultural Heritage?', *United Nations Educational, Scientific and Cultural Organization* (Web Page) <<https://ich.unesco.org/en/what-is-intangible-heritage-00003>>; Teina Te Hemara, 'The State of Intangible Cultural Heritage in Australia', *National Native Title Council* (Web Page) <https://nntc.com.au/news_latest/the-state-of-intangible-cultural-heritage-in-australia/>; Terri Janke and Maiko Sentina, 'Indigenous Knowledge: Issues for Protection and Management' (Discussion Paper, 2018) <https://www.terrijanke.com.au/_files/ugd/7bf9b4_043109b224984e32aebf847b96509a24.pdf>.
 - 16 Inge Kral, 'Kinship Systems', *Central Land Council* (Web Page) <<https://www.clc.org.au/our-kinship-systems/>>; Patricia Dudgeon and Abigail Bray, 'Indigenous Relationality: Women, Kinship and the Law' (2019) 3(2) *Genealogy* 23 <<https://doi.org/10.3390/genealogy3020023>>; 'Kinship and Belonging', *Kinship and Social Organisation* (Web Page) <<https://course.oeru.org/inda101/learning-pathways/kinship-and-social-organisation/kinship-and-belonging/>>; Claire Smith, *Country, Kin and Culture: Survival of An Australian Aboriginal Community* (Wakefield Press, 2004); 'The Role of Family & Kinship in Aboriginal Culture', *Watarrka Foundation* (Blog Post) <<https://www.watarrkafoundation.org.au/blog/the-role-of-family-kinship-in-aboriginal-culture/>> ('The Role of Family and Kinship'); 'Kinship', *Deadly Story* (Web Page) <https://www.deadlystory.com/page/culture/Life_Lore/Family/Kinship>.
 - 17 Deborah Bird Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996) 7; 'Welcome to Country', *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Web Page, 25 May 2022) <<https://aiatsis.gov.au/explore/welcome-country/>>; 'Our Country', *Aboriginal Art and Culture* (Web Page) <<https://www.aboriginalart.com.au/culture/tourism2.html>>; Smith (n 16).
 - 18 'Kinship' (n 16); Dudgeon and Bray (n 16); 'Kinship and Belonging' (n 16); Kral (n 16); 'The Role of Family and Kinship' (n 16); Smith (n 16); Rose (n 17); 'Welcome to Country' (n 17); 'Our Country' (n 17); Robin Gregory et al, 'Compensating Indigenous Social and Cultural Losses: A Community-Based Multiple-Attribute Approach' (2020) 25(4) *Ecology and Society* 4:1 <<https://doi.org/10.5751/ES-12038-250404>>; Janke and Sentina (n 15).
 - 19 Te Hemara (n 15); Janke and Sentina (n 15).
 - 20 Te Hemara (n 15); Janke and Sentina (n 15).
 - 21 When Yolngu man, Dr Galarwuy Yunupingu was Chairman of the Northern Land Council he expressed the value of the land beyond the economy: Queensland Studies Authority, 'The History of Aboriginal Land Rights in Australia (1800s–1980s)' (Resource No 6, December 2007) <https://www.qcaa.qld.edu.au/downloads/approach2/indigenous_res006_0712.pdf>.

impacts more than the physical quality of life and life expectancy.²² It can also prevent the capacity to actively practice culture and pass down cultural knowledge. Another illustration is the decline in wellbeing that follows a breach of the right to freedom from arbitrary arrest because a physical removal from kin and Country disrupts necessary cultural ties.²³

All interactions which have altered First Nations Peoples' circumstances, particularly through the restriction or violation of rights, have inflicted significant intangible social and cultural damage. A history of colonial and oppressive laws, policies and institutions has restricted First Nations Peoples from fully practicing their culture, depriving them of a realm of intangible cultural and spiritual aspects which are crucial to the essence of their being.²⁴ This loss has caused long-term intergenerational trauma which has also not been adequately addressed by the Anglo-Australian legal system.²⁵ First Nations Peoples have been forced to self-manage this trauma because sufficient support services have not been provided. The combination of this deprivation from practicing culture and self-management of trauma has contributed immensely to the disadvantages suffered by First Nations Peoples in Australia today. This includes higher levels of unemployment, poverty, depression, and isolation; higher rates of drug and alcohol dependency, domestic violence, and involvement in the criminal 'justice' system; and poorer levels of education, physical, and mental health, and a reduced life expectancy compared to non-Indigenous people.²⁶ Intangible losses evidently include any adverse effect

22 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12.

23 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9.

24 Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (Oxford University Press, 2009); Tallulah Thompson, 'Lessons to Learn: The Role of Aboriginal History in Promoting Reconciliation in the Classroom and Beyond' (2018) 4(1) *NEW: Emerging Scholars in Australian Indigenous Studies* 51 <<https://doi.org/10.5130/nesais.v4i1.1531>>.

25 David McCallum, 'Law, Justice, and Indigenous Intergenerational Trauma: A Genealogy' (2022) 11(3) *International Journal for Crime, Justice and Social Democracy* 165 <<https://doi.org/10.5204/ijcsd.2121>>; Richard Weston, 'The Gap Won't Close until We Address Intergenerational Trauma', *The Guardian* (online, 12 February 2018) <<https://www.theguardian.com/commentisfree/2018/feb/12/the-gap-wont-close-until-we-address-intergenerational-trauma>>.

26 Kiyo Dörner, 'The Ones Left Behind', *DW* (online, 29 November 2016) <<https://www.dw.com/en/how-australia-is-failing-its-indigenous-people/a-36573151>>; Casey Temple, Patrick Mercer and Neerim Callope, 'Australia's First Nations Incarceration Epidemic: Origins of Overrepresentation and a Path Forward', *United Nations Association of Australia* (Web Page, 18 March 2021) <<https://www.unaa.org.au/2021/03/18/australias-first-nations-incarceration-epidemic-origins-of-overrepresentation-and-a-path-forward/>>; *Royal Commission into Aboriginal Deaths in Custody* (National Report, 9 May 1991) vol 2; Chris Cunneen, Barry Goldson and Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28(2) *Current Issues in Criminal Justice* 173 <<https://doi.org/10.1080/10345329.2016.12036067>>; Devon Indig et al, *2009 NSW Young People in Custody Health Survey: Full Report* (Report, March 2011); Bianca Nogrady, 'Trauma of Australia's Indigenous "Stolen Generations" is Still Affecting Children Today' (2019) 570(7762) *Nature* 423 <<https://doi.org/10.1038/d41586-019-01948-3>>; Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future* (Community Guide, 2020) 13, 20 ('Wiyi Yani U Thangani'); 'Intergenerational Trauma', *Australians Together* (Web Page, 6 August 2021) <<https://australians.together.org.au/discover/the-wound/intergenerational-trauma/>>; Australian Government, *Closing the Gap* (Report, 2020) ('Closing the Gap Report').

on social relations, cultural practices, identity, governance systems, and mental health, which are particularly prevalent when First Nations Peoples' circumstances are altered because of the Anglo-Australian legal system.²⁷

III (THE PROBLEM WITH) LOSS UNDER THE ANGLO-AUSTRALIAN LEGAL SYSTEM

The Anglo-Australian legal system defines loss as any negative consequence arising from the illegitimate actions (or inactions) of another person or entity.²⁸ This can be physical detriment or injury (to a person or property), mental detriment or injury, or simply an interference with any legal right.²⁹ The way the Australian legal system primarily responds to loss is through the award of a payment of compensation, which is addressed in Part IV of this article. In accordance with this approach, the legal system measures loss through an economic analysis. Thus, the legal system categorises instances of loss as either pecuniary (loss that has clear monetary value) or non-pecuniary (loss that does not have readily ascertainable monetary value but still impacts quality of life).³⁰ Examples of pecuniary loss include damage to property, lost income, loss of earning capacity, medical bills, or costs of future medical treatment.³¹ Examples of non-pecuniary loss include pain and suffering, psychiatric distress, loss of amenities, the expectation of life, enjoyment, or the ability to have children.³² Some of these losses are intangible – such as psychiatric distress and loss of enjoyment. Thus, the Australian legal system has demonstrated some ability to address intangible loss. However, when experiences of loss are categorised as tangible or intangible, it becomes clear how limiting the current approach is. For instance, tangible loss can include environmental impacts – either through damage to the environment, or exclusions from access to the environment or environmental resources. Tangible loss would include the examples of pecuniary loss identified above, but would also cover loss of life, loss of economic opportunities, additional expenses caused by poor health,

27 Terre Satterfield et al, 'Culture, Intangibles and Metrics in Environmental Management' (2013) 117 *Journal of Environmental Management* 103 <<https://doi.org/10.1016/j.jenvman.2012.11.033>>; Gregory et al (n 18).

28 *LexisNexis* (n 9) 'loss'; *LawRight* (n 12); *Legalpedia* (n 12).

29 *LawRight* (n 12); *Legalpedia* (n 12); *LexisNexis* (n 9) 'loss'.

30 *LexisNexis* (n 9) 'non-pecuniary loss', 432 'pecuniary loss'; Romaan Dullo, 'The Differences between Pecuniary and Non-pecuniary Loss', *Lawpath* (Web Page, 1 December 2020) <<https://lawpath.com.au/blog/the-differences-between-pecuniary-and-non-pecuniary-loss>>; RP Balkin and JLR Davis, *Law of Torts* (LexisNexis, 5th ed, 20); Julia Davis, *Connecting with Tort Law* (Oxford University Press, 2012) 643; Denver Trial Lawyers, 'Pecuniary vs. Non-pecuniary Losses: What's the Difference?', *Wahlberg, Woodruff, Nimmo and Sloane LLP* (Web Page, 19 May 2020) <<https://www.denverttriallawyers.com/blog/2020/may/pecuniary-vs-non-pecuniary-losses-what-s-the-dif>>; *Civil Liability Act 2002* (NSW) ('CLA') section 3 provides a non-exhaustive list of non-economic loss.

31 *LexisNexis* (n 9) 'pecuniary loss'; Dullo (n 30); Balkin and Davis (n 30) 379–386 [11.6]–[11.21]; Davis (n 30); Denver Trial Lawyers (n 30); *CLA* (n 30) s 3.

32 *LexisNexis* (n 9) 'non-pecuniary loss'; Dullo (n 30); Balkin and Davis (n 30) 379 [11.6], 389 [11.27]–[11.30]; Davis (n 31); Denver Trial Lawyers (n 30); *CLA* (n 30) s 3.

restrictions to accessing natural resources (such as hunting or fishing restrictions), environmental degradation, and impacts on ecosystems.³³ Evidently, a pecuniary/non-pecuniary characterisation of loss not only conceals intangible losses but excludes a host of tangible losses too.

This conceptualisation of loss has been driven by colonialism. Since invasion, the legal and social order within Australia has been defined by colonisation and its structures, which has misunderstood and devalued First Nations cultures.³⁴ The colonising state continues this devaluing through positioning First Nations Peoples³⁵ as objects within colonial Australia, which delegitimises their distinct cultures.³⁶ This has translated in practice to a continued exclusion of First Nations Peoples from the construction of and contribution to the institutions and structures which hold power within society.³⁷ Consequently, this lack of representation has meant a lack of acknowledgement and understanding of First Nations Peoples' complex systems of law and the spiritual relationships with kin and Country which have existed since the first sunrise, for time immemorial.³⁸ As Tanganekald, Meintangk Bunganditj woman Irene Watson posits, 'our laws are in the DNA of the land and our bodies'.³⁹ In turn, this lack of representation has translated to a lack of comprehension of the distinct experiences of loss which occur when culture

33 Gregory et al (n 18) 3; 'Aboriginal and Torres Strait Islander Peoples' Health', *Health Direct* (Web Page, July 2022) <<https://www.healthdirect.gov.au/indigenous-health>>; Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* (Report, 9 June 2015); 'Closing the Gap', *Australian Indigenous HealthInfoNet* (Web Page) <<https://healthinfonet.ecu.edu.au/learn/health-system/closing-the-gap/>>; 'Indigenous Life Expectancy and Deaths', *Australian Institute of Health and Welfare* (Web Page, 25 July 2022) <<https://www.aihw.gov.au/reports/australias-health/indigenous-life-expectancy-and-deaths>>.

34 Larissa Behrendt et al, *Aboriginal and Torres Strait Islander Legal Relations* (Oxford University Press, 2nd ed, 2019) 9; Watson, 'Colonial Project' (n 3); Larissa Behrendt and Nicole Watson, 'Shifting Ground: Why Land Rights and Native Title Have Not Delivered Social Justice' (2007) (8) *The Journal of Indigenous Policy* 94, 97; Lauren Butterly and Rachel Pepper, 'Are Courts Colourblind to Country? Indigenous Cultural Heritage, Environmental Law and the Australian Judicial System' (2017) 40(4) *University of New South Wales Law Journal* 1313 <<https://doi.org/10.53637/KPGT8699>>; Michael Dodson and Lisa Strelein, 'Australia's Nation-Building: Renegotiating the Relationship between Indigenous Peoples and the State' (2001) 24(3) *University of New South Wales Law Journal* 826, 828.

35 See above n 3.

36 Watson, 'Colonial Project' (n 3).

37 See, eg, Dani Larkin and Sophie Rigney, 'State and Territory Legislative Vulnerabilities and Why An Indigenous Voice Must Be Constitutionally Enshrined' (2021) 46(3) *Alternative Law Journal* 205 <<https://doi.org/10.1177/1037969X211032734>>.

38 Irene Watson, 'The Future Is Our Past: We Once Were Sovereign and We Still Are' (2012) 8(3) *Indigenous Law Bulletin* 12; Callum Clayton-Dixon, 'I Can't Call Myself an Indigenous Australian and Also Say Sovereignty Never Ceded', *The Guardian* (online, 11 December 2015) <<https://www.theguardian.com/commentisfree/2015/dec/11/i-cant-call-myself-an-indigenous-australian-and-also-say-sovereignty-never-ceded>>; Sean Brennan, 'Native Title and the Treaty Debate: What's the Connection?' (2005) 7 *Balayi* 116; Celine Travesi, 'Knowing and Being Known: Approaching Australian Indigenous Tourism through Aboriginal and Non-Aboriginal Politics of Knowing' (2018) 28(3) *Anthropological Forum* 275, 283 <<https://doi.org/10.1080/00664677.2018.1486285>>; Kristina Everett, 'Welcome to Country ... Not' (2009) 79(1) *Oceania* 53 <<https://doi.org/10.1002/j.1834-4461.2009.tb00050.x>>.

39 Irene Watson, 'Aboriginal Recognition: Treaties and Colonial Constitutions, "We Have Been Here Forever ..."' (2018) 30(1) *Bond Law Review* 7 <<https://doi.org/10.53300/001c.5657>>; Dani Cooper, 'DNA Confirms Aboriginal People Have a Long-Lasting Connection to Country', *ABC News* (online, 9 March 2017) <<http://www.abc.net.au/news/science/2017-03-09/dnaconfirms-aboriginals-have-long->

and country are impacted and subsequently, the legal protection for these losses has been neglected. In order to understand and adequately respond to First Nations Peoples' losses, the Anglo-Australian legal system needs to broaden conceptions of loss through recognising 'any modification of the pre-existing conditions affecting ... life' as perceived by 'the persons and/or communities concerned'.⁴⁰ That is, through recognising the unique intangible losses experienced by First Nations Peoples. This needs to be facilitated through greater First Nations representation across all aspects of Anglo-Australian law.

IV REPARATIONS AND DAMAGES

The *Concise Australian Legal Dictionary* defines reparations as the making of amends for a wrongdoing or injustice.⁴¹ Whilst reparations can take several forms, within the legal system, 'compensation' has seemingly become interchangeable with 'reparations'. Compensation, as defined by the *Concise Australian Legal Dictionary*, consists of payment or receipt of money 'as recompense for a loss suffered'.⁴² The aim of compensation in Australia is to put a person back into their original position following a wrong, as best as possible.⁴³ The notion of money to achieve this originates from the economic system brought to Australia by British colonisers which relies on the transfer of currency. Accordingly, reparations are often legally accomplished through payment of money.⁴⁴ In the Anglo-Australian legal system 'cash is the currency of justice'.⁴⁵

In Australia, monetary compensation is available under common law, equity, and statute. The origin of the entitlement will determine what type of monetary relief is available, whether relief is discretionary, and furthermore, what happens to an entitlement upon death.⁴⁶ For instance, under common law, damages are

lasting-connection-to-country/8336284>; Ray Tobler et al, 'Aboriginal Mitogenomes Reveal 50,000 Years of Regionalism in Australia' (2017) 544(7649) *Nature* 180, 184 <<https://doi.org/10.1038/nature21416>>.

40 Lenzerini (n 10) 15–16.

41 *LexisNexis* (n 9) 'reparation'.

42 *Ibid* 106 'compensation'.

43 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn); *ibid*. The purpose of the compensation is not to punish the person paying the compensation (*Butler v Fairclough* (1917) 23 CLR 78, 89 (Griffith CJ)), but to ensure that the applicant for compensation is placed, as far as possible, in the position they occupied before the loss or injury; *Wenham v Ella* (1972) 127 CLR 454, 460 (Barwick CJ); *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 84 (Mason CJ and Dawson J). The *Oxford English Dictionary* defines 'compensation' in several ways, including 'the action of compensating, or condition of being compensated; counterbalance, rendering of an equivalent, requital, recompense ... remuneration, amends ... recompense for loss or damage.'; *Oxford English Dictionary* (online at 27 May 2022) 'compensation' (defs 1a, 2a, 2b).

44 *LexisNexis* (n 9) 'reparation'.

45 Davis (n 30) 634.

46 'In Search of Indigenous Justice', *Legal 500* (Web Page) <<https://www.legal500.com/fivehundred-magazine/the-big-issue/in-search-of-indigenous-justice/>>.

extinguished upon death, whereas under equity, the entitlement is passed through the estate.⁴⁷

Damages have been described as the ‘guiding light’ of the common law’s private compensatory doctrines.⁴⁸ Damages can be categorised in several ways: nominal,⁴⁹ compensatory, equitable, aggravated,⁵⁰ and exemplary/punitive.⁵¹ The most common is compensatory. Damages that account for the profit of the wrongdoer in civil law actions are classified as restitutionary damages. These damages prevent a wrongdoer from being unjustly enriched⁵² and can serve to punish and deter similar conduct. However, in Australia, damages accounting for profit are limited to equity’s jurisdiction (both exclusive, eg, regarding fiduciary duties, and auxiliary, eg, regarding intellectual property).⁵³ Restitutionary damages are more readily available in the civil law sphere outside of Australia.⁵⁴ The absence of this type of damages within the Australian civil law sphere limits justice for First Nations Peoples because, as will be discussed in Part V, White Australia continues to profit off the exploitation and oppression of First Nations Peoples without accountability.

An award of compensatory damages focuses on paying for the loss, suffering, or injury endured because of a legal wrongdoing.⁵⁵ Compensatory damages can be calculated precisely⁵⁶ (special compensatory damages), imprecisely⁵⁷ (general

47 Ibid. See also Teck H Ong, ‘Equitable Damages: A Powerful but Often Forgotten Remedy’ (1999/2000) 4(2) *Deakin Law Review* 61.

48 Sarah Lim, Nathalie Ng and Greg Weeks, ‘Government Schemes for Extrajudicial Compensation: An Assessment’ (2020) 100 *Australian Institute of Administrative Law Forum* 79, 82 <<https://doi.org/10.2139/ssrn.4277169>>.

49 These rarely arise and are symbolic to recognise a legal wrong has occurred but was not a significant infringement and that damage probably cannot be proven: Harvey McGregor, *Mayne and McGregor on Damages* (Sweet & Maxwell, 12th ed, 1961) 191 [10–001]; ‘Nominal Damages’, *Sewell & Kettle* (Web Page) <<https://sklawyers.com.au/dictionary/nominal-damages/>>. Nominal damages are available in trespass cases: Balkin and Davis (n 30) 774 [27.3]; *LawRight* (n 12).

50 These damages are based on non-pecuniary loss and are awarded when illegitimate conduct is involved: Parisa Hart, ‘An Update on Defamation Damages Reform in Australia’, *Lexology* (Web Page, 21 May 2021) <<https://www.lexology.com/library/detail.aspx?g=204b865f-1f9f-44d2-926e-34120cfd754>>.

51 Non-compensatory in nature, designed to punish and deter the particular conduct (eg, fines) and not available in civil law (only in criminal law): Australian Law Report Commission, *Serious Invasions of Privacy in the Digital Era* (Report No 123, 3 September 2014) 220–39; Hart (n 50).

52 Piper Alderman, ‘In a Nutshell: Claiming Damages in Australia’, *Lexology* (Web Page, 4 November 2019) <<https://www.lexology.com/library/detail.aspx?g=36235415-e63c-4588-8a8d-127687d6cbd5>>; Doug Rendleman, ‘Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages’ (2011) 68(3) *Washington and Lee Law Review* 973.

53 Katy Barnett, ‘Disgorgement of Profits in Australian Private Law’ in Ewoud Hondius and André Janssen (eds), *Disgorgement of Profits: Gain-Based Remedies throughout the World* (Springer, 2015) 13, 13.

54 For example, in Canada, the United Kingdom and the United States (‘US’): *ibid*.

55 Michael Tilbury, ‘Damages for Personal Injuries: A Statement of the Modern Australian Law’ (1980) 14(3) *University of Western Australia Law Review* 260.

56 For example, hospital expenses.

57 For example, where the harm suffered cannot easily be equated to monetary loss such as subjective damage of pain and suffering like to reputation or hurt feelings: Hart (n 50); Thomson Reuters, *The Laws of Australia* (online at 14 May 2023) 33 [33.10.170]; Paul Burke, ‘How Can Judges Calculate Native Title Compensation?’ (Discussion Paper, Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002) 8.

compensatory damages), or can be a predetermined specified amount under contract (liquidated damages).⁵⁸ Losses categorised as pecuniary therefore lead to special compensatory damages, and non-pecuniary losses result in general compensatory damages. Whilst the overall aim of compensation is to return a person to their original state, the aim of general compensatory damages has been differentiated to instead provide some measure of consolation for the injury.⁵⁹ This has been determined because there is no market for suffering, loss of amenities, or loss of expectation/quality of life.⁶⁰ The Australian legal system sets up judges to consider the impact non-pecuniary loss will have on someone's quality of life and award an amount which is 'fair' to both parties.⁶¹ This notion seems at odds with returning a person to their original state.

Further, the legal system in Australia has categorised certain actions (or inactions) as legal transgressions whereby reparations can be awarded for the resulting losses. However, not all acts that cause negative consequences are conceptualised under the Australian legal system as a legal wrongdoing.⁶² The existing categories were predominantly carried across by colonisers from Britain, influenced by feudalism.⁶³ Whilst the legal system has continued to evolve in Australia, the legal categories are still largely underpinned by non-Indigenous social values of power and profit through land and labour exploitation, without regard for a broader responsibility to the environment as its custodians, or rights inherent to all human beings.⁶⁴ First Nations Peoples have continually been excluded from creating or influencing the legal categories of wrongdoings.⁶⁵ Thus, First Nations' losses have had to be interpreted through a legal category designed without contemplation of their values. For instance, a loss of an ability to perform cultural traditions was first addressed in *Napaluma v Baker* in 1982 and was considered underneath the categories of pain and suffering, loss of amenities, and enjoyment of life.⁶⁶ In this

58 Balkin and Davis (n 30) 774 [27.3].

59 *Review of the Law of Negligence* (Final Report, September 2002) 186; Nicholas Mullany, 'A New Approach to Compensation for Non-pecuniary Loss in Australia' (1990) 17(4) *Melbourne University Law Review* 714, 717.

60 *Review of the Law of Negligence* (n 59) 14.

61 Judicial Commission of New South Wales, *Civil Trials Bench Book* (2023) 7051 [7-0000] <<https://jirs.judcom.nsw.gov.au/public/assets/benchbooks/civil>>.

62 Again, this is demonstrated by not codifying international human rights laws into federal law.

63 '1215-1500', *The National Archives* (Web Page, 2 February 2022) <<https://webarchive.nationalarchives.gov.uk/ukgwa/20220201230817/https://www.nationalarchives.gov.uk/humanrights/1215-1500/?hr-link=1215>>.

64 'Custodianship and Stewardship', *Rous County Council* (Web Page) <<https://rous.nsw.gov.au/custodianship-and-stewardship>>; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008* (Report No 2, 2009) ch 5; Irene Margaret Watson, 'Raw Law: The Coming of the Muldarbi and the Path to its Demise' (PhD Thesis, The University of Adelaide, 1999) 32; '1215-1500' (n 63); 'Human Rights in Australia', *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/our-work/education/human-rights-australia>>.

65 Watson, 'Colonial Project' (n 3) 32; Australian Human Rights Commission, *Leading for Change: A Blueprint for Cultural Diversity and Inclusive Leadership Revisited* (2018) (Report, April 2018) ('*Leading for Change*'); Tim Soutphommasane, 'Institutional Racism' (Keynote Speech, Alfred Deakin Institute for Citizenship and Globalisation's Institutional Racism Conference, 1 November 2017).

66 *Napaluma v Baker* (1982) 29 SASR 192, 194 (Zelling J) ('*Napaluma*'). For an overview of cases from 1982-87 which address cultural loss in some capacity see Graeme Orr, 'Damages for Loss of Cultural

instance, a 22-year-old Pitjantjatjara man sustained brain damage following a car accident preventing him from learning and passing down cultural traditions and knowledges.⁶⁷ Zelling J articulated this to be a ‘loss of position in the Aboriginal community’ awarding \$10,000 as part of the general award of \$35,000.⁶⁸ However, this did not create a new legal category for calculating compensation, allowing for different interpretations of the judgment. For instance, in *Mulladad v Palmer* an Eastern Aranda man was in a car crash which caused damage to his legs and left him with a limp.⁶⁹ This prevented his ability to fully participate in ceremony and continue his traditional roles in community which involved heavy lifting.⁷⁰ Again, these losses were considered under an assessment for loss of amenities. The Court determined that Zelling J’s assessment in *Napaluma v Baker* essentially considered a ‘loss of cultural standing’ and held in this instance the losses suffered fell short of this principle.⁷¹ The lack of reform to extend the existing legal categories is testimony to the inability of the Australian legal system to protect First Nations’ rights. The existing heads of damages do not adequately capture First Nations’ experiences of losses and the legal system has not responded by reforming principles of law or by facilitating a broader representation of First Nations Peoples within the decision-making processes. This reflects a broader legal denial of First Nations’ legal and political authority in society, along with a lack of formal understanding of the fuller relationship that First Nations Peoples have with Country.⁷²

This article diverges from a narrow understanding of reparations being interchangeable with compensation. Instead, the terms ‘reparations’ and ‘justice’ are used to encapsulate both remedy for and prevention of loss, understanding lasting structural change is needed for true reparations.⁷³ This definition aligns itself with conceptions of reparations by First Nations Peoples, which particularly draw attention to the need for remedying violations of human rights through any suitable measure.⁷⁴ Under this conceptualisation, reparations take the form of any measures which ‘[wipe] out all the consequences of the harm suffered’ (that is, the loss inflicted) and/or ‘[re-establish] the situation which would have existed if the

Fulfilment in Indigenous Community Life’ (1997) 4(6) *Indigenous Law Bulletin* 17, 17–19 (‘Damages for Loss’).

67 *Napaluma* (n 66) 192–3.

68 *Ibid* 194–5.

69 *Mulladad v Palmer* (Supreme Court of the Northern Territory, Rice J, 5 May 1987) (‘*Mulladad*’), cited in Orr, ‘Damages for Loss’ (n 66).

70 *Ibid*.

71 *Ibid*.

72 Watson, ‘Colonial Project’ (n 3) 32; Ambelin Kwaymullina, ‘Seeing the Light: Aboriginal Law, Learning and Sustainable Living in Country’ (2005) 6(11) *Indigenous Law Bulletin* 12; Cammi Murrup-Stewart et al, “‘Connection to Culture Is Like a Massive Lifeline’: Yarning with Aboriginal Young People about Culture and Social and Emotional Wellbeing’ (2021) 31(10) *Qualitative Health Research* 1833 <<https://doi.org/10.1177/10497323211009475>>.

73 Simeon Gready, ‘The Case for Transformative Reparations: In Pursuit of Structural Socio-economic Reform in Post-conflict Societies’ (2022) 16(2) *Journal of Intervention and Statebuilding* 182 <<https://doi.org/10.1080/17502977.2020.1852833>>.

74 Lenzerini (n 10) 7–13.

wrong had not been produced' (that is, the circumstances prior to the intervention).⁷⁵ Furthermore, discourse surrounding 'reparations' in the international context emphasises Indigenous sovereignty, which is lacking in the legal system's characterisation of compensation.⁷⁶ Considering this, Part V explores the shortfalls of the limiting conceptualisation of loss and reparations by the legal system.

V LIMITATIONS OF COMPENSATION

As detailed, in Australia, reparations have primarily been facilitated through the provision of compensation, predominantly through litigation. This is a limiting approach in understanding certain kinds of loss and providing an appropriate forum for tending to these distinct types of loss. Moreover, the legal system's restriction and rejection of First Nations' rights has exceedingly triggered these distinctive experiences of loss. It is unquestionable that a system that breaches rights, thus causing extensive and long-lasting harm that furthermore manifests into greater disadvantage is unjust and needs to be adjusted.

A Insufficient for Intangible Cultural Loss

Compensation alone as a mechanism for justice overvalues pecuniary losses and neglects a broader understanding of reparations. This is because a focus on economic value overlooks holistic experiences of loss, devaluing intangible and non-pecuniary losses that often accompany tangible pecuniary losses, whilst concealing more appropriate forms of reparations.⁷⁷ Not all losses can draw parallels within the market and those more difficult to measure (such as social, cultural, spiritual, or mental) are framed as subordinate and not properly recognised or understood. As outlined in Part II, extensive intangible practices, knowledges, and values are grounded in First Nations cultures. Consequently, when wrongs impact First Nations Peoples, the harder to measure effects are particularly prevalent. An approach to justice which

⁷⁵ Grounded in international law, this conceptualisation comes from *Factory at Chorzów (Merits)* [1928] PCIJ (ser A) No 13, 47, cited in Lenzerini (n 10) 13 (emphasis in original). International conceptualisations of reparations are grounded within international human rights laws (through the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN Doc A/RES/60/147 (21 March 2006, adopted 16 December 2005) and the *UNDRIP* (n 5)) and in international state responsibility: International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, GA Res 56/83, UN GAOR, 6th Comm, 56th sess, Agenda Item 162, UN Doc A/Res/56/83 (28 January 2002); Chiara Lawry, 'Moving beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations' (2010) 14(2) *Australian Indigenous Law Review* 83, 84.

⁷⁶ For more, see Lenzerini (n 10) 11 ff.

⁷⁷ Which is also how compensation is frequently conceived – ie, to compensate refers to currency (eg, in exchange for work). The notion of monetary compensation has been around for thousands of years, such as when people were injured whilst performing labour (before contracts and insurance were conceptualised) they would be compensated for that injury: *Review of the Law of Negligence* (n 59); Judicial Commission of New South Wales (n 61); Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 1997) 244 ('*Bringing Them Home Report*').

centres economic value means certain losses, particularly those experienced by First Nations Peoples, are either completely ignored or misconstrued and devalued as they are extrapolated by questionable proxies.⁷⁸ As Bibblemun-Kaneang Elder Edith De Giambattista has stated, '[y]ou couldn't put a money figure on what we went through.'⁷⁹ Despite this, more holistic reparations such as structural change have not been offered. Instead, First Nations Peoples are exponentially disadvantaged without being granted the social and political influences of money.⁸⁰ This, coupled with the delegitimisation of First Nations' autonomy by the Australian legal system, has caused a continual undervaluing of First Nations' experiences of loss, which is particularly highlighted through Part VI.⁸¹

A reconceptualisation of loss which centres intangible loss rather than economic value can more appropriately provide justice to both First Nations Peoples and non-Indigenous people, in their varied experiences of loss.⁸² The current response to non-pecuniary loss merely offers solace for 'misfortune'.⁸³ This reconceptualisation offers the possibility of protection of rights and interests from violation in the future. History has demonstrated a trend of tabling broader reparation strategies such as apologies, acknowledgements, guarantees against repetitions, or structural and systemic changes. For instance, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* ('*Bringing Them Home Report*') proposed the use of the van Boven principles (for victims of gross violations of human rights and fundamental freedoms) to approach the losses of the Stolen Generations more holistically.⁸⁴ These principles have gained international support and are regarded as 'the basic principles' in international human rights law on

78 Gregory et al (n 18) 1; Nancy J Turner et al, 'From Invisibility to Transparency: Identifying the Implications' (2008) 13(2) *Ecology and Society* 7 <<https://doi.org/10.5751/ES-02405-130207>>.

79 Lorena Allam, '"We Want Our Money. We Deserve our Money": Aboriginal Elders Sue for Compensation for Stolen Wages', *The Guardian* (online, 24 October 2020) <<https://www.theguardian.com/australia-news/2020/oct/24/we-want-our-money-we-deserve-our-money-aboriginal-elders-sue-for-compensation-for-stolen-wages>>; Yasmine Phillips, 'New Exhibition Uses Virtual Reality to Voice Aboriginal Survivor Stories' (Media Release, Curtin University, 23 November 2021).

80 Geoffrey Ingham, 'Money Is a Social Relation' (1996) 54(4) *Review of Social Economy* 507 <<https://doi.org/10.1080/00346769600000031>>; Hadrien Saiag, 'Money as a Social Relation beyond the State: A Contribution to the Institutional Approach Based on the Argentinian Trueque' (2019) 70(3) *The British Journal of Sociology* 969 <<https://doi.org/10.1111/1468-4446.12610>>.

81 Bonita Lawrence and Enakshi Dua, 'Decolonizing Antiracism' (2005) 32(4) *Social Justice* 120, 128; Nandita Sharma and Cynthia Wright, 'Decolonizing Resistance, Challenging Colonial States' (2008) 35(3) *Social Justice* 120.

82 These notions are not unique to Australia, and similar sentiments have been echoed globally, with regards to other colonial-settler states. For instance, academics in the US have challenged the economic focus within reparations and its ability to facilitate justice for Indigenous peoples: Gregory et al (n 18) 1.

83 Mullany (n 59); Siewert Lindenbergh, 'Damages as a Remedy for Infringements upon Privacy' in Katja Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart Publishing, 2007) 98.

84 *Bringing Them Home Report* (n 77) 268–9; Chris Cunneen and Julia Grix, 'The Limitations of Litigation in Stolen Generations Cases' (Research Discussion Paper No 15, Institute of Criminology, University of Sydney Law School, 2004) 36 <https://aiatsis.gov.au/sites/default/files/research_pub/cunneen-cunneen-grix-jdp15-limitations-litigation-stolen-generation-cases_0_2.pdf>.

reparations.⁸⁵ However, unsurprisingly, the federal government did not implement the suggested recommendations and under the Howard Government, rejected the report.⁸⁶ This is reflective of the apathy of the legal system to First Nations Peoples, and more so the pace in which the legal system is willing to adapt.

There have been some advances in the legal system which have offered glimpses of a potential reconceptualisation. These advances have not been without delay or flaws. It has taken hundreds of years of resistance from First Nations Peoples for the legal system to recognise a separate land system and the consequential intangible losses flowing from dispossession. In 1992, the High Court in *Mabo v Queensland [No 2]* ('*Mabo*') finally acknowledged the distinct land systems that pre-existed colonisation.⁸⁷ It then took another 27 years for the *Timber Creek* decision to comprehend intangible cultural and spiritual loss as significant and valuable in monetary terms.⁸⁸ However, whilst this intangible loss was recognised, reparations did not include any structural change. The Australian legal system continues to disregard the importance of cultural and spiritual loss through its policies and practices. An exemplar of this is how the destruction of the Jukkan Gorge caves in 2020 was legally sanctioned by the *Aboriginal Heritage Act 1972* (WA).⁸⁹ The Act purports to protect important sites, with section 17 dictating it is an offence to excavate, destroy, damage, conceal, or alter an Aboriginal site.⁹⁰ However, this is qualified – any of the offending actions are allowed if authorised by the Registrar under section 16 or given consent by the Minister under section 18.⁹¹ This section 18 exception was used by Rio Tinto, whom were granted legal consent by the Western Australian Minister in 2013 (in part due to the severely flawed associated administrative processes) to use their land in a way that could therefore destroy, damage, or alter an Aboriginal site.⁹² Evidently, compensation mechanisms as they currently stand in the Australian legal system are limited in their ability to address intangible losses and foster structural change. As articulated by Wotjobaluk Elder, Lyn Austin, '[r]eparations and compensation is different:

85 The Basic Principles were initially developed by UN Special Rapporteur Theo van Boven and have been further developed by Independent Expert, M Cherif Bassiouni: Lawry (n 75) 95.

86 Helen Davidson, 'John Howard: There Was No Genocide against Indigenous Australians', *The Guardian* (online, 22 September 2014) <<https://www.theguardian.com/world/2014/sep/22/john-howard-there-was-no-genocide-against-indigenous-australians>>.

87 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

88 June Oscar, 'Day 2 Plenary: Truth' (Keynote Address, AIATSIS Summit, 1 June 2021).

89 *Aboriginal Heritage Act 1972* (WA) ss 17–18 ('*Aboriginal Heritage Act*'); Michelle Stanley and Kelly Gudgeon, 'Pilbara Mining Blast Confirmed to Have Destroyed 46,000 Year-Old Sites of "Staggering" Significance', *ABC News* (online, 26 May 2020) <<https://www.abc.net.au/news/2020-05-26/rio-tinto-blast-destroys-area-with-ancient-aboriginal-heritage/12286652>>.

90 *Aboriginal Heritage Act* (n 89) s 17. See also s 5 (definition of 'Aboriginal site').

91 *Ibid* s 17.

92 *Ibid* s 18; Joint Standing Committee on Northern Australia, *Never Again: Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia* (Interim Report, 3 December 2020).

This [reparation] is about justice'.⁹³ Providing reparations for actions in the past is intrinsically linked with combatting the same injustices that occur today.⁹⁴

B Confines of the Adversarial Justice System

The adversarial justice system in Australia pits parties against each other in the pursuit of the 'truth' and justice.⁹⁵ An individual who has been wronged (and who is wanting compensation for their loss) needs to assert their case in direct competition against their alleged wrongdoer before a judge in court. This process is inherently limiting as it creates an 'us' versus 'them' narrative, which prevents a conciliation approach whereby both parties are looking to resolve injustice. Moreover, the binary categorisation of plaintiff and defendant facilitates 'othering', resulting in anyone claiming against the colonising state to be categorised as 'other'. Otherness relies on division into two opposing categories whereby the dominant power (ie, the colonising State) exists as normative and those with less power are marked as different and subjected to stereotypes and unjustified beliefs.⁹⁶ Knowledges and beliefs that are dissimilar to those of the dominant group are delegitimised and devalued.⁹⁷ This results in First Nations Peoples' claims not being treated in the same way as non-Indigenous claims, because First Nations' losses are not experienced by non-Indigenous people. This is facilitated through the 'generalised set of common processes, structures and conditions'⁹⁸ of the adversarial court system which propagates and maintains colonial domination, subsequently facilitating the 'exclusion, marginality and persistent inequality' of First Nations Peoples.⁹⁹ Those that contribute to how these institutions operate allow for which forms of knowledge and truth are accepted. A dramatic underrepresentation of First Nations Peoples within legal institutions therefore causes the consistent devaluing of First Nations Peoples and perpetuates injustice.¹⁰⁰ The undervaluing of oral

93 Jens Korff, 'Compensation for Stolen Generation Members', *Creative Spirits* (Web Page, 8 August 2021) <<https://www.creativespirits.info/aboriginalculture/politics/stolen-generations/compensation-for-stolen-generation-members>> ('Compensation'); 'Stolen Gens Bill Gains Support', *Koori Mail* (Lismore, 8 October 2008) 35 <https://aiatsis.gov.au/collection/featured-collections/koori-mail?combine=2008&items_per_page=24>; Ali MC, "'They are Waiting to Wipe Us All Out': Aunty Lyn Austin on Victoria's Refusal to Compensate the Stolen Generation", *NITV* (online, 13 February 2019) <<https://www.sbs.com.au/nitv/article/they-are-waiting-to-wipe-us-all-out-aunty-lyn-austin-on-victorias-refusal-to-compensate-the-stolen-generation/m3ik8q07x>>.

94 Lawry (n 75) 94.

95 'Adversarial Versus Inquisitorial Legal Systems', *United Nations Office on Drugs and Crime* (Web Page, April 2020) <<https://www.unodc.org/e4j/en/organized-crime/module-9/key-issues/adversarial-vs-inquisitorial-legal-systems.html>>.

96 Hyacinth Utah, 'Searching for a Place to Belong in a Time of Othering' (2019) 8(11) *Social Sciences* 297:1–16, 5 <<https://doi.org/10.3390/socsci8110297>>; Vance Locke and Lucy Johnston, 'Stereotyping and Prejudice: A Social Cognitive Approach' in Martha Augoustinos and Katherine Jane Reynolds (eds), *Understanding Prejudice, Racism and Social Conflict* (SAGE Publications, 2001) 107 <<https://doi.org/10.4135/9781446218877.n7>>.

97 Utah (n 96); Locke and Johnston (n 96).

98 Utah (n 96) 5; John A Powell and Stephen Menendian, 'The Problem of Othering: Towards Inclusiveness and Belonging' (2016) 1 *Othering and Belonging* 14.

99 Utah (n 96) 301; Powell and Menendian (n 98).

100 *Leading for Change* (n 65); Soutphommasane (n 65).

histories within the adversarial court system is proof of this.¹⁰¹ Non-Indigenous colonisers have maintained the control over the identification and representation of First Nations Peoples through deciding which forms of knowledge are valued – allowing, for instance, colonisers' documentary evidence to be favoured over the oral histories presented by First Nations knowledge holders.¹⁰²

Despite the egalitarian promise in Australian democracy that all should be treated equally and should be free to rise according to their merit, Othering practices continue to create inequality by presenting bias and structural barriers associated with institutional racism.¹⁰³

Adversarial court processes and compensatory damages therefore embody neo-colonialism, by favouring the resolution of loss and disputes for non-Indigenous people caused by institutional barriers and implicit racial bias hidden behind a facade of impartiality.¹⁰⁴ This occurs across all areas of law – the disparity in outcomes within criminal justice, health, and policing systems are testimony of this.¹⁰⁵ This unjust legal system is compounded by certain factors which make the court process discriminatory, such as affluence, power, status in society, and familiarity with the legal system and Western knowledges. Furthermore, societal structures – for instance, a lack of access to medical services, education, and employment – can restrict the ability of First Nations Peoples to express loss in the same way and to the same extent as non-Indigenous people.¹⁰⁶ Legal institutions such as courts reinforce the values of those that created them – thus, Australian courts value economic over unpaid labour and prioritise documented forms of evidence.¹⁰⁷ If First Nations Peoples cannot access adequate treatment such as appropriate psychiatric care, then the losses they have suffered are not supported

101 Jimmy Peterson, 'Judicial Treatment of Aboriginal Peoples' Oral History Evidence: More Room for Reconciliation' (2019) 42(2) *Dalhousie Law Journal* 483.

102 See, eg, Behrendt et al (n 34).

103 Udah (n 96) 8 (citations omitted).

104 See, eg, Brimbank Melton Community Legal Centre, *Legal Needs and Barriers to Accessing the Justice System in Brimbank* (Report, 2013); 'Access to Justice', *Law Council of Australia* (Web Page) <<https://www.lawcouncil.asn.au/justice-project/access-to-justice>>; Subhabrata Bobby Banerjee, 'Whose Land Is It Anyway? National Interest, Indigenous Stakeholders, and Colonial Discourses' (2000) 13(1) *Organization & Environment* 3 <<https://doi.org/10.1177/1086026600131001>>; Margarita Angelica Guevara, 'Implications of Colonial Practices on Accountability: The Case of the Yindjibarndi People' (MPhil Thesis, University of Wollongong, 2016); Brimbank Melton Community Legal Centre, Submission No 131 to Victorian Parliament, *Inquiry into Victoria's Criminal Justice System* (17 September 2021) 4; Kim Usher et al, 'Indigenous Resilience in Australia: A Scoping Review Using a Reflective Decolonizing Collective Dialogue' (2021) 9 *Frontiers in Public Health* 640601:1–17 <<https://doi.org/10.3389/fpubh.2021.630601>>.

105 Udah (n 96) 8; Val Colic-Peisker, 'Visibility, Settlement Success and Life Satisfaction in Three Refugee Communities in Australia' (2009) 9(2) *Ethnicities* 175 <<https://doi.org/10.1177/1468796809103459>>; Soutphommasane (n 65).

106 Cunneen and Grix (n 84).

107 As the Australian Law Reform Commission outlined in the context of the hidden gender bias, 'inequality in economic life has a direct relationship with legal principles which fail to give due value to unpaid work': Australian Law Reform Commission, *Equality before the Law: Women's Equality* (Report No 69(2), 1994) [1.9]. The hidden Whiteness of the law works in the same way – whilst it is predominantly domestic work that is undervalued for women, for First Nations Peoples it is the labour involved in fulfilling cultural obligations.

by sources valued by the court. In the same way, unpaid labour is undervalued, and reduced access to paid employment therefore compounds the undervaluing of First Nations Peoples' losses. Arguably, the loss suffered by the plaintiff in *Mulladad v Palmer* of no longer being able to fulfil his role in collecting lumber for his community was not perceived to be of the same value as paid labour supported by documentary evidence of employment history, earnings, and potential. As labour is valued in a different way, First Nations Peoples are limited by the system to express their loss in the same way and to the same extent.

Further, the court as an institution embodies the power of the colonising State. Its role in determining the 'winner' and 'loser' intensifies power imbalances. This, in tandem with the violence, oppression, and discrimination inflicted on First Nations Peoples since first contact has caused a fundamental distrust of the colonising state. This makes the pursuit of reparations by this forum unenticing for First Nations Peoples.¹⁰⁸

Timeliness and cost are additional deterrents to litigation.¹⁰⁹ *Timber Creek*, the first High Court case addressing compensation for loss of native title rights, took over eight years to reach its final award.¹¹⁰ In tandem with delay and cost, there is an intangible emotional toll which is intensified when claimants are already suffering from trauma. First Nations claimants are often also suffering pre-existing illnesses at a disproportionate rate to non-Indigenous claimants.¹¹¹

Criticism of the adversarial litigation system is not new, with academics suggesting it is 'a poor forum for judging the big picture of history.'¹¹² For instance, within tort law, the award of damages has been critiqued as amounting to a 'lottery' system, with 'similar victims [obtaining] dissimilar results'.¹¹³ Compensation is awarded arbitrarily and unfairly, influenced by the adversarial legal system and how 'deep' the 'pockets' are of the tortfeasor.¹¹⁴ This inconsistency is also prominent in the provision of compensation for First Nations Peoples. Some First Nations Peoples' claims to compensation are barred while others are awarded substantially

108 Leonie Cox, 'Fear, Trust and Aborigines: The Historical Experience of State Institutions and Current Encounters in the Health System' (2007) 9(2) *Health and History* 70 <<https://doi.org/10.1353/hah.2007.0022>>; Chris Cunneen and Juan Tauri, *Indigenous Criminology* (Policy Press, 2016) 70, citing Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture* (Final Report, Project 94, 2006) 192; Asafa Jalata, 'The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians' (2013) 3(3) *SAGE Open* 1 <<https://doi.org/10.1177/2158244013499143>>; Shaimaa Khalil, 'Aboriginal Australians "Still Suffering Effects of Colonial Past"', *BBC News* (online, 16 July 2020) <<https://www.bbc.com/news/world-australia-53436225>>.

109 Cunneen and Grix (n 84) 37.

110 In 2011, the Ngaliwurrur and Nungali Peoples lodged the application for compensation. The High Court handed down its decision in 2019: 'Timber Creek Compensation Case', *AIATSIS* (Web Page) <<https://aiatsis.gov.au/explore/timber-creek-compensation-case>>.

111 Cunneen and Grix (n 84) 38.

112 Antonio Buti, 'The Stolen Generations and Litigation Revisited' (2008) 32(2) *Melbourne University Law Review* 382, 419.

113 Eleanor Wallis, 'Justice, Janus-like: The Future of Australian Personal Injury Compensation' [2015] 7 *Australian National University Undergraduate Research Journal* 117, 121; Cunneen and Grix (n 84) 36–7.

114 Wallis (n 113).

different amounts.¹¹⁵ Evidently, as addressed *infra* in Part VII, quantum is influenced by factors beyond loss suffered. This highlights how litigation is unsuitable for providing reparations.

Collective loss that is specific to First Nations Peoples is also not considered within judicial damages. First Nations Peoples have advocated for collective reparations, in accordance with the van Boven principles, however, as identified above, Australian Parliament has failed to implement these recommendations.¹¹⁶ Consequently, the existing avenue cannot adequately address the breach of collective rights.¹¹⁷ The community loss and suffering brought about by government practices and policies is excluded when the predominant avenue for redress is through an individually focused private law system.¹¹⁸ The individualised focus on economic value that has been grounded in private actions within common law has predominantly transferred across into the public law sphere through statutory compensation schemes, further barring appropriate reparations. An individual focus cannot address systemic and structural violence and the resulting losses in the form of environmental destruction and the subjugation and breaches of human rights. Whilst *ex gratia* statutory compensation schemes have been described as a superior remedy to judicially ordered damages, in part because they are more accessible,¹¹⁹ they echo economic limitations and are far from ideal.¹²⁰ Furthermore, statutory schemes reproduce the same structural injustices caused by a lack of representation in decision-making. Besides these flaws, they are offered infrequently, leaving litigation as the only avenue available in seeking recompense. Whilst the Australian legal system views compensation as the preferential (and often only) remedy for loss, it is often not offered, or is insufficient, for First Nations Peoples, as Part VI stresses.

VI CASE STUDIES

‘To those who think this is a “poor bugger” story, today’s compensation is nowhere near enough to compensate what we have been though [sic].’¹²¹ The trauma First Nations Peoples have endured since invasion continues to affect their lives

115 This could be due to access to supporting evidence which is held by the colonising state being prevented. The loss being foreign to and manipulated by the courts could also weigh in on the differing calculations of compensatory damages. For instance, members of the Stolen Generations have had their loss valued in disparate ways: Valerie Linow was awarded \$35,000 by the New South Wales Victims Compensation Tribunal: Public Interest Advocacy Centre, ‘Stolen Generations Woman Wins Claim for Sexual Assault’ (Media Release, 17 October 2002); whilst in 2002, O’Loughlin J’s notional assessment of damages was considerably higher at \$126,800 and \$144,100: *Cubillo v Commonwealth* (2000) 103 FCR 1, 479 [1547]. See also Cunneen and Grix (n 84) 36.

116 Lenzerini (n 10) 16.

117 *Ibid.*

118 Cunneen and Grix (n 84) 36.

119 Since they are not limited by a private law cause of action: Lim, Ng and Weeks (n 48) 81.

120 *Ibid.*

121 As expressed by Elder Hal Heart: Kate Ashton, ‘Tears of Joy and Pain as NT Stolen Generation Survivors React to News of Compensation’, *ABC News* (online, 6 August 2021) <<https://www.abc.net.au/news/2021-08-06/stolen-generation-compensation-scheme-survivors-speak/100353958>>.

today.¹²² Since invasion, violent and systematic processes of land dispossession and resource appropriation have occurred, beginning with the forced removal of First Nations Peoples onto state-run ‘missions’ or ‘reserves’ located on the outskirts of colonial society.¹²³ The continuation of colonising and oppressive laws, systems, and practices, underpinned by protectionist and assimilation policies, have meant First Nations lives have been heavily controlled.¹²⁴ This has resulted in the theft and destruction of First Nations land, generations of child removal from families and communities, silencing of languages and cultural practices, economic theft, and damage to people’s health caused by dangerous labour (such as dust disease arising from work in asbestos mines).¹²⁵ These consequences are non-exhaustive and accompanied by a host of intangible losses.

The following two case studies offer a glimpse into how the Australian legal system has interacted with First Nations Peoples – embodying oppression, subjugation, and injustice. Together, the case studies exhibit a tendency for dismissal of First Nations’ experiences and denial of liability by the legal system. There has been a history of rejecting and concealing the experiences of First Nations Peoples, moving them away from public eye and scrutiny. Only in response to continued calls for justice has the Australian legal system turned to compensation, in line with its preferential approach to reparations. This compensation acts as a front to the resolution of past injustices yet is often insultingly insufficient. No preventative approach is taken in line with international and First Nations conceptualisations of reparations. The control over First Nations lives continues – without the offer of structural or formal change. An important step for reparations to meet the aim of preventing reoccurrence of injustices is to recognise and accept past actions. This is part of the reason the Uluru Statement¹²⁶ calls for a Makarrata Commission to oversee a truth-telling process – something that historically has not occurred in the

122 Ibid.

123 Marnie Graham and Uncle Lexodious Dadd, ‘Deep-Colonising Narratives and Emotional Labour: Indigenous Tourism in a Deeply-Colonised Place’ (2021) 21(3) *Tourist Studies* 444 <<https://doi.org/10.1177/1468797620987688>>.

124 Ibid; Aboriginal Affairs NSW, ‘Transforming the Relationship between Aboriginal Peoples and the NSW Government 2018–2023’ (Research Agenda, Department of Education, October 2017) <https://www.aboriginalaffairs.nsw.gov.au/media/website_pages/research-and-publications/AANSW-Research-Agenda-2018-2023-Transforming-the-relationship-between-Aboriginal-peoples-and-the-NSW-Government.pdf> (‘Transforming the Relationship’); Kay Schaffer, ‘Stolen Generation Narratives in Local and Global Contexts’ (2002) 16(1) *Antipodes* 5.

125 See, eg, Joint Standing Committee on Northern Australia (n 92); Aleisha Orr, ‘Country Left Scarred’, *National Indigenous Times* (online, 22 October 2021) <<https://nit.com.au/country-left-scarred/>> (‘Left Scarred’); Susan Standen, ‘Wittenoom’s Asbestos Mining Waste Continues to Lay Unresolved after 55 Years’, *ABC News* (online, 5 July 2021) <<https://www.abc.net.au/news/2021-07-04/healing-of-banjima-country-at-wittenoom/100216504>>; Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (Report, December 2006) (‘*Unfinished Business*’); *Bringing Them Home Report* (n 77); Nogrady (n 26); Angus Sargent, ‘Indigenous West Australians Have Highest Death Rate for Asbestos-Related Disease: Study’, *ABC News* (online, 6 July 2016) <<https://www.abc.net.au/news/2016-07-06/indigenous-west-australians-highest-mesothelioma-rate-study/7575240>>.

126 ‘History is Calling’ (n 6).

legal system's interactions with First Nations Peoples.¹²⁷ Structural change more so requires the representation of First Nations Peoples within decisions that affect their lives because when this is facilitated, frameworks can be designed in a way that centres and comprehends First Nations' experiences. This is testament to the importance of enshrining a First Nations Voice in the *Australian Constitution* and the subsequent First Nations representation on laws and policies.¹²⁸

A The Stolen Generations

'The silence in communities today is just infectious', reflected Lorraine Peeters, decades after her forced removal from her home in Weilwan Country as a child.¹²⁹ Lorraine was only four when she and her seven siblings were taken.¹³⁰ Lorraine was moved hundreds of kilometres away to Cootamundra, where she was placed in an institution and 'trained up for white families to be a domestic'.¹³¹ Children placed into group homes were taught skills that would be of service to non-Indigenous families – such as housekeeping and domestic duties for the girls, and farming for the boys.¹³²

Upon arrival, Lorraine was assigned a new name, her clothes were removed and burned, her hair shaved, and she was doused in toxic dichlorodiphenyltrichloroethane ('DDT').¹³³ DDT is an insecticide that was commonly used in agriculture to kill mosquitos and lice to prevent the spread of disease.¹³⁴ Racist assumptions of Aboriginal children being unclean motivated this use of DDT. Human exposure to DDT has been linked to comas, tremors, seizures, vomiting, and diarrhoea and has been identified as a possible cause of cancer.¹³⁵ The casual use of this agricultural substance on humans exemplifies the value placed on First Nations lives by the

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

128 'History is Calling' (n 6).

129 'Telling Our Stories: Our Stolen Generations' (Healing Foundation, 2015) <<https://ictv.com.au/video/item/3239>> ('Telling Our Stories').

130 Abbie O'Brien, "'We Say Sorry': Today Marks More than a Decade since Kevin Rudd's National Apology", *SBS News* (online, 13 February 2019) <<https://www.sbs.com.au/news/we-say-sorry-today-marks-more-than-a-decade-since-kevin-rudd-s-national-apology/cc5612cf-083c-40f0-9402-c2c79fc38d86>>; Nick Baker, 'Twelve Years Since the National Apology, Australia's "Journey of Healing" Has a Long Way to Go', *SBS News* (online, 13 February 2020) <<https://www.sbs.com.au/news/twelve-years-since-the-national-apology-australia-s-journey-of-healing-has-a-long-way-to-go/6166b751-2dad-4455-9f2b-69e2abecde54>>; Pat Anderson and Edward Tilton, *Bringing Them Home 20 Years On: An Action Plan for Healing* (Report, 2017).

131 Baker (n 130).

132 Michael O'Loughlin, 'The Stolen Generation', *Australian Museum* (Web Page, 22 June 2020) <<https://australian.museum/learn/first-nations/stolen-generation>>.

133 Anna Salleh, 'Stolen Generations Survivor Aunty Lorraine Has Been Healing Her Mob for 20 Years', *ABC News* (online, 1 June 2020) <<https://www.abc.net.au/news/2020-06-01/stolen-generations-survivor-aunty-lorraines-healing-program/12224998>>; Schaffer (n 124); Graham and Dadd (n 123); Alice Shadwell, 'Sheep Dip: Has the Wool Been Pulled over Our Eyes?', *Groundsure* (Blog Post, 3 September 2019) <<https://www.groundsure.com/sheep-dip-has-the-wool-been-pulled-over-our-eyes>>.

134 Shadwell (n 133).

135 'Dichlorodiphenyltrichloroethane (DDT) Factsheet', *Centers for Disease Control and Prevention* (Web Page, 16 August 2021) <https://www.cdc.gov/biomonitoring/DDT_FactSheet.html#:~:text=Following%20exposure%20to%20high%20doses,to%20U.S.%20and%20International%20authorities>.

colonising state. These actions were a reflection of the perception that Aboriginal people were less than human.¹³⁶ Further, Lorraine was separated from her siblings and barred from speaking to them.¹³⁷ Children in these institutions were forbidden from speaking their language and practicing their culture.¹³⁸ Children were told their families were abusive, had died, or did not want them.¹³⁹ The intention of this, along with the significant distances children were moved, was to sever family and cultural ties so that children could be assimilated into non-Indigenous society and family reunion and cultural revitalisation would prove difficult. This was the government's way of ensuring the policies were 'successful' by preventing children (or parents) from returning to each other.¹⁴⁰

Whilst under the 'care' of the state, children were subjected to several human rights abuses; they lived in slave-like conditions, were neglected, and often abused – physically, sexually, and/or psychologically.¹⁴¹ Lorraine described their experience: 'We were brainwashed to act, speak, dress and think white and we were punished if we didn't ... We were not allowed to talk in our language or about culture or about our families.'¹⁴² Over time this caused Aboriginal ways to be forgotten, with children being conditioned into non-Indigenous society and their way of experiencing the world, at odds with their intrinsic way of being.¹⁴³

Lorraine was only one of the thousands of First Nations children removed from their kin and Country due to government practices implemented between the 1880s and 1980s.¹⁴⁴ This created a community of removed First Nations children, known as the Stolen Generation(s).¹⁴⁵ During this time, approximately one third of First Nations children were put in institutions, foster homes, or adopted into non-Indigenous families.¹⁴⁶ The policies facilitating this purported to either protect, separate, absorb, or assimilate First Nations populations 'depending on the prevailing philosophy of governments at the time'.¹⁴⁷ Essentially, the abuse

136 Salleh (n 133).

137 Ibid.

138 Ibid; *Bringing Them Home Report* (n 77); Jens Korff, 'Loss of Aboriginal Languages', *Creative Spirits* (Web Page, 22 September 2020) <<https://www.creativespirits.info/aboriginalculture/language/loss-of-aboriginal-languages>>.

139 'The Stolen Generations', *Australians Together* (Web Page) <<https://australianstogether.org.au/discover/australian-history/stolen-generations>>.

140 O'Loughlin (n 132).

141 *Bringing Them Home Report* (n 77); Schaffer (n 124); Graham and Dadd (n 123).

142 Anderson and Tilton (n 130) 48.

143 Salleh (n 133).

144 *Unfinished Business* (n 125); *Bringing Them Home Report* (n 77); Nogrady (n 26).

145 *Unfinished Business* (n 125); *Bringing Them Home Report* (n 77); Nogrady (n 26); *Wiyi Yani U Thangani* (n 26).

146 Nogrady (n 26) 423.

147 *Unfinished Business* (n 125) 21; *Aboriginals Ordinance 1911* (Cth). The *Aboriginals Ordinance 1918* (Cth) extends the Chief Protector's control even further in the Northern Territory ('NT'). *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld) (until 1965, all 'Aboriginal' children were under the guardianship of the Director of Native Welfare even if their parents were alive); *Aborigines Act 1911* (SA). The *Infants' Welfare Act 1935* (Tas) was used to remove Indigenous children on Cape Barren Island from their families (where Aboriginal people from Tasmania were removed to at first instance of invasion); *Victorian Aboriginal Protection Act 1869* (Vic); *Aborigines Act 1905* (WA). In New South Wales ('NSW') in 1883, the Aborigines Protection Board (later renamed Aborigines Welfare Board) was

and attempted genocide of First Nations Peoples was legally sanctioned through state and federal policies.¹⁴⁸ Underpinning these policies were racist assumptions that First Nations Peoples were an inferior race and already 'dying' out.¹⁴⁹ The government believed 'mixed blood' children could better assimilate into White society and that Christian values and Western ideals would offer a better life (and save children from 'neglect').¹⁵⁰

In cruel irony, severe trauma is involved with the forced removal of children from their family, community, culture, and traditional land. Often the repercussions from this conditioning (and abuse) were not realised until much later in life.¹⁵¹ Lorraine has no memory of two years of her life, because of the severity of trauma.¹⁵² Lorraine was in her fifties when the gravity hit her: 'I suffered a mental health issue, trauma. There was an Aboriginal person inside, screaming to get out.'¹⁵³ The assumption that Aboriginality could be 'bred' out was proven to be untrue – intrinsic connection to kin and Country could not be stripped away by coercion to assimilate.

Communities experienced suffering and loss too, because of the removal of their children. Ties to Country, kin, and culture were severed. As Lorraine expressed later in life, 'no children to teach, no children to tell the stories to, no children to teach dance and song, no children to teach culture, all lost, language, everything is all lost because you've taken a couple of generations out of a community'.¹⁵⁴ This loss is still being felt by First Nations Peoples today, being passed down among generations.¹⁵⁵ Removing children from cultures that innately require community and connection causes disconnect and spiritual hurt unfathomable to people outside of those cultures. As identified in Part II, loss of cultural heritage

established. Most states and territories established similar boards. At the same time, NSW introduced the *Aborigines Protection Act 1909* (NSW), as repealed by the *Aborigines Act 1969* (NSW), and the *Child Welfare Act 1939* (NSW), which authorised the board to remove Aboriginal children 'legally' without consent or desire from their natural parents and community. Anita Heiss, 'Our Truths: Aboriginal Writers and the Stolen Generations' (Essay, 30 April 2019) <<https://www.austlit.edu.au/austlit/static/new/files/newsitefiles/Our-Truths--Aboriginal-Writers-and-the-Stolen-Generations.pdf>>; Anita Heiss, 'Blackwords: Writers on Identity' (2014) 14(3) *Journal of the Association for the Study of Australian Literature* 1.

148 Wiyi Yani U Thangani (n 26) 13; Nogrady (n 26).

149 Which was a belief held due to the decline in numbers of First Nations Peoples resulting from British invasion (through both murder and the introduction of foreign diseases).

150 O'Loughlin (n 132).

151 *Bringing Them Home Report* (n 77) 185–218; 'Who Are the Stolen Generations?', *Healing Foundation* (Web Page, 2022) <<https://healingfoundation.org.au/resources/who-are-the-stolen-generations>>; The Healing Foundation, *Make Healing Happen: It's Time to Act* (Final Report, May 2021); 'The Stolen Generations', *Common Ground* (Web Page, 25 October 2022) <<https://www.commonground.org.au/learn/the-stolen-generations>>; 'Telling Our Stories' (n 129).

152 'Telling Our Stories' (n 129) 0:00:48–0:01:00.

153 Anderson and Tilton (n 130) 48; Salleh (n 133).

154 'Telling Our Stories' (n 129) 0:01:51–0:02:10.

155 O'Loughlin (n 132); 'Stolen Generation Survivors in Victoria to Receive \$100,000 Payments through Redress Scheme', *The Guardian* (online, 3 March 2022) <<https://www.theguardian.com/australia-news/2022/mar/03/stolen-generation-survivors-in-victoria-to-receive-100000-payments-through-redress-scheme>> ('Victorian Stolen Generation Survivors').

and disempowerment severely impacts well-being and causes considerable, long-lasting, and transgenerational adverse outcomes.¹⁵⁶

Children from the Stolen Generations who experienced abuse and neglect have found it difficult at times to care for their own children without having a proper parenting example to refer to, given their past experiences of not being cared for as a child because they were part of the Stolen Generations.¹⁵⁷ As outlined in Part II, intergenerational trauma and the self-management of such trauma continues to contribute to the significant disadvantages that impact First Nations Peoples. Members of the Stolen Generations, their children, and grandchildren, are more likely to experience substance abuse, domestic violence, unemployment, poor physical and mental health, and/or poor education, which feeds into trajectories of poverty, reduced life expectancies and the overrepresentation of First Nations Peoples in the criminal justice system.¹⁵⁸

1 Reparations

The occurrence of the Stolen Generations is widely known, largely due to the national apology offered in 2008 by Prime Minister at the time, Kevin Rudd.¹⁵⁹ Lorraine recounts, ‘we gathered in Canberra, Stolen Generations from all over the country assembled there and it was a day I will never, ever forget in my life because we were being acknowledged as a group of people’.¹⁶⁰ The apology recognised the trauma inflicted by past laws and was meaningful in its commencement of truth-telling. However, the apology held no legal ramifications and was not provided in tandem with compensation or systemic change. Negligence and liability were not admitted.¹⁶¹ More than a decade after the apology Lorraine has expressed how the journey of healing is far from over: ‘I spend every waking moment thinking ... how can we heal our mob quicker than we’re doing.’¹⁶² The delivery reinforced a lack of accountability and confirmed a devaluing of First Nations lives as compensation was not being offered. This is particularly damaging because, as outlined in Parts III and IV, the colonising state centres money and profit, favouring compensation as a legal mechanism to provide justice. The legal system has been built around money only as far as it privileges the colonising state because compensation is not offered to remedy First Nations’ losses in the same way.

156 Wiyi Yani U Thangani (n 26) 20.

157 *Bringing Them Home Report* (n 77); Larissa Behrendt, *Indigenous Australia for Dummies* (Wiley Publishing, 2012) 135–7 (‘*Indigenous Australia*’); Janet Stanley, Adam M Tomison and Julian Pocock, ‘Child Abuse and Neglect in Indigenous Australian Communities’ [2003] 19 (Spring) *Child Abuse Prevention Issues* 1, 7–8.

158 Nogrady (n 26); Wiyi Yani U Thangani (n 26) 20; *Closing the Gap Report* (n 26); ‘Intergenerational Trauma’ (n 26).

159 Nogrady (n 26).

160 O’Brien (n 130).

161 ‘National Apology’, *National Museum Australia* (Web Page, 23 May 2023) <<https://www.nma.gov.au/defining-moments/resources/national-apology>>; Korff, ‘Compensation’ (n 94); Chris Merritt, ‘PM’s Words Will Not Expose the Commonwealth to Liability’, *The Australian* (Canberra, 13 February 2008) <<https://amp.news.com.au/national/pms-words-wont-expose-commonwealth-to-liability/news-story/2fe10a29e996d1685a75bae7c683e91f>>.

162 Baker (n 130).

For years, attempts through litigation have been made to obtain damages for the harm suffered by members of the Stolen Generations. Several attempts were unsuccessful; a few were settled outside of court, and only one was successful in court (*Trevorrow v State of South Australia [No 5]*).¹⁶³ In 2014, an informal settlement process was negotiated in New South Wales ('NSW'), whereby a claim was brought against the NSW Government by members of the Stolen Generations and an alternative dispute process was followed, which had less stringent requirements and 'settled' over 200 cases.¹⁶⁴ Only recently (in 2021), and only for the Northern Territory ('NT'), has a class action been launched.¹⁶⁵ The lack of proceedings instigated from the thousands of potential First Nations litigants is testimony to the inaccessibility and undesirability of the adversarial justice system for First Nations Peoples.¹⁶⁶

The first Stolen Generations statutory reparation scheme was established in 2006, by the Tasmanian government, allocating \$5 million to eligible applicants.¹⁶⁷ Various other jurisdictions only followed suit almost 10 years on. In South Australia in 2015, an \$11 million scheme was established, which provided both funds to survivors and to a Stolen Generations Community Reparations Fund, designed to facilitate healing.¹⁶⁸ In 2017 NSW created a scheme providing payments of \$75,000 to Stolen Generations survivors who were removed under the *Aborigines Protection*

163 (2007) 98 SASR 136; Hayley Aldrich, 'The Stolen Generations Group Action: An Alternative Model to Redress a Traumatic Past' (2017) 141 *Precedent* 22; Maithri Panagoda, 'Stolen Generations Litigation in NSW' (2013) 116 *Precedent* 30. See Maithri Panagoda, 'The Stolen Generations: A Struggle for Justice' [2017] (30) *Law Society Journal* 80 for a list of matters, including the matters of *Kruger v Commonwealth* (1997) 190 CLR 1, *Williams v Minister Aboriginal Land Rights Act 1983* (2000) Aust Torts Reports ¶81-578, *Cubillo v Commonwealth [No 2]* (2000) 103 FCR 1, and *Collard v Western Australia [No 4]* (2013) 47 WAR 1 (which were unsuccessful proceedings) and *Johnson v Department of Community Services* (2000) Aust Torts Reports ¶81-540, and the withdrawn matters of Boreham against New South Wales in 2001 and Jones against New South Wales in 2004 which were settled outside of court.

164 Hayley Aldrich, 'Redress: Are We There Yet?', *Carroll & O'Dea Lawyers* (Web Page, 15 April 2019) <<https://www.codea.com.au/publication/redress-are-we-there-yet/>>; Aboriginal Affairs NSW, 'Guidelines for the Administration of the NSW Stolen Generations Reparations Scheme' (Guidelines, September 2019) <https://www.aboriginalaffairs.nsw.gov.au/media/website_pages/healing-and-reparations/stolen-generations/reparations-scheme/Funeral-Fund-Guidelines_Sep-2019.pdf> ('Reparations Guidelines').

165 'Northern Territory Stolen Generations Class Action', *Shine Lawyers* (Web Page) <<https://www.shine.com.au/service/class-actions/northern-territory-stolen-generations-class-action/>> ('NT Class Action'); Sarah Smit, 'NT Stolen Generation Class Action to Continue despite Redress Scheme', *National Indigenous Times* (online, 17 September 2021) <<https://nit.com.au/nt-stolen-generation-class-action-to-continue-despite-redress-scheme/>>.

166 Barriers which include the statute of limitations; evidentiary difficulties; the trauma experienced by members of the Stolen Generations in the adversarial setting; considerable costs and delays; the problem of establishing specific liability for harms that have been caused; overcoming the judicial view that 'standards of the time' justified the removal in the best interests of the child; historical statutory provisions; difficulty in accessing historical records; fading memories; the unavailability of witnesses, along with the policy floodgates defence: Panagoda (n 163); Buti (n 112) 414–15.

167 Panagoda (n 163).

168 'Department of Premier and Cabinet (SA), Stolen Generations Reparations Scheme', *Department of the Premier and Cabinet* (Web Page, 2021) (Web Page, 2021) <<https://web.archive.org/web/20220525141825/https://www.dpc.sa.gov.au/responsibilities/aboriginal-affairs-and-reconciliation/reconciliation/stolen-generations-reparations-scheme/>>; Aldrich (n 164).

Act 1909 (NSW).¹⁶⁹ In March 2020, Victoria announced a \$10 million redress scheme, involving compensation, counselling, and a funeral fund.¹⁷⁰ Applications for this redress scheme have only just opened (31 March 2022), two years after the commitment.¹⁷¹ The scheme provides those removed before 1977 with \$100,000.¹⁷² In May of 2021, one month after the NT class action was launched, the federal government agreed to a scheme which would pay \$380 million to survivors from the territories.¹⁷³ Prime Minister Scott Morrison stated this step was long awaited to formally take responsibility.¹⁷⁴ Under this plan, survivors would receive a payment of up to \$75,000 and the opportunity to request a personal apology.¹⁷⁵ Queensland and Western Australia ('WA') are yet to set up a redress scheme, despite mounting pressure to do so.¹⁷⁶ Some members of the Stolen Generations were able to pursue other redress schemes such as those who suffered severe abuse/neglect in WA, those mistreated in Queensland state care, or the national scheme for child sexual abuse while in care, but these were not specific to the Stolen Generations.¹⁷⁷

2 Limitations and Inaccessibility of the Available Reparations

Evidently, in this area, compensation has either not been offered, or has been significantly delayed (and inadequate). Victoria speaks to the timeliness (and valuing) of matters impacting First Nations Peoples through the commitment taking over two years to be implemented.¹⁷⁸ Compensation is a necessary part of a more holistic approach to reparations. As Bangerang and Wiradjuri elder Geraldine

169 Ex gratia payments are those made for damages but without the admittance of liability by the party making the payment: 'Reparations Guidelines' (n 164) 1.

170 Justine Longmore, 'Stolen Generations Redress Scheme Announced in Victoria', *ABC News* (online, 18 March 2020) <<https://www.abc.net.au/news/2020-03-18/stolen-generations-redress-scheme-announced-in-victoria/12067572>>; Aaron Bloch, 'More Funding for Victorian Stolen Generations Services', *National Indigenous Times* (online, 8 January 2021) <<https://nit.com.au/more-funding-for-victorian-stolen-generations-services/>>.

171 'Services for Victoria's Stolen Generations', *First Peoples–State Relations* (Web Page, 16 June 2022) <<https://www.firstpeoplesrelations.vic.gov.au/services-victorias-stolen-generations>>; 'Victorian Stolen Generation Survivors' (n 155).

172 'Victorian Stolen Generation Survivors' (n 155).

173 'Territories Stolen Generations Redress Scheme External Advisory Board', *Australian Government* (Web Page, 31 March 2022) <<https://www.directory.gov.au/portfolios/prime-minister-and-cabinet/national-indigenous-australians-agency/territories-stolen-generations-redress-scheme-external-advisory-board#:~:text=The%20Territories%20Stolen%20Generation%20Redress,caused%20by%20their%20forced%20removal>>; Smit (n 165).

174 Rachel Pannett, 'Australia to Pay Hundreds of Millions in Reparations to Indigenous "Stolen Generations"', *The Washington Post* (online, 5 August 2021) <<https://www.washingtonpost.com/world/2021/08/05/australia-indigenous-school-reparation/>>.

175 Smit (n 165).

176 Eliza Edwards, "'Time's Up': Calls for WA and Queensland to Compensate Survivors of the Stolen Generation", *9News* (online, 5 August 2021) <<https://www.9news.com.au/national/closing-the-gap-1-billion-funding-stolen-generation-reparations-new-indigenous-initiatives/c9390799-726d-4a44-aeb0-47168728b22c>>.

177 Korff, 'Compensation' (n 93); Department for Communities (WA), 'Redress WA' (Newsletter No 3, February 2010) <<https://www.findandconnect.gov.au/ref/wa/objects/pdfs/WD0000118%20Redress%20WA%20Newsletter%20No%203%20Feb%202010.pdf>>; 'Redress Scheme', *Link-Up (NSW) Aboriginal Corporation* (Web Page) <<https://www.linkupnsw.org.au/program/redress-scheme/>>.

178 'Services for Victoria's Stolen Generations' (n 171); 'Victorian Stolen Generation Survivors' (n 155).

Atkinson has said, 'I don't believe there is anything that can heal that trauma or ever repay that loss' but a compensation package 'will go some way to helping people address the disadvantage caused by the inhumane practices our people have been subjected to'.¹⁷⁹

The provided reparations have numerous shortcomings and are far from delivering justice. Liability has still not been admitted, with compensation schemes only offering ex gratia payments.¹⁸⁰ This lack of accountability facilitates the continuation of similar rights breaches. The Australian legal system perpetuates Stolen Generations by responding to communities of traumatised people with child removal. The bundle of 'protectionist policies' sanctioning the removal of children has essentially transformed into 'child protection' legislation.¹⁸¹ This is evidenced by an overrepresentation of First Nations children in state care, with more children in care now than members of the Stolen Generation.¹⁸² This is underpinned by an ignorance of First Nations cultures and losses. The legal system is inherently racially biased. For instance, notions of the 'nuclear' family underpin the legal system: according to the *Family Law Act 1975* (Cth), the best interest of a child is parenting by a mother and father.¹⁸³ This ignores different concepts of kin and child rearing that involve extended families and communities, which is prevalent in First Nations cultures, ultimately contributing to the disproportionate removal

179 'Victorian Stolen Generation Survivors' (n 155).

180 Ex gratia payments are those made for damages but without the admittance of liability by the party making the payment. South Australia: 'Stolen Generations Reparations Scheme' (n 168); 'New South Wales Stolen Generations Reparations Scheme and Funeral Assistance Fund', *Aboriginal Affairs* (Web Page) <<https://www.aboriginalaffairs.nsw.gov.au/healing-and-reparations/stolen-generations/reparations-scheme>>.

181 Child protection legislation is racially biased, prioritising White, Westernised models of childcare whilst disregarding child rearing norms of First Nations Peoples: Jacynta Krakouer, 'Systemic Racism in Australian Child Protection Systems Must Be Addressed', *National Indigenous Times* (online, 10 June 2020) <<https://www.nit.com.au/systemic-racism-in-australian-child-protection-systems-must-be-addressed/>>. Furthermore, the child protection system is riddled with non-compliance and unethical practices: Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-Home Care in New South Wales* (Review Report, 25 October 2019). Members of the Stolen Generations who were removed as children were often neglected and prevented from living in a healthy family environment and learning parenting skills. In some instances, this has resulted in generations of children being raised in state care: Larissa Behrendt, *Indigenous Australia* (n 157) 135–7. Some people and organisations call this a 'new Stolen Generation': "'A New Stolen Generation': On National Sorry Day, Family Matters Calls on Governments to Take Action for Our Children', *Family Matters* (Web Page, 26 May 2020) <<https://www.familymatters.org.au/a-new-stolen-generation-on-national-sorry-day-family-matters-calls-on-governments-to-take-action-for-our-children/>>.

182 Jens Korff, 'A Guide to Australia's Stolen Generations', *Creative Spirits* (Web Page, 3 May 2022) <<https://www.creativespirits.info/aboriginalculture/politics/stolen-generations/a-guide-to-australias-stolen-generations#more-children-are-being-taken-today-than-during-the-stolen-generations-period>>; Productivity Commission, 'Government Services 2021' (Report, 20 January 2021) s 16 <<https://www.pc.gov.au/ongoing/report-on-government-services/2021/community-services/child-protection/rogs-2021-partf-section16-child-protection-services.pdf>>; Adam Phelan, 'Another Generation at Risk in Failing Child Protection System', *UNSW Newsroom* (online, 11 November 2021) <<https://newsroom.unsw.edu.au/news/business-law/another-generation-risk-failing-child-protection-system>>.

183 *Family Law Act 1975* (Cth) s 60CC.

of First Nations children.¹⁸⁴ Evidently, reparations have not remedied the initial loss suffered by the Stolen Generations or prevented the continuation of the loss associated with child removal.¹⁸⁵ This disproportionate family separation for First Nations Peoples is compounded by the myriad of institutionalised racism and disadvantage which contributes to the disproportion of First Nations children in the criminal justice system.¹⁸⁶ When children are incarcerated the detrimental effects of separation from family are exacerbated.¹⁸⁷

Furthermore, oppressive government control has not ceased – exhibiting how reparations have not prevented similar harm from occurring. This is evidenced by the extensive regulations implemented through the 2007 NT Intervention, which morphed into the Stronger Futures laws in 2012, operating for 10 years until midnight 16 July 2022.¹⁸⁸ Despite these laws ceasing effect on 17 July 2022, other laws remain in operation that similarly regulate – such as alcohol restrictions under the *Liquor Act 2019* (NT).¹⁸⁹ An understanding and respect of First Nations cultures, focusing on community strengths and knowledges, is required to facilitate self-determination and protection from similar future harm.

Accountability and truth-telling is needed to achieve justice, to both respond to loss and to prevent future loss. As outlined in reconciliation rhetoric with First Nations Peoples, providing adequate reparations for actions in the past is intrinsically linked with combatting the same injustices that occur today.¹⁹⁰ In this light, reparations need to facilitate reconnection to Country and kin (which is not achieved through limited payments of money). As Lorraine has said, ‘For Aboriginal people ... the ultimate in healing is to be reconnected to everything that you’ve lost.’ The truth is required for healing because being a member of the Stolen Generations is ‘like your identity is gone so you’ve got to find out what is your true identity’.¹⁹¹

184 Keryn Ruska and Zoe Rathus, ‘The Place of Culture in Family Law Proceedings: Moving beyond the Dominant Paradigm of the Nuclear Family’ (2010) 7(20) *Indigenous Law Bulletin* 8.

185 Jack Latimore, ‘Stolen Generations: 21st Anniversary of Launch of Inquiry, 17 Years since Report’, *Australian Museum* (Web Page, 26 May 2020) <<https://australian.museum/learn/first-nations/stolen-generations/>>.

186 Around half of youth in custody are First Nations children: Lorena Allam, ‘Half of Australia’s Youth Detainees Are Indigenous Children, Research Finds’, *The Guardian* (online, 1 April 2022) <<https://www.theguardian.com/australia-news/2022/apr/01/half-of-australias-youth-detainees-are-indigenous-children-research-finds>>; Paul Gregoire and Ugur Nedim, ‘NSW Youth Koori Court Keeps First Nations Youth Out of Prison, Reports Finds’, *NSW Courts* (online, 3 May 2022) <<https://nswcourts.com.au/articles/nsw-youth-koori-court-keeps-first-nations-youth-out-of-prison-reports-finds/>>.

187 This is because it impacts ability to navigate the world outside of incarceration, creating more barriers to practicing and passing down culture.

188 *Stronger Futures in the Northern Territory Act 2012* (Cth); Matt Garrick, ‘Northern Territory Intervention-Era Alcohol Bans Are Set to Expire after 15 Years’, *ABC News* (online, 7 April 2022) <<https://www.abc.net.au/news/2022-04-07/nt-aboriginal-communities-alcohol-restrictions-could-be-lifted/100967520>>.

189 ‘Changes to Alcohol Restrictions in NT Communities’, *Northern Territory Government* (Web Page, 6 July 2022) <<https://nt.gov.au/law/alcohol/bans-and-dry-areas/changes-to-alcohol-restrictions-in-nt-communities>>.

190 Lawry (n 75) 94.

191 Salleh (n 133).

A supposed intent of the federal compensation scheme was to reduce the disparity between First Nations Peoples and non-Indigenous Australians.¹⁹² Yet, without structural change, and the award of sufficient quantum, this cannot occur. The harmful rhetoric of First Nations' hopelessness continues to infiltrate discourse and policy in Australia.¹⁹³ First Nations Peoples are seen as an 'intractable problem'.¹⁹⁴ Racist and colonising discourses remain prominent in society which allows insulting, insufficient monetary compensation (if offered at all) to be the 'solution' to state-made injustices.¹⁹⁵

Furthermore, availability of the offered reparations is limited. The requirement of documentary evidence creates a barrier as records were not properly kept by the state or were subsequently destroyed.¹⁹⁶ This prevents potentially more than half of survivors from compensation under the separate schemes and drastically reduces their chances of success in litigation.¹⁹⁷ Statutory schemes also exclude certain survivors and sever any entitlements upon death, despite the impacts being intergenerational. For instance, NSW prevented over 50% of members of the Stolen Generations from accessing compensation because they were removed under a different Act to the one contained in the redress scheme.¹⁹⁸ The national redress scheme for the territories excluded entitlement to compensation for descendants of deceased Stolen Generations members.¹⁹⁹ If statutory schemes followed principles of equity,²⁰⁰ then Stolen Generations members' entitlements would be passed on through their estate. This is also one of the reasons the NT class action claim is proceeding, even with the later announcement of a statutory scheme.²⁰¹

In litigation, as addressed in Part V, to seek compensatory damages, loss needs to be translated into recognised forms of action. As this article has considered, this excludes certain types of loss from being addressed. The informal settlement process in NSW mirrored these limitations and loss of culture was not accounted for in determinations of monetary compensation.²⁰² An exploration of quantum awarded in non-Indigenous claims before Australian courts significantly contrasts with amounts awarded to First Nations Peoples both judicially and statutorily; evidence for the undervaluing of First Nations lives and experiences of loss. One

192 Pannett (n 174).

193 'Transforming the Relationship' (n 124) 8.

194 Ibid.

195 Gawaian Bodkin-Andrews and Bronwyn Carlson, 'The Legacy of Racism and Indigenous Australian Identity within Education' (2016) 19(4) *Race, Ethnicity and Education* 784 <<https://doi.org/10.1080/13613324.2014.969224>>.

196 Peter Read and Lizzie May, 'The Government's Stolen Generations Redress Scheme is Piecemeal and Unrealistic', *The Conversation* (online, 30 August 2021) <<https://theconversation.com/the-governments-stolen-generations-redress-scheme-is-piecemeal-and-unrealistic-165878>>.

197 Ibid.

198 Those removed under the *Child Welfare Act 1939* (NSW), when the redress scheme was only applicable to those removed under the *Aborigines Protection Act 1909* (NSW), as repealed by *Aborigines Act 1969* (NSW); Aldrich (n 164).

199 Smit (n 165).

200 Which originated to better serve justice.

201 'NT Class Action' (n 165); Smit (n 165).

202 Aldrich (n 164).

example of this is that damages of over \$1 million were awarded by the NSW Supreme Court to a non-Indigenous man because he received the strap at school eight times.²⁰³ This is compared to the offer of \$100,000 or less (if even offered at all) for a lifetime of abuse and trauma. Courts are fundamentally ill-equipped to provide comprehensive reparations for the Stolen Generations as they are limited to awarding individual damages and are influenced by racial bias.²⁰⁴ Statutory reparations can extend beyond monetary payments yet have continued to fall short, failing to facilitate truth-telling and self-determination.

There has been some support from First Nations Peoples for the establishment of a reparations tribunal to provide comprehensive reparations. This option was proposed by the Public Interest Advocacy Centre in 1997, and supported by the Moving Forward Consultation Project, on the basis that the tribunal could support a collective approach and remove some of the barriers posed by litigation (such as time, cost, and bias).²⁰⁵ Despite proposals for other modes of reparations such as a tribunal, the colonising state has promoted the idea that the provision of any compensation is a 'resolution' for the inflicted trauma, echoing through non-Indigenous public perceptions. However, years of trauma from forced removal from kin and Country, spiritual disconnect, groomed disdain for culture, and the loss of traditional languages and knowledges which are all intrinsically linked to identity and wellbeing for First Nations Peoples cannot be resolved by payment of an insignificant monetary figure. These non-pecuniary losses cannot be extrapolated through an economic lens. Any proxy used to equate spiritual hurt, loss of identity, culture, and family to a numerical figure, particularly repeatedly less than \$100,000 is inappropriate and re-traumatising. This strikingly demonstrates the need to broaden approaches to reparations beyond monetary payments.

B Dust Disease

In early 2017, 55-year-old Bundjalung and Yaegl man Ffloyd Laurie was killed by mesothelioma (dust disease).²⁰⁶ He was one of several hundred First Nations

203 Jennifer Clarke, 'Case Note: *Cubillo v Commonwealth*' (2001) 25(1) *Melbourne University Law Review* 218, 284; Cunneen and Grix (n 84) 21; 'Payout for Strapping Halved', *The Age* (online, 28 March 2003) <<https://www.theage.com.au/national/payout-for-strapping-halved-20030328-gdv46.html>>.

204 Lawry (n 75) 88.

205 Ibid; Public Interest Advocacy Centre, 'Providing Reparations: A Brief Options Paper' (Research Paper, 1997); Public Interest Advocacy Centre, *Restoring Identity: Final Report of the Moving Forward Project* (Report, Revised Edition, 2009) 48.

206 Matt Peacock, 'James Hardie Unlikely to Pay Compensation for Aboriginal Kids Exposed to Asbestos in NSW Town of Baryulgil', *ABC News* (online, 8 September 2016) <<https://www.abc.net.au/news/2016-09-08/man-with-mesothelioma-from-asbestos-cant-sue-james-hardie/7823308>> ('James Hardie Unlikely to Pay'); Elloise Farrow-Smith and Catherine Marciniak, 'Mourners Farewell Mesothelioma Victim Ffloyd Laurie Who Played in Asbestos-Ridden Schoolyard', *ABC News* (online, 9 Feb 2017) <<https://www.abc.net.au/news/2017-02-09/ffloyd-laurie-funeral-for-asbestos-in-schoolyard-victim/8254894>>; Matt Peacock, 'Mesothelioma Kills Man Who Played on Asbestos Tailings Left in School Yard When He Was a Child', *ABC News* (online, 31 January 2017) <<https://www.abc.net.au/news/2017-01-31/ffloyd-laurie-dies-of-mesothelioma/8226826?nw=0>> ('Mesothelioma Kills Man').

People to die from the disease since asbestos mining began in the 1930s.²⁰⁷ The disproportionate impact of mesothelioma on First Nations Peoples has not been addressed in many research studies regarding the dangers of asbestos. Mesothelioma is a very aggressive and incurable cancer, only contracted by asbestos exposure.²⁰⁸ All kinds of asbestos are carcinogenic to humans and ingesting or inhaling asbestos spores is very likely to lead to mesothelioma.²⁰⁹ However, mesothelioma can take around 20 to 70 years to develop after asbestos exposure.²¹⁰ This was the case with Ffloyd, who was exposed to asbestos as a child when mounds of asbestos tailings were dumped in the school grounds at Baryulgil, often used by children as a jump pit.²¹¹ Before he died, he recounted how 'we used to have it all around our yard'.²¹² This was no anomaly, it was common for children to play in asbestos piles, and/or freight hop onto trucks that were transporting asbestos.²¹³ Archie Tucker from Wittenoom recounted 'we used to roll in it in the gorges ... We'd climb up on it and roll down it into the water at Gorge Pool'.²¹⁴ Asbestos mining, which operated from the early 20th century, observed unsafe practices, which caused the wide spread of these tailings.²¹⁵ Asbestos' desirability was in its usefulness within building

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- 207 An exact number is not available, as discourse conceals the disproportionate effect on Aboriginal people by providing statistics on mesothelioma on all Australians, or by providing statistics on all types of cancer in Aboriginal people. Further, the national data only became available from the 1980s and this was not specific to Aboriginal people: Safe Work Australia, *Mesothelioma in Australia: Incidence (1982 to 2013) and Mortality (1997 to 2012)* (Report, 2015) 4 <<https://www.safeworkaustralia.gov.au/system/files/documents/1702/mesothelioma-in-australia-2015.pdf>>; Australian Institute of Health and Welfare, *Mesothelioma in Australia 2019* (Report, 26 August 2020) <<https://www.aihw.gov.au/getmedia/558c0b6d-e872-4a0f-953d-23ae6afab3b0/aihw-can-134.pdf.aspx?inline=true>>; Sargent (n 125). One study found there were 39 recorded cases of mesothelioma in Aboriginal people from Western Australia ('WA') from the mid-1970s to 2016, but this is not reflective of the true number of cases: Peter Franklin et al, 'Incidence of Malignant Mesothelioma in Aboriginal People in Western Australia' (2016) 40(4) *Australian and New Zealand Journal of Public Health* 383 <<https://doi.org/10.1111/1753-6405.12542>>.
- 208 Sargent (n 125); Straif et al, 'A Review of Human Carcinogens: Part C' (2009) 10(5) *Lancet Oncology* 453 <[https://doi.org/10.1016/S1470-2045\(09\)70134-2](https://doi.org/10.1016/S1470-2045(09)70134-2)>.
- 209 Sargent (n 125); Straif et al (n 208).
- 210 Ludwig Heinrich, 'Blue Murder at Wittenoom', *Independent Australia* (online, 3 June 2013) <<https://independentaustralia.net/politics/politics-display/blue-murder-at-wittenoom,5376>>; 'Risk Factors for Malignant Mesothelioma', *American Cancer Society* (Web Page, 16 November 2018) <<https://www.cancer.org/cancer/malignant-mesothelioma/causes-risks-prevention/risk-factors.html#:~:text=Mesotheliomas%20related%20to%20asbestos%20exposure,the%20exposure%20to%20asbestos%20stops>>.
- 211 Jock McCulloch, 'The Mine at Baryulgil: Work, Knowledge, and Asbestos Disease' (2007) 92 *Labour History* 113, 118 <<https://doi.org/10.2307/27516191>>. See Peacock, 'James Hardie Unlikely to Pay' (n 206); Peacock, 'Mesothelioma Kills Man' (n 206); House Standing Committee on Aboriginal Affairs, Parliament of Australia, *The Effects of Asbestos Mining on the Baryulgil Community* (Report, October 1984) 3 ('*Asbestos Mining on the Baryulgil Community*').
- 212 Peacock, 'James Hardie Unlikely to Pay' (n 206). See also, Peacock, 'Mesothelioma Kills Man' (n 206).
- 213 Standen (n 125).
- 214 Kirsti Melville, 'How Mesothelioma Devastated This Indigenous Community in the Pilbara', *ABC News* (online, 7 February 2019) <<https://www.abc.net.au/news/2019-02-07/how-asbestos-devastated-wittenoom-indigenous-community/10781312>>.
- 215 Lee Moerman and Sandra van der Laan, 'The Baryulgil Mine: Asbestos and Aboriginality' (Research Paper, 6th Asia Pacific Interdisciplinary Research in Accounting Conference, 2010) <<http://citeseerx.ist.psu>.

and industry supplies.²¹⁶ Baryulgil mine (operated by James Hardie) in NSW and Wittenoom mine (operated by a subsidiary of the Colonial Sugar Refining Company ('CSR')) in WA were among the largest of several asbestos mines in Australia.²¹⁷ At Baryulgil Mine primarily Bundjalung families were employed.²¹⁸ In Wittenoom, Banjima, Guruma, Yindjibarndi, Ngarluma, Yinhawangka, Nyaparli and Palyku people who lived in the area would work within the mines.²¹⁹ The conditions for the workers in these mines have been described as akin to the harsh conditions endured by black miners under apartheid in South Africa.²²⁰

In NSW, conditions for working with asbestos and in asbestos mines were not regulated until 1964.²²¹ Prior to this, poor conditions were permitted: Aboriginal workers would hand mine asbestos with picks and shovels, often barefoot and in extreme heat.²²² It was mostly Aboriginal men who drove asbestos trucks, loading and unloading the bags at either end. This would be done by hand, shoving asbestos into bags, unintentionally consuming and being covered by the dust.²²³ Accordingly, workers, their families, and nearby communities were all exposed to asbestos – the dust and fibres infiltrated everywhere – covering workers bodies and clothes (which were then taken home) and the nearby town's gullies and creeks (due to being blown by the wind).²²⁴ Furthermore, tailings were discarded haphazardly, hence the use of Baryulgil Primary School as a dumping ground.²²⁵ This exposure was what killed Ffloyd.²²⁶ Exposure from dust and tailings occurred in addition to any exposure from asbestos-containing infrastructure. Referencing Wittenoom, Kirsti Melville writes, '[t]here's nowhere else in the world where an entire town has been so completely contaminated by asbestos.'²²⁷ In light of the mines being built on Aboriginal land, and the extensive control the government had over Aboriginal lives at the time, Aboriginal people were disproportionately affected by asbestos exposure. Accordingly, Aboriginal people have the highest mortality rate from mesothelioma compared to any other group in the world.²²⁸

edu/viewdoc/download?doi=10.1.1.1076.4196&rep=rep1&type=pdf> 3; Peter Webster, *White Dust Black Death: The Tragedy of Asbestos Mining at Baryulgil* (Trafford, 2005) 107.

216 Moerman and van der Laan (n 215) 8; Webster (n 215).

217 There was also Woodsreef in NSW and a handful of smaller mines in Tasmania and South Australia: 'Asbestos Key Facts', *Asbestos.vic.gov.au* (Web Page, 22 November 2021) <<https://www.asbestos.vic.gov.au/about-asbestos/what-is-asbestos>>.

218 McCulloch (n 211) 115.

219 Standen (n 125). They would also work at the mill, farms, and other rural industries close by the mine.

220 McCulloch (n 211) 113.

221 Ibid 119.

222 Standen (n 125); *ibid* 116.

223 Melville (n 214).

224 *Ibid*; McCulloch (n 211), citing Evidence to House Standing Committee on Aboriginal Affairs, Parliament of Australia, Sydney, 7 February 1984, 159 (Jerry Burke); Evidence to House Standing Committee on Aboriginal Affairs, Parliament of Australia, Sydney, 7 February 1984, 210–15 (Rodney MacBeth).

225 *Asbestos Mining on the Baryulgil Community* (n 211).

226 Dani Larkin, 'Growing Up with Baryulgil's Asbestos Genocide' (2016) 26(18) *Eureka Street* 49, 49–51.

227 Melville (n 214).

228 Lorraine Kember, 'Meet the Group with Highest Mesothelioma Mortality Rate in the World', *Asbestos.com* (Blog Post, 19 March 2019) <<https://www.asbestos.com/blog/2019/03/19/asbestos-problem-australian-aboriginals/>> ('Meet the Group'); Sargent (n 125).

The dangers of asbestos were initially unknown.²²⁹ However, once exposed, risks were not mitigated. Safety precautions were not implemented.²³⁰ Further, the safety concerns did not facilitate mine closures, rather this was dictated by financial considerations.²³¹ The asbestos mine at Wittenoom, despite being shut down, had workers there as late as 1994.²³² Aboriginal workers discussing their concerns were ignored; they had little (if any) political and social standing. For instance, Bundjalung Elder Pauline Gordon wrote

'[a]nd when we confronted him ... he said: "Oh no, I don't think that would affect you". I said: "Why, it affects peoples overseas. Why can't it affect us?" He said "I don't think so." I said "Why not, only because we're aboriginal people?"' Pauline continued, addressing the same neglect by medical professionals; 'You go to your doctor and say, "Look doctor I'm sure it's dust." He says: "Oh no, it's not dust, it's just bronchitis", and well you don't argue with your doctor. You think he knows more than you, we're only Aborigines, unintelligent Aborigines.'²³³

This language reflects the overt racist discourse that permeated society, along with how institutionalised racism affected Aboriginal people – their voices, identity and culture were not respected or valued, causing significant tangible disadvantage – evidenced here in terms of poor health and health care. This is not an isolated incident. As discussed, First Nations Peoples observe higher rates of poor health and lower life expectancies than non-Indigenous people.²³⁴ Studies have exposed the Whiteness of the health care system in Australia, permeated with institutional and interpersonal racism which impede the provision of quality health care for First Nations Peoples.²³⁵ A glaringly alarming example of this is how First Nations women who are incarcerated experience poorer health outcomes than non-Indigenous people or men.²³⁶

The extensive government control over First Nations lives, which was sanctioned by the legal system, contributed to the racially disproportionate exposure to asbestos, eliciting more deaths of Aboriginal people from dust diseases than non-Aboriginal people.²³⁷ Following the protectionist policies that instigated the Stolen Generations, the state moved towards policies of assimilation. The rationale

229 Melville (n 214).

230 Ibid.

231 Kelly Gudgeon, 'A Spotlight on Wittenoom', *Pilbara Breakfast* (ABC Radio, 16 November 2021) <<https://www.abc.net.au/radio/pilbara/programs/breakfast/wittenoom-awareness-and-legalities/13633216>>.

232 Heinrich (n 210).

233 Pauline Gordon was a Bundjalung Elder who grew up in Grafton and was sent to Bomaderry Home and Cootamundra Girls Home: Matthew Peacock, *Asbestos: Work as a Health Hazard* (Australian Broadcasting Commission, 1978) ('*Asbestos: Work*'), quoted in Moerman and van der Laan (n 215) 16.

234 *Wiyi Yani U Thangani* (n 26) 20.

235 See, eg, in WA: Angela Durey and Sandra C Thompson, 'Reducing the Health Disparities of Indigenous Australians: Time to Change Focus' (2012) 12(1) *BMC Health Services Research* 151 <<https://doi.org/10.1186/1472-6963-12-151>>.

236 Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (Report, 2019) 112 <<https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true>>.

237 See, eg, Franklin et al (n 207).

behind this transition was if First Nations Peoples could assimilate into White society, the state would no longer have to act as their ‘protectors’.²³⁸

During this transition between policy agendas, employment opportunities emerged for First Nations Peoples, however, they were limited to the most undesirable and dangerous jobs. This implementation of assimilation policies essentially transferred paternalistic attitudes from the state to corporations.²³⁹ ‘Corporate benevolence’ was discourse accepted by policy regulators and society, however in effect it translated to Aboriginal people being placed under the guardianship of corporate owners, which had a realm of exploitative repercussions.²⁴⁰ Markedly, the mining industry embodied assimilation policies, ‘inspiring’ Aboriginal people to build better lives through taking up their generous offer of employment. Thus, the government (and society) perceived the mining industry as a successful example of assimilation; Aboriginal people could join the workforce and consequently procure (supposed) social and economic benefits, no longer needing to ‘rely’ on the state.²⁴¹

Consequently, the government withdrew any accountability for the welfare of Aboriginal people.²⁴² Through the state’s perception that Aboriginal people had effectively ‘assimilated’ into White society, Aboriginality was rendered invisible.²⁴³ For corporations, this Aboriginality was acutely visible. It’s believed the ‘corporate benevolence’ by corporations such as James Hardie was underpinned by desires to gain profit through exploiting Aboriginal labour and to avoid potential future liability for harm because Aboriginal people were considered a ‘dying race’ and would not live long enough to experience the effects of asbestos-related disease.²⁴⁴ Baryulgil asbestos mine epitomises this ‘ruthless exploitation of an Aboriginal labour force by a major Australian company’.²⁴⁵ This exploitation has been described as an act of genocide.²⁴⁶

This exemplifies how the availability of employment being restricted to dangerous work was underpinned by oppressive and exploitative colonial discourses disguised as protectionism and paternalism.²⁴⁷ Aboriginal people were given a ‘choice’ between working themselves to death or dying from impoverishment

238 Tim Rowse, ‘Civilising: A Continuing Australian Project?’ (Digest, August 2009) <<http://www.australianreview.net/digest/2009/08/rowse.html>>; Bruce Buchan, *Empire of Political Thought* (Pickering and Chatto, 2008) 272.

239 Webster (n 215) 10.

240 Peacock, *Asbestos: Work* (n 228), quoted in Moerman and van der Laan (n 215) 16.

241 Webster (n 215) 10.

242 Ibid; Moerman and van der Laan (n 215) 10.

243 Webster (n 215) 10.

244 Peacock, ‘James Hardie Unlikely to Pay’ (n 206); Larkin (n 226).

245 Moerman and van der Laan (n 215) 4; Larkin (n 226). Baryulgil was more so exploitative as the mining operations did not provide profit to James Hardie but acted as a mechanism to facilitate tax breaks in the importation of cheap foreign asbestos by granting Hardie a seat on the tariff board: McCulloch (n 211) 114; Moerman and van der Laan (n 215) 20.

246 Debbie Brennan, ‘More Aboriginal Genocide: Miners Battle White Death at Baryulgil’, *Freedom Socialist Party* (Web Page, Summer 1992/1993) <<https://socialism.com/fsb-article/more-aboriginal-genocide-miners-battle-white-death-at-baryulgil/>> (‘Aboriginal Genocide’).

247 Ibid.

facilitated by government 'protection'.²⁴⁸ Yet the protection from poverty through employment also became the cause of suffering and death due to the impacts from asbestos exposure.²⁴⁹

Following media attention on the effects of asbestos among workers in the industry, the NSW government held an inquiry into the conditions at Baryulgil in 1983–84, along with the impact on the local populations.²⁵⁰ During the inquiry, James Hardie denied claims of the working conditions being unsafe, arguing adequate protection from risk was provided.²⁵¹ A claim that Aboriginal people were being racially exploited was also denied on the basis the working conditions supposedly mirrored those at Wittenoom, where workers were mostly non-Aboriginal.²⁵² This defence concealed how universally, including at Wittenoom, the most dangerous jobs within the mining industry, such as working in the 'dusty, lower-paid job of loading raw crocidolite [asbestos] for transport' were given to Aboriginal workers.²⁵³ Consequently, Aboriginal workers were disproportionately exposed to the most potent form of asbestos compared with non-Aboriginal workers – which indeed supports the claim of racial exploitation.²⁵⁴ This reality was iterated in 2021 by Greens MP Brad Pettitt who stated that 'while thousands of Whitefella workers in the mines have suffered, nothing compares to the suffering of the Aboriginal people of the area the Banjima, Guruma, Yindjibarndi, Ngarluma, Yinhawangka, Nyaparli and Palyku Peoples [those local to the mine at Wittenoom]'.²⁵⁵

The conclusion drawn by the inquiry in relation to compensation demonstrates the Whiteness of the legal system. The inquiry found that there were adequate legal remedies available and, any difficulties in the pursuit of reparations were experienced by everyone and not unique to Baryulgil people.²⁵⁶ This homogenisation of people is clearly a feature of the hidden Whiteness of the law and its current inability to represent and account for the distinctive needs of First Nations Peoples. The homogenisation conceals the specific limitations of the adversarial system as a route to reparations for First Nations Peoples that were addressed in Part IV of this article. Furthermore, despite the inquiry in 1984, Bundjalung people

248 Ibid; McCulloch (n 211) 125.

249 Moerman and van der Laan (n 215) 3.

250 Brennan, 'Aboriginal Genocide' (n 246); Matthew Soeberg et al, 'Australia's Ongoing Legacy of Asbestos: Significant Challenges Remain Even after the Complete Banning of Asbestos Almost Fifteen Years Ago' (2018) 15(2) *International Journal of Environmental Research and Public Health* 384:1–14 <<https://doi.org/10.3390/ijerph15020384>>.

251 McCulloch (n 211) 121, citing Hardie Trading (Services) Proprietary Ltd, Submission to House Standing Committee on Aboriginal Affairs, *Inquiry into the Effects of Asbestos Mining on the Baryulgil Community* (November 1983) 4.

252 Lorraine Kember, 'Deadly Legacy of the James Hardie Asbestos Mine in Baryulgil', *Asbestos.com* (Blog Post, 16 October 2020) <<https://www.asbestos.com/blog/2015/09/08/james-hardie-asbestos-mine-baryulgil/>> ('Deadly Legacy').

253 'Wittenoom's Indigenous Legacy: The World's Worst Mesothelioma Rate', *WAtoday* (online, 7 July 2016) <<https://www.watoday.com.au/national/western-australia/wittenooms-indigenous-legacy-the-worlds-worst-mesothelioma-rate-20160707-gq0yz1.html>>.

254 Ibid.

255 Orr, 'Left Scared' (n 125); 'Wittenoom Tragedy', *Asbestos Diseases Society of Australia Inc* (Web Page) <<https://asbestosdiseases.org.au/the-wittenoom-tragedy/>>.

256 *Asbestos Mining on the Baryulgil Community* (n 211).

have continued to die disproportionately. Bundjalung Elders and academics have expressed it was as if the inquiry had never taken place.²⁵⁷

The Baryulgil story of ‘low wages, hazardous work conditions, and environmental pollution’ is a microcosm of the global industry – indicative of how both a paternalistic environment and corporate pursuits of profit facilitate human rights abuses.²⁵⁸ The vesting of ‘responsibility’ in corporations has restricted the accessibility of reparations. The government has blamed corporations for the harm, and corporations have hidden behind various corporations laws, shielding them from legal liability.²⁵⁹ Evidently, the story of Aboriginal people and dust diseases continues today because of the long latency period of mesothelioma, continued asbestos exposure,²⁶⁰ and as a story of a struggle by communities for recognition of their losses.²⁶¹

‘If the bullet takes 20 years to kill you, it’s not called murder, it’s called business.’²⁶²

1 Reparations

The same options for pursuing compensation are available for those affected by dust disease as members of the Stolen Generations: litigation, or a statutory claim if the state/territory has created a compensation scheme.²⁶³ In some instances, pursuing compensation through litigation has been successful. For instance, in Western Australia, the Supreme Court held the CSR accountable for causing asbestos-related diseases to two of their subsidiary’s former employees.²⁶⁴ Subsequently, in 1989 CSR settled out of court, providing a mass compensation of \$18.4 million to 200 workers from the Wittenoom asbestos mine.²⁶⁵ Following this, liability was admitted and subsequently, CSR has faced ongoing liabilities. Despite this, CSR (or any other corporation) has not created a compensation scheme or automatic payment and if victims wish to obtain compensation, they must instigate

257 McCulloch (n 211) 124.

258 Ibid 125.

259 See, eg, Moerman and van der Laan (n 215).

260 Continued exposure occurs due to a myriad of reasons, most predominately of which is the return to Country which has been contaminated due to a need to practice culture on country, along with the fact that older housing containing asbestos is more prevalent in rural towns predominantly occupied by Aboriginal Peoples. These problems exist due to a lack of environmental and structural restoration of asbestos-ridden land and infrastructure: Rachael Knowles, “‘It Has Devastated Aboriginal People’: WA Govt Has No Plans to Clean-Up Wittenoom”, *NITV* (online, 11 April 2022) <<https://www.sbs.com.au/nitv/article/2022/04/07/it-has-devastated-aboriginal-people-wa-govt-has-no-plans-clean-wittenoom>>.

261 McCulloch (n 211) 125.

262 Brennan, ‘Aboriginal Genocide’ (n 246), citing Ben Hills, *Blue Murder* (Sun Books, 1989) 163.

263 ‘Statutory Claim’, *Cancer Council* (Web Page) <<https://www.cancercouncil.com.au/pleural-mesothelioma/compensation/statutory-claim/#State-and-territory-compensation-schemes>>; ‘Mesothelioma’, *Better Health Channel* (Web Page, 22 September 2021) <<https://www.betterhealth.vic.gov.au/health/conditionsandtreatments/mesothelioma>>.

264 *Barrow v CSR Ltd* (Supreme Court of Western Australia, Rowland J, 4 August 1988). See also ‘Battling CSR’, *Australian Asbestos Network* (Web Page) <<https://www.australianasbestosnetwork.org.au/asbestos-history/battles-2/battling-csr/>>.

265 Kember, ‘Meet the Group’ (n 228).

court proceedings. As discussed in Part V, this is a barrier to reparations for First Nations Peoples.

The significance of successful litigation being from former Wittenoom workers is not to be overlooked. Most workers at Wittenoom were non-Indigenous.²⁶⁶ There is no readily ascertainable information on the ethnicity of those who were successful in litigation against CSR but considering official records of employment were not kept for Aboriginal Peoples (reflective of the attitude at the time, more so evident in the fact they were not even counted in the census), it is doubtful that Aboriginal Peoples accounted for any of the successful claims.²⁶⁷

NSW was the only state to administer a specific compensation scheme for dust diseases.²⁶⁸ The scheme provided payments of less than \$20,000 to affected workers and was subsequently criticised for sabotaging the possibility for any adequate award of compensation.²⁶⁹ Thus, statutory claims for dust diseases have generally been limited to existing workers compensation schemes.

Outside of compensation, some measures (although incomprehensive and ephemeral) were implemented in response to the harm caused by the asbestos. For example, from 1977–83, \$3.5 million was spent by the government to solve the remaining environmental problems at Baryulgil.²⁷⁰ Despite this, asbestos exposure continues in Baryulgil today.²⁷¹ Additionally, after the Baryulgil inquiry concluded, the Standing Committee handed down a report which made 10 recommendations.²⁷² Only one was addressed – the building of a health centre in Grafton, which offered services to victims of asbestos-related diseases.²⁷³

One of the other recommendations from the Standing Committee was for the government to ‘use every effort to persuade the residents of Baryulgil Square to move to another site’.²⁷⁴ Whilst not explicitly followed, indirectly, government infrastructure and capital works funding was not provided to Baryulgil, ‘with

266 ‘Who Went There’, *Australian Asbestos Network* (Web Page, 2023) <<https://www.australianasbestosnetwork.org.au/asbestos-history/asbestos-wittenoom/went/>>; Lenore Layman, ‘Work and Workers’ Responses at Wittenoom, 1943–1966’ (1983) 7(1) *Community Health Studies* 1, 4.

267 Heinrich (n 210).

268 The Dust Diseases Authority of NSW until 2015 administered a statutory compensation scheme established by the *Workers Compensation (Dust Diseases) Act 1926* (NSW) (now administered by Insurance and Care NSW, trading as icare NSW and operating the NSW Dust Diseases Care Scheme): ‘Options For Claiming Compensation in New South Wales’, *Turner Freeman Lawyers* (Web Page) <<https://www.turnerfreeman.com.au/personal-injury/asbestos-disease-compensation/avenues-of-compensation/>> (‘Options for Claiming in NSW’); ‘Statutory Claim’ (n 263); *Asbestos Mining on the Baryulgil Community* (n 211) 108.

269 Brennan, ‘Aboriginal Genocide’ (n 246).

270 Ibid; *Asbestos Mining on the Baryulgil Community* (n 212) 2–29; McCulloch (n 211) 124.

271 Because it is within infrastructure and is still exposed at the mine site: Ombudsman (NSW), *Asbestos: How NSW Government Agencies Deal with the Problem* (Special Report, April 2017) 33 (‘How NSW Government Agencies Deal’).

272 *Asbestos Mining on the Baryulgil Community* (n 211); Brennan, ‘Aboriginal Genocide’ (n 246).

273 Kember, ‘Deadly Legacy’ (n 252); Janine Williams, ‘Group Seeks Justice for Baryulgil Asbestos Victims’, *Green Left* (online, 5 February 1992) <<https://www.greenleft.org.au/content/group-seeks-justice-baryulgil-asbestos-victims>>.

274 Brennan, ‘Aboriginal Genocide’ (n 246).

the intention of making it uninhabitable'.²⁷⁵ Recently in Wittenoom, the Western Australian government has advised any existing properties will be compulsorily acquired and demolished.²⁷⁶ According to the explanatory memorandum of the Wittenoom Closure Bill 2021 (WA):

despite extensive negotiations and generous offers of compensation, there still remain three people who own a total of 14 lots in Wittenoom with one person still residing in Wittenoom. The state wants to demolish remaining buildings and above ground infrastructure [once they have obtained ownership] ... The Bill provides for the compulsory acquisition of the 14 remaining freehold lots in Wittenoom and fixes the compensation payable in respect of them.²⁷⁷

Thus, an approach favoured by the state has been relocation; once again demonstrating ignorance of (or disdain for) the detrimental effects of dispossession of First Nations Peoples from their traditional lands.

2 Limitations and Inaccessibility of the Available Reparations

The Australian legal system has restricted litigation in this area because, as discussed, liability has been particularly circumvented. The colonising state has imputed responsibility to mining corporations and corporations have been shielded behind corporations' laws. Harm from asbestos at Baryulgil is a stellar example of this. James Hardie restructured entirely to avoid liability by hiding behind the corporate veil.²⁷⁸ When they were investigated in 2004,²⁷⁹ misleading and deceptive conduct was found, specifically regarding the company's asbestos liabilities being 'fully funded'.²⁸⁰ While they were restructuring, James Hardie made assurances that it could put \$1.85 billion aside to cover any liabilities. However, the Medical Research and Compensation Foundation which surfaced in the reorganisation was left with only \$293 million.²⁸¹ Furthermore, James Hardie used contractual clauses, specifying them as a defendant of last resort.²⁸² These clauses prevented Ffloyd Laurie from litigating against James Hardie, because there were other entities jointly liable for the harm.²⁸³ The NSW Education Department could be pursued

²⁷⁵ Ibid.

²⁷⁶ 'Final Wittenoom Residents to Be Forced out of Asbestos-Ridden Mining Town', *The Guardian* (online, 21 March 2019) <<https://www.theguardian.com/australia-news/2019/mar/21/final-wittenoom-residents-to-be-forced-out-of-asbestos-ridden-mining-town>>; Isabel Moussalli and Andrew Tyndall, 'Last Homes in Asbestos-Riddled Wittenoom to Be Demolished, but Some Want to Stay', *ABC News* (online, 12 November 2021) <<https://www.abc.net.au/news/2021-11-12/wittenoom-closure/100599722>>.

²⁷⁷ Explanatory Memorandum, Wittenoom Closure Bill 2021 (WA) 1.

²⁷⁸ James McConville, 'Revisiting Holding Company Liability for Subsidiary Company Debts in Australia: A Response to the James Hardie Controversy' (2005) 7 *The University of Notre Dame Australia Law Review* 23, 24; Edwina Dunn, 'James Hardie: No Soul to Be Damned and No Body to Be Kicked' (2005) 27(2) *Sydney Law Review* 339.

²⁷⁹ DF Jackson, *Special Commission of Inquiry into Medical Research and Compensation Foundation* (Report, 21 September 2004).

²⁸⁰ McCulloch (n 211) 115.

²⁸¹ Bob Burton, 'Fund for Patients with Asbestos Induced Diseases May Run Out' (2004) 328(7442) *British Medical Journal* 728 <<https://doi.org/10.1136/bmj.328.7442.728-c>>; McCulloch (n 211) 114.

²⁸² Peacock, 'James Hardie Unlikely to Pay' (n 206).

²⁸³ Ibid.

as the asbestos tailings were on school property.²⁸⁴ They settled outside of court.²⁸⁵ Arguably, rationales underpinning the out of court settlement were that liability did not have to be admitted, binding precedent would not be created, and less awareness of the issue was raised.²⁸⁶

A further example of the limiting nature of litigation was the non-recognition of tribal marriage, which barred many widows of Aboriginal minors from obtaining damages.²⁸⁷ The recognition of this restriction within the final report of the 1984 NSW inquiry brought to light just one instance of the privileging of non-Indigenous society within the legal system. Despite the report's findings that there were adequate pathways to obtain compensation, it remains true (and hidden from mainstream discourse) that Aboriginal people are subject to more extensive barriers in obtaining compensation than their non-Aboriginal counterparts. Evidently, the legal system does not account for differing cultural contexts, and instead the homogenisation of experiences of loss creates barriers to accessing justice. This is substantiated by the impact consistent poor health of First Nations Peoples (ultimately attributable to invasion and colonialism) has had on the recognition of health conditions from asbestos exposure. Several common illnesses such as bronchitis have symptoms comparable to asbestosis or mesothelioma and thus the health impacts from asbestos exposure have been concealed.²⁸⁸ The colonising state's homogenisation renders these health disparities invisible within the legal system, yet paradoxically they are made acutely visible in the health industry, contributing to skewed data because of the prevalence of misdiagnosis and tendency to discount First Nations Peoples. A Baryulgil community member reported their father's experience of this to the NSW Ombudsman:

My Dad worked in the mine for 29 years; he died at 43, worked from when he was thirteen years of age. Never drank. Hypertension they had on his death certificate, but he never drank, never smoked lived a pretty healthy life. The doctor when he died, called me back into his office and said your Dad's body was riddled with asbestos. Hypertension was on his death certificate.²⁸⁹

These racial biases facilitate (or perhaps underpin) the colonising state's avoidance of liability. These biases have also contributed to the lack of coverage, research, and reparations for asbestos dust diseases which disproportionately affect First Nations Peoples.²⁹⁰ This demonstrates the need for truth-telling to guide reparations.

284 Ibid.

285 Ibid.

286 'Pros and Cons of Settling Out of Court', *Mulligan Attorneys* (Web Page, 2021) <<https://web.archive.org/web/20211018212754/https://www.helpingpeoplenc.com/pros-and-cons-of-settling-out-of-court/>>.

287 *Asbestos Mining on the Baryulgil Community* (n 211) 105; Larkin (n 226).

288 McCulloch (n 211) 121; Karen Selby, 'How is Mesothelioma Diagnosed?', *Asbestos.com* (Web Page, 28 April 2023) <<https://www.asbestos.com/mesothelioma/diagnosis/#:~:text=Is%20mesothelioma%20difficult%20to%20diagnose,the%20use%20of%20a%20biopsy>>.

289 *How NSW Government Agencies Deal* (n 271) 33; Baryulgil community member stated in meeting with Ombudsman staff on 25 October 2016: *How NSW Government Agencies Deal* (n 271) 33.

290 There have been no epidemiological cancer or mortality follow-up studies of the Woodsreef mine workers. This is a substantial gap in the story of Australia's asbestos-related disease epidemic: Soeberg et

The undervaluing of First Nations' experiences of loss is evident in the insufficient quantum offered. For instance, an out of court settlement with CSR amounted to a payment of around \$50,000 to widow Yvonne Adam.²⁹¹ This was after \$10,000 went to legal fees. If the deceased were White, there is no doubt a greater figure would have been granted. This is evidenced by compensation provided to non-Indigenous people. For instance, in 2020, the Australian Capital Territory government made a payment of \$250,000 to White man James Wallner, who was exposed to Mr Fluffy (aptly named due to its fluffy texture and appearance) asbestos as a child, because this type of asbestos was commonly used in roofing insulation.²⁹²

The need to centre experiences of loss inclusive of intangible loss to reconceptualise reparation mechanisms is made acutely visible when looking at dust diseases. Awarding damages in accordance with the finality principle (the principle determining the case concludes the legal rights and relationships between the parties in full) is particularly inappropriate as it is difficult to ascertain the true value of future loss.²⁹³

The timeliness in resolving matters affecting First Nations Peoples also speaks volumes to the undervaluing of First Nations lives. Movement in dealing with this health crisis has not been prioritised. For instance, in early 2017, a second NSW Ombudsman report was presented, which followed a 2010 report.²⁹⁴ The government response did not follow until later in the year which supported the report but said they needed to consider 'how best to progress the recommendations'.²⁹⁵ In 2019, the federal government established a National Dust Disease Taskforce which reported recommendations for a national approach. In April 2022, the government responded to the report with a strong commitment to reduce 'incidence of silicosis and other dust diseases among workers, and increase the quality of life for people affected and their families'.²⁹⁶ Clearly silicosis is the main target of this national approach,

al (n 250) 3. As of 2017 there were no studies into asbestos-related diseases in Aboriginal communities in NSW: *How NSW Government Agencies Deal* (n 271) 35.

291 'Wittenoom: A Toxic Time Bomb', *Slater and Gordon Lawyers* (Blog Post, 5 July 2018) <<https://www.slatergordon.com.au/blog/featured/wittenoom-a-toxic-time-bomb>>.

292 Craig Allen, 'Canberra Man Who Contracted Mesothelioma after Exposure to Mr Fluffy Asbestos Awarded \$250k from ACT Government', *ABC News* (online, 2 December 2020) <<https://www.abc.net.au/news/2020-12-01/mr-fluffy-act-government-payment-to-mesothelioma-patient/12938118>>; 'Mr Fluffy Asbestos: Everything You Need to Know', *GBAR Group* (Web Page, 2022) <<https://gbargroup.com.au/mr-fluffy-asbestos/>>.

293 *Asbestos Mining on the Baryulgil Community* (n 211) 117.

294 *How NSW Government Agencies Deal* (n 271); Ombudsman (NSW), *Responding to the Asbestos Problem: The Need for Significant Reform in NSW* (Report, November 2010) 1–22 <http://web.archive.org/web/20220318013944/https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0015/3372/SR_AsbestosProblem_Nov10.pdf>.

295 Parliament of New South Wales, 'NSW Government Response to NSW Ombudsman Report *Asbestos: How NSW Government Agencies Deal with the Problem* (Government Response, October 2017) <[https://www.parliament.nsw.gov.au/tp/files/72034/Government Response to NSW Ombudsman's Report on Asbestos.pdf](https://www.parliament.nsw.gov.au/tp/files/72034/Government%20Response%20to%20NSW%20Ombudsman's%20Report%20on%20Asbestos.pdf)>.

296 'National Dust Disease Taskforce', *Department of Health and Aged Care (Cth)* (Web Page, 21 September 2022) <<https://www.health.gov.au/committees-and-groups/national-dust-disease-taskforce>>. See Department of Health (Cth), National Dust Disease Taskforce, *Final Report to Minister for Health and Aged Care* (Report, June 2021).

as dust diseases from asbestos exposure such as mesothelioma and asbestosis were only referenced three times in the government response.²⁹⁷ Asbestos-related dust diseases have still not been adequately addressed. As Banjima Elder Maitland Parker expressed to the United Nations Special Rapporteur regarding Toxins and Indigenous Peoples, 'There are no remedies available for mesothelioma or asbestosis, merely health management as the illnesses progress.'²⁹⁸

Statutory compensation schemes are restrictive and do not adequately tend to asbestos related dust diseases. The NSW scheme limited eligibility to workers, thus those affected in the community could not pursue reparations via this mechanism.²⁹⁹ Similarly, general workers' compensation schemes could not be pursued by non-mineworkers. Workers' compensation schemes are more so limiting to those who worked in the mines because workers' compensation schemes aim to return people to work.³⁰⁰ For those suffering from deadly dust diseases, this is not an achievable aim and as such is not an appropriate avenue for reparations.

One of the largest limitations of possible reparations is the exclusion of environmental restoration. Asbestos remains at several previous mine sites in Australia.³⁰¹ Moreover, the 2010 Ombudsman report identified the occurrence of illegal dumping of asbestos onto Aboriginal land.³⁰² Undoubtedly, the most widespread example of remaining asbestos contamination on Aboriginal land is at Wittenoom. Wittenoom has been described as Australia's Chernobyl.³⁰³ The town has been struck from maps because of the extensive contamination.³⁰⁴ Despite years of pleas, the government has no plans to clean-up Wittenoom.³⁰⁵ The aim of relocation is indicative of the comfort of the state to dispossess First Nations Peoples, despite the known impacts of this.

Healing of Country through environmental restoration can mitigate the ample tangible and intangible losses that flow from land destruction. Tangibly, future health risks remain if asbestos is not appropriately dealt with. Innate needs to practice culture on Country will continue to expose First Nations Peoples to asbestos. Intangibly, the severed ties to Country through forced dispossession

297 Australian Government, *All of Governments' Response to the Final Report of the National Dust Disease Taskforce* (Final Report, March 2022).

298 Banjima Native Title Aboriginal Corporation, Submission to Special Rapporteur on Toxics and Human Rights, *The Impact of Toxic Substances on the Human Rights of Indigenous Peoples* (23 May 2022) 5 <<https://www.ohchr.org/sites/default/files/documents/issues/toxicwaste/toxics-indigenous-peoples/inputsreceived/2022-07-13/banjima-native-title-aboriginal-corporation.docx>> ('Banjima Native Title Submission').

299 'Options for Claiming in NSW' (n 269); 'Statutory Claim' (n 263); *Asbestos Mining on the Baryulgil Community* (n 211) 108–9.

300 'What is the Difference between a Statutory and a Common Law Workplace Accident Claim?', *Corney & Lind Lawyers* (Web Page) <<https://www.injurylaw.net.au/workplace-injury/what-is-the-difference-between-a-statutory-and-a-common-law-workplace-personal-injury-claim/>>.

301 For example, asbestos remains at Barraba, Baryulgil and Wallaga Lake: *How NSW Government Agencies Deal* (n 271) 31.

302 Ibid 34.

303 Heinrich (n 210).

304 Sargent (n 125).

305 Knowles (n 260).

and the inability to care for Country have extensive ongoing cultural, spiritual, psychological, and social impacts.³⁰⁶

Referencing Wittenoom, Maitland Parker has said ‘[w]hen we talk about Country and culture, it’s not just a beautiful gorge that’s been ruined, our history and culture go a long way in that gorge and the surrounds.’³⁰⁷ Leaving deadly asbestos fragments on Country is not only a health hazard to anyone entering the area, but also limits the practice of culture.³⁰⁸ Parker has expressed ‘[w]e want to be safe in our home. We want to be able to come back home.’³⁰⁹

A lack of environmental restoration is more so telling of the limited political power First Nations Peoples hold. Action has not been taken despite countless calls, and the Banjima’s Native Title Rights that were acknowledged in 2014 do not embody political autonomy.³¹⁰ Rachael Knowles for NITV News has reported ‘Banjima people have not been able to safely access their ancestral Country since mining began’.³¹¹ Furthermore, no Banjima Peoples have been invited into discussions on ongoing management.³¹²

This article has extensively addressed how loss of connection to Country compounds into negative social, economic, and health impacts. First Nations women have identified how good health is reliant on culture because culture and law contain knowledge on a range of health matters, including healing.³¹³ Evidently, reparations for asbestos contamination need to do more than attempt to make amends for those suffering from dust disease – they need to prevent the harm from happening again and need to account for the realm of intangible losses suffered due to the land destruction. First Nations cultures need to be preserved, respected, and be at the forefront of decision-making for systemic changes that will protect against experiences of loss. It is crucial that reparations reflect structural political power. One means of achieving this is facilitated through the Uluru Statement’s call for a constitutionally enshrined First Nations Voice to Parliament.³¹⁴

Preventative measures to mitigate the known health risks of asbestos exposure are lacking. Communities continue to contain infrastructure that is more than 50 years old and consequently contains asbestos.³¹⁵ These communities are often Aboriginal, which contributes to the ongoing disproportionate risk of asbestos exposure to Aboriginal people today. The NSW Ombudsman in their 2017 report has written, ‘[t]he widespread past use of [asbestos containing material] within

306 ‘Baryulgil’, *Australian Museum* (Web Page, 11 August 2020) <<https://australian.museum/learn/first-nations/unfinished-business/unfinished-business-baryulgil/>>.

307 Orr, ‘Left Scarred’ (n 125).

308 Standen (n 125). For further information on the human rights implications of the toxins at Whittenoom, see Maitland Parker’s advice to the United Nations Special Rapporteur on Toxins and Human Rights: Banjima Native Title Submission (n 298).

309 Banjima Native Title Submission (n 298) 3.

310 The contamination violates the Banjima People’s human rights and native title rights: *Ibid*.

311 Knowles (n 260).

312 *Ibid*.

313 *Wiyi Yani U Thangani* (n 26) 19.

314 ‘History is Calling’ (n 6); Gabrielle Appleby and Eddie Synot, ‘A First Nations Voice: Institutionalising Political Listening’ (2020) 48(4) *Federal Law Review* 529 <<https://doi.org/10.1177/0067205X20955068>>.

315 *How NSW Government Agencies Deal* (n 271) 31.

Aboriginal communities has left a legacy that needs to be addressed. Most of the fibro asbestos buildings in Aboriginal communities were constructed by state or federal government programs.³¹⁶ Further, there lacks awareness about asbestos risks in Aboriginal communities.³¹⁷ Reparations need to contain preventative measures which place the same value on Aboriginal lives as non-Aboriginal lives, eliminating the disparity in risk.

Alongside cultural loss from land destruction is the cultural loss from the premature deaths of a proportion of a community. A mesothelioma diagnosis carries significant tangible and intangible losses such as the deterioration of mental health of the individual diagnosed, along with their family and community.³¹⁸ Ffloyd left behind his mother, wife, children, and grandchildren, extending the experiences of loss beyond Ffloyd as the person diagnosed.³¹⁹ However, Ffloyd was one death of many – the prevalence of the exposure has created an epidemic killing numerous community members. Bundjalung elder Linda Walker, for instance, lost her brothers, father, husband, sister-in-law, and sister from dust disease.³²⁰ Each of these deaths have real impacts – there are people, families, and communities behind the numbers/statistics.³²¹ These deaths have fractured Aboriginal communities.³²² Hundreds of Aboriginal people, including strong community leaders, have been killed too soon by mesothelioma. This has limited the growth, and passing down, of culture. As ecologist Peter Kendrick writes, ‘So many people who’ve gone were leaders in their community and it’s had a huge impact in the Pilbara...It really set things back because it took people when they were young, they died in their 40s, at the peak of their lives. They were ... [those] active in their community and across communities’.³²³ The same intangible consequences (such as cultural and spiritual loss) do not accompany the death of non-Indigenous people. This is because of distinct cultural differences. For instance, in First Nations communities, oral traditions and continuity are paramount to preserve culture and to thrive.³²⁴ The offered reparations overlook these intangible, but very real consequences.

These factors have contributed to the inaccessibility and inadequacy of pathways to reparations. At the crux of this is both the lack of accountability from corporations and the colonising state, and the realm of losses that are intricately tied with the health epidemic. Losses in social, cultural, and health areas are still being revealed.³²⁵ Considering this, any compensation that follows a finality principle will not be appropriate as they cannot adequately address unknown future experiences

316 Ibid.

317 For example, in Weilmoringle the community is unaware of asbestos within the infrastructure, despite the 2010 report calling for greater public awareness for regional Aboriginal communities that typically contain older buildings.

318 Suzanne Dixon, ‘Mental Health and Mesothelioma’, *Asbestos.com* (Web Page, 11 April 2023) <<https://www.asbestos.com/support/mental-health/>>; ‘Baryulgil’ (n 297).

319 Farrow-Smith and Marciniak (n 206); Peacock, ‘Mesothelioma Kills Man’ (n 206).

320 McCulloch (n 211) 122.

321 ‘Baryulgil’ (n 306).

322 McCulloch (n 211) 122.

323 Melville (n 214).

324 McCulloch (n 211) 122.

325 Soeberg et al (n 250).

of loss. As Matthew Soeberg et al wrote in 2018, ‘this is only part of an unfinished story. A complete asbestos ban was in place in 2003. Almost fifteen years later, Australia is only now seeing the peak of its asbestos-related disease epidemic with ongoing risks of asbestos exposure.’³²⁶

Finally, the wealth generated from the exploitation of Aboriginal labour and land has been excluded from compensation discussions.³²⁷ Bundjalung man Terry Robinson articulated the nature of the inverse relationship arising from the exploitation of Aboriginal people: ‘We see Hardie’s shares keep going up and my family members keep going down.’³²⁸ The profits of both corporations and the colonising state need to be restored to counter the unjust enrichment they obtained because of the exploitation of Aboriginal miners who were underpaid, and lived and worked in disturbing conditions akin to ‘indescribable poverty’.³²⁹ This account of profits could speak volumes in deterring similar conduct. This demonstrates a need for the expansion of the availability of restitutionary damages in the Australian legal system.

VII CONCLUSION

This article has exposed a pattern in the colonising state’s approach to First Nations Peoples. Firstly, paternalistic decisions are made under a guise of benevolent ‘protection’. Following this is a tendency to ignore, or merely acknowledge, the harms caused by these decisions. Finally, the issue is ‘conclusively resolved’ through the provision of ‘reparations’ – taking the form of limited compensation. The colonising state remains unaccountable for past, present, and future oppressive acts. Broader understandings of sovereignty, loss, and reparations are needed to facilitate appropriate recompense, healing, and systemic change. Reconceptualising these concepts through understanding and respecting First Nations’ intrinsic relationship with land and community is required. Changing the mainstream discourse through truth-telling is needed to mitigate inherent racial biases within society that feed the ongoing oppression and devaluing of First Nations Peoples. Truth-telling can also facilitate self-determination and provide justice. Yet, this has never been offered.³³⁰ If it were, it would disrupt the status quo that vests the colonising state with power. Discussions about reparations that centre First Nations’ unique intangible losses threaten the colonising state because it up-ends the dominant paternalistic discourse of development and British ‘settlers’ as benefactors.³³¹ True reparations

326 Ibid 12.

327 Larkin (n 226).

328 Mr Terry Robinson stated in meeting with Ombudsman staff, 25 October 2016: *How NSW Government Agencies Deal* (n 271) 33.

329 McCulloch (n 211) 118.

330 Amy Maguire, ‘Law Protecting Rights: Restoring the Law of Self-Determination in the Neo-colonial World’ (2008) 12 *Law Text Culture* 12.

331 Jason Hickel, ‘Enough of Aid: Let’s Talk Reparations’, *The Guardian* (online, 28 November 2015) <<https://www.theguardian.com/global-development-professionals-network/2015/nov/27/enough-of-aid-lets-talk-reparations>>.

recognise First Nations sovereignty and consequently unravels the very foundation of colonial Australia.

The colonial and paternalistic discourses that are institutionally embedded within the Australian legal system need to be dismantled through understanding and respecting First Nations cultures by amplifying their representation within legal institutions. In addition to payment of adequate monetary compensation, a reallocation of resources and redistribution of political power is needed; put simply, a level of colonial power needs to be relinquished. As emphasised throughout this article, connections with kin and Country are vital for First Nations' spiritual healing. Reparations that fail to address the barriers to these connections (such as psychological, emotional, and intergenerational trauma) tacitly repeat First Nations' dispossession in contemporary Australia by ignoring unique intangible losses. First Nations cultures and knowledges need to be equally valued within the legal system. To facilitate these changes, recommendations championed by First Nations Peoples need to be implemented. The best way to do this is to support the calls from the Uluru Statement, facilitating required changes from the ground up.³³² A Voice to Parliament, Treaty and Truth-Telling provide a means to address the limitations of the reparations that are made available by the Australian legal system, allowing for the development of a framework which accounts for intangible loss.

At minimum, the Australian legal system needs to appropriately value the oldest living culture in the world. When the custodians of the land are respected and granted power to create change, people in Australia (and globally) will experience the benefits of a more ethical and sustainable society. It is time reparations in Australia address all experiences of loss and commit to preventing their reoccurrence.

332 'History is Calling' (n 6).