

Evolution of Rights to Self-Determinism of Aboriginal People: A Comparative Analysis of Land Rights Reforms in Australia

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Abstract

Despite Australia's ratification of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) in 2009, Aboriginal peoples continue to face obstacles in exercising their inherent rights to self-determination and to free, prior and informed consent regarding the development of their traditional land. Recent decades have seen advancements in legislation and government-backed programming to support the recognition of Aboriginal peoples' land rights; however, the current framework often fails to achieve meaningful outcomes for impacted communities. This paper provides an overview of Australia's current legislative and programming efforts to secure Aboriginal peoples' land rights, evaluating the benefits and downsides to each initiative from a rights-based perspective, with the aim of promoting productive discourse on pathways to protecting and implementing the rights enshrined in the UNDRIP.

Introduction

In 2009, Australia ratified the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), after being one of only four countries to vote against its adoption in 2007. In reversing its decision, Australia symbolically demonstrated its commitment to the global shift towards the recognition of indigenous peoples' inherent rights, which as the Declaration outlines derive from "their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies." (United Nations, 2008) Although the UNDRIP covers a range of rights, from culture and identity to employment and education, a core focus of the agreement is the right of indigenous peoples to determine the development of their people and traditional land according to their own needs and interests. The Declaration enshrines in particular the rights to "self-determination" and "free, prior and informed consent" regarding all acts of development.

Australia's formal recognition of indigenous peoples' inherent rights is an important step towards overcoming the trajectory of human rights abuse that the Aboriginal peoples of Australia have been subjected to by the settler population since the beginning of the country's colonization in the early eighteenth century. Despite consistently resisting the forces of colonization, Aboriginal peoples were forcibly expelled from their traditional lands, endured deliberate attempts at extinguishment and faced continued denial of their human rights. Even after the country's initial colonization, the process of state-building – driven by a European model of property ownership and an emphasis on industrial, mining and agricultural interests as a mechanism for growth – has marginalized Aboriginal peoples from political processes and largely excluded them from access to and decision-making power over the lands of their ancestors.

In recent decades, Australia has made some efforts to right these wrongs, for example through the implementation of land rights and native title legislation and through the development of supplementary programming aimed at including Aboriginal peoples in the management of traditional land. However, the degree to which these efforts involved the obtainment of 'free, prior and informed consent' from impacted Aboriginal peoples in their creation and the level of 'self-determination' they have secured for these groups requires examination. Recent controversies surrounding the Adani Carmichael coal mine and resultant amendments to native title legislation have brought to public

attention the complexities and limitations of the system, highlighting in particular the fraught concept of what constitutes ‘consent’ and the tension between Aboriginal peoples’ rights vis-à-vis mining interests. The Adani controversy, and what it indicates about Australia’s currently limited progress towards securing the rights enshrined in the UNDRIP, emphasizes that mere recognition of Aboriginal peoples’ inherent rights is insufficient to repair historical injustices.

The true value of human rights is in their implementation, and Australia’s poor performance on a number of indicators suggests a failure to achieve sincere protection of Aboriginal peoples’ rights and interests. Aboriginal peoples have the lowest economic status of all Australians and experience higher rates of unemployment, incarceration, and drug and alcohol abuse, as well as lower levels of educational attainment compared to non-Indigenous Australians (Australian Government Department of the Prime Minister and Cabinet [DPRC], 2017; Johnston et al., 2007). Both the physical and mental health of Aboriginal peoples is poor compared not only to the non-Indigenous population of Australia but also to the native populations of other countries such as New Zealand (Johnston et al., 2007). Indigenous men and women have a life expectancy that is 10.6 and 9.5 years lower, respectively, than the rest of the population. This is largely due to a higher prevalence of chronic diseases such as diabetes and cancer, and suicide rates that are double that of non-Indigenous Australians (DPRC, 2017).

This striking gap between Indigenous and non-Indigenous health and wellbeing can be attributed to a combination of political oppression and resource alienation, with research drawing attention to the fundamental link in Aboriginal cultures between the health of the people and that of their land (Kingsley et al., 2009; Johnston et al., 2007). As one group of researchers notes, “loss of connection to country brings changes to people far greater than reduced opportunities for healthy food and physical exercise; it inherently brings the loss of a part of one’s own identity and an inability to fulfill cultural and spiritual obligations” (Johnston et al., 2007, p. 494). In order to truly close the gap in health and income status and overcome historical injustices, it is therefore essential that Australia goes beyond mere recognition of Aboriginal peoples’ inherent right to determine the development of traditional lands; measures must be taken to ensure that these rights are in fact being effectively implemented.

This paper aims to outline Australia’s current efforts to secure Aboriginal peoples’ right to determine the development of the land of their ancestors according to their own needs and interests, both through legislation and supplementary programming. This paper will first investigate the history of the denial of Aboriginal peoples’ land rights (1). The paper will then turn to Australia’s efforts to recognize and implement these rights, beginning with land rights (2) and native title (3) legislation, followed by supplementary programming targeted at the inclusion of Aboriginal peoples in the ownership and management of traditional land (4). While an in-depth analysis of each of these programs is outside the scope of this paper, we aim to provide an overview of Australia’s efforts from a rights-based perspective, with the objective of illuminating points of limitation and proposed pathways forward so as to allow Aboriginal peoples to fully exercise the rights enshrined in the UNDRIP.

Background: Denial of Rights

As the original inhabitants of Australia, with ancestral and spiritual ties to the land that stretch back for an estimated 50,000 years, Aboriginal peoples possess inherent rights to the land and its resources (Clarke, 2003). In spite of these inherent rights, the Aboriginal peoples of Australia have been denied the ability to exercise these rights since the beginning of the country’s colonization in the eighteenth century.

In fact, the very premise of the country's colonization denied the right of Aboriginal peoples to own the land of their ancestors. Upon their arrival in Australia, European settlers declared the continent *terra nullius*, a legal term indicating land that is unclaimed and without a sovereign. The European concept of property ownership, which was imposed by settlers at the point of colonization and remains the foundation of Australian property law, is driven by a perceived obligation of man to 'cultivate' or 'improve' a patch of land, and in so doing, to exclude others from the right to use it. Because Aboriginal peoples were not perceived to 'cultivate' the land in the same way as the Europeans, they were not recognized as its true owners.¹ This acted as a justification for the country's colonization and the resultant dispossession of Aboriginal peoples from the lands of their ancestors (Coe, 1994, 12).

In what is now recognized as a deliberate attempt to erase the Aboriginal population, who were seen as a hindrance to the inland expansion of agriculture, settlers forcibly took possession of Aboriginal peoples' territories through mass shootings, hunting gangs, poisoning, and both the intentional and unintentional spreading of foreign diseases, causing an 80-96% decline in population during the first 150 years of colonization (Harris, 2003, p. 81; Veracini, 2003; Coe, 1994; Edgar, 2011). This genocide was carried out by settlers, stockmen, police forces and armed troops alike, because of colonizers' perception that they were divinely ordained to carry out the conquering and 'cultivation' of Australia and its native peoples (Harris, 2003).

The attempted extinguishment of Aboriginal peoples to allow for pastoral expansion was supplemented by other aggressions that indirectly contributed to their expulsion from traditional territories and to the denial of their inherent right to determine the development of their land and people. The construction of fences, introduction of domesticated animals, and establishment of permanent townships diminished the availability of natural resources and physically excluded Aboriginal peoples from the land and resources that had sustained them for centuries, driving them into dependence upon colonial provisions (Harris, 2003, p. 91; Coe, 1994, p. 11). Disconnected from country and forced into squalid and overcrowded shantytowns, malnutrition and disease prevailed, expediting population decline and contributing to an increase in "despair and alcoholism" (Harris, 2003, p. 97). In response to this crisis, the colonial government established a protectorate system in the late nineteenth century that forced Aboriginal peoples onto designated reserves and granted supposed 'guardians' of the people the authority to determine their residence, marriage, and employment (Summers, 2000). In an attitude indicative of the coercive paternalism that continues to be reflected in some policy decisions today, the

¹ Ownership is defined by linguists as a "culturally constituted and socially sanctioned relationship," in this context between people and the land (Rigsby, 1999, p. 966). Aboriginal peoples' understanding of land ownership differs substantially from the European model, with its emphasis on improvement. Anthropologist Bruce Rigsby notes that there is a fundamental "dual relationship of Aboriginal people to the spirit and the material world" in that "Aboriginal people belong to the land and the land belongs to Aboriginal people" (1999, pp. 964-965). While there are regional variations in traditional lore, Rigsby notes that Aboriginal peoples consider themselves to belong to the land because they share spirit with it and with their deceased ancestors who continue to live in and on country. As Bob Randall, a Yankunytjatjara elder and traditional owner of Uluru, remarks in an interview as part of the Global Oneness Project, Aboriginal Australians are "part of all that is" (Global Oneness Project, 2017). Additionally, Aboriginal peoples can be considered 'owners' of the land in the sense that they have rights and responsibilities to live on and care for geographically specific tracts of land, against other people groups. While rights to the land were not recorded in written deeds as in Western countries, Aboriginal communities recognize and pass on the knowledge of their own and other groups' territorial boundaries through oral traditions that describe how the landscapes were formed by their ancestors in the Dreamtime or Story-time (Rigsby, 1999). Aboriginal peoples maintained the rights to use and reside upon their designated areas exclusively; however, these rights were held by the community as a whole, rather than by individuals as in the European notion of property law (Terrill, 2009). Henceforth, this paper will use the term 'ownership' in the narrow, legal sense of possessing title to the land, acknowledging that for Aboriginal communities this term has a broader meaning.

Australian government justified the forcible removal of children of mixed descent from their communities and traditional lands for education in distant missionary schools as a measure for the ‘benefit’ of Aboriginal peoples. (Commonwealth of Australia, 1997; Edgar, 2011).² While the protectorate system has since been dismantled and government-owned reserves have largely been handed over to Aboriginal peoples under land rights and native title legislation, the drastic government overreach of this era established a precedent of intervention in Aboriginal peoples’ affairs that continues to have implications for policy-making today.

The rise of environmentalism in Australia also contributed to the exclusion of Aboriginal peoples from their traditional territory. From the late nineteenth century onwards, in accordance with global trends in conservation, the Australian government implemented a people-free model of conservation that emphasized protecting unique natural features by restricting human interaction with the landscape except for recreational use (Ross et al., 2009; Bauman & Smyth, 2007). This effectively prohibited traditional inhabitants of the land from the right to reside on or use the land and its resources, exacerbating Aboriginal peoples’ dispossession and marginalization (Ross et al., 2009).

Both the colonization of Australia and the subsequent process of state-building have resulted in the deliberate and often violent dispossession and exclusion of Aboriginal peoples from the land of their ancestors, with contemporary ramifications not only in the inability of Aboriginal peoples to fully exercise the rights enshrined in the UNDRIP, but also in the severe health and income gaps experienced between Aboriginal peoples versus non-Indigenous Australians. While Australia has made efforts to recognize Aboriginal peoples’ rights to the land, as outlined in the sections that follow, current efforts need to be reevaluated and ramped up in order to truly secure for Aboriginal peoples the right to determine the development of their people and land according to their own aspirations.

Aboriginal Land Rights

Although Aboriginal peoples have inherent rights to the land of their ancestors, which they maintained against other people groups even before Australia’s colonization, these rights were not recognized under Australian property law until recent decades due to the fact that the country’s legal system is founded upon the doctrine of *terra nullius* and European concepts of property ownership (see Table 1).

While some informal ownership and access rights existed towards the beginning of Australia’s colonization, for example in the exchange of manual labor on cattle stations for the right to reside on traditional land, it was not until the 1966 Aboriginal Lands Trust Act of South Australia that a government body took decisive action to legally recognize Aboriginal peoples’ right to own land (Edgar, 2011; Veracini, 2003; Pollack, 2001). Under this Act, the titles for nine missions and reserves operating in the State were vested in an Aboriginal Lands Trust, which held the land in an estate of fee simple to be leased back to Aboriginal communities at nominal rates for repeatedly renewable periods of 99 years (Terrill, 2009). Although the Governor was entitled to appoint a few key members to the Trust, the remainder of its membership was confined to people of Aboriginal descent recommended by communities in impacted areas. The primary function of the Trust was to hold the title to the land on behalf of the collective traditional landowners, as well as to act as an official body for the direction of funds for the acquisition and development of landholdings (Pollack, 2001). The nature of this

² In the case of indigenous peoples’ rights, coercive paternalism is characterized by a government’s limitation of indigenous peoples’ autonomy through a forcible act or policy that is supposedly for the peoples’ own good. It exemplifies the attitude of moral superiority that colonial governments have historically adopted in justifying their subjugation of indigenous peoples (Dorfmann 2015).

legislation is controversial from a rights-based perspective, both in its establishment by the government with limited if any consent by the communities whose ancestral land was impacted by the Act, and also in the structure of the agreement. The fact that the land is held in trust ‘on behalf’ of the community is not only a continuation of historical paternalism and marginalization, but also undermines Aboriginal peoples’ right to self-determination.

While the direct outcomes of the 1966 Act were at this point limited to South Australia, the enactment of this legislation coincided with the growth of the Aboriginal land rights movement across the country. It was in that same year, for example, that activist Vincent Lingiari led a ‘walk-off’ of 200 Gurindji stockmen from Wave Hill Pastoral Station in the Northern Territory, initially to protest the appalling wages and living conditions suffered by Aboriginal workers, but which escalated into a demand for the right to the land itself as its traditional owners (National Archives of Australia, 2018). Despite achieving widespread publicity, the group did not secure immediate results; however, they did amplify existing pressures on the federal government to address Aboriginal land rights, as expressed in the historic 1967 referendum that overwhelmingly approved of constitutional amendments to advance Aboriginal peoples’ interests. While the referendum was mostly a symbolic gesture with limited tangible outcomes for Aboriginal peoples, it nonetheless contributed to the momentum that put Aboriginal land rights at the forefront of political debate during Prime Minister Gough Whitlam’s ascent to power.

After declaring in 1972 a new policy of ‘self-determination,’ wherein the government would ostensibly support Aboriginal peoples’ decision-making in lieu of the paternalistic control exercised by previous administrations, Whitlam sought to establish a legal precedent for Aboriginal land rights in the Commonwealth-controlled Northern Territory. Justice Woodward was appointed in 1973 to inquire into the appropriate means to recognize and establish the traditional land rights and interests of Aboriginal peoples. His recommendations form the basis of the Aboriginal Land Rights (Northern Territory) Act (ALRA), which was passed by the Commonwealth Government in 1976 (Central Land Council [CLC], 2018; Commonwealth of Australia, 1999). Woodward emphasized the importance of establishing secure land tenure in promoting the social, economic and spiritual wellbeing of Aboriginal peoples, as well as highlighting the responsibility of the Commonwealth to provide “just compensation” for land taken forcibly from traditional owners (CLC, 2018; Commonwealth of Australia, 1999).

The resultant legislation was the first statutory land rights regime for Aboriginal Australians. It handed over the aforementioned ‘reserves’ to traditional owner groups in the form of inalienable freehold title held by Aboriginal Land Trusts and provided for additional claims to be made over ‘unalienated’ Crown land, which indicates territory not legally owned or being used by any party other than the Australian government. As in South Australia, the Land Trusts are comprised primarily of Aboriginal representatives; however, all decision-making authority is vested in Aboriginal Land Councils that are also intended to be representative bodies. In lieu of a private property market, these Councils make decisions about the allocation of property, protection of sacred sites, and the degree to which the community will interact with mining interests and other external parties. Instead of making payments to private landlords, tenants on ALRA-granted property contribute some form of ‘rent’ to Indigenous Community Housing Organizations (ICHOs) that are responsible for maintaining housing. While this arrangement is intended to encourage the inclusion of traditional owners in decision-making about their land, the extent to which self-determination actually occurs is dependent upon the proportion of Aboriginal peoples’ representation on these Councils, as well as their relative position of power (Terrill, 2009). On the whole, this arrangement is a substantial improvement upon the reserve system, in which the inclusion of traditional owners in management decisions was negligible, and for the most part the ALRA is considered to meet community land use needs (Terrill, 2009). Since the initial establishment

of the ALRA in the Northern Territory in 1976, every other state and territory has passed a similar statutory land rights act with the exception of Western Australia, which to this day has no Aboriginal land rights legislation, arguably due to the influence of powerful extraction interests in the region (Pollack, 2001; United Nations Economic and Social Council, 2007).

Despite the largely positive attitude towards the ALRA as a means for enshrining in law Aboriginal peoples' rights over traditional land, there are substantial limitations to the legislation. First, Woodward's initial proposal to grant needs-based claims was excluded from the final draft of the Bill, resulting in a system that requires stringent proof of traditional ties to the land and of management of potential detriment to other parties (CLC, 2018). Instead of recognizing Aboriginal peoples' inherent rights to the land of their ancestors, this places undue burden on impacted groups to prove their heritage, and moreover positions them as one of several 'stakeholders' with competing interests in a region, rather than as the ultimate decision-maker regarding development of traditional lands. Second, the only territory available for claim is 'unalienated Crown land', which severely limits the ability of this legislation to offer recourse for Aboriginal communities whose land was forcibly occupied under colonization. Third, section 50(2A) of the Act, known as the 'sunset clause', prohibits the lodging of further land claims after 1997, which introduces concerns of intergenerational equity, as the land rights of future generations are limited by the ability of present generations to secure them under law. Land rights legislation has also been criticized for being costly and time-intensive. A review of the New South Wales Aboriginal Land Rights Act, for example, found that in 2012 there were 26,000 claims outstanding with only 484 processed that year, 56 of which were successful (Waters & Black, 2012, p. 19). The review estimates that it would take 57 years to determine existing claims if the process remains unchanged.

In addition to these limitations to the claims process, the very structure of the Land Trust arrangement has been called into question. The informal nature of land tenure under the ALRA propagates uncertainty about ownership rights and responsibility for maintenance, while discouraging investment and undermining decision-making authority (Terrill, 2009). Because of the ICHO arrangement, traditional owners cannot treat property as an asset and therefore do not personally receive rent or a return on their investment, which limits the economic benefits of land ownership at an individual level (Terrill, 2009).

Furthermore, land granted under the ALRA cannot be considered to have an equivalent status to private property outside of the regime, with the Northern Territory National Emergency Response (NTER) Act of 2007 offering an illustrative example. In response to an inquiry into the widespread sexual abuse of children, the Australian federal government compulsorily acquired 5-year leases of land that had been granted to traditional owners under the ALRA. This permitted them "unfettered access to the land and assets," supposedly as a protective measure that would allow them to repair and rebuild communities and safeguard human rights (Terrill, 2009, p. 838; Keenan, 2013; Cowan, 2013). Although ostensibly well-intentioned, the intervention met with outrage over its discriminatory and non-consultative approach, which directly contradicted the rights of consent and self-determination as outlined in the UNDRIP that was adopted that same year and which Australia had been instrumental in crafting.

In addition to demonstrating Australia's continued disregard for Aboriginal peoples' right to determine the development of their ancestral land, the NTER also exposed the fragile nature of land rights under the ALRA. In deliberations over two communities' legal challenges to the emergency measures, one of the presiding Judges argued that the fee simple estate granted to Trusts under the ALRA was "a formidable property interest" that was nonetheless not equivalent to true property as it was "susceptible to adjustment" and "significant government intervention" (Keenan, 2013, p. 483). Therefore, while the

purpose of the ALRA, according to another of the Judges presiding over the case, was “to grant rights to aboriginal people that were comparable to the rights of non-aboriginal land-owners,” it is clear that the legislation in its present state does not achieve this goal. Although the ALRA offers limited recognition of the right of Aboriginal peoples to collectively own and determine the development of traditional land, the Australian government retains the prerogative to intervene (Keenan, 2013). If Australia truly wishes to embody the spirit of the UNDRIP and to close the gap in health and income status between Aboriginal peoples and non-Indigenous Australians, the ALRA needs to be substantially revised in order to overcome this continued trajectory of coercive paternalism and government intervention, which inhibits Aboriginal peoples’ ability to determine the development of their own land and people.

Native Title

The Native Title Act

While statutory land rights legislation allowed Aboriginal peoples to make claims over unallocated government property, the very nature of these claims in handing over what was deemed to be ‘Crown land’ failed to acknowledge Aboriginal peoples as the traditional owners. It was not until the Mabo decision of 1992 in the High Court of Australia, which recognized “pre-existing rights and interests in land held by Aboriginal and Torres Strait Islander peoples” that the concept of *terra nullius* was legally challenged, and acknowledgement of Aboriginal peoples’ prior occupation embedded in common law (Australian Law Reform Commission [ALRC], 2015, p. 120)³. Also referred to as ‘native title’, this legal concept differs from land rights legislation in that its authority derives not from the government’s legislative power but from the recognition of pre-existing rights embedded in traditional Aboriginal laws and customs, which the Crown’s absolute title, declared at the point of colonization, was subject to (U.N. Economic and Social Council, 2007; Howard-Wagner & Maguire, 2010). The Native Title Act (NTA) of 1993 integrated the concept of native title into statutory law at a national level and established Native Title Bodies Corporate, entities responsible for holding or managing native title rights and interests on behalf of the native title claim group (Godden & Cowle, 2016). While the idea of *terra nullius* remains the foundation of Australian property law today, the acknowledgement of pre-existing native title opened a channel for some groups to reclaim land or at least gain back access and use rights to traditional territory in some capacity (see Table 1).

Nonetheless, there are a number of limitations to the ability of native title to grant meaningful opportunities for the ownership and management of traditional land by Aboriginal peoples according to their own aspirations. Conceptually, native title legislation is problematic, as it does not challenge the Crown’s fundamental sovereignty. Native title, once conferred, can be voluntarily “surrendered” to the Crown, and will be extinguished and returned to the Crown if an Aboriginal people group becomes extinct or moves from the defined territory. This implies that the government is the ultimate retainer of the rights and is only temporarily conceding them to Aboriginal peoples (Howard-Wagner & Maguire, 2010; Mansell, 1992).

³ *Terra nullius* is a legal term indicating land that is unclaimed and without a sovereign. It provided the legal justification for considering Australia a ‘colonized’ rather than ‘invaded’ territory, and established the sovereignty of the Crown. The High Court’s decision in *Mabo v Queensland (no 2)* acknowledged prior occupancy by Aboriginal peoples, which meant that customary laws and rights present at the time of colonization continued to exist, where they had survived extinguishment by conflicting government laws and acts (Behrendt, 1999).

As with ALRA legislation, the requirements for the establishment of native title are fundamentally inequitable and exclusionary. Acknowledgement of a native title claim requires evidence of continuous occupation or connection to the land, and the burden of proof rests heavily upon the claimant. Given the widespread and non-consensual expulsion of Aboriginal peoples from their traditional land under colonization, many people groups are precluded from lodging a claim, including children who were removed from their communities and groups whose traditional land is now occupied by agriculture or urban development (Mansell, 1992; Howard-Wagner & Maguire, 2010; Pollack, 2001). The very nature of both native title and land rights legislation in preventing claims over land that Aboriginal peoples were forcibly dispossessed of goes against the core tenets of the UNDRIP. Under the declaration, Aboriginal peoples possess the right to own, use and develop the lands of the ancestors, and where this land has been taken without their free, prior and informed consent, they have the right to redress through restitution or compensation. In order to meet the standards of the international agreement and ensure meaningful outcomes for all Aboriginal peoples, Australia needs to radically revise the approach of both native title and land rights legislation to traditional land that was forcibly acquired from Aboriginal peoples so as to provide either compensation or, where possible, restitution of the land.

A further limitation to the Native Title Act is the fact that despite its established legal status, native title is treated as a lesser property right. The conferred land cannot be bought or sold due to the requirements of continuous occupation, and native titleholders do not possess the right to veto mining interests as they do on land granted under the ALRA, resulting in coercion by corporate interests (Cleary, 2014; Commonwealth of Australia, 2003). Moreover, despite the intention of native title legislation to establish exclusive rights to possession, occupation, use and enjoyment of traditional land for claimant groups, the Australian government has in some cases indicated a willingness to overturn these rights through compulsory acquisition of land granted under native title processes for the advancement of other interest groups, namely mining and industrial interests. This became evident during recent controversies over the proposed Adani Carmichael coal mine, wherein the Queensland government hinted at the prospect of compulsory acquisition should an agreement not be reached between native title holders and mining interests (Lyons, Brigg, & Quiggin, 2017, p.6). Such disregard for land rights conferred under native title legislation places severe doubt on the ability of the NTA to offer secure rights to self-determination and free, prior and informed consent over the development of traditional land and resources for Aboriginal peoples.

Additionally, there is a lack of institutional and resource support for the Registered Native Title Bodies Corporate, which limits their ability to assert native title rights and interests on behalf of successful claim groups (Godden & Cowell, 2016). As with land rights legislation, court-based native title determinations are a time- and resource-intensive process. One successful claim in New South Wales, for example, took 17 years to accomplish, and while 213 cases had succeeded in the courts by February 2014, 52 were rejected and 420 claims remained unresolved (Mara, 2014). As Justice Barker notes, the system of native title is “often characterized by formulaic approaches to dispute resolution, slowness and expense in arriving at outcomes; outcomes which sometimes are considered of limited or no utility by some Aboriginal peoples and frustrate other parties” (Barker, 2015).

Alternative Procedures under the NTA: Consent Determinations and Land Acquisition

Given the acknowledged limitations of court determinations, the NTA established alternative procedures for the establishment of native title, including consent determinations and land acquisition

programs. Under consent determinations, a claimant group can lodge their application for native title and have it referred to mediation between the parties impacted by the claim. Section 107 of the NTA established the National Native Title Tribunal (NNTT) as the mediating body for these native title claims; however, the Tribunal has no judiciary powers in the event that parties to the agreement cannot come to a resolution. If as a result of the mediation an agreement is reached regarding the existence of native title in an area and the extent to which those rights may be exercised alongside other interests, the court will give effect to the terms of the agreement, offering an alternative means for determining native title (Sheiner, 2001) (see Table 1).

An acknowledged benefit of this approach includes the greater level of nuance and detail a negotiated agreement affords to both Aboriginal peoples and other parties in establishing the extent of native title rights and how they will be carried out in practice (Sheiner, 2001). Consent determinations are also recognized as less time- and resource- intensive than court proceedings, offering hope for claimant groups to move long-standing claims to a more immediate resolution (Sheiner, 2001). However, the mediation process presents its own set of limitations and inefficiencies, and in some cases is inadequate to secure native title rights, as evidenced by the experience of the Yorta Yorta people of north-eastern Victoria and southern New South Wales (Atkinson, 2001).

As the first claimant group to attempt a native title determination through mediation in 1994, the Yorta Yorta people found that the burden of proof rested disproportionately upon themselves, with non-Indigenous parties to the mediation not being required to prove their identity or justify their own historical connection to the land. Due to the ambiguous definition of who constitutes a ‘party’ to a negotiated agreement, even individuals with limited interests in a defined region – such as short-term permit holders – are permitted to register, resulting in a burdensome mediation process that in the case of the Yorta Yorta claim required over twenty days of conferences to accommodate the more than 400 parties to the agreement. The Yorta Yorta faced a power imbalance, being comparatively outnumbered and under-resourced, and moreover were positioned as one in a series of ‘stakeholders’ with competing interests in the region, instead of being acknowledged as its traditional owners with ultimate decision-making power over its development (Atkinson, 2001). Despite the fact that mediation was supposed to provide an alternative recourse to the court system, the process only resulted in a stalemate that forced the Yorta Yorta to resort to court action, bringing into question whether mediation is in fact a viable alternative for securing native title (Atkinson, 2001).

Land acquisition programs have also been posited as an alternative mechanism for restoring land to its traditional owners outside of the court system. By purchasing property through the traditional market system, land acquisition programs secure for Aboriginal peoples the same exclusive property rights enjoyed by non-Indigenous landowners, while also enabling the restitution of land that was forcibly acquired from Aboriginal peoples and thereby disqualified from land rights claims and court-based native title determinations with their requirements of continuous connection. Under section 201 of the NTA, provisions were made for the establishment of an Indigenous Land Fund – currently known as the Land Account – which built up capital through appropriations from the federal budget over a period of 10 years, reaching a total of \$1.4 billion in 2004, after which point the fund was expected to become self-sustaining (Sullivan, 2009). The Indigenous Land Corporation (ILC), established in 1995, is an autonomous body responsible for its administration, with a directive to employ a yearly allocation of these funds in purchasing ‘alienated’ land unable to be claimed under native title legislation and divest it to Aboriginal groups, while also assisting with the management of these land purchases (Altman & Pollack, 2001). The ILC is governed by a Board of Directors with majority representation by Aboriginal peoples and has built into its mission the necessity of obtaining the informed consent of the

majority of landowners or native title claimants in an impacted region (Altman & Pollack, 2001; Lane, 2005). Proposals for land purchases may be made on cultural, social and economic development grounds, and are assessed based on connection to the land through custom and tradition, historical attachment to the land (including post-colonial events that resulted in dispossession), and contemporary significance (Altman & Pollack, 2001). This differentiates the ILC from land rights legislation and court determinations of native title, with their stringent and exclusionary requirements of proof of continuous connection to traditional land. Since its establishment in 1995, the ILC has purchased over 250 properties covering more than 6 million hectares in urban, rural, and remote regions of Australia, and 75% of them have since been divested to Indigenous organizations (Indigenous Land Corporation [ILC], 2018).

The organization's dual focus on property acquisition and management, while well-intentioned, has proven to be a cause for criticism. The emphasis of the ILC on longer-term management of acquisitions demonstrates a valid desire to promote a sustainable and holistic approach to restoring land to traditional owners. However, the failure of the initial legislation to clearly delineate the ILC's land management responsibilities vis-à-vis other agencies' initiatives has led to overlap and missed opportunities for multilateral partnership (Lane, 2005). Moreover, the organization has been criticized for shifting its focus more heavily to land management objectives in recent years, which it argues is due to "the increasing extent of the Indigenous estate, the increasing price of land in Australia, and more considered approaches to acquisition that take into account the capacity of the land and of future land holding bodies" (ILC, 2016, p. 5). As a result of this redirection, the ILC has decreased the volume of its land acquisition and divestment initiatives, therein deviating from its founding purpose and focusing instead on programs that promote employment, training, and education. While the resultant projects are well-meaning, such as the purchase of Ayers Rock Resort to create jobs for Aboriginal peoples in the tourism sector, the organization has faced criticism and frustrated its intended beneficiaries for having "strayed into commercially-oriented activities that distract the ILC from its core compensatory function" (Ernst & Young, 2014, p. 10; Sullivan, 2009). Insertion of the ILC into land management post-acquisition also diminishes the potential of such programs to promote self-determination by the communities to whom the land is intended to be divested.

Indeed, inclusive approaches to the management of traditional land are an important consideration; however, land acquisition and the subsequent divestment of these landholdings to Aboriginal peoples to enable self-determination must remain central to the ILC's mission. Without direct purchases of traditional land from private owners, it is unlikely that Aboriginal peoples will be able to attain ownership rights over 'alienated' property where native title is considered extinguished and land rights legislation does not apply. Land acquisition programs therefore fill a critical gap left by the legislative framework, and until the disparity in economic status between Indigenous and non-Indigenous peoples has been closed, government support of land acquisition programs is essential.

Alternative Procedures under the NTA: Indigenous Land Use Agreements (ILUAs)

Amendments to the NTA in 1998 established Indigenous Land Use Agreements (ILUAs) as the primary mechanism for achieving consent determinations of native title. ILUAs are voluntary but legally binding long-term agreements between native titleholders or claimants and other parties such as private landowners and government, farming, and extractive interests in a disputed region. ILUAs must be registered with the NNTT and unlike a contract under common law, ILUAs bind all native titleholders or claimants in the defined region, even those not involved in crafting the agreement

(Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund 2001; National Native Title Tribunal [NNTT], 2014). ILUAs can cover a wide range of native title issues, including “consent to future acts, compensation, protection of significant site and culture, [and] how native title rights and interests can be exercised alongside other interests” (NNTT, 2014, p. 1). In 2018, there were 1210 registered ILUAs covering large swathes of South Australia, Queensland and Western Australia; NSW has only sparse coverage, with Tasmania demonstrating none at all (NNTT, 2018) (see Table 1).

On the whole, ILUAs have been praised as an effective alternative model to litigation for securing native title rights because of their comparatively lower costs and quicker turnaround, as well as for the broadness of their scope. ILUAs typically take only 6 months to negotiate, compared to the decades often observed in court determinations of native title and they do not require stringent proof of continued connection to country to proceed (NNTT, 2014, p. 1; Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 2001; Australian Government, 2001). Furthermore, the fact that ILUAs cover such a broad range of topics expands their potential to bring tangible benefits to Aboriginal communities beyond what the court can offer. Court determinations of native title typically only extend as far as to acknowledge their existence, whereas ILUAs can delve into the specifics of how that native title will be carried out in practice alongside other interests (Howard-Wagner & Maguire, 2010).

For example, the Karajarri Traditional Lands Association (KTLA), a Registered Native Title Body Corporate representing the Karajarri people of Western Australia, was granted a consent determination of Native Title in 2002 that established exclusive possession of over 20,000 square kilometres of land as well as non-exclusive native title rights over an additional 6494 square kilometres (Edgar, 2011). The non-exclusive rights established in the ILUA include “the right to enter and remain on land, camp, take flora and fauna, access natural resources and water, engage in rituals and ceremony, and maintain and protect sites of significance” on land that is legally classified as unallocated Crown land, pastoral leases or reserves (Edgar, 2011, p. 59). In this case, the designation of an ILUA afforded the Karajarri people rights to access and use their traditional land without having to secure exclusive property rights or native title determinations through the largely ineffectual court system.

While it is evident that this flexibility is what makes ILUAs so attractive as a tool for securing access to and management of land for traditional owner groups, the potentially broad scope of these agreements also functions as a severe limitation. Despite the intention of ILUAs to provide an alternative to the time and resource intensive court process, the wide range of potential content of and parties to the agreements means their establishment is still a burdensome process for participants. Critics also note that the advent of ILUAs has not significantly decreased the volume of disputes or litigation surrounding native title (Howard-Wagner & Maguire, 2010). ILUAs are additionally recognized as a somewhat diluted form of native title determination, championing the co-existence of native title with other interests in a way that furthers Australia’s historical promotion of mining and industrial development against Aboriginal peoples’ land rights (Lyons, Brigg, & Quiggin, 2017). Critics of the ILUA negotiation process argue that the balance of power is skewed in favour of mining and industrial interests, and as a result the agreements act as another mechanism to facilitate the encroachment of the mining industry on Aboriginal peoples’ traditional land, instead of offering an opportunity for the advancement of their rights to self-determination and free, prior and informed consent (Lyons, Brigg, & Quiggin, 2017; Wangan & Jagalingou, 2017).

ILUAs do, however, have the potential to offer traditional owner groups the opportunity to benefit financially from other parties’ use of the land and its resources and to stipulate how that compensation

should be distributed, when structured appropriately. In Central Australia, for example, compensatory land use agreement payments are typically made to royalty associations that invest half of the funds on behalf of the people and distribute the remainder directly to native titleholders (Campbell & Hunt, 2012). More recently, these representative associations have begun to stipulate that a proportion of the payments flow to community development initiatives, such as educational, health and infrastructure projects (Campbell & Hunt, 2012). The Central Land Council's Community Development Unit, the identified disperser of these allocated funds for the region, endeavours to make use of these resources in conjunction with Aboriginal peoples' strengths, knowledge, and preferences to build programmes that align with community interests. This is in contrast to the typical top-down service provision model often imposed by Australian government bodies, arguably ineffectively, in the past (Campbell & Hunt, 2012). While this model of compensation targeted at social and economic development gives ILUAs the opportunity to offer more practical benefits to communities than simplistic court determinations of native title, the structure of royalty associations in maintaining decision-making power over the dispersal of compensation is problematic from the standpoint of the UNDRIP. In order for ILUAs to enable Aboriginal peoples to exercise their rights of self-determination and consent over the development of their land and resources, it is essential that these royalty associations undergo examination to ensure that they are under the jurisdiction of the Aboriginal peoples to whom the land belongs.

The binding nature of ILUAs over all native title claimants in a region over an indefinite period of time is perhaps one of the most concerning aspects of the agreements, representing a radical departure from traditional contract law, which is founded upon the notion that all parties are aware of and freely entering into the contract (Wangan & Jagalingou, 2017). While the purpose of this stipulation is ostensibly to provide security so that ILUAs are not continually challenged by additional native title claimants, this requirement skews the balance of power against Aboriginal peoples. Not only are non-Indigenous parties exempted from this sweeping clause, but the rights of traditional owners are moreover placed at the mercy of governing bodies, for the degree to which Aboriginal peoples' interests are represented in the final agreements is dependent upon how much effort authorities are willing to expend seeking out potential claimants. This imbalanced structure clearly calls into question Australia's commitment to the UNDRIP, with its championing of self-determination and the free, prior and informed consent of traditional owners regarding the development of their traditional land. The indefinitely binding nature of the agreement is also problematic, as the interests of Aboriginal peoples today are unlikely to be entirely representative of the interests of future generations, leading critics to propose that time limitations or requirements for future revisions should be included in the initial agreements (Howard-Wagner & Maguire, 2010). The fact that the establishment of an ILUA, where stipulated, has the power to extinguish native title is also of concern as it prohibits future generations of Aboriginal peoples from seeking recourse through native title legislation.

The process of ILUA negotiation and registration, including what constitutes the 'consent' of Aboriginal peoples who are party to the agreement, has come under intense scrutiny recently due to the large-scale coalmine proposed by Indian conglomerate, the Adani Group, in Wangan and Jagalingou (W&J) territory in Central Queensland. Construction of the mine by Adani necessitates extinguishment of native title in the defined area, which under the NTA requires the group to register an ILUA with the W&J. Demonstrating a concerning governmental disregard for native title legislation, the Queensland government granted several mining leases to the Adani Group in 2016 in advance of any ILUA being reached (Lyons, Brigg, & Quiggin, 2017; Davidson, 2017). In fact, according to the W&J Traditional Owners Council, although the 12 formal applicants were split on the issue, the claim group had voted down an ILUA with Adani both in 2012 and 2014, as well as demonstrating their rejection of proposed

deals with Adani through a third ‘self-determined’ meeting in 2016 in which they established that the construction of the mine would devastate their traditional lands and, as a result, their culture and identity (Lyons, Brigg, & Quiggin, 2017; Wangan & Jagalingou, 2017). Nonetheless, at an Adani-run meeting facilitated by the local Native Title Representative Body in April 2016, attendees voted 294-1 in favour of establishing an ILUA. Both third-party critics and members of the W&J who oppose the deal argue that this meeting was illegitimate, with many of the voters not demonstrating any relation to the clan and being unjustly compensated for their attendance at the meeting, leading the W&J Traditional Owners Council to contest the agreement in court (Lyons, Brigg, & Quiggin, 2017; Wangan & Jagalingou, 2017). The experience of the W&J people with the Adani ILUA not only exposes serious flaws in the ILUA negotiation process, but it also has implications for native title legislation more broadly.

In 2010, the court ruled in *QGC Pty Ltd v Bygrave* that an ILUA could be registered without the signatures of all Registered Native Title Claimants (RNTCs), provided that the majority of the clan or claim group had voted in support of the agreement.⁴ This decision set the precedent for ILUAs until it was overruled in February 2017 by the full Federal Court’s decision in *McGlade v Native Title Registrar [2017]*, which determined that an ‘area’ ILUA cannot be registered unless signed by all RNTCs who are ‘named applicants’ (Scott & Cuda, 2017).⁵ The *McGlade* decision was reported by the Australian Government and across mainstream media to introduce uncertainty into the native title system by throwing into doubt a series of ILUAs where applications had been made but were not yet officially registered. The outrage over this uncertainty stemmed not only from mining companies and pastoralists who feared disruption of commercial engagements dependant on the registration of ILUAs, but also from Aboriginal spokespersons such as Marcia Langton, who argued that the decision would be detrimental to the thousands of Aboriginal Australians whose livelihoods and native title aspirations depended on these agreements (Murphy, 2017).

While protecting native title rights conferred under an ILUA is of undeniable importance, it is also essential that the registered agreements adequately represent the rights and interests of the claimant group. The *McGlade* case emerged as a result of the refusal of several Noongar applicants to sign ILUAs that they did not believe represented their interests (Lyons, Brigg, & Quiggin, 2017; Davidson, 2017). Therefore, the decision of the full court that all RNTCs must be signatories to an ILUA offered native title applicants who felt disenfranchised by an ILUA or subject to poor process the opportunity to effectively veto these deals. W&J applicants opposed to the Adani deal took advantage of this court ruling to move to strike out the ILUA established at the “sham” meeting run by Adani in 2016 (Lyons, Brigg, & Quiggin, 2017). However, only 13 days after the *McGlade* decision, the *Native Title*

⁴ In pursuing a natural gas project on the registered native title land of the Iman people, QGC Pty Ltd signed an ILUA with the claimant group in order to secure their consent to future acts of development. The ILUA was signed by only eight of the nine registered applicants for the native title claim, leading the final applicant to dispute the validity of the agreement. In *QGC Pty Ltd v Bygrave (No 2) [2010] FCA 1019 (Bygrave)*, Justice Reeves ruled that an ILUA could be registered without the signatures of every registered claimant, provided that it was ‘properly authorized,’ meaning that the majority of the clan or claim group had voted in support of the agreement (Geritz & Aro, 2012; Reeves, 2010; Singleton & Audeyev, 2017).

⁵ The State of Western Australia sought to finalize the native title claims of the Noongar people by negotiating six ILUAs with the native title claimants and seeking to register them with the NNTT. The validity of four of the ILUAs were disputed by some of the registered claimants who refused to sign the agreements, resulting in the *McGlade v Native Title Registrar [2017]* case, which was heard by the Full Federal Court. The *McGlade* decision reversed the *Bygrave* ruling, arguing that the language of the NTA explicitly required that all RNTCs must be party to the agreement. The *McGlade* decision was specific to ‘area’ ILUAs, which are agreements between a native title group and other parties in areas where native title has not yet been determined.

Amendment (Indigenous Land Use Agreements) Bill 2017 was introduced to Parliament, passing into law in June of that year. The proposed amendments sought to reinstate the ‘status quo’ of the Bygrave decision, allowing majority support by claimants to be sufficient for registration of an ILUA. The intention of the Bill as stated in its explanatory memorandum is to “confirm the legal status and enforceability” of ILUAs that came into question under the McGlade ruling; however, critics of the legislation, including the W&J Family Council, contend that few ILUAs were jeopardized by the original decision and that in fact the true objective of the amendments was to advance the Adani project and facilitate mining and industrial interests in securing favourable ILUAs in the future, at the expense of the rights and interests of impacted Aboriginal peoples (Wangan & Jagalingou, 2017). Reintroducing the premise that partial support is sufficient to approve an ILUA has the potential to undermine traditional decision-making processes, exacerbate internal conflict, and promote the use of ‘divide and conquer’ tactics by mining and other interests to secure favourable outcomes at the expense of traditional owners’ right to free and informed consent (Wangan & Jagalingou, 2017). The acting government was moreover criticized, including by the Greens and the Australian Labor Party, for its failure to adequately consult and obtain the consent of Aboriginal peoples in crafting the Bill, in particular by imposing such an expedited timeline, which prohibited both consultation and thorough consideration of the impact of the McGlade decision on existing agreements (Tillett, 2017; Chang, 2017; Wangan & Jagalingou, 2017).

The UNDRIP, as ratified by the Australian government, champions the rights of Aboriginal peoples to free, prior and informed consent and to self-determination over the development of traditional land. Article 27 of the Declaration also demands that states “establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process... to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources” (United Nations, 2008). The experiences of both the Noongar and W&J peoples in negotiating ILUAs, as well as the limitations outlined above to both court and consent determinations of native title, would suggest that Australia’s current process for determining Aboriginal peoples’ land rights is insufficient to meet the standards of the UNDRIP. In fact, in his statement regarding the status of human rights in Australia in 2016, UN Special Rapporteur Michel Frost condemned the failure of the Australian government to meaningfully consult and cooperate with Aboriginal peoples and to protect their right to free, prior and informed consent under law, pinpointing the Adani project in particular for its demonstration of the advancement of the mining industry at the expense of Aboriginal peoples’ interests.

Supplemental Programming

This paper has focused thus far on the progress and limitations of land rights and native title legislation in affording Aboriginal peoples the opportunity to meaningfully exercise their rights to determine the development of their traditional land. This final segment shall shift the focus to programs outside of the aforementioned legislation that work towards similar goals, commencing with Regional Forest Agreements (RFAs), and continuing through Joint Management Agreements (JMAs), Indigenous Protected Areas (IPAs), and the Working on Country Program (WoC).

Regional Forest Agreements

Regional Forest Agreements (RFAs) are 20-year plans for the sustainable management and conservation of forest resources that emerged as a result of the National Forest Policy Statement (NFPS) of 1992. In response to decades of debate by commercial extractors, farmers, and

environmental lobbyists over use of and access to the 125 million hectares of Australian forest, 75% of which is publically owned, the NFPS outlined a participatory model of governance that, at least in theory, departed from the previously centralized decision-making approach (Lacey, Edwards & Lamont, 2016; Musselwhite & Herath, 2005). Between 1996 and 2001, 10 RFAs were signed in commercial timber-producing regions across Victoria, New South Wales, Western Australia and Tasmania (Lacey, Edwards & Lamont, 2016) (see Table 1).

The process of drawing up an RFA ostensibly involved an intensive evaluation of forest use and value from a scientific, economic, environmental and heritage perspective, with input being drawn from a variety of identified 'stakeholders' organized into advisory groups. Despite being the traditional owners and inhabitants of the land and possessing inherent rights to it, Aboriginal peoples were treated under this consultation process as merely one party in a collection of groups with competing interests in the land and its resources. This framework for consultation aligns with the Australian government's demonstrated preference for promoting the co-existence of Aboriginal peoples' land rights with other interests, which in the case of RFAs include timber and agricultural industry representatives, environmental lobbyists, and local community groups.

While RFAs are promoted as highly consultative and inclusive agreements, they have faced criticism for offering only symbolic opportunities for participation. Through working groups, public meetings, media releases, and submission of documentation for public commentary, the process of consultation for RFAs achieved an outward semblance of participation. However, critics have argued that timelines were too short to allow for real engagement, resources and approach varied regionally, and moreover there was no agreed-upon national guideline for social assessment, all of which resulted in an ineffective and limited consultation process (Lacey, Edwards & Lamont, 2016; Coakes, 1998; Musselwhite & Herath, 2005; Rangan & Lane, 2001).

For Aboriginal peoples in particular, involvement in decision-making was highly constrained. The crafting of RFAs offered little recognition of the rights afforded to Aboriginal peoples under the NTA, instead limiting the participation of traditional owners to the identification of sites of cultural value. Rather than acknowledging traditional owners' land claims and aspirations for economic benefit through compensation and employment opportunities, RFAs marginalized Aboriginal peoples by offering only symbolic acknowledgement of their interests (Musselwhite & Herath, 2015; Rangan & Lane, 2001).

Although RFAs claim to take local social, economic and cultural concerns into consideration, the actual process for valuing forest resources was highly quantitative and technical in nature, resulting in agreements that often overlook the needs and interests of impacted communities (Rangan & Lane, 2001). Moreover, while all identified stakeholders were included in the initial assessment phases, final decision-making was highly centralized and the resultant agreements established between state and federal governments are acknowledged to heavily promote the interests of powerful timber and agricultural lobby groups (Musselwhite & Herath, 2005; Rangan & Lane, 2001). This not only reflects the broader trend of marginalization of Aboriginal peoples' rights and interests in order to promote big industry, but also the continued failure of the Australian government to adequately consult and obtain the consent of Aboriginal peoples' whose traditional land is impacted by policy decisions.

As existing RFAs come into the final stages of their 20-year binding periods and discussions emerge regarding whether they should be renewed, it is essential that Aboriginal peoples are properly consulted and given agency in decision-making over their traditional land, particularly in areas where native title claims have been made. Going forward, RFAs may not be the most beneficial avenue for Aboriginal

Australians to pursue their land rights aspirations, as they present limited opportunities for inclusion and moreover do not offer a path towards exclusive ownership or self-determination, given that the very premise of RFAs implies inclusion of multiple competing interest groups in decision-making over forest resources.

Joint Management Agreements

The ALRA of 1976 included provisions for claims to be made over unalienated Crown land, on the condition that traditional owners could prove their ties to the land and that probable detriment to other parties was minimal. In cases where these strict requirements would have caused land claims to be rejected, joint management agreements, also known as co-management agreements, emerged as a creative solution (see Table 1).

The first instance of a joint management agreement occurred as a resolution to a pending land claim by the Bininj and Munggyu peoples over Crown land that now makes up part of Kakadu National Park (Ross et al., 2009). The land claim was likely to fail due to the probable detriment clause and thus an agreement was forged between the Northern Land Council, as a representative of traditional owners, and the federal government, to grant freehold title to the claimants on the condition that they lease it back to the government for a period of 99 years in which the property would be managed collaboratively (Ross et al., 2009). This type of leaseback agreement, which maintains substantial decision-making power in the hands of the government and limits the ability of Aboriginal peoples to exercise self-determination, is typical of joint management agreements today; however, there are alternatives to this approach. For example, the first case of a joint management agreement between a state-level government body and a traditional owner group resulted in the formation of Garig Gunak Barlu (formerly Gurig) National Park, and under this agreement traditional owners maintained the title to the land (Ross et al., 2009). The degree to which joint management agreements include Aboriginal peoples in the management of traditional land has changed over time and continues to vary based on their proportional representation on management boards and relative position of power, as well as geographical differences in land rights legislation. Upon its foundation in 1979, for example, Kakadu National Park faced substantial criticism for its lack of a management board but has since evolved to maintain a board with majority representation by traditional owners (Haynes, 2017).

For the most part, joint management agreements are considered an improvement upon the historical approach of sole management by federal and state government bodies, which was standard prior to the rise of land rights legislation in the 1970s. They also offer a positive outcome to land claim disputes that may otherwise have resulted in the outright rejection of claims and thus furthered the dispossession of Aboriginal claimants. A case study of two joint management agreements – Nitmiluk National Park in the Northern Territory and Booderee National Park in south-eastern Australia – in which freehold title was leased back to the state and federal governments, respectively, found that traditional owners experienced concrete economic benefits as a result of the arrangements, through training programs for the provision of park services and through the growth of a tourism industry (Bauman & Smyth, 2007).

Nonetheless, there are some key limitations to the current structure of joint management agreements, the resolution of which would enhance their inclusivity of Aboriginal peoples in the management of country. One of the primary criticisms of joint management agreements is that they exhibit an asymmetrical power balance (Bauman & Smyth, 2007). In order to secure ownership rights to traditional territory via the land claims process, Aboriginal peoples are often faced with limited options outside of partaking in joint management agreements that stipulate leasebacks, establish protected area status over the land, and insert government officials into the land management process. Instead of

securing both ownership and managerial rights to the land, as would be afforded under a successful land rights claim, joint management agreements require traditional owners to concede some of their decision-making authority in order to obtain ownership rights. Such concessions are not in the spirit of the UNDRIP, and moreover suggest a degree of coercion and paternalism. In order to ensure that joint management agreements offer positive pathways to resolving land rights claims, it is necessary to assess the structure of each agreement from the perspective of the degree of self-determination it affords participating Aboriginal peoples. It is also essential that the limitations of land rights legislation be examined and resolved, so that traditional owners are not forced into joint management agreements as a less comprehensive mechanism for achieving ownership rights.

Indigenous Protected Areas (IPAs)

The Indigenous Protected Area (IPA) program initiative was established in 1997 as a result of the Australian government's commitment to establishing a National Reserve System (NRS) that would protect biodiversity by ensuring different bioregions were represented in the nation's protected area network (Szabo & Smyth, 2003; Ross et al., 2009). Successful native title determinations were increasing at the time, along with concerns that the interests of Aboriginal peoples were inadequately represented in national park management (Gilligan, 2006). Land owned by Aboriginal peoples moreover dominated key bioregions missing from the reserve system, and thus the IPA initiative was formed as a means of securing protected area status for these important territories without undermining advances in Aboriginal peoples' ownership and control over traditional land (Szabo & Smyth, 2003) (see Table 1). Over 70 IPAs have been declared to date, encompassing 65 million hectares and making up over 40% of Australia's NRS (Australian Government Department of the Environment, 2018).

Indigenous Protected Areas (IPAs) differ from joint management agreements primarily in the higher degree of agency they afford to Aboriginal peoples in their initial formation. Unlike joint management agreements in which the attainment of ownership rights through the land claim process is contingent upon the declaration of protected area status and an agreement to allow government involvement in management, IPAs are "owned, declared and managed by Indigenous communities and organizations, with varying levels of government support" (Bauman & Smyth, 2007, p. 5). IPAs can be established on a variety of tenures, from freehold property obtained through land rights legislation and acquisition programs to native title land (Ross et al., 2009). Once a tract of land is volunteered and confirmed as an IPA, the property becomes part of the NRS and is eligible for federal funding through the National Landcare Programme (NLP). This federal resource makes up the bulk of the IPA budget; however, partnerships with the Indigenous Land Corporation and nonprofits such as the Nature Conservancy have supplemented these funds substantially, making the program a promising collaborative approach (Gilligan, 2006). In fact, the opportunities IPAs open up for "multiple bilateral and multilateral partnerships" in research, management, financial and advisory capacities are arguably some of the program's key strengths and a further point of differentiation from the typical bilateral partnership approach of joint management agreements (Bauman & Smyth, 2009, p. xi).

Part of the allocation of funds is directed towards the planning phase of IPAs, which involves "extensive consultation" with traditional owners to facilitate the incorporation of Traditional Ecological Knowledge (TEK) along with contemporary conservation science in the management of natural resources (Godden et al., 2016). This consultative approach aims to complement biodiversity and natural resource preservation goals with "benefits in health, education, employment and social cohesion for indigenous people" and has been praised for offering "great flexibility" to traditional owner groups (Australian Government Department of the Prime Minister and Cabinet, 2015; Ross et al., 2009, p.

246). The incorporation of TEK in management of traditional land is critical from an inclusivity perspective, both because it allows Aboriginal peoples to carry on cultural traditions of caring for country on their own terms and because the education of younger generations about their heritage has been shown to enhance social cohesion and connection to traditional land (Gilligan, 2006; Australian Government, 2015). Interviews conducted in 2011 with IPA program staff and members of participating communities emphasized in particular the benefits of IPAs in offering opportunities to care for country in their “own way” (Smyth, 2011, p. 10). Reported outcomes included that it brought communities back together, reconnected them with country, and provided participants with a sense of freedom (Smyth, 2011).

Interviewees also reported that the implementation of IPA programs improved mental and physical health, increased school attendance, and reduced crime rates (Smyth, 2011). A 2006 commissioned review of the program additionally found that 95% of IPA communities reported economic participation and development benefits, 74% noted a reduction in substance abuse, and 74% reported that participation in IPA work contributed to more functional families “by restoring relationships and reinforcing family and community structures” (Gilligan, 2006, p. 4). These positive outcomes highlight the potential for inclusive approaches to land ownership and management to contribute to the goals of the Closing the Gap initiative.

Despite these documented gains in health and income status, however, the program has been criticized for its lack of continued funding post-establishment, which limits the long-term success of these and other conservation outcomes (Ross et al., 2009; Smyth, 2011). Additionally, participants reported the difficulty of balancing Aboriginal peoples’ aspirations in caring for country with government priorities, suggesting that the degree of self-determination afforded to traditional owners is somewhat inhibited by the government’s broader agenda in funding the management of these properties through the NRS (Smyth, 2011).

The Working on Country (WoC) Program

An essential component of the IPA program that drives socioeconomic benefits for participants is the engagement of Aboriginal community members in voluntary or paid land management work, the most prominent example of this being the federally-funded Working on Country (WoC) program (Table 1). WoC was established in 2007 as part of the Closing the Gap initiative to reduce Aboriginal peoples’ disadvantage in the areas of life expectancy, child mortality, education and unemployment (Caring for our Country, 2013, p. 38). The program seeks to link job creation objectives with Aboriginal peoples’ aspirations to receive compensation for the work they are already doing in caring for country, while simultaneously working towards Australia’s environmental protection goals by funding what now amounts to 777 full-time equivalent ranger positions for Aboriginal Australians (Mackie & Meacheam, 2016; Smyth, 2011; Australian Government Department of the Prime Minister and Cabinet, 2018).

Through consultation with traditional owners and other Aboriginal stakeholders, WoC programs incorporate TEK along with Western conservation science to establish tailored ranger programs that take into consideration local needs and aspirations. The identified outcomes of these WoC programs typically extend beyond mere resource management to include cultural preservation and educational activities (Urbis, 2012). Aboriginal peoples are included both in the planning and implementation phases of the projects, resulting in land management structures characterized by an “unusually high level of delegation of authority on project decisions” (Mackie & Meacheam, 2016). The WoC initiative thus exemplifies the potential for mutual benefit from land management approaches that place more decision-making authority in the hands of Aboriginal peoples, as the handover of project

implementation and staffing responsibilities to Aboriginal communities reduces implementation risks to the government while simultaneously affording participants a sense of “ownership and responsibility” (Mackie & Meacheam, 2016).

One key strength of WoC programs is the flexibility of land tenure types upon which they can be established, with 50% of rangers working on IPAs while the remainder are spread across a variety of federal and state managed park services as well as land owned outright by Aboriginal peoples (Australian Government, 2015; May, 2010). They thus offer a promising solution to the inclusion of Aboriginal peoples in decision-making over traditional land regardless of the underlying legal ownership structure.

The benefits of WoC extend beyond their structural inclusivity; the approach has met with widespread approbation largely because of its success in securing tangible economic, social, and health outcomes for Aboriginal peoples (Mackie & Meacheam, 2016; Urbis, 2012; Smyth, 2011). The creation of ranger positions has provided meaningful and long-term employment opportunities and raised the median gross income of rangers above that of non-Indigenous Australians, while indirectly benefiting the service industries of participating communities (Allen Consulting Group, 2011; Mackie & Meacheam, 2016). Both the enhanced job prospects and championing of TEK have been noted to increase social cohesion within the family unit and the broader community, and they moreover provide opportunities to begin bridging the disconnection from country that emerged as a result of colonial dispossession and relocation (Smyth, 2011; Urbis, 2012).

As with other land ownership and management initiatives reviewed herein, the WoC program exhibits opportunities for improvement. Establishing a sustainable source of funding is considered of particular concern, with critics suggesting that pursuing commercial operations – such as tourism, pest control and the sustainable use of wildlife – and seeking funding from additional public sector sources in support of the education, training, governance and capital infrastructure components of programming could help to secure the program’s longevity (Urbis, 2012; May, 2010). Career development for rangers has also been noted as a point of potential improvement, as well as the necessity for simultaneous investment in local housing and transportation infrastructure (Urbis, 2012; Smyth, 2011). Aboriginal representatives also recommend that investment in ongoing participatory planning beyond the initial establishment of WoC programs would enhance the success of the initiative by ensuring that Aboriginal peoples are continually consulted and afforded the opportunity to give their consent (Smyth, 2011). While there remains room for improvement, the WoC program seems a promising candidate for expansion given its existing support base amongst politicians and traditional owner groups as well as its transferability across different land ownership and management regimes.

Table 1: Background of Land Rights Legislations in Australia

| Name of Initiative [Date Est.] | Origins | Key Characteristics | Proof Required | Self-determination |
|---|---|--|---|---|
| Aboriginal Land Rights (Northern Territory) Act (ALRA) [1976] | National legislation that emerged after South Australia had passed a similar Act in 1966 (Aboriginal Lands Trust Act). Prime Minister Gough Whitlam sought to establish a legal precedent for Aboriginal land rights in the Commonwealth-controlled Northern Territory. | <ul style="list-style-type: none"> - First statutory land rights regime for Aboriginal Australians - Handed over reserve land and included provisions for claims over 'unalienated Crown land' - Land Trusts elected primarily by Aboriginal communities hold granted land on their behalf; Aboriginal Land Councils make decisions regarding its use | Requires proof of continuous connection to the land and management of probable detriment | Self-determination depends upon degree of Aboriginal peoples' representation on Councils and relative position of power. Land grant process excludes communities who were forcibly expelled from traditional land since colonization. Granted land not equivalent to property rights held by non-Indigenous Australians; vulnerable to government acquisition. |
| Native Title Act (NTA) [1993] | Arose as a result of High Court's Mabo Decision (1992), which recognized prior occupation of Aboriginal peoples and challenged the concept of <i>terra nullius</i> in common law. | <ul style="list-style-type: none"> - Acknowledges pre-existing rights embedded in traditional Aboriginal laws and customs, which the Crown is subject to - Provides for claims to be made over 'unalienated' land - Native Title Bodies Corporate are entities responsible for holding or managing native title rights and interests on behalf of the native title claim group | Requires proof of continuous connection to the land | Native title claim process excludes communities who were forcibly expelled from traditional land since colonization. Native title does not challenge the Crown's fundamental sovereignty, as it can be surrendered to the Crown and will be extinguished if a community becomes extinct or moves from defined territory. Granted land not equivalent to property rights held by non-Indigenous Australians; vulnerable to government acquisition. |
| Consent Determinations [1993] | Section 107 of the NTA (1993) established consent determinations as an alternate mechanism to grant native title. | <ul style="list-style-type: none"> - Claimant groups can have their application referred to mediation between parties impacted by the claim - If an agreement is reached by parties regarding the existence and extent of native title rights, the court will give effect to the terms of the agreement - The National Native Title Tribunal is the mediating body, but lacks judicial power over the resolution | Although proof of continuous occupancy is not explicitly required, the burden of proof rests more heavily on Aboriginal peoples than non-Indigenous Australians to justify heritage and connection to the land | Native title claimants portrayed as a 'stakeholder' instead of ultimate decision-maker. Burden of proof rests unreasonably on claimants. |
| Land Acquisition Programs [1993] | Section 201 of the NTA (1993) established the Indigenous Land Fund as a mechanism for building up funds to purchase land on behalf of Aboriginal peoples | <ul style="list-style-type: none"> - The Indigenous Land Fund (now Land Account) built up \$1.4bn in appropriations from the federal budget to become a self-sustaining fund - The Indigenous Land Corporation (ILC) administers the fund and employs it to purchase 'alienated' land on behalf of Aboriginal peoples - Purchased land is then divested to Aboriginal groups, with the ILC continuing to be involved in land management | Proposals assessed based on traditional connection to land (pre-colonial customs and traditions), historical attachment (including post-colonial events that resulted in dispossession), and contemporary significance, thereby filling a crucial gap left by initiatives that require proof of continuous occupancy or use | Potential to offer recourse to Aboriginal peoples who cannot claim land through native title or land rights legislation due to requirement of continuous occupation. Purchased land, once divested, affords exclusive property rights; however, the ILC has begun participating more in management, introducing potential to impinge on self-determination. |

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| Indigenous Land Use Agreements (ILUAs) [1998] | Amendments to the NTA in 1998 established ILUAs as the primary mechanism for securing consent determinations of native title | <ul style="list-style-type: none"> - Voluntary, legally-binding, long-term agreements between native title claimants and other parties in a disputed region - Quicker turnaround, more flexibility and broader scope (ownership and usage rights) than court determinations - All Aboriginal peoples in a defined region bound by the agreement; however, only majority approval is required to form an ILUA | Proof of continuous occupancy is not required; parties must agree to the existence and extent of native title rights to the land | ILUAs champion co-existence of native title rights with other interests, limiting Aboriginal peoples' decision-making authority. Power arguably skewed in favour of mining and industrial interests. Extent of Aboriginal peoples' rights to consent and self-determination in formation of agreements is questionable, especially in light of Adani disputes, and land is vulnerable to government acquisition. |
| Regional Forest Agreements (RFAs) [1992] | Emerged as a result of the National Forest Policy Statement of 1992 | <ul style="list-style-type: none"> - 20-year plans for sustainable management and conservation of forest resources - Involve an intensive evaluation of forest value; however, biased towards agricultural and extractive interests; social and cultural value largely overlooked | Proof of continuous occupancy is not required as native title rights are not considered in agreement formation | Aboriginal peoples included as a 'stakeholder' during consultative period prior to establishment. Inclusion symbolic only; input restricted to identifying sites of cultural importance. |
| Joint Management Agreements (JMAs) [1979] | Formed for the first time in 1979 as the resolution to a pending land claim made under the ALRA | <ul style="list-style-type: none"> - Typically, Government body grants native title claimants freehold title on the condition that land is leased back to the government and jointly managed - Regarded as largely positive outcomes to land claims that would likely be rejected due to probable detriment clause | Continuous connection to land has not been 'proven' as land claims are still pending; JMAs are formed as a resolution to these pending claims | Leaseback structure maintains substantial power in Government's hands; Aboriginal peoples forced to concede some managerial rights to obtain ownership rights. Degree of self-determination dependent on representation on managerial boards and relative position of power. |
| Indigenous Protected Areas (IPAs) [1997] | Established to further government's commitment to the National Reserve System (NRS) without compromising Aboriginal peoples' aspirations to own and manage traditional land | <ul style="list-style-type: none"> - IPAs are voluntarily declared by Aboriginal peoples and can be formed on a variety of land tenures, including freehold property and native title land - Once confirmed, land becomes part of NRS and eligible for federal funding - Seek to combine Traditional Ecological Knowledge (TEK) and social, cultural and economic aspirations of Aboriginal peoples with biodiversity goals - Balancing Aboriginal peoples' and government's priorities challenging | Variety of land tenures accepted, therefore no proof of continuous occupancy required; in some cases already proven as a means of obtaining native title property that is being declared | Aboriginal peoples voluntarily declare IPAs and participate in management through ranger programs such as WoC and consultation regarding TEK. However, simultaneous focus on biodiversity can counter Aboriginal peoples aspirations. |
| Working on Country (WoC) [2007] | Established as part of the Closing the Gap initiative to reduce Aboriginal peoples' disadvantage in areas of life expectancy, education and unemployment | <ul style="list-style-type: none"> - Funds 777 full-time equivalent ranger positions for Aboriginal Australians - Seeks to link environmental protection goals with job creation objectives and Aboriginal peoples' aspirations to be compensated for their work in caring for country - Ranger programs are tailored to incorporate TEK and local needs and aspirations, e.g. cultural preservation and education - Regarded to provide meaningful, long-term employment opportunities, with indirect benefits to broader communities | Implemented on a variety of land tenures, therefore no proof of continuous occupancy required; in some cases already proven in the process of obtaining native title/ALRA-granted land where WoC takes place | Aboriginal peoples involved in planning and implementing phases, both in incorporating TEK and, in many cases, delegation of authority on land management decisions. |

Conclusion

Despite being instrumental in crafting the UNDRIP and promoting the inclusion of language relating to self-determination, Australia chose to vote against the declaration in 2007. This decision is recognized to have emerged out of a fear that the agreement would encourage veto rights for Aboriginal peoples against the development of traditional land for mining and industrial purposes (Lyons, Brigg, & Quiggin, 2017). Although Australia later ratified the agreement, recognizing it as an “aspirational document” without binding authority over policy-making decisions, the government’s initial aversion to promoting veto rights exposes a bias towards mining and industrial interests and an apparent disregard for Aboriginal peoples’ rights to consent and self-determination (Dorfmann, 2015). These biases have implications for legislation surrounding Aboriginal peoples’ land rights, as well as for supplementary programs aimed at including traditional owners in land management.

Specifically, the legislation and initiatives explored in this paper demonstrate a limited understanding of consent and consultation, while also illuminating the government’s clear preference for promoting the coexistence of Aboriginal peoples’ land rights with other interests and their desire to maintain a level of involvement in decision-making over traditional land. This is evident in the ALRA’s stipulation that land claims may only be approved where probable detriment to other parties is minimal, as well as in the joint management agreements formed as resolutions to pending claims, wherein Aboriginal peoples are required to collaborate with the government in decision-making over their ancestral land in order to secure ownership rights. Although IPAs are ostensibly consensual in their formation, in practice they promote a balance between Aboriginal peoples’ interests and conservationist and biological concerns, which does not necessitate a trade-off but nonetheless inserts government priorities into development decisions regarding traditional land and resources. RFAs not only fail to obtain the consent of Aboriginal peoples in their formation, but their supposedly consultative process additionally neglects to incorporate traditional owners’ socioeconomic and land rights aspirations, instead championing timber and agricultural interests while maintaining purely cultural and symbolic reference to Aboriginal peoples’ rights. Even the WoC program, which promotes self-determination and consultation more than most initiatives, presents opportunities for improvement in the inclusion of Aboriginal peoples in decision-making throughout the course of implementation. Amendments to native title legislation regarding the requirements for consent in ILUA formation following the McGlade decision further demonstrate the government’s unwillingness to permit veto rights for Aboriginal peoples, where those rights are seen to jeopardize mining and industrial interests.

In order to afford Aboriginal peoples, the appropriate avenues for exercising their rights as enshrined in the UNDRIP, it is essential that Australia move beyond its currently limited approach to consultation. This will require re-examining native title and land rights legislation, as well as programs such as RFAs, JMAs, IPAs and the WoC program, to ensure that each initiative provides Aboriginal peoples with the opportunity to give or withhold their consent, even where this has the potential to adversely impact other interest groups. In particular, Australia must recognize its bias towards mining and industrial interests and work to resolve that preference where it impedes upon Aboriginal peoples’ ability to exercise their rights. In order to overcome a historical trajectory of oppression, dispossession and coercive paternalism, the Australian government must hold true to its earlier promise of advocating for self-determination and abstain from intervening in Aboriginal peoples’ decision-making over their traditional land and resources. Both native title and land rights legislation must be amended to support this objective by conferring land rights to Aboriginal peoples that are equivalent in status to those experienced by non-Indigenous Australians. Furthermore, the unjust denial of native title and land

rights claims over territory that was forcibly acquired under colonization must be remedied; at a minimum, Aboriginal peoples should be compensated where restitution of the land is not possible in order for Australia to comply with the provisions of the UNDRIP.

Evidently, Australia's current legislative framework does not afford Aboriginal peoples the opportunity to fully exercise their rights to self-determination and free, prior and informed consent regarding all acts of development on traditional land. Without significant redirection, it is unlikely that the goals of the Closing the Gap initiative – which seeks to eliminate disparities between the health and income status of Aboriginal versus non-Indigenous Australians – will be achieved. Nonetheless, Australia has made significant progress in recent decades towards recognizing and protecting Aboriginal peoples' land rights, both in ratifying the UNDRIP and in advancing legislation and programming that seek in some capacity to promote ownership rights and inclusion in decision-making. While such efforts certainly cannot repair the trauma of the past, there remains hope that Australia can at least begin to mend the injustices of the present. On that note, it seems appropriate to reflect on the words of late Australian Prime Minister, Gough Whitlam, during his speech at the Gurindji Land Ceremony in which he symbolically handed over the title to the land by pouring sand into the hands of Gurindji leader and land rights activist Vincent Lingiari.

On this great day, I, Prime Minister of Australia, speak to you on behalf of all Australian people – all those who honor and love this land we live in. For them I want to say to you:

... I want to acknowledge that we Australians have still much to do to redress the injustice and oppression that has for so long been the loss of Black Australians.

... I want to promise that, through their Government, the people of Australia will help you in your plans to use this land fruitfully for the Gurindji.

... Vincent Lingiari, I solemnly hand to you these deeds as proof, in Australian law, that these lands belong to the Gurindji people and I put into your hands part of the earth itself as a sign that this land will be the possession of you and your children forever. (Gough Whitlam, Gurindji Land Ceremony Speech, August 16th 1975)

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