

# INDIGENOUS LAND TENURE REFORM, SELF-DETERMINATION, AND ECONOMIC DEVELOPMENT: COMPARING CANADA AND AUSTRALIA

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## ABSTRACT

*In the last two decades, both the Australian and Canadian governments have introduced reforms to Indigenous land tenure. This article compares the most significant reform from each country: the First Nations Land Management Act in Canada and township leasing in Australia. The Canadian reforms demonstrate the potential for effective reform and Indigenous-led decision making, while the comparison with Australia highlights problems with the township leasing model and the process that led to its introduction.*

## I INTRODUCTION

There is a long history of scholars comparing way in which Indigenous claims to land have been dealt with in Canada and Australia.<sup>1</sup> This article continues that tradition with respect to a more recent development: in both countries, governments have made changes to tenure arrangements on Indigenous land with the aim of improving opportunities for economic development. The key reform in Canada has been the *First Nations Land Management Act* ('*FNLMA*'),<sup>2</sup> which allows First Nations to opt out of parts of the *Indian Act*<sup>3</sup> and adopt their own, customized land codes.<sup>4</sup> Since its enactment in 1999, 72 First Nations have used the *FNLMA* to enact their own codes and a further 130 are either in the process of doing so or have confirmed an interest.<sup>5</sup> With some reservations, the Act is 'widely regarded as a success story, both in taking

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<sup>1</sup> See, for example, Kent McNeil, 'Co-Existence of Indigenous Rights and Other Interests in Land in Australia and Canada' (1997) 3 *Canadian Native Law Reporter* 1; Kent McNeil, 'The Vulnerability of Indigenous Land Rights in Australia and Canada' (2004) 42 *Osgoode Hall Law Journal* 271; Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008); P.G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011).

<sup>2</sup> SC 1999.

<sup>3</sup> SC 1876.

<sup>4</sup> It is described below how the Act also enables First Nations to create their own environmental assessment procedures. The focus of this paper is on land tenure regimes.

<sup>5</sup> First Nations Land Advisory Board, '2016-2017 Annual Report' (2017) 4. A total of 205 First Nations are participating or have confirmed an interest.

back governance authority from the federal government and in facilitating economic development'.<sup>6</sup> During a similar period, the Australian government has also devoted considerable resources to Indigenous land tenure reform. Its flagship reform has been the introduction of township leasing in communities on Aboriginal land in the Northern Territory [why is this relevant? References?], which has been more controversial and less successful than the *FNLMA*. This article compares township leasing with the *FNLMA* so as to consider what Australia might learn from the Canadian experience.

The comparison provided below reveals three striking differences. First, in Canada the government's role in the reform process has been more responsive and less directive. The *FNLMA* implements an agreement that was made between the federal government and a group of First Nations in the 1990s.<sup>7</sup> Two Indigenous-run organisations were created to oversee the introduction of the reforms and to provide support and training to those First Nations that wish to join the scheme. In Australia, township leasing was designed and implemented by the federal government. To overcome resistance to the reforms, the government has offered financial incentives to communities that participate. It was only after resistance persisted for a decade that the government agreed to alter key aspects of its reform model. Whereas the approach in Canada has been of one of agreement making leading to legislation, the approach in Australia has been of government-led reform, resistance and compromise.

The second distinction is with respect to the approach the reforms take to self-management. Care must be taken here, as the starting point in each case is different. The *Indian Act* has for more than a century imposed paternalistic restrictions on dealings with reserve land. The *FNLMA* removes part of that paternalistic regime and gives greater autonomy to First Nations. Initially, township leasing had the opposite effect: the grant of a township lease resulted in legal control over community land passing from the Aboriginal landowners to a government body. The amendments referred to earlier, which were introduced in 2015, mean that it is now possible for a township lease to be held by a local Aboriginal organization. The shift is significant but not complete, and it remains the case that township leases give governments a greater role in decision making over Aboriginal land.

The third distinction is with respect to the prescriptiveness of outcomes. The *FNLMA* streamlines procedures for the grant of formal rights (such as leases and

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<sup>6</sup> Malcolm Lavoie and Moira Lavoie, 'Land Regime Choice in Close-Knit Communities: The Case of the First Nations Land Management Act' (2017) 54(2) *Osgoode Hall Law Journal* 559-607, 561. Some of the reservations identified in the literature are considered by the authors at note 4 on page 562. The two key concerns are the costs to First Nations of implementing the regime and their increased exposure to liability.

<sup>7</sup> The Framework Agreement on First Nations Land Management (1996), which is described in further detail below.

certificates of possession) over reserve land, but leaves it to each band council to decide if and when such grants occur. Township leasing instead implements a wholesale shift, whereby formal property rights are effectively made compulsory. All occupiers are required to obtain a sublease. Underlying all three of these distinctions is a clear difference in the approach that has been taken to local autonomy, Indigenous self-determination and the role of centralized governments.

The comparison between the *FNLMA* and township leasing highlights significant flaws in the way that the Australian government has gone about the introduction of land tenure reform. Its approach has been heavy handed and prescriptive, putting Aboriginal organisations in the position of having to respond and resist, and making it more difficult for them to engage in the sort of Indigenous-led decision making that has taken place in Canada. This curtails possibilities and undermines leadership. It also puts greater pressure on the government to address issues in Indigenous communities, while making it harder for Indigenous communities and organisations to do so themselves. It is too late to change what has happened. However, the persistence of government-led approaches to reform over the last decade suggests that the Australian government must look more carefully at its reform culture and reflect on the way it approaches its role in the development of Indigenous policy.

More positively, the comparison identifies the potential for Australia to adopt new approaches to supporting local Indigenous capacity. Rather than reflexively imposing government control, it is possible to implement approaches such as resourcing region-wide Indigenous bodies to provide the support and expertise that local communities require.

#### A *Overview and Scope of the Article*

Comparative research is only useful to the extent that the comparisons it makes are meaningful. When comparing legal reforms, this means accounting for any significant differences in the setting for the reforms. To enable an informed comparison, Part II of the article describes existing arrangements for Indigenous land ownership in each country, and sets out earlier practices with respect to land use. It emerges that Canada has a longer history of granting rights to individuals and families over Indigenous land, and that leases have been more widespread despite notably higher transaction costs, although there is considerable variation between First Nations. The section concludes with a discussion of the significance of those differences for the introduction of land tenure reform.

Part III then describes township leasing and the *FNLMA*: how each reform was introduced, what they do, and the available evidence as to their impact. Part IV identifies the key differences between the two reforms, and Part V concludes with a discussion of what the reforms reflect about the nature of the political compact in each country and the implications of this for policy development in Australia.

It has been noted that the introduction of tenure reform in communities on Indigenous land involves three, inter-related issues: to whom rights are granted, upon what terms, and who controls the process.<sup>8</sup> The focus of this article is on the all-important question of who controls the process, which is the point upon which both township leasing and the *FNLMA* operate. While it would no doubt be valuable, it is not possible here to comprehensively address the approach that has been taken in each country to the selection of grantees or the terms of grants, as it would require empirical study beyond what the existing research provides.<sup>9</sup>

## II OVERVIEW OF INDIGENOUS LAND IN EACH COUNTRY

### A *Indigenous Land Rights in Australia*

#### 1 *Statutory Land Rights*

The recognition of Indigenous land rights in Australia is a recent development. When British colonisation began in 1788, the prior ownership rights of Indigenous peoples were not acknowledged. There were no land purchases,<sup>10</sup> no agreements, and no treaties; simply an assumption of ownership by the British Crown. This non-recognition of Indigenous rights, often referred to as the doctrine of *terra nullius*, was the approach that prevailed until at least the 1960s. Colonial governments, and later

<sup>8</sup> Leon Terrill, *Beyond Communal and Individual Ownership: Indigenous Land Reform in Australia* (Routledge, 2016) 260-2.

<sup>9</sup> In Canada, several authors have described the characteristics of certificates of possession: see, eg, Christopher Alcantara, 'Individual Property Rights on Canadian Indian Reserves: The Historical Emergence and Jurisprudence of Certificates of Possession' (2003) 23 *The Canadian Journal of Native Studies* 391. No studies could be found on the terms of leases granted over First Nations land. More recently, Lavoie and Lavoie have studied the extent to which schemes enacted under the *FNLMA* impose restrictions or consent requirements for the transfer of interests within the band and to outsiders: Lavoie and Lavoie, above n 6. In Australia, the terms of subleases granted under township leases in the Northern Territory have been described in broad terms: Leon Terrill, 'Township Leases and Economic Development in Northern Territory Aboriginal Communities' (2017) 43(2) *Monash University Law Review* 463. There are no published studies from other jurisdictions or outside of township leases.

<sup>10</sup> In 1835, a settler by the name of John Batman purported to buy an area of land off a group of Wurundjeri men in what is now the city of Melbourne. Reflecting the mindset of that time, the Governor of the colony issued a proclamation declaring that all such agreements were invalid: not because they might be considered suspect or unfair, or because the Crown had a right of pre-emption, but because the Crown already claimed ownership. A copy of the proclamation can be found at: Australasian Legal Information Institute, *Proclamation of Governor Bourke, 26 August 1835 (Approved by the Colonial Office and Sent to the Governor on 10 October 1835)* <<http://www.austlii.edu.au/au/other/IndigLRes/1835/1.html>>.

state and territory governments, did set aside small areas of land as reserves for Indigenous groups, but this conveyed no ownership or political rights. The land was treated as belonging to the Crown, which had unfettered authority to convert it to another use should they wish to, and was under no legal obligation to consult with or consider the interests of Indigenous residents. The relocation and closure of reserves was commonplace.<sup>11</sup>

Change came about in two ways. The first was that, beginning in 1966, most Australian parliaments came to pass legislation granting land rights to Indigenous groups in some areas.<sup>12</sup> These are known as ‘statutory land rights’. In legal terms, statutory land rights are the conferral of a benefit by parliaments rather than a recognition of prior ownership. The first statutory scheme was the *Aboriginal Lands Trust Act 1966* (SA).<sup>13</sup> While progressive at the time, it was a relatively modest scheme in that it merely converted existing Aboriginal reserves in South Australia to Aboriginal ownership through a state-wide trust.<sup>14</sup> A more ambitious scheme was enacted by the federal government a decade later. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (‘ALRA’) transferred existing reserves to Aboriginal ownership, but also created a mechanism under which vacant Crown land could be claimed by those people who could demonstrate that they were the ‘traditional Aboriginal owners’.<sup>15</sup> As a result, today nearly half of the Northern Territory is Aboriginal land under the ALRA.

The ALRA is federal legislation applying only to the Northern Territory and it was originally thought possible that the federal government might go on to create a nation-wide land rights scheme. In 1985, Prime Minister Bob Hawke went as far as releasing a ‘Preferred National Land Rights Model’<sup>16</sup> for discussion, however state governments – particularly that of Western Australia – successfully campaigned against the model and a national scheme was never created.<sup>17</sup> Instead, statutory land rights schemes have

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<sup>11</sup> The revocation of reserves continued well into the 19<sup>th</sup> century. Norman describes how between 1940 and 1963, more than half of all Aboriginal reserve land in New South Wales was revoked by the government: Heidi Norman, *What Do We Want? A Political History of Aboriginal Land Rights in New South Wales* (Aboriginal Studies Press, 2015) 11.

<sup>12</sup> For an overview of the introduction of statutory land rights see Heather McRae and Garth Nettheim, *Indigenous Legal Issues: Commentary and Materials* (Lawbook Co, 4th ed, 2009) ch 4; Peter Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (University of Toronto Press, 2005) ch 6.

<sup>13</sup> The original Act has been repealed and replaced by the *Aboriginal Lands Trust Act 2013* (SA).

<sup>14</sup> A few years later, Victoria enacted a similar scheme through the *Aboriginal Lands Act 1970* (Vic).

<sup>15</sup> See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss3 (definitions of ‘traditional Aboriginal owners’ and ‘traditional land claim’), 50.

<sup>16</sup> Australian Government, Department of Aboriginal Affairs, ‘Preferred National Land Rights Model: Distributed by the Commonwealth Government for Discussion’ (February 1985).

<sup>17</sup> See Ronald T. Libby, *Hawkes Law: The Politics of Mining and Aboriginal Land Rights in Australia* (University of Western Australia Press, 1989); Coral Dow and John Gardiner-Garden, *Overview of Indigenous*

been enacted on a piecemeal, state-by-state basis. States such as New South Wales and South Australia went on to introduce relatively strong schemes. Queensland, Victoria and Tasmania introduced more modest schemes, while Western Australia retained a reserve system and has never introduced a statutory land rights scheme at all.<sup>18</sup>

## 2 Native Title

The second way in which change has come about is through native title. In 1992, in *Mabo No 2*,<sup>19</sup> the High Court declared that the common law of Australia recognises the prior ownership rights of Indigenous peoples where those rights have not been extinguished.<sup>20</sup> The Court also found that native title can be extinguished by settler governments, through making a grant to another person (such as a fee simple) or through their own use of the land.<sup>21</sup> Once extinguished, native title cannot be revived, and by 1992 it had already been extinguished over large parts of Australia, particularly in the more densely settled regions. A consequence of the *Racial Discrimination Act 1975* (Cth) is that today state governments cannot treat native title less favourably than other property rights. This means, for example, that since 1975 state governments must pay compensation on just terms when extinguishing native title. Processes for recognizing native title, and for regulating dealings on native title land, are dealt with by the *Native Title Act 1993* (Cth).

In the decades since *Mabo No 2*, a large number of Indigenous groups have brought claims to have their native title recognised. Several of those claims have been contested by governments, leading to a further series of cases that have refined the law on recognition and extinguishment.<sup>22</sup> At times, those later cases have been decided in

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*Affairs: Part 1: 1901 to 1991* (10 May 2011) Parliament of Australia <[http://www.aph.gov.au/about\\_parliament/parliamentary\\_departments/parliamentary\\_library/pubs/bn/1011/indigenousaffairs1](http://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/bn/1011/indigenousaffairs1)>.

<sup>18</sup> McRae and Nettheim, above n 12, chs 4 & 5; Garth Nettheim, Gary D Meyers and Donna Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (Aboriginal Studies Press, 2002) 237-317.

<sup>19</sup> *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

<sup>20</sup> *Ibid*, see especially 69-71 (Brennan J, with whom Mason CJ and McHugh J concurred); 109-13 (Toohey and Gaudron JJ) and 180-4 (Toohey J).

<sup>21</sup> *Ibid* 63 (Brennan J, with whom Mason CJ and McHugh J concurred); 89-90 (Toohey and Gaudron JJ) and 192-6 (Toohey J).

<sup>22</sup> Especially *Wik People v Queensland* (1996) 187 CLR 1; *Fejo v Northern Territory* (1998) 195 CLR 96; *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Western Australia v Ward* (2002) 213 CLR 1 and *Yorta Yorta v Victoria* (2002) 214 CLR 422.

a way that has limited the potential scope of native title.<sup>23</sup> Despite these challenges, there have been 356 positive determinations of native title across the country.<sup>24</sup>

The combined impact of land rights and native title has been remarkable. Just over fifty years ago, Australian law gave no recognition whatsoever to Indigenous claims to land. Today, Indigenous groups have exclusive rights to more than 20 per cent of the continent.<sup>25</sup> The impact has been uneven, however, and 99.8 per cent of Indigenous land is found in areas classified as ‘remote’ and ‘very remote’.<sup>26</sup> The impact on more populous areas has been far more contained. This is clearly relevant to any discussion of reforms to enable economic development.

### 3 *How Indigenous Land is Owned*

Statutory land rights schemes provide for collective or communal ownership of land by granting a fee simple to a corporate body that holds title for the benefit of the ownership group.<sup>27</sup> In most cases,<sup>28</sup> the underlying fee simple is inalienable but the land holding body can, following a process, grant interests such as leases over parts of the land.<sup>29</sup> There is some variation in the way this occurs. Under the Northern Territory *ALRA* – which is the largest scheme in Australia, and the one impacted by township leasing – leases require the consent of the traditional Aboriginal owners.<sup>30</sup> Consent is obtained through region-wide bodies called Aboriginal land councils, which are made

<sup>23</sup> See Lisa Strelein, *Compromised Jurisprudence: Native Title Cases since Mabo* (Aboriginal Studies Press, 2006); Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008); Sean Brennan, ‘Native Title in the High Court of Australia a decade after Mabo’ (2003) 14 *Public Law Review* 209.

<sup>24</sup> This figure is correct as at 7 November 2018, see National Native Title Tribunal, *Statistics* <<http://www.nntt.gov.au/Pages/Statistics.aspx>>. A further 297 claims are still in progress.

<sup>25</sup> Jon Altman and Francis Markham, ‘Burgeoning Indigenous Land Ownership: Diverse Values and Strategic Potentialities’ in Sean Brennan *et al.* (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 126, 135. A further 12 percent is subject to non-exclusive native title.

<sup>26</sup> Jon Altman, Geoff Buchanan and Libby Larsen, ‘The Environmental Significance of the Indigenous Estate: Natural Resource Management as Economic Development in Remote Australia’ (Discussion Paper No 286/2007, Centre for Aboriginal Economic Policy Research, 2007) 7. This is well illustrated in the maps produced by the National Native Title Tribunal, see: National Native Title Tribunal, *Indigenous Estates* <[http://www.nntt.gov.au/Maps/Indigenous\\_Estates\\_and\\_Determinations\\_A1L.pdf](http://www.nntt.gov.au/Maps/Indigenous_Estates_and_Determinations_A1L.pdf)>.

<sup>27</sup> Most town camp land in the Northern Territory is perpetual leasehold rather than fee simple: Terrill, *supra* n 8, 81.

<sup>28</sup> The New South Wales scheme is the only one that allows for the underlying fee simple to be sold: see *Aboriginal Land Rights Act 1983* (NSW) s 40 (definition of ‘deal with land’), 42E. Other schemes permit transfer in limited circumstances. For examples, the Northern Territory *ALRA* allows for transfer from one Land Trust to another or surrender to the Crown: *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 19(1), (4).

<sup>29</sup> See, eg, *Aboriginal Lands Trust Act 2013* (SA) ss 3(3), 44; *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) s6(2); *Aboriginal Land Act 1991* (Qld) ss 3.11, 5.13.

<sup>30</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s19.

up of elected Aboriginal delegates and have a permanent staff.<sup>31</sup> Where there is a lease application, the land council consults with the traditional owners and, if the traditional owners ‘understand the nature and purpose of the proposed action and, as a group, consent to it’, the lease may be granted.<sup>32</sup> Traditional owners are the primary decision makers, while Aboriginal land councils provide the governance machinery.<sup>33</sup> It is described below how township leases significantly alter decision-making authority and governance machinery on subject land.

#### 4 Residential Communities on Indigenous Land

The various forms of Indigenous land host a large number of residential communities, some with just a handful of people and others with several thousand residents. In the Northern Territory, there are 68 residential communities on Aboriginal land which have a population of more than 100.<sup>34</sup> The largest of these is Maningrida, with a recorded population of 2 773.<sup>35</sup> There are also more than 500 smaller communities, which are referred to as homelands or outstations and often comprise just a handful of houses.<sup>36</sup> To date, governments have focused their land tenure reform efforts on larger residential communities rather than homelands or outstations. In the Northern Territory, this has included trying to obtain township leases over the larger communities.

Significantly, Indigenous people who live in residential communities on Indigenous land are not necessarily the traditional owners for that particular land.<sup>37</sup>

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<sup>31</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s29(1).

<sup>32</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s19(5)(a). Anthropologists employed by the Land Councils maintain a register of traditional Aboriginal owners for each area, which changes over time as people are born and pass away. The land council must also be satisfied that ‘any Aboriginal community or group that may be affected by the proposed grant ... has been consulted and has had adequate opportunity to express its view to the Land Council’ and that the terms of the leases are reasonable: see paras (b) and (c). However, the only group whose consent is required is the traditional Aboriginal owners. Leases for more than 40 years require the approval of the federal Minister for Indigenous Affairs, see ss (8). This is an administrative rather than substantive requirement and there are no reports of this leading to the long delays associated with Ministerial approval under the Canadian *Indian Act*.

<sup>33</sup> For a more detailed discussion of the land ownership structure see Sean Brennan, ‘Wurridjal v Commonwealth: The Northern Territory Intervention and Just Terms for the Acquisition of Property’ (2009) 33 *Melbourne University Law Review* 957, 960.

<sup>34</sup> Terrill, above n 8, 96, 136.

<sup>35</sup> Population data is available through the Bushtel website: see Northern Territory Government, *Maningrida* (undated) Northern Territory Government Bushtel <<http://www.bushtel.nt.gov.au/#!/profile/362>>.

<sup>36</sup> Sean Kerins, ‘The First-Ever Northern Territory Homelands/Outstations Policy’ (Topical Issue No. 09/2009, Centre for Aboriginal Economic Policy Research) 4. Kerins states that around 10,000 people live on those outstations, noting that it is a highly mobile population with people moving frequently between homelands/outstations and larger townships: page 2.

<sup>37</sup> Terrill, above n 8, 97.



They might be the traditional owners for another area of land. They might even have some rights to the land on which the community is situated, but not to the extent of being regarded as a traditional owner.<sup>38</sup> This means that for residential communities there are often two (overlapping) Indigenous groups with a legitimate and long-standing interest in the same area of land: the residents and the traditional owners. There are also many communities where the majority of Indigenous residents are not traditional owners.<sup>39</sup> It is described above how the *ALRA* effectively provides for ownership of land by the traditional Aboriginal owners, rather than by Aboriginal residents. This has become increasingly significant due to reforms such as township leasing which increase the economic and political position of traditional Aboriginal owners relative to non-traditional owner residents.

### 5 *Land Use Arrangements in Residential Communities*

While most statutory land rights provide that the landholding body can grant leases, until recently the grant of leases over houses and other infrastructure in residential communities on Indigenous land has been rare, particularly in remote areas.<sup>40</sup> The consequence is that for several decades land and infrastructure in those communities has been allocated and occupied under *informal arrangements*. It is described below how informal arrangements are also common on First Nations land in Canada, where they have been described by some authors as ‘customary rights’<sup>41</sup> or ‘customary allotments’.<sup>42</sup> In Australia, such a term might mislead. The informal arrangements in communities on Aboriginal land are not derived from traditional law, which tends to provide groups of people with rights to areas of country.<sup>43</sup> They are ‘intercultural’ arrangements that emerged following the establishment of permanent residential communities and are based on ‘the exigencies of modern-day community

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<sup>38</sup> For a detailed analysis of current understandings about traditional laws with respect to land see Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (Cambridge University Press, 2003).

<sup>39</sup> Terrill, above n 8, 97.

<sup>40</sup> Ibid 97-8; Michael Dillon and Neil Westbury, *Beyond Humbug: Transforming Government Engagement with Indigenous Australia* (Seaview Press, 2007) 134-5. It appears that in New South Wales land dealings on Aboriginal land have been more common, although the numbers are still small. Over the last five financial years, NSWALC report 48, 31, 45, 52 and 68 land dealings respectively: see New South Wales Aboriginal Land Council, ‘Annual Report 2016-17’ (2017) 15.

<sup>41</sup> Tom Flanagan and Christopher Alcantara, ‘Individual Property Rights on Canadian Indian Reserves’, (2004) *Queen’s Law Journal* 489, 494.

<sup>42</sup> Marena Brinkhurst and Anke Kessler, ‘Land Management on First Nations Reserves: Lawful Possession and its Determinants’ (Working Paper, Simon Fraser University Department of Economics, April 2013).

<sup>43</sup> It is different in the Torres Strait, where customary law has long provided individuals and families with exclusive rights to areas of land use for housing and agriculture. In the *Mabo* case, which originated from the Torres Strait, the individual applicants sought recognition of their rights to specific areas of land: see *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 6, and discussion of Brennan J at pp 17-8, 24.

life and the need for people living and working in communities ... to give order to the way in which land and infrastructure are utilised'.<sup>44</sup>

The impact of reforms such as township leasing has been to convert these informal arrangements into something more formal, through the widespread grant of leases and subleases. Below it is described how what is particular about township leasing is the approach it takes to the question of who has control over the formalization process.

## B *First Nations Land Rights in Canada*

While there are clear similarities in the colonial histories of Canada and Australia, the recognition of Indigenous land rights has occurred very differently. Canada does not have statutory regimes for the grant of land rights to Indigenous groups.<sup>45</sup> It does have an equivalent to native title, in the form of Aboriginal title and Aboriginal rights, though there are some important differences in the way the doctrines have evolved in each country. More importantly, in Canada there are a significant number of treaties.<sup>46</sup> Those treaties acknowledge the prior ownership and ongoing rights of First Nations,<sup>47</sup> something that never occurred in Australia. However, treaties have also been used to divest Indigenous people of many of their rights and much of their land.<sup>48</sup> Crown representatives often negotiated in bad faith and there are myriad conflicts over the interpretation of treaty texts, which continue to be addressed in Canadian courts. As

<sup>44</sup> Terrill, above n 8, 112, 137.

<sup>45</sup> It is described below how the Canadian *Indian Act* is of a different nature to statutory land rights schemes in Australia. The *Indian Act* regulates a number of aspects of reservation life, including land dealings on reserves. It does not provide for the grant of land to Indigenous groups.

<sup>46</sup> The following maps provide a helpful visual summary of historical and modern treaties in Canada: Indigenous and Northern Affairs Canada, "Pre-1975 Treaties Map in Canada," <[https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm\\_treaties\\_th-ht\\_canada\\_1371839430039\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm_treaties_th-ht_canada_1371839430039_eng.pdf)>; Indigenous and Northern Affairs Canada, "Modern Treaties Map – Comprehensive Land Claims and Self-Government Agreement Modern," <[https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm\\_pdf\\_modrn-treaty\\_1383144351646\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm_pdf_modrn-treaty_1383144351646_eng.pdf)>.

<sup>47</sup> Three groups of Indigenous peoples are recognised by the Canadian Constitution: First Nations, Inuit, and Metis. This paper focuses on First Nations rather than Inuit and Metis peoples as the *First Nations Land Management Act* is only available to First Nations. Significant developments have also occurred in recent years regarding Métis settlements land and Inuit self-determination: see generally Catherine E. Bell, *Alberta's Métis Settlements Legislation: An Overview of Ownership and Management of Settlements Lands* (Canadian Plains Research Center, University of Regina, 1994); D. Bruce Sealey, *Statutory Land Rights of the Manitoba Métis* (Manitoba Metis Federation Press, 1975); *Daniels v. Canada (Indian Affairs and Northern Development)* [2016] SCC 12; Jack Hicks and Graham White, *Made in Nunavut: An Experiment in Decentralized Government* (UBC Press, 2015); Kirk Cameron and Alastair Campbell, 'The Devolution of Natural Resources and Nunavut's Constitutional Status' (2009) 43(2) *Journal of Canadian Studies* 198; Andre Legare, 'Canada's Experiment with Aboriginal Self-Determination in Nunavut: From Vision to Illusion' (2008) 15(2-3) *International Journal on Minority and Group Rights* 335.

<sup>48</sup> Brian Crane, Robert Mainville and Martin Mason, *First Nations Governance Law* (LexisNexis, 2008) 30.

such, treaties embody appropriation as well as recognition and resistance. A further difference between the two countries is that in Canada jurisdiction with respect to First Nations peoples and reserve land is vested solely in the federal government, whereas in Australia that jurisdiction is shared between the federal government and the states.<sup>49</sup> As described below, this means that reserve land in Canada is exempt from certain provincial laws, a dynamic that does not exist in Australia.

### 1 *Land Rights and Treaties*

Recognition of Indigenous land rights has a much longer history in Canada than Australia. British and French settlement of what would become Canada began in the 16<sup>th</sup> century and had dramatically increased by the 1750s, leading to competition and conflict between the two nations. During this period, both countries negotiated treaties with First Nations for the purpose of forming military alliances. Following victories over the French, by the 1760s the British had become the dominant colonial power in North America.<sup>50</sup> The *Royal Proclamation of 1763* (*'Royal Proclamation'*), which set out the rules for British settlement of North America, became a foundational document for Crown-Indigenous relations. The British claimed sovereignty over the entire region but recognised that First Nations retained some rights to land that had not been ceded. The Proclamation also set the ground work for future treaty-making by forbidding the settling on or purchase of First Nations lands except through purchase by the Crown (i.e. through a treaty).<sup>51</sup> While earlier treaties had focused on friendships and alliances, treaties following the *Royal Proclamation*, and particularly following the War of 1812, increasingly focused on the acquisition of land by the Crown.<sup>52</sup>

When several colonies confederated to form the Dominion of Canada in 1867, section 91(24) of the new Constitution gave the federal government exclusive

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<sup>49</sup> With respect to Canada, see discussion below on section 91(24) of *Constitution Act, 1867*. The *Constitution of Australia* was amended by referendum in 1967 to give the Commonwealth the concurrent power to legislate with respect to Aboriginal people. Today, legislation such as the *Native Title Act 1992* (Cth) and *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) are Commonwealth while most statutory land rights schemes are passed by state governments.

<sup>50</sup> See generally, Peter Russell, *Canada's Odyssey: A Country Built Upon Incomplete Conquests* (University of Toronto Press, 2017) ch 2.

<sup>51</sup> As Borrows notes, First Nations were 'active participants' in the formation of the Proclamation and used the process to assert their rights. He thus argues the *Royal Proclamation* should not be interpreted as a "unilateral declaration of the Crown's will." See John Borrows, 'Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government' in Michael Asch (ed), *Aboriginal and Treaty Rights in Canada* (University of British Columbia Press, 1998) 155, 160.

<sup>52</sup> Indigenous and Northern Affairs Canada, *Treaties with Aboriginal People in Canada* (2010) <<http://www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292>>.

jurisdiction over ‘Indians, and lands reserved for the Indians’.<sup>53</sup> This meant that the negotiation of treaties became a federal responsibility. Between 1871 and 1921, the federal government concluded a series of eleven numbered treaties with First Nations across huge swathes of Canada. Similar to pre-Confederation treaties, First Nations give up large areas of land in exchange for reserve lands and other rights such as annuities and the continued right to hunt and fish on land that has not yet been allocated to settlers.<sup>54</sup> Amendments to the *Indian Act* in 1927 made it an offence to raise funds or hire lawyers for the purpose of pressing a land claim without the government’s consent.<sup>55</sup> This effectively signalled an end to the first period of treaty-making in Canada. By that time, most of southern Canada was covered by treaties, however large parts of British Columbia, Yukon, the North West Territories, Quebec, and Newfoundland and Labrador remained without treaties.

## 2 *Modern Treaties*

In 1973, in *Calder et al. v Attorney General of British Columbia* (‘*Calder*’),<sup>56</sup> the Supreme Court of Canada (‘SCC’) found that the recognition of Aboriginal title formed part of the common law of Canada. While there was no declaration of Aboriginal title in the *Calder* decision itself, the recognition that Aboriginal title *could* exist had a profound political impact. It led to a renewed focus on agreement making for those parts of Canada that remained without a treaty. Soon afterwards, the Canadian government introduced a ‘comprehensive land claims’ policy, which outlined procedures for the negotiation of new agreements.<sup>57</sup> Over 26 treaties have now been negotiated under the comprehensive land claims policy, most covering the large areas of northern Canada, with 18 including provisions with respect to self-government.<sup>58</sup>

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<sup>53</sup> Originally passed as the *British North America Act, 1867*. The name of this legislation was changed to the *Constitution Act, 1867* at request of Canada upon patriation of the Canadian constitution in 1982. Supreme Court of Canada jurisprudence has clarified that this jurisdiction extends not only to First Nations, but also Inuit and Métis: see respectively *Reference Re Eskimos* 1939 SCR 104 and *Daniels v. Canada*, 2016 SCC 12.

<sup>54</sup> Indigenous and Northern Affairs Canada, above n 52.

<sup>55</sup> National Centre for First Nations Governance, ‘The Inherent Right of Self-Governance: A Timeline’ <<http://www.fngovernance.org/timeline/timelinewindow>>. This amendment was repealed in 1951, setting the stage for the recognition of Aboriginal title and negotiation of modern treaties: see P.G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011) 36; Ken Coates, *The Indian Act and the Future of Aboriginal Governance in Canada* (National Centre for First Nations Governance, May 2008) 4; Russell, *Canada’s Odyssey*, above n 50, Chapter 12.

<sup>56</sup> [1973] SCR 313 (hereafter ‘*Calder*’).

<sup>57</sup> The government also introduced a ‘specific claims’ policy, to deal with claims that the Crown was in breach of existing treaty obligations.

<sup>58</sup> Indigenous and Northern Affairs Canada, *Comprehensive Claims* (13 July 2015) <<https://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578>>; and see also Sari Graben, “Lessons for Indigenous

The applicants in the *Calder* case itself – the Nisga’a people – ultimately resolved their claim through a modern treaty.<sup>59</sup>

### 3 *Aboriginal Title*

Since *Calder*, the SCC has engaged directly with the law of Aboriginal title on two further occasions: in *Delgamuukw v British Columbia*,<sup>60</sup> and in *Tsilhqot’in Nation v British Columbia*.<sup>61</sup> The reason British Columbia has been the frontline in the struggle for Aboriginal title is due to the historical non-recognition of rights in that province. Indeed, Russell describes British Columbia as ‘Canada’s Australia’ as its historical policies were akin to *terra nullius*.<sup>62</sup> Most First Nation lands in British Columbia were taken and reserves created without treaty.<sup>63</sup> It was not until the *Tsilhqot’in* decision in 2014 that the SCC made an actual declaration of Aboriginal title over a specific area of land. This contrasts with Australia, where over three hundred declarations of native title have been made.

### 4 *How Land Is Owned and Managed Under the Indian Act*

Today the federal government recognises 618 distinct First Nations.<sup>64</sup> As some First Nations have more than one reserve, there are around 3 003 reserves<sup>65</sup> comprising a total area of 35 000 square kilometers.<sup>66</sup> Historically, all reserves in Canada – both those created under treaties and those created unilaterally (as in British Columbia) – were regulated under the *Indian Act*. Today, around 72 First Nations have engaged the *FNLM* to opt out of the land management provisions of the *Indian Act*.<sup>67</sup> To clarify

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Property Reform: From Membership to Ownership on Nisga’a Lands,” (2014) 47 *University of British Columbia Law Review* 399.

<sup>59</sup> Graben, above n 58; Margaret Stephenson, ‘You Can’t Always Get What You Want - Economic Development on Indigenous Individual and Collective Titles in North America: Which Land Tenure Models are Relevant to Australia?’ in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, 2010) 100, 121-4.

<sup>60</sup> [1997] 3 SCR 1010.

<sup>61</sup> [2014] 2 SCR 257.

<sup>62</sup> Peter Russell, *Recognizing Aboriginal Title*, above n 12, 173.

<sup>63</sup> Ibid; Indigenous and Northern Affairs Canada, *A History of Treaty-Making in Canada* (2011) <<https://www.aadnc-aandc.gc.ca/eng/1314977704533/1314977734895>> 4. In fact, treaty-making had largely ceased by 1860 in British Columbia due to the government’s reluctance to recognise Aboriginal title.

<sup>64</sup> Indigenous and Northern Affairs Canada, *First Nation Profiles* (2016) <<http://fnp-ppn.aadnc-aadnc.gc.ca/fnp/Main/index.aspx?lang=eng>>.

<sup>65</sup> Brinkhurst and Kessler, above n 42, 2.

<sup>66</sup> Indigenous and Northern Affairs Canada, *Land Base Statistics* (24 March 2014) <<https://www.aadnc-aandc.gc.ca/eng/1359993855530/1359993914323>>.

<sup>67</sup> First Nations Land Advisory Board, ‘2016-2017 Annual Report’, above n 5, 4. The Government of Canada’s 2018 budget committed funding to support 50 more First Nations joining the FNLM Regime, see Government of Canada, *Budget Plan 2018 – Reconciliation*, (2018) <<https://www.budget.gc.ca/2018/docs/plan/chap-03->

what it means to opt out of the *Indian Act*, this section first describes how land management occurs under that Act.

To begin, formal title to reserve land is held by the Crown, which is under a fiduciary duty to use that title for the benefit of the band.<sup>68</sup> This arrangement, which is akin to a trust, means that reserve lands cannot be seized by legal process and cannot be mortgaged, pledged, or charged to non-First Nations (although leasehold interests on reserve lands may be mortgaged). A consequence of s 91(24) of the Constitution granting the federal parliament exclusive legislative authority over ‘Indians, and Lands reserved for the Indians’ is that the application of provincial laws to reserve lands is highly restricted.<sup>69</sup> Taxation on reserve lands is also limited in that First Nations interests in reserve or surrendered lands cannot be taxed by non-First Nations authorities unless held under a lease or permit.<sup>70</sup>

The *Indian Act* creates bodies called ‘band councils’ as the basic unit of governance on reserves. Band councils are made up of Chiefs and Councilors and have a similar legal structure to municipal governments.<sup>71</sup> Milloy describes how the *Indian Act* effectively abolished traditional forms of government and replaced them with a ‘male-only elective system largely under the control of the local Indian agent.’<sup>72</sup> Legally, band councils are considered to exercise their functions under delegated authority from the *Indian Act*, meaning that all band council actions are reviewable in Federal Courts<sup>73</sup> and some powers are subject to ministerial disallowance.<sup>74</sup> While the *Indian Act* imposed restrictions on the authority that First Nations had previously exercised, band councils do retain some law-making authority with respect to activities

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en.html>. Further, at least 20 other First Nations have opted out of the *Indian Act* through self-government agreements, see Indigenous and Northern Affairs Canada, *Fact Sheet: Aboriginal Self-Government* (2015) <<http://www.aadnc-aandc.gc.ca/eng/1100100016293/1100100016294>>.

<sup>68</sup> Margaret Stephenson ‘To lease or not to lease? The leasing of indigenous statutory lands in Australia: lessons from Canada’ (2009) 35(3) *Commonwealth Law Bulletin* 545, 558; see *Guerin v. The Queen* [1984] 2 SCR 335.

<sup>69</sup> *Indian Act*, SC 1876, c 18, section 88. For a more detailed discussion of application of provincial laws on reserve see: John Gailus, ‘Land Management and Economic Development under the Indian Act’ (2009) Continuing Legal Education Society of British Columbia, *Aboriginal Law: Solicitors’ Issues 2009 Update*, Paper 1.1, 2.

<sup>70</sup> Indian and Northern Affairs Canada, *Land Management Manual* (2002) <[http://www.collectionscanada.gc.ca/webarchives/20071122053840/http://www.aainc-inac.gc.ca/ps/lts/lmm\\_e.html](http://www.collectionscanada.gc.ca/webarchives/20071122053840/http://www.aainc-inac.gc.ca/ps/lts/lmm_e.html)> ch. 2, 3-5.

<sup>71</sup> Christopher Alcantara, ‘Reduce Transaction Costs? Yes. Strengthen Property Rights? Maybe: The First Nations Land Management Act and Economic Development on Canadian Indian Reserves,’ (2007) 132 *Public Choice* 421, 424.

<sup>72</sup> John Milloy, ‘Indian Act Colonialism: A Century of Dishonour, 1869-1960’ (May 2008) *National Centre for First Nations Governance* <[http://fngovernance.org/ncfng\\_research/milloy.pdf](http://fngovernance.org/ncfng_research/milloy.pdf)> 7. Band council elections were only opened to women in the 1950s.

<sup>73</sup> Crane et al, above n 48, 241.

<sup>74</sup> *Ibid*, ch 4.

such as public health, the maintenance of roads and bridges and the construction of public buildings.<sup>75</sup> Where they set up a property tax regime, band councils are also able to levy property taxes.<sup>76</sup>

### 5 *Land Use Arrangements on First Nations Reserve Lands*

There are three main options for granting rights to occupiers on reserve lands. The first is informal, where First Nations create ‘customary rights’<sup>77</sup> or ‘customary allotments’.<sup>78</sup> Customary rights exist outside of the *Indian Act* and Canadian courts have ruled on several occasions that they are not legally enforceable.<sup>79</sup> Despite this, customary rights are the most common form of property rights on reserve land.<sup>80</sup> Approaches vary with respect to the level of band council involvement in the allocation and enforcement of customary rights and the extent to which boundaries are surveyed and formally recorded.<sup>81</sup> The advantage of customary rights is their low cost and flexibility, and it is reported that some First Nations band members believe that they are more consistent with their culture than formalised rights.<sup>82</sup> They can, however, be insecure and are not well suited to transactions with outsiders or being used as collateral for a loan.<sup>83</sup>

The second and third options occur under the *Indian Act*. With the approval of both the band council and the Minister, band members can be issued a certificate of possession (‘CP’). CPs have no equivalent under Australian law. They are a perpetual right to use of the subject land which can be devised and alienated within the band. They cannot be alienated or mortgaged externally,<sup>84</sup> although CP holders can grant leases over their land to non-band members. Brinkhurst and Kessler estimate that, as of 2012, there were around 40 841 current CPs across Canada, covering around 3 per

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<sup>75</sup> Milloy, above n 72, 8.

<sup>76</sup> Aleksandra Sagan, “First Nations pay more tax than you think,” *CBC News*, (2 March 2015) <<http://www.cbc.ca/news/business/taxes/first-nations-pay-more-tax-than-you-think-1.2971040>>.

<sup>77</sup> Flanagan and Alcantara, above n 41, 494.

<sup>78</sup> Brinkhurst and Kessler, above n 42.

<sup>79</sup> Thomas Flanagan, Christopher Alcantara and Andre Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (McGill Queen’s University Press, 2010) 80; Stephenson, ‘You Can’t Always Get What You Want’, above n 59, 111-2.

<sup>80</sup> Flanagan, Alcantara and Le Dressay, above n 79, 74.

<sup>81</sup> *Ibid* 76.

<sup>82</sup> *Ibid* 85.

<sup>83</sup> *Ibid* 85-90.

<sup>84</sup> Flanagan and Alcantara, above n 41, 505-512; Stephenson, ‘You Can’t Always Get What You Want’, above n 59, 112-3.

cent of all reserve land.<sup>85</sup> It is described below how the use of CPs varies significantly between First Nations.

Through a more complex process, reserve land can also be leased. On unallocated land, leases require the approval of the band council and of the Minister, and the process for obtaining Ministerial approval can be time consuming. Holders of a CP may ask the Minister to grant a lease without band council approval.<sup>86</sup> Leases can be held by anyone, and tend to be used for transactions with non-band members.<sup>87</sup> Precise data on the number and location of leases could not be found, however Alcantara and Flanagan state there are ‘tens of thousands of leases’ on reserve land ‘creating the basis for shopping centres, industrial parks, vacation communities, and year-round residential housing projects’.<sup>88</sup>

It does appear that the costs and delays associated with *Indian Act* processes inhibit the formalisation of land interests on reserve land. This is one of the reasons why some First Nations choose not to register land dealings and instead rely on customary rights. It has been reported that approximately ‘80% of all individual/family allotments are done outside the *Indian Act*; 50% of total band leasing is unregistered; and 66% of all short-term usage of reserve lands, like for gravel pits, garbage dumps etc., is not federally regulated.’<sup>89</sup>

## C Similarities and Differences

### 1 Property rights and political rights

As this section illustrates, while there are similarities there are also significant differences in the way that Indigenous rights to land have occurred in Australia and Canada. In both countries, Indigenous people were dispossessed through colonisation and have pursued a variety of means to reestablish their rights to land. The resulting forms of Indigenous title involve forms of tenure that are different to other land: on Indigenous land, entire areas – such as a land trust or reservation – are owned by a single legal entity that holds title for the benefit of a group of Indigenous people.

<sup>85</sup> Brinkhurst and Kessler, above n 42, 6 n 14.

<sup>86</sup> See Flanagan and Alcantara, above 41, 527-8; Flanagan, Alcantara and Le Dressay, above n 79, 91-107.

<sup>87</sup> Indigenous and Northern Affairs Canada, *Land Transactions on Reserve* (15 September 2010) <<https://www.aadnc-aandc.gc.ca/eng/1100100022257/1100100022258>>.

<sup>88</sup> Flanagan and Alcantara, above n 41, 526.

<sup>89</sup> House of Commons, AANO, *Evidence*, 1<sup>st</sup> Session, 41<sup>st</sup> Parliament, 1 May 2012, (Warren Johnson, President, New Road Strategies, as an individual) as cited in: Canada, Parliament, House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Study of Land Management and Sustainable Economic Development on First Nations Reserve Lands: Report of the Standing Committee on Aboriginal Affairs and Northern Development*, 41st Parl, 2nd session (March 2014) (Chair: Chris Warkentin) 35.



In most cases these landholding entities cannot sell the land, but they can grant leases and other interests. A variety of formal and informal arrangements have been used to structure the rights of occupiers on that land.

The most obvious difference is that in Australia settler governments took far longer to give legal recognition to Indigenous land rights. There is, perhaps, a small upside to this sorry history. When governments finally agreed to enact statutory land rights, most did so by granting Aboriginal groups a fee simple,<sup>90</sup> whereas reserve land under the *Indian Act* in Canada is essentially owned by the Crown on trust for First Nations. Statutory land rights schemes such as the Northern Territory *ALRA* give greater autonomy to the Indigenous landowners than was historically provided to First Nations under the *Indian Act*. Paradoxically, the reforms described below have frequently reversed this.

The key downside to the Australian approach is that there has been a shorter history of acknowledging rights to land and a lack of engagement with Aboriginal peoples at a nation-to-nation level. While they have been problematic, Canadian treaties do entail the recognition of distinct peoples with historic and ongoing rights. This recognition has been strengthened by amendments to the Canadian Constitution in 1982 which recognize and affirm the ‘aboriginal and treaty rights of the aboriginal peoples of Canada’,<sup>91</sup> meaning that Aboriginal title and rights given under treaties now have constitutional protection.<sup>92</sup> As noted in Part V below, attempts at achieving Constitutional recognition by Indigenous peoples in Australia have to date not been as successful.

More broadly, the governments of each country often take a different approach to Aboriginal self-government. In Canada, the current federal government espouses a policy of restoring nation-to-nation relationships by facilitating greater First Nations self-government, including for First Nations who signed pre-1975 treaties with the Crown, though this rhetoric has yet to be matched with practice.<sup>93</sup> In Australia, over

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<sup>90</sup> It is different for native title, where a successful determination does not give rise to a fee simple or other form of unitary title. Native title is a *sui generis* property form and ‘is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory’: see *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 58 (Brennan J). In some places, native title has been also been partially extinguished by government action, such as where there has been the grant of a pastoral lease.

<sup>91</sup> *Canada Act 1982* (UK) c 11, sch B (‘*Constitution Act 1982*’) s 35.

<sup>92</sup> See P.G. McHugh, ‘A Common Law Biography of Section 35’ in Patrick Macklem and Douglas Sanderson (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press, 2016) 137; Margaret Stephenson, ‘Indigenous Lands and Constitutional Reform in Australia: A Canadian Comparison’ (2012) 15(2) *Australian Indigenous Law Review* 87.

<sup>93</sup> See, eg, James Munson, ‘Nation-to-nation relationship taking shape’, *iPolitics* (online), 4 June 2016 <<https://ipolitics.ca/2016/06/04/nation-to-nation-relationship-is-starting-to-take-shape-says-inac/>>.

the last decade and a half Indigenous policy – particularly at a federal level – has often included a resurgence in paternalism and interventionism.<sup>94</sup> On occasion, the government has gone so far as to characterise self-determination as a failed policy.<sup>95</sup> There are no treaty-based or constitutional safeguards that prevent them from engaging in reforms that diminish Indigenous rights or discriminate against Indigenous groups. Below it is described how these differences in Indigenous-state relations appear to have impacted on the way that land tenure reform has occurred.

## 2 Land Use Arrangements

It appears that processes for the grant of leases and other interests over First Nations land in Canada have been more time-consuming than comparable processes in Australia.<sup>96</sup> In particular, there have been long delays in obtaining Ministerial approval under the *Indian Act*. Despite this, historically the grant of leases and other formal interests over reserve land in Canada has been more widespread. There have reportedly been tens of thousands of leases over reserve land in Canada, while until recently there were relatively few leases in communities on Indigenous land in Australia. It would appear that there has been greater commercial interest in reserve land in Canada, at least in certain areas. This too is a reflection of each country's history. As land rights in Australia were only recognised recently, most of the land available for claim has been in remote areas.<sup>97</sup> In Canada, some of the reserves created in the 19<sup>th</sup> Century are now situated in populous areas, while others are very remote.

It is also significant that there is a longer history of granting formal rights to individuals and families on First Nations land in Canada. CPs, which can only be held by members of a First Nation, are widespread on some reserves, with a total of more than 40 000 across Canada. There is no equivalent to CPs in Australia, and few reports of Indigenous landowners granting leases to individuals and families from within the

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<sup>94</sup> See generally Will Sanders, 'Experimental Governance in Australian Indigenous Affairs: From Coombs to Pearson via Rowse and the Competing Principles' (Discussion Paper No. 291/2014, Centre for Aboriginal Economic Policy Research); Time Rowse, *Rethinking Social Justice: From 'Peoples' to 'Populations'* (Aboriginal Studies Press, 2012); and the contributions to Jon Altman and Melinda Hinkson (eds), *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (UNSW Press, 2010).

<sup>95</sup> For example, in 2006 then Minister for Indigenous Affairs, Mal Brough, told parliament 'As the Chief Minister of the Northern Territory, Clare Martin, recently said, self determination was the biggest mistake': Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, 121 (Mal Brough).

<sup>96</sup> Again, it is different for native title. Native title holders are not able to grant leases directly, they are limited to consenting to the grant of a lease through the future act processes of the *Native Title Act 1992* (Cth). This is more complex and time consuming than comparable processes on statutory land.

<sup>97</sup> The New South Wales land rights scheme is a notable exception. The different claims mechanism has resulted in the grant of some valuable land in more populous areas. As noted earlier, it also appears that dealings on Aboriginal land in New South Wales have historically been more common: see above n 40.

landowning group.<sup>98</sup> This is likely to impact on how formalisation occurs in the future, in that in places where there is an established culture of granting formal rights to individuals and families there is likely to be greater willingness to do so again.

The variety of outcomes on Canadian reserves is also of interest. The same legal regime has applied to all reserve land, regardless of location, and yet outcomes have been very different. Nearly 95 per cent of all CPs are found in Ontario, Quebec and British Columbia,<sup>99</sup> while the majority of reserves across Canada have no CPs at all.<sup>100</sup> Of those who do, most have less than 5 per cent of their land under certificate.<sup>101</sup> Less than 10 per cent of First Nations have CPs over more than 50 per cent of their land.<sup>102</sup>

Brinkhurst and Kessler have conducted a study of the factors that make some reserves more likely than others to use CPs. The results are mixed, and some are difficult to decipher. First Nations with higher levels of education and a smaller percentage of the population under 15 are more likely to use CPs.<sup>103</sup> The small number of bands with a modern treaty have a greater portion of CPs, while bands that remain under the *Indian Act* and have adopted their own election processes (rather than the default processes under the Act) have fewer.<sup>104</sup> Curiously, bands with a higher level of median income also have fewer CPs – which the authors suggest indicates the presence of a ‘systematic difference’ that they were unable to observe which correlates positively with income and negatively with CP use.<sup>105</sup> Remoteness initially appears to have an impact,<sup>106</sup> but once other factors are controlled for (such as income, education, governance structures etc) that impact disappears.<sup>107</sup> Overall, the results suggest the existence of complex, and difficult to predict, cultural preferences that impact on the

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<sup>98</sup> In the Northern Territory, the two major land councils report few leases of any kind prior to the recent reforms: see Terrill, above n 8, 98. The leases they do refer to were to governments and corporate entities. In Queensland, several hundred ‘Katter leases’ were granted to individuals during a short period in the late 1980s and early 1990s. Following a change of government in 1991, the grant and processing of Katter leases ceased: see Mark Moran, ‘Home Ownership for Indigenous People Living on Community Title Land in Queensland: Scoping Study Report’ (Queensland Aboriginal Coordinating Council, Aboriginal and Torres Strait Islander Commission, 1999) 13-4. There are no reports on the extent to which there have been leases to individuals and families in other jurisdictions with significant areas of Indigenous land, such as South Australia.

<sup>99</sup> The percentage of reserve land under certificates in Ontario, Quebec and British Columbia is 53.87%, 22.04% and 18.82% respectively. In Saskatchewan and Alberta, for example, it falls to 0.35% and 0.19% respectively. There are next to no certificates in Yukon Territory and none in the Northwest Territories: Brinkhurst and Kessler, above n 42, 7.

<sup>100</sup> Ibid 8.

<sup>101</sup> Ibid 10.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid 15, 19.

<sup>104</sup> Ibid 15.

<sup>105</sup> Ibid 21.

<sup>106</sup> Ibid 14.

<sup>107</sup> Ibid 21.

extent to which particular communities utilise formal rather than informal property rights.

### III THE REFORMS: TOWNSHIP LEASING AND THE FIRST NATIONS LAND MANAGEMENT ACT

#### A *Township Leasing*

##### 1 *Impetus for Reform*

The introduction of land tenure reform on Indigenous land in Australia began more than a decade ago and arose out of widespread public debate about whether communal ownership of Indigenous land inhibited economic development.<sup>108</sup> The debate was divisive, heated, and overwhelmingly led by individuals and politicians from the conservative side of politics – including the Howard Government itself. It has been described elsewhere how that debate was deeply flawed, in that it misrepresented the circumstances of Indigenous communities and the nature of the issues in contention. In particular, debate about communal ownership of land was often used as a proxy for debate about the distinct cultural practices of Indigenous communities.<sup>109</sup> The introduction of individual ownership and private property was presented as a means for enabling a shift to a more integrated, individualistic and entrepreneurial culture.<sup>110</sup> Debate at this abstract and highly ideological level crowded out any consideration of the land use arrangements that have actually emerged in communities on Aboriginal land over recent decades.

This was not a debate that was initiated or led by Indigenous groups. While there were some Indigenous voices on both sides, the discussion itself did not arise out of concerns articulated by Indigenous landowners, the residents of Indigenous communities or their representative bodies. It was very much government-led, as have been the reforms themselves. The Howard Government was at that time looking for new approaches to Indigenous policy, a conscious move away from the policies of the

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<sup>108</sup> The debate is documented in Terrill, above n 8, 128-48; Stuart Bradfield, 'White Picket Fence or Trojan Horse? The Debate over Communal Ownership of Indigenous Land and Individual Wealth Creation' (Issues Paper No 3, Australian Institute of Aboriginal and Torres Strait Islander Studies Native Title Research Unit, 2005); Michael Dodson and Diana McCarthy, 'Communal Land and the Amendments to the *Aboriginal Land Rights (Northern Territory) Act*' (Research Discussion Paper No 19, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2006); Tom Calma, 'Native Title Report 2007' (Australian Human Rights Commission, 2007), chs 1, 2.

<sup>109</sup> Terrill, above n 8, 128, 142.

<sup>110</sup> *Ibid* 142, 145-8.

previous few decades.<sup>111</sup> While it was still working out the exact nature of its new approach, it included strong themes of ‘normalisation’,<sup>112</sup> and a greater emphasis on personal responsibility and engaging with Indigenous people as individuals rather than communities.<sup>113</sup> The introduction of land reform to enable ‘individual ownership’ was presented as a key component of this new approach.<sup>114</sup>

## 2 *The Reform: Township Leasing*

It was against this background that in 2006 the Australian government amended the Northern Territory *ALRA* to enable township leasing.<sup>115</sup> The amendments were drafted by the government internally rather than in consultation with Aboriginal landowners and the major Aboriginal land councils were concerned about, and opposed to, the reforms.<sup>116</sup> At its simplest, a township lease is a community-wide headlease for residential communities on *ALRA* land. The amendments initially provided for all township leases to be held by a government body called the Executive Director of Township Leasing (‘EDTL’), whose role has been central to how township leases operate. One alternative to township leasing is for land councils and traditional owners to grant leases directly to each occupier. The government argues that township leases make the process quicker and easier.<sup>117</sup> When granting a lease directly to occupiers,<sup>118</sup> land councils are required to obtain the consent of traditional owners as a group; when granting a sublease, the EDTL is not. The process of convening meetings, of consulting and obtaining consent, can take time and cost money. It should be noted, however, that leases and subleases tend to be long-term, and so formalisation is more of a transition than a recurring process. Further, land councils are able to consult on several leases at the same time. In the last few years, the two major land councils have leased several

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<sup>111</sup> See, eg, Amanda Vanstone, ‘Address to National Press Club’ (Speech delivered at the National Press Club, Canberra, 23 February 2005), in which the then Minister for Indigenous Affairs argued that previous Indigenous policies had not worked, that the ‘status quo is not an option. We want dramatic change’ and that her government was embarked on a ‘quiet revolution in Indigenous affairs’.

<sup>112</sup> Kirsty Howey, ‘“Normalising” What? A Qualitative Analysis of Aboriginal Land Tenure Reform in the Northern Territory of Australia’ (2014–15) 18(1) *Australian Indigenous Law Review* 4.

<sup>113</sup> See, eg, Mal Brough, ‘Blueprint for Action in Indigenous Affairs’ (Speech delivered at the National Institute of

Governance, Canberra, 5 December 2006); Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, 121 (Mal Brough).

<sup>114</sup> Terrill, above n 8, 142, 129.

<sup>115</sup> See *Aboriginal Land Rights (Northern Territory) Act 1976* (cth) s 19A.

<sup>116</sup> See Sean Brennan, ‘Economic Development and Land Council Power: Modernising the Land Rights Act or Same Old Same Old?’ (2006) 10(4) *Australian Indigenous Law Reporter* 1.

<sup>117</sup> See, eg, Australian Government Office of Township Leasing, ‘Executive Director of Township Leasing: Annual Report 2016-2017’ (Commonwealth of Australia, 2017) 23.

<sup>118</sup> Technically, when directing a land trust to grant a lease.

thousand lots directly to occupiers in communities without a township lease.<sup>119</sup> There is, unfortunately, no empirical research that addresses whether, or to what extent, the EDTL is quicker than land councils at formalising tenure arrangements. To the extent that the EDTL is inherently quicker, it is because it is required to consult less.<sup>120</sup> While the *FNLMA* aims to reduce transaction times by removing the government from the process, township leases aim to do so by removing Aboriginal land councils from the process and by reducing the need for consultation with the traditional Aboriginal owners.

Once a township lease has been granted, it is the role of the EDTL to formalise tenure arrangements for the community by granting subleases to each occupier. As the offices of the EDTL state on their website, the ‘aim of a Township Lease is to regularise *all* current tenure arrangements’.<sup>121</sup> There is a point of distinction here between a township lease and the *FNLMA*: while the latter makes formalisation easier, if and when a First Nations chooses to do so, a township lease creates a wholesale shift from informal to formal tenure. It is about instituting new arrangements rather than better enabling choice.

### 3 *Resistance and Compromise*

Importantly, the grant of a township lease itself requires the consent of traditional Aboriginal owners. To encourage their uptake, the Australian government provides incentives in the form of up-front rent and community benefits packages. The size of the incentives is considerable: for example, for Wurrumiyanga the government offered up-front rent of \$5 000 000 and a benefits package that included 25 new houses, repairs and maintenance for existing houses, \$1 million for additional health initiatives, improvements to the cemetery and a community profile study.<sup>122</sup> More broadly, over the last decade the government has devoted considerable resources to persuading traditional owners of the value of township leasing. In its recent White Paper on Developing Northern Australia, for example, the government committed to spending ‘\$17 million to improve land administration and support new township leases in the

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<sup>119</sup> See, eg, Central Land Council, ‘Land Reform in the Northern Territory: Evidence Not Ideology’ (October 2013) 3, 18 n 51.

<sup>120</sup> Published reports indicate that to date the Office of Township Leasing has put considerable effort into consulting broadly with traditional owners in relation to developments under a township lease. They are, however, not legally required to consult in the same way as Aboriginal land councils.

<sup>121</sup> Executive Director of Township Leasing ‘Annual Report 2015-2016’ (Australian Government, 2016) 9 (emphasis added).

<sup>122</sup> Terrill, above n 8, 178.

Northern Territory'.<sup>123</sup> There is a staff dedicated to the task and it has become one of the Australian government's key initiatives with respect to economic development on Aboriginal land.

Despite this, until recently only three township leases had been agreed to. In other communities the traditional owners and land councils have refused to consent out of concern for the loss of control that township leases entail. In 2010, one of the two major Aboriginal land councils, published a policy document setting out an alternative leasing proposal, under which a community-wide headlease would be held by an Aboriginal corporation rather than the EDTL.<sup>124</sup> At the time the Australian government 'resoundingly rejected' its proposal.<sup>125</sup> In the face of ongoing resistance to its model, however, in 2015 the Australian government changed its position and announced amendments to the *ALRA* to enable township leases to be held by a 'strong community entity' rather than the EDTL.<sup>126</sup> The Minister for Indigenous Affairs, Nigel Scullion, has described to Parliament how the process had been 'a lesson for everybody.'<sup>127</sup> Acknowledging that '[w]e thought we had the answer', he said that '[e]ventually, when nothing seemed to be working, we said to the community, "How do you think it will be?" and, remarkably, in different ways and in different places, they have put up the solutions.'<sup>128</sup> That is, after a long period in which communities refused to accept the government's 'answer', the government instead asked communities for their preferred solution.

The amendments have paved the way for at least three further township leases. In November 2016, traditional owners for Gunyangara agreed to a township to 'a community entity owned and controlled by the traditional owners of Gunyangara'.<sup>129</sup> The following month, further agreement was reached for the community of

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<sup>123</sup> Australian Government, 'Our North, Our Future: White Paper on Developing Northern Australia' (June 2015), 32

<sup>124</sup> Central Land Council, 'Community Leasing: An Alternative Proposal' (December 2010).

<sup>125</sup> Central Land Council, 'Township Leasing Our Way: CLC Approves Community Driven Model for Muŋitjulu' (Media Release, 8 December 2016).

<sup>126</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2015, 7382-3 (Alan Tudge, Parliamentary Secretary to the Prime Minister).

<sup>127</sup> Commonwealth, *Parliamentary Debates*, Senate, 28 March 2017, 2370 (Nigel Scullion, Minister for Indigenous Affairs).

<sup>128</sup> *Ibid.*

<sup>129</sup> The details of the proposed agreement were set out in a fact sheet in 2015: Australian Government, *Factsheet Gunyangara Community Entity Township Lease Memorandum of Understanding* (July 2015) <<https://www.dpmc.gov.au/sites/default/files/publications/gunyangara-fact-sheet.pdf>>. The lease itself was agreed to in November 2016 – see Nigel Scullion, 'Historic Agreement over Gunyangara Township Lease' (Media Release, 21 November 2016) – but delayed for a year due to legal action by a rival landowning group, see Nigel Scullion, 'Historic Township Lease for Gunyangara, NT' (Media Release, 18 November 2017).

Muṭitjulu.<sup>130</sup> Importantly, the township lease at Muṭitjulu was initially granted to the EDTL, however provision has been made for its transfer to ‘a new community corporation when the [land council] is satisfied that the corporation has the capacity to manage it’.<sup>131</sup> Both township leases can be transferred (or retransferred) to the EDTL ‘if the community entity becomes unable to effectively hold and administer the lease’.<sup>132</sup> More recently, a township lease was granted over the community of Pirlangimpi, which follows the Muṭitjulu model whereby the lease is initially being held by the EDTL, with provision to transfer it to a community corporation when it ‘can show it is ready to take over’.<sup>133</sup>

There are considerable expenses associated with managing a township lease and for the six years from 2008 to 2014 the costs of the office of the EDTL totalled \$6,377,827.<sup>134</sup> In 2014-15 alone they were \$1,542,897<sup>135</sup> and in 2015-16 they reached \$3,359,450.<sup>136</sup> As the EDTL has acquired several additional roles in recent years,<sup>137</sup> it is not possible to say how much of those costs are associated with managing township leases. Under the new township lease model, it will be the community entity who will oversee the grant and management of subleases, for which it will need staff and expertise.<sup>138</sup> It has been reported that the community entity at Gunyangara will receive \$200 000 from the government towards its operating costs,<sup>139</sup> beyond which it will be required to pay its expenses from the rent collected on subleases.

It is described below how there have been several independent reviews of the *FNLMA*. To date, there has been no independent review of township leasing or its impact, of what has worked and what hasn’t.

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<sup>130</sup> Central Land Council, ‘Township Leasing Our Way’, above n 125. This is a township sublease rather than a township lease, as Muṭitjulu is located inside of a National Park and together with surrounding land has already been leased to the Director of National Parks for 99 years. The Muṭitjulu sublease was signed in March 2017: Central Land Council, ‘Township Leasing Our Way: Muṭitjulu Celebrates its Community-Driven Model’ (Media Release, 17 March 2017).

<sup>131</sup> Central Land Council, ‘Township Leasing Our Way’, above n 125.

<sup>132</sup> Australian Government, above n 129. See also *ibid*.

<sup>133</sup> Sara Everingham, ‘Tiwi Islands Community Signs 99-year Lease with Commonwealth after ‘Difficult’ Negotiations’, *ABC News*, 27 Jun 2017 <<http://www.abc.net.au/news/2017-06-27/tiwi-islands-community-signs-99-year-lease-with-commonwealth/8654442>>.

<sup>134</sup> Terrill, above n 8, 186.

<sup>135</sup> Executive Director of Township Leasing ‘Annual Report 2014-2015’ (Australian Government, 2015) 23.

<sup>136</sup> Executive Director of Township Leasing ‘Annual Report 2015-2016’, above n 121, 30.

<sup>137</sup> The EDTL now also manages town camp leases for the Alice Springs town camps, housing precinct leases and a range of other leases over infrastructure in communities on Aboriginal land on behalf of the Australian government: *ibid* 31-5

<sup>138</sup> It is also possible for the community entity to outsource functions such as drafting leases to the Land Council or the EDTL.

<sup>139</sup> Stephen Fitzpatrick, ‘Traditional Owners Take Charge of East Arnhem Land Town’, *The Australian* (online), 21 November 2016 <<http://www.theaustralian.com.au/national-affairs/indigenous/traditional-owners-take-charge-of-east-arnhem-land-town/news-story/2b31a24a425c3f7b73eefe63e99fefbf>>.



Clearly, the recent shift to allow township leases to be held by an Aboriginal corporation rather than a government entity is a significant development. It came about as the result of sustained resistance and advocacy by Aboriginal communities and land councils. As CEO of the Northern Land Council, Joe Morrison, has written, the two major land councils ‘campaign[ed] successfully against the Commonwealth Government’s previous model of township leases which were held by a Commonwealth entity.’<sup>140</sup> The Central Land Council describes the Mutitjulu township leases as ‘township leasing our way’ and has celebrated the shift to a ‘community-driven model’.<sup>141</sup> The Australian government has also been keen to promote its role in the development of the new model. When announcing the Gnyangara township lease, the Minister said that his government had ‘worked in partnership with [the] community to develop a model of township leasing that will strengthen local decision making’.<sup>142</sup> The recent Closing the Gap Report refers to the three recent township leases under the heading of ‘Outstanding Local Solutions Delivering Exciting Outcomes’, and states that the Gnyangara township lease represents ‘years of collaboration between the Gumatj Corporation, the Northern Land Council and the Government’.<sup>143</sup>

It is unsurprising that the government would want to portray its action in the most positive light, however it would be a mistake to treat this successful example of Aboriginal advocacy as a positive model for policy development. It took nearly a decade for the government to agree to township leases being held by an entity other than the EDTL and earlier attempts to persuade it to make this change were unsuccessful. When in 2007 the Thamarrurr Council proposed a community-wide head lease to a ‘Town Corporation controlled by the traditional owners’, the government would not agree and the proposal went no further.<sup>144</sup> When in 2010 the Central Land Council proposed a community leasing model, ‘the Commonwealth resoundingly rejected it’.<sup>145</sup> The process has been one of government-led reform, resistance and

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<sup>140</sup> Australian Broadcasting Corporation, ‘There’s No Conflict Between Indigenous People, Native Title and Development’, *ABC News (opinion)*, 16 November 2017 <<http://www.abc.net.au/news/2017-11-16/no-conflict-between-native-title-and-development/9146346>>.

<sup>141</sup> Central Land Council, ‘Township Leasing Our Way: Mutitjulu Celebrates its Community-Driven Model’, above n 130.

<sup>142</sup> Nigel Scullion, ‘Historic Agreement over Gnyangara Township Lease’ (Media Release, 21 November 2016), available at <<http://www.indigenous.gov.au/news-and-media/announcements/minister-scullion-historic-agreement-over-gnyangara-township-lease>>.

<sup>143</sup> Australian Government, Department of Prime Minister and Cabinet, ‘Closing the Gap: Prime Minister’s Report 2018’ (Commonwealth of Australia, 2018) 98.

<sup>144</sup> Tom Calma, ‘Native Title Report 2005’ (Australian Human Rights Commission, 2005) 53.

<sup>145</sup> Central Land Council, ‘Township Leasing Our Way: Mutitjulu Celebrates its Community-Driven Model’, above n 130.

compromise rather than the community-led decision-making that has occurred in Canada.

Further, as discussed below, the government continues to stamp its authority on the process rather than acting responsively. Only communities who agree to a township lease are eligible for the financial benefits that the government offers; and not, for example, communities who would prefer to use section 19 leases, or to develop a new approach. And even under the new township leasing model, the government plays a greater role in decision making over Aboriginal land than it did previously. Just as flaws in the decade-long policy development process should not be forgotten, the current level of responsiveness to community decision-making should not be overstated.

## B *The First Nations Land Management Act*

### 1 *Impetus for Reform*

The process for enacting the FNLMA in Canada has been strikingly different. In the early 1990s, a group of First Nations chiefs presented the federal government with a proposal that would allow them to exit the *Indian Act* land-management system and assume control of their own lands. The proposal arose out of dissatisfaction with the *Indian Act*, which has been widely criticised for its slow processes and for inhibiting Indigenous self-government.<sup>146</sup> One issue is the lack of capacity at Indian and Northern Affairs Canada (INAC), both in terms of understaffing and a lack of expertise.<sup>147</sup> As Chief Gilbert Whiteduck writes:

The big difficulty has always been the bureaucracy of Indian and Northern Affairs Canada — the slowness of the machine to provide responses to questions, approvals, and that kind of thing. We're often ready to move very quickly. It's really the machinery. Usually what we get back is that they are overloaded and over-worked. All of these things are told to us. Then, they tell us they don't work in trying to deal with issues in months, but are looking at issues in years. That's very alarming. Business has to move forward.<sup>148</sup>

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<sup>146</sup> See generally Alcantara, 'Reduce Transaction Costs? Yes. Strengthen Property Rights? Maybe', above n 71, 421-432.

<sup>147</sup> Aboriginal Affairs and Northern Development, above n 89, 33.

<sup>148</sup> House of Commons, AANO, Evidence, 1st Session, 41st Parliament, 7 February 2012, (Chief Gilbert W. Whiteduck, Algonquin Anishinabe Nation, Kitigan Zibi Anishinabeg First Nation) as cited in *ibid* 34.

In addition to the inherent paternalism of requiring ministerial approval for First Nations decisions, these delays inhibit self-determination and economic development.<sup>149</sup>

## 2 *The Reform: First Nations Land Management*

The proposal brought forward by this group of First Nations found form in the Framework Agreement on First Nations Land Management (*'Framework Agreement'*), which was negotiated between the Canadian government and fourteen First Nations in 1996. Three years later, the *Framework Agreement* was enacted in the *FNLMA*.<sup>150</sup> The *Framework Agreement* and the *FNLMA* are referred to collectively as the First Nations Land Management Regime (*'FNLM Regime'*).

To join the FNLM Regime, a First Nation passes a resolution stating that it wishes to ratify the *Framework Agreement* and completes an assessment questionnaire which is evaluated by INAC and the First Nations Land Advisory Board (see below). Following approval, the First Nation ratifies the *Framework Agreement* and is added to the schedule of the *FNLMA*. The First Nation then enters the developmental phase, in which it drafts a land code and negotiates an individual agreement with the federal government (concerning funding, interim management measures, etc.). When the land code and agreement have been ratified by the band council, the Minister signs and transfers management of reserve lands and resources to the First Nation.<sup>151</sup>

While most existing township leases in Australia have led to land-management authority being transferred to a governmental body (the EDTL), the *FNLMA* empowers First Nations to make laws and manage lands themselves. The *FNLMA* is also broader than township leasing, as it transfers authority not just to manage tenure, but also to make laws and regulations concerning the environment and natural resources. Participating First Nations are required to develop an environmental assessment and protection regime, although this obligation 'depends on adequate financial resources and expertise being available to the First Nation.'<sup>152</sup>

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<sup>149</sup> See generally: Coates, above n 55; Milloy, above n 72; John Borrows, *Seven Generations, Seven Teachings: Ending the Indian Act* (National Centre for First Nations Governance, May 2008) <[http://fngovernance.org/resources\\_docs/7\\_Generations\\_7\\_Teachings.pdf](http://fngovernance.org/resources_docs/7_Generations_7_Teachings.pdf)>; Flanagan, Alcantara, and Le Dressay, above n 73; Pamela Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Purich, 2011).

<sup>150</sup> *First Nations Land Management Act*, S.C. 1999, c. 24.

<sup>151</sup> Indigenous and Northern Affairs Canada, 'First Nations Land Management Regime' <<https://www.aadnc-aandc.gc.ca/eng/1327090675492/1327090738973#chp4>> at 7 July 2016.

<sup>152</sup> *Framework Agreement on First Nations Land Management*, s.27.1. Available at: <<http://www.squiala.com/files/File/FIRST-NATIONS-LAND-MANAGEMENT-ACT-FULL-VERSION.pdf>> (Hereafter '*Framework Agreement*').

### 3 *Support for Participating First Nations*

There are two independent Indigenous organisations that provide support to First Nations participating in the scheme: the First Nations Land Advisory Board (LAB) and the First Nations Land Management Resource Centre (LMRC). The LAB has a primarily political role in coordinating with the government and advocating for First Nations who have joined the FNLM Regime. It has two main advocacy functions: negotiating funding with the Minister in consultation with First Nations signatories,<sup>153</sup> and proposing amendments to the Framework Agreement and the *FNLMA*.<sup>154</sup> While government-funded, the LAB operates independently from government and has 12 directors and a chair who are appointed on a regional basis by First Nations who have ratified the *FNLMA*.<sup>155</sup>

The LMRC provides more technical support to assist First Nations with the management of their lands and resources. Incorporated in 2004, the LMRC develops model land codes, land laws, land management systems and agreements for use by First Nations. It helps First Nations to develop customised versions of these documents, to resolve difficulties relating to land management and to obtain expert advice where required.<sup>156</sup> The LMRC also supports capacity-building through training programs for land managers. It currently operates a five-point strategy for capacity-building: 1) a certification program; 2) a virtual online resource centre; 3) online courses; 4) an online community and discussion space; and 5) face-to-face workshops.<sup>157</sup> Currently the LMRC is working to develop accreditation, in partnership with post-secondary institutions, for land managers who complete its programs.<sup>158</sup>

### 4 *The Proposed First Nations Property Ownership Act*

While the FNLM Regime changes the land-management regime, it does not alter other fundamental features of reserve land: underlying title to the land remains with the Crown, it continues to be subject to certain taxation exemptions,<sup>159</sup> it remains a federal responsibility under s.91(24), and is protected against future surrender and

<sup>153</sup> *Framework Agreement*, s.39 (i).

<sup>154</sup> *Framework Agreement*, s.39 (h).

<sup>155</sup> First Nations Lands Advisory Board, 'Board Members' (n.d.) <<http://landsadvisoryboard.ca/board-members/>> at 5 July 2016. For further description of the appointment process see: FNLAB Annual Report 2014-15 <<https://labrc.com/wp-content/uploads/2015/07/Final-2014-2015-LAB-AR-Eng-incl-FS.pdf>>.

<sup>156</sup> For an inclusive list of services see First Nations Land Advisory Board, '2015-2016 Annual Report' (2016) 4-5.

<sup>157</sup> House of Commons, AANO, *Evidence*, Parl. No. 26, 1<sup>st</sup> Session, 1 March 2012, 3 (Dr. Elizabeth Childs, capacity-building advisor to the LAB and LMRC).

<sup>158</sup> House of Commons, AANO, above n 89, 4.

<sup>159</sup> *Framework Agreement on First Nations Land Management*, 18.3, 4.2.

sale.<sup>160</sup> To this extent, the *FNLMA* can be contrasted to another proposed reform that has generated significant debate in Canada: the *First Nations Property Ownership Act* ('*FNPOA*'). In addition to granting First Nations a range of land-management powers similar in scope to those of the *FNLMA*, the *FNPOA* would also have given them fee simple ownership, allowing them to transfer that fee simple to individual members who could in turn transfer it to non-members.<sup>161</sup> Pasternak has questioned the legality of some of the claims made by *FNPOA* proponents about this transfer of title.<sup>162</sup> As opt-in legislation, the *FNPOA* would only have applied to those First Nations who chose to ratify it. However, the risk of land being lost through privatisation sparked a significant backlash against the *FNPOA*. Baxter has described how the social movement 'Idle No More' played a key role in shaping opposition to the proposed reforms.<sup>163</sup> With the defeat of Prime Minister Stephen Harper, who had supported the *FNPOA*, in the October 2015 election, the *FNPOA* appears to have all but vanished from public debate.<sup>164</sup>

## 5 Evaluating the *FNLM* Regime

KPMG have conducted two evaluations of the *FNLMA*, in 2010 and 2014.<sup>165</sup> Both find that First Nations report significant economic benefits through an increase in revenues, investment in infrastructure and jobs.<sup>166</sup> Nearly three-quarters of First

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<sup>160</sup> First Nations Land Management Resource Centre, "Framework Agreement on First Nations Land Management - Executive Summary," (May 2015) <<https://labrc.com/wp-content/uploads/2015/05/Framework-Agrmt-Exec-Summary-May-2015.pdf>> 3.

<sup>161</sup> Flanagan, Alcantara, and Le Dressay, above n 79, 160 ff.

<sup>162</sup> See: Shiri Pasternak, 'How Capitalism Will Save Colonialism: The Privatization of Reserve Lands in Canada' (2015) 47(1) *Antipode* 179, 189-190. Pasternak elaborates a series of concerns regarding implications of reserve privatization on provincial vs. federal jurisdiction, compatibility of fee simple with Aboriginal title's *sui generis* nature, and First Nations jurisdiction over fee-simple property.

<sup>163</sup> James Baxter, 'Storytelling, Social Movements, and the 'Evolution' of Indigenous Land Tenure' (2014) 18(1) *Australian Indigenous Law Review* 65, 71-73.

<sup>164</sup> More recent writing promoting fee simple ownership of First Nations land has not mentioned the *FNPOA*: see, eg, Ravina Bains, 'Ottawa Should Grant Property Rights on First Nations Reserves', *Huffington Post* (7 April 2016) <[http://www.huffingtonpost.ca/ravina-bains/property-rights-reserves\\_b\\_9628286.html](http://www.huffingtonpost.ca/ravina-bains/property-rights-reserves_b_9628286.html)>; Joseph Quesnel, 'Empowering Aboriginal Communities With Free Markets,' *The National Post*, 3 October 2016 <<http://news.nationalpost.com/full-comment/joseph-quesnel-empowering-aboriginal-communities-with-free-markets>>.

<sup>165</sup> KPMG, 'Cost-Benefit Analysis of Future Investment in the Framework Agreement on First Nations Land Management' (Final Report, 27 January 2010) <[http://labrc.com/wp-content/uploads/2014/03/FNLM-Benefits-Report\\_FINAL\\_Jan-27\\_2010.pdf](http://labrc.com/wp-content/uploads/2014/03/FNLM-Benefits-Report_FINAL_Jan-27_2010.pdf)> ('KPMG 2010 Report'); KPMG, 'Framework Agreement on First Nation Land Management: Update Assessment of Socio/Economic Development Benefits' (Final Report, 27 February 2014) <[http://labrc.com/wp-content/uploads/2014/03/FNLM-Benefits-Review-Final-Report\\_Feb-27-2014.pdf](http://labrc.com/wp-content/uploads/2014/03/FNLM-Benefits-Review-Final-Report_Feb-27-2014.pdf)> ('KPMG 2014 Reports').

<sup>166</sup> KPMG 2014 Report, above n 165, 22, 57.

Nations have reported increased investment, both internal and external.<sup>167</sup> It appears that the *FNLMA* has significantly reduced transaction costs and wait times, what Alcantara refers to collectively as ‘drag’,<sup>168</sup> which has in turn led to improved relationships with developers.<sup>169</sup> Chief Robert Louie of the Westbank First Nation, who is also Chair of the LAB, states that they are now ‘able to respond to the business at the speed of business and not wait six months or two years for decision-making with the Department of Indian Affairs.’<sup>170</sup> At times the reduction in transaction times has been dramatic: in some cases they are now as much as 72 times faster.<sup>171</sup> First Nations report that when they were under the *Indian Act* processing times for (i) permits and leases and (ii) registration of instruments were 584 and 133 days respectively. Following adoption of their own land codes, this has been reduced to 17 and 9 days respectively.<sup>172</sup>

The effects of the *FNLMA* on tenure security is less clear. As Alcantara notes, the impact on tenure security varies between First Nations as it depends upon the terms of their land code.<sup>173</sup> There is no research that addresses this. It is also unclear whether the benefits provided by the *FNLMA* are the same for remote First Nations. Peri-urban First Nations are likely to benefit from increased transactions with nearby third-parties and can establish businesses geared towards off-reserve customers.<sup>174</sup> The *FNLMA* would also seem to offer benefits to those remote communities with strong natural resource economies, by reducing transaction costs and granting greater flexibility in negotiating agreements. Research indicates that First Nations closer to urban areas are somewhat more likely to join the *FNLMA* and seem to derive greater economic benefit from it than more remote communities.<sup>175</sup>

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<sup>167</sup> Ibid 56.

<sup>168</sup> Alcantara, ‘Reduce Transaction Costs? Yes. Strengthen Property Rights? Maybe’, above n 71.

<sup>169</sup> AANO, (Philip Goulais, Director, First Nations Land Advisory Board), as cited in Standing Committee on Aboriginal Affairs and Northern Development, above n 89, 28.

<sup>170</sup> House of Commons, AANO, Evidence, 1st Session, 41st Parliament, 20 October 2011, (Chief Robert Louie, Chairman, First Nations Land Advisory Board).

<sup>171</sup> KPMG 2014 Report, above n 165, 3.

<sup>172</sup> Ibid 9.

<sup>173</sup> Alcantara, ‘Reduce Transaction Costs? Yes. Strengthen Property Rights? Maybe’, above n 71, 427-431.

<sup>174</sup> See e.g. this profile of Osoyoos Indian Band’s economic development strategy: Jake MacDonald, ‘How a B.C. native band went from poverty to prosperity’ *The Globe and Mail* (29 May 2014) <<http://www.theglobeandmail.com/report-on-business/rob-magazine/clarence-louie-feature/article18913980/>>.

See also this profile of Westbank First Nation: Aboriginal Business and Investment Council, ‘Westbank First Nation’ (n.d.) <<http://www.bcabc.ca/success-stories/westbank-first-nation/>>.

<sup>175</sup> Mary Doige, James Deaton, and Bethany Woods, ‘Institutional Change on First Nations: Examining Factors Influencing First Nations Adoption of the Framework Agreement on First Nations Land Management’ (Paper presented at the Agricultural & Applied Economics Association’s 2013 AAEA & CAES Joint Annual Meeting, Washington, D.C., 4-6 August 2013) <<http://ageconsearch.umn.edu/bitstream/150519/2/Doige%20Deaton%20Woods%20AAEA%20submission>>.

#### IV COMPARING THE REFORMS

##### A *Community-led or Government-led Reform?*

A first point of distinction between the two reforms is how they came about. The *FNLMA* gives effect to an agreement between the federal government and 14 First Nations, who worked together to develop an alternative to the cumbersome and paternalistic provisions of the *Indian Act*. Township leasing was instead an initiative of the Australian government. Its key elements were designed internally and for many years the government refused to make changes to its core model. It was only after sustained resistance by Aboriginal landowners that amendments were introduced in 2015 to allow township leases to be granted to a community entity instead of the EDTL.

The government-led nature of township leasing is reflected in the use of incentives: the government offers substantial up-front rent to landowners and a benefits package to communities upon grant of a township lease. It is described above how Wurrumiyanga received sizeable up-front rent and other benefits. At Gunbalanya, there has been up-front rental of \$2 000 000 as well as a \$2 500 000 payment towards economic development, around \$200 000 per year towards the operating costs of the community entity and a \$5 000 000 investment in housing for local workers.<sup>176</sup> At Muṯitjulu, the government has promised to invest \$10 000 000 in community housing, build ‘modest accommodation’ for visiting traditional owners and pay \$2 000 000 towards a community business centre.<sup>177</sup>

Those same benefits are not available to other communities and this use of incentives is problematic. While it is sometimes portrayed by governments as one of the benefits of township leasing, it is more accurately described as the targeting of discretionary spending towards particular communities based on their compliance with government preferences. This undermines Aboriginal autonomy, raises questions about whether limited funds are being allocated in the most effective manner and, if an evaluation is conducted, will make it more difficult to determine whether township leasing itself has had a positive impact or whether any differences are attributable to additional funding and other benefits.

Township leasing was also introduced at the same time as the controversial Northern Territory Emergency Response, or Intervention, which ran between 2007 and

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pdf>; Ying Chen, ‘An Economic Analysis of Factors Influencing the Adoption of the First Nations Land Management Act and the Consequences of Adoption’ (MSc Thesis, University of Guelph, 2015).

<sup>176</sup> Fitzpatrick, above n 139.

<sup>177</sup> Central Land Council, ‘Township Leasing Our Way’, above n 125.

2012 and included a number of coercive reforms such as mandatory income management and alcohol restrictions and the compulsory acquisition of five-year leases over 64 communities on Aboriginal land.<sup>178</sup> While township leasing is itself opt-in, albeit highly incentivized, it was designed and initially implemented by the government during a period in which coercive intervention had become normalised. The recent shift to allow township leases to be held by an Aboriginal corporation coincides with a broader retreat from hardline coercive policies. This is a positive development. However, the current approach reflects a long-term pattern of incentivizing compliance rather than meaningfully engaging with local Aboriginal leadership.

This does not mean that Aboriginal communities have been without agency. Those landowners who have elected to participate in township leasing did so by negotiating favourable terms, within the boundaries of what was on offer. As the government has been keen to secure their agreement, those terms have been relatively generous. It has also been noted that traditional Aboriginal owners have used township leasing to increase their authority vis-à-vis non-traditional owner residents. This is a more complex, and potentially more problematic, development that is yet to receive much research attention.<sup>179</sup>

It is clear that the government-led nature of the reforms has impacted on their success. After ten years, generous incentives, and millions of dollars spent trying to negotiate township leases, by 2016 only three had been agreed to. In contrast, of the 618 recognised First Nations in Canada, by 2017 around 205 had either joined the FNLMA Regime or had confirmed an interest in doing so.<sup>180</sup> First Nations join the Regime not because of government incentives (there are none), but because they elect to do so based on the benefits it can offer. Those benefits have been documented in two independent evaluations.

## B *Self-Management*

It is unsurprising then that the two reforms have taken such different approaches to self-management. The *FNLMA* allows First Nations to take control of their own processes and lessens the role of government. Until recently, township leasing did the opposite: it shifted legal control over the formalisation process from landowners and

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<sup>178</sup> For a discussion of the Intervention see, eg, Calma, 'Native Title Report 2007', above n 108, ch 3 and the contributors to Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (Arena Publications, 2007).

<sup>179</sup> Cf Terrill, above n 8, 236-8, 242-4; Nicolas Peterson, 'Community Development, Civil Society and Local Government in the Future of Remote Northern Territory Growth Towns' (2013) 14(1) *Asia Pacific Journal of Anthropology* 339, 342-4.

<sup>180</sup> First Nations Land Advisory Board, '2016-2017 Annual Report', above n 5, 4.



land councils to the EDTL, a government body. The recent amendment to allow township leases to be held by a community entity is a retreat from this hardline assertion of government control. The retreat is not complete, in that for two out of the three leases agreed to under the new model, the township lease will first be held by the EDTL – during the important initial period of formalisation – and will only be transferred to the community entity when it demonstrates that it has capacity. For all three, the EDTL (rather than, for example, a regional Indigenous body) will replace the community entity if it is unwilling or unable to continue.

In Australia, the approach when implementing land tenure reform has been that Aboriginal self-government can be regarded as aspirational.<sup>181</sup> Even under the new township leasing model, it is treated as something that has to be demonstrated or earned, rather than being an inherent right, an immutable political fact or a foundational principle of government. Throughout the reforms it has been something that might be sidelined in the pursuit of other goals such as the introduction of new forms of tenure. This approach impacts not just on the formal outcomes of reform, but also on the way those outcomes are experienced by communities.

It is also the case that the new township leasing model will have enduring political consequences. The government offers incentives for communities to shift away from the existing, land council-based management structure towards smaller local bodies. Other communities do not receive the same assistance. This reflects an approach of trying to influence decision making rather than responding to community choice. Here, the government is informed by a broader policy of wanting to see certain of the larger land council's functions devolved to local organisations.<sup>182</sup> The government argues that the large and centralised land councils are bureaucratic and that delegation will better enable decision-making at the local level.<sup>183</sup> Critics have noted that the land councils' size gives them greater political heft, against a long history of governments trying to break them up and diminish their power.<sup>184</sup>

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<sup>181</sup> We refer here to the more long-term pattern. As noted above, during the period which led to the Northern Territory Intervention the federal government was actively hostile to the idea of Aboriginal self-government or self-determination, characterizing it as a source of dysfunction. There has since been some retreat from hard-line interventionism.

<sup>182</sup> This began in 2006: see Brennan, 'Economic Development and Land Council Power', above n 116.

<sup>183</sup> The Minister for Indigenous Affairs has said that he would like to see 'delegations used to support the aspirations of traditional owners and reduce unnecessary bureaucratic process': Nigel Scullion, 'The Land is Our Backbone' (Speech delivered at the Garma Festival, Gulkula, 30 July 2016).

<sup>184</sup> See Brennan, 'Economic Development and Land Council Power', above n 116, 3-9. It has also been noted that in other areas of policy – such as housing and local government – the trend has been towards centralizing rather than decentralizing service delivery: see Leon Terrill, 'Two New Township Leases on Aboriginal Land in the Northern Territory' (2017) 91 *Australian Law Journal* 370, 372-3.

### C *Building Indigenous Capacity*

This is further reflected in the approach taken to building and supporting the capacity of Indigenous organisations. A key feature of the FNLM Regime, and one that is often overlooked in literature on the topic,<sup>185</sup> is the provision of advocacy and support by the LAB and LMRC. These bodies are Indigenous-run and independent of government. In recognition of the challenges faced by First Nations when engaging in land management and environmental approval, they provide advice and a wide range of resources. There is no equivalent in Australia. For years, the Australian government would only agree to township leases that transferred control to a government entity. It ultimately shifted from this policy in the face of ongoing resistance by landowners. Even now, rather than creating an institutional support structure, or providing better resources to existing organisations such as land councils, the amended township leasing model provides for the transfer of responsibility to the EDTL in the event that the community entity is unwilling or unable to perform its role. The Canadian example of the LAB and LMRC shows that another, less intrusive and more constructive approach is possible.

### V CONCLUSION: WHAT DO THE REFORMS REFLECT ABOUT INDIGENOUS-STATE RELATIONS?

The article concludes by considering what this comparison between the *FNLM* and township leasing might tell us about governmental processes and the nature of Indigenous-state relations. While it would be careless to draw too broad a conclusion from a comparison between just two sets of reforms, the differences described here have been stark and persistent: the Australian reforms have been government led, prescriptive of outcomes and have resulted in a higher level of government involvement in decision making over Aboriginal land. The Canadian reforms implement an agreement between the federal government and a group of First Nations and provide a pathway for greater autonomy. More recently the Australian government has retreated from its hard-line assertion of control, but it still uses its financial resources to direct communities towards its preferred model of land administration – the model it developed – rather than working with communities to achieve the goals they identify. These differences cannot be without meaning, and particularly in light of contemporary Australian debate about treaties, recognition and

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<sup>185</sup> For further discussion of this oversight see Sasha Boutilier, 'An Unsung Success: The *First Nations Land Management Act*,' *Policy Options* (online), 18 August 2016 <<http://policyoptions.irpp.org/magazines/august-2016/an-unsung-success-the-first-nations-land-management-act/>>.

Constitutional reform, it would be remiss not to reflect upon the broader significance of such high-profile reforms.

Part II of the article describes how Australia has a different history to Canada with respect to the recognition of Indigenous claims to land. The modern legacy of this history is the culture and the institutions that exist today. It emerges that from a property perspective Australia had the better starting point for reform. Aboriginal land in the Northern Territory is an inalienable fee simple, a strong and direct form of ownership, whereas reserve land in Canada is held by the Crown subject to its trust-like obligations. The *ALRA* provides Aboriginal landowners with greater autonomy and simpler processes than the cumbersome and paternalistic *Indian Act*. The *ALRA* also establishes region-wide Aboriginal governance bodies in the form of Aboriginal land councils, which have a permanent staff and have developed considerable experience and expertise. It was open to the Australian government to build on this starting point and create opportunities for community-led economic development through a responsive approach to land tenure reform that entailed meeting with Aboriginal landowners and community residents to identify the problems or constraints they experienced with respect to land tenure when trying to attain their aspirations for economic development. This could have formed the basis for a set of reforms that were well informed and locally adapted, something more akin to what occurred in Canada. Instead, the Australian government took the approach that existing arrangements were flawed and that it knew how to fix them. It developed its own reform model and presented it to communities, only agreeing to alter the rigid parameters of that model after sustained resistance.

In Canada, there is a longer history of recognising Indigenous claims to land and of dealing with First Nations on a nation-to-nation basis. Relatedly, First Nations enjoy stronger legal protection and political recognition, through treaties and through section 35 of the Constitution, which recognises the ‘aboriginal and treaty rights of the aboriginal peoples of Canada’. Neither treaties nor constitutional recognition currently exist in Australia, and for several decades a number of Indigenous leaders from around the country have campaigned for their introduction. This most recently found form in the ‘Uluru Statement from the Heart’ and the report of the Referendum Council, which followed on from a comprehensive Indigenous consultation process.<sup>186</sup> The documents recommend a series of treaties or *Makarrata* with Indigenous groups, and a referendum to enable amendments to the Australian Constitution to provide for an Indigenous

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<sup>186</sup> See Referendum Council, ‘Final Report of the Referendum Council’ (30 June 2017). The consultation process included 12 major regional dialogues and the appointment of 250 delegates who travelled to Mutitjulu in May 2017 to formulate the Statement.

‘Voice to Parliament’, a representative body that would provide non-binding advice on matters affecting Indigenous peoples.<sup>187</sup> The introduction of a body to provide non-binding advice is a more modest proposal than the entrenchment of Aboriginal rights in s 35 of the Canadian Constitution. Despite this, the proposal for an advisory body was rejected by the Turnbull Coalition Government as too radical.<sup>188</sup>

It is tempting for Australians to overstate the extent to which Indigenous groups in Canada have secured the protection of their rights and achieved control over their affairs. A number of authors have cautioned against this assumption.<sup>189</sup> On many indicators, the position of Indigenous peoples in the two countries is similar: higher rates of illness, mortality, suicide, crime and imprisonment than the general population, combined with lower rates of income, education and wealth.<sup>190</sup> Though self-government agreements and treaties have been shown to have positive effects,<sup>191</sup> Indigenous peoples in Canada continue to face many of the same social and political challenges as Indigenous peoples in Australia. It might also be said that the *FNLMA* represents a rare example of legislation that advances Indigenous self-determination. Borrows describes Canada’s record of legislative initiatives to advance Indigenous self-determination as ‘abysmal’ compared to that of the United States,<sup>192</sup> and many other recent legislative changes with regard to Indigenous peoples in Canada have been more likely to harm Indigenous self-determination than to advance it.<sup>193</sup>

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<sup>187</sup> Also recommended were a non-constitutional statement of recognition of Indigenous peoples and a truth commission / process to facilitate truth telling: *ibid* 30-2.

<sup>188</sup> See Australian Broadcasting Corporation, ‘Indigenous Leaders Enraged as Indigenous Advisory Body Rejected by PM in “Kick in the Guts” for Advocates’, *ABC News*, 26 October 2017 (Dan Conifer, Bridget Brennan, Isabella Higgins, Joanna Crothers and Shahni Wellington) <<http://www.abc.net.au/news/2017-10-26/indigenous-advisory-body-proposal-rejected-by-cabinet/9087856>>.

<sup>189</sup> For an overview of the issues and limitations of ‘judicialization’ of Indigenous affairs in Canada see: Michael Ignatieff, ‘Afterword: The Indigenous International and a Jurisprudence of Jurisprudences’, in Patrick Macklem and Douglas Sanderson (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal Rights and Title*, (University of Toronto Press, 2016) 506, 508 ff. For an Australian perspective, see Larissa Behrendt, ‘The Protection of Indigenous Rights: Contemporary Canadian Comparisons’ (Research Paper 27, Parliamentary Library, Parliament of Australia, 2000).

<sup>190</sup> See, eg, Calla Wahlquist, “It’s the same story’: How Australia and Canada are twinning on bad outcomes for Indigenous people,” *The Guardian*, (24 February 2016) <<https://www.theguardian.com/world/2016/feb/25/indigenous-australians-and-canadians-destroyed-by-same-colonialism>>.

<sup>191</sup> See, eg, Price Waterhouse Coopers, “Financial and Economic Impacts of Treaty Settlements in BC,” (Research Paper, British Columbia Treaty Commission, November 2009) <<http://www.bctreaty.net/sites/default/files/BC-Treaty-Commission-PriceWaterhouseCoopers-Report.pdf>>.

<sup>192</sup> John Borrows, *Freedom and Indigenous Constitutionalism*, (University of Toronto Press, 2016) 165 ff.

<sup>193</sup> *Ibid*; John Borrows, “Legislation and Indigenous Self-Determination in Canada and the United States” in Patrick Macklem and Douglas Sanderson (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal Rights and Title*, (University of Toronto Press, 2016) 474-505.

As this article has shown, however, in the context of land tenure reform there is a clear distinction between the approach that each country has taken – not just with respect to the reforms themselves, but also with respect to the process that led to their introduction. The distinction becomes even sharper when it is considered that other land tenure reforms introduced by the Australian government over the last decade have been more intrusive than township leasing. As part of the Northern Territory Intervention, the government unilaterally acquired five-year leases over 64 communities on Aboriginal land.<sup>194</sup> As part of its housing reforms, it requires that all housing areas in remote communities be leased to the relevant state or territory government on terms that give the government unfettered control over housing management.<sup>195</sup> While Aboriginal landowners in the Northern Territory began with stronger property rights, it appears that the stronger political rights of First Nations in Canada have had the greater impact. This adds weight to the arguments of Indigenous campaigners for substantive structural reform; experience has shown that strong property rights are not alone sufficient.

More broadly, the comparison between township leasing the *FNLMA* highlights problems with the Australian government's reform culture in the context of land tenure reform. There has been a persistent failure to give due weight to the importance of Indigenous communities exercising authorial control over their own circumstances. This is not a matter of abstract principle or government nicety: an approach to policy development based on government led reform, resistance and compromise – the approach that has been taken in Australia – places constraints around what can be achieved, interferes with the generation of ideas and the development of improved understandings, and reduces opportunities for leadership and problem solving at the local level. The Canadian experience shows that when governments take a more responsive approach to land tenure reform the outcome can be more targeted and effective reforms that are demand driven and better enable Indigenous-led decision making.

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<sup>194</sup> Terrill, above n 8, 186-92.

<sup>195</sup> *Ibid* 193-9.