

THE ROAD TO SELF-DETERMINATION: ABORIGINAL SELF-GOVERNMENT THROUGH AGREEMENT-MAKING

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ABORIGINAL SELF-GOVERNMENT—AUSTRALIAN
ABORIGINAL ISSUES—SELF-GOVERNMENT
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ABSTRACT

Self-government is a foundational step towards the UN-recognised right of self-determination for First Nations peoples. It is also a significant method of resolving the continuing paternalism and effects of colonisation inflicted upon them. The positive impacts of self-government have been exemplified in Canada and the US, where Indigenous self-government has led to better economic and social outcomes for First Nations peoples. In particular, Canada's approach demonstrates a proven path toward self-government for Aboriginal Australians through agreements that confer the power to self-govern outside of historical treaties and discussions of sovereignty. The Noongar Settlement may be an example of one such agreement in Australia. The similarity between the Australian and Canadian jurisdictions, the existence of the Settlement and other movements towards Aboriginal self-government, the expanding definition of sovereignty, and legal pluralism principles indicate that there may be further scope to develop Aboriginal self-government in Australia.

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I INTRODUCTION

The *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*') recognised the right of Indigenous peoples across the world to self-determine to reclaim the autonomy lost by many Indigenous peoples as a result of colonisation by other nations.¹ Inherent in the right to self-determination is the right to self-government—the right to govern Indigenous internal affairs by the Indigenous peoples affected by them—through traditional and modern means.² Australia ratified the *UNDRIP* in 2009. However, the right of Aboriginal Australian peoples to self-govern (and, by extension, their right to self-determination) remains unrecognised in Australian law, as well as federal and state policy despite continued and renewed calls for the power to self-determine by Aboriginal Australians.³

The Indigenous right to self-govern is more adequately realised in the United States of America ('US') and Canada, where some First Nations peoples maintain their own courts, governmental institutions, and laws regarding internal Indigenous issues. Of particular note are the self-government agreements in Canada between First Nations peoples—such as the Nisga'a—and Canadian governments. These 'modern treaties'⁴ convey powers of self-government, including the power to make laws, and are not dependent upon the existence of a colonially recognisable sovereignty. These treaties instead recognise the continuing laws and customs of First Nations

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) art 3 ('*UNDRIP*'): 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

² *Ibid* art 4.

³ The Human Rights and Equal Opportunity Commission, Submission to the United Nations Committee on Economic, Social and Cultural Rights (2 December 2001) [4.5]: 'Most notably, [the federal government] have rejected or failed to implement recommendations of the Royal Commission into Aboriginal Deaths in Custody, and *Bringing them home*, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families. Many recommendations, particularly those concerning the application of the principle of self-determination, have been actively rejected.'

⁴ Alice Petrie, 'Treaties and Self-Determination: Case studies from International Jurisdictions' (Research Note No 8, Parliamentary Library, Parliament of Victoria, June 2018) 3.

Canadians despite Canadian colonial sovereignty.⁵ There are similarities between these agreements and Australian agreements that have been reached to date, such as the Noongar Settlement, which illustrates that the Australian legal system may be able to accommodate self-government agreements of a similar nature.

This article will argue that Aboriginal Australian communities can achieve the right to self-government by entering into negotiated agreements with Australia's state and territory governments. It also argues that a lack of recognised sovereignty does not preclude Aboriginal Australians from attaining the right to self-govern under the term's expanding definition and the application of legal pluralism. Part II of this article outlines the concepts of self-government and self-determination and the relationship between these respective concepts. Part III explains the benefits of self-government for Aboriginal Australians. Part IV considers the issues that may eventuate in Australia upon introducing historical Indigenous treaties. Part V examines First Nations self-governance agreements in Canada, focusing on the Nisga'a Agreement. Part VI evaluates the Noongar Settlement and other initiatives in Australia that may operate to confer self-government rights. Part VII argues that the expanding definition of sovereignty and the concept of legal pluralism demonstrate that Aboriginal self-government can coexist with Australia's colonial sovereignty against the prevailing fear of Australian courts and governments. Lastly, Part VIII will discuss the ongoing questions evoked in recognising Aboriginal sovereignty and constitutional recognition of Aboriginal peoples and explore how Aboriginal self-government can proceed while they remain unanswered. This article aims to demonstrate that the stage is set for agreements like the Noongar Settlement to create powers to self-

⁵ Vanessa Sloan Morgan, Heather Castleden and Tayii Hawil, "'Our Journey, Our Choice, Our Future': Huu-ay-aht First Nations' Self-Government enacted through the Maa-nulth Treaty with British Columbia and Canada' (2019) 51(4) *Antipode* 1340, 1346.

govern for Aboriginal Australian peoples and thus help develop their right to self-determination.

II SELF-GOVERNMENT AND SELF-DETERMINATION

Self-determination and self-government have received no singular definition in international law;⁶ they are, however, frequently referred to as intrinsically dependent concepts. Self-government is considered to be an indicator of, and a stepping stone to, the inherent right to self-determination for Indigenous peoples around the world.⁷ As such, it is argued that self-governance is a necessary step towards self-determination will be demonstrated.

A *Self-Government*

In the absence of a definition in international law, this article refers to self-governance generally as the necessary powers to self-determine; to make rules and institutions that govern the relevant group or polity. Indigenous self-government is specifically described with reference to Indigenous people's ability to regulate internal affairs according to customary law and the ability to create, maintain, and develop legal and political institutions.⁸ The concept reflects the idea, often repeated in Aboriginal policy-making, that Aboriginal communities understand their own needs better than policymakers at a national level.⁹

⁶ Petrie (n 4) 1.

⁷ *UNDRIP* (n 1) art 4: 'Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'.

⁸ International Law Association, *Resolution on the Rights of Indigenous Peoples*, Resolution No 5/2012, 75th Conference of the International Law Association, (26–30 August 2012) recommendation 5.

⁹ See Bertus de Villiers, 'A Fresh Approach to Aboriginal Self-Government and Co-Government: Grassroots Empowerment' (2020) 47(1) *Brief* 10, 11: 'Local communities understand their own needs better than a few selected leaders at a national level ... Top-down schemes affecting indigenous communities ... have a poor record'; *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 4 [27.9.2] ('*Royal Commission into Aboriginal Deaths*'): '... the resolution of the "Aboriginal problem" has been beyond the capacity of non-Aboriginal policy makers and bureaucrats. It is about time they left the stage to those who collectively know the problems at national and local levels; they know the problems because they live the problems'.

It is important to distinguish between Aboriginal institutions that exercise self-government rights and Aboriginal service providers that assist Aboriginal communities by implementing programs designed to achieve positive social and economic outcomes in communities.¹⁰ For example, the Nisga'a Lisims Government's Council of Elders, which interprets cultural tradition and advises the Nisga'a Lisims Government,¹¹ is an institution of self-government. Conversely, while service providers such as Aboriginal Medical Services ('AMS') offer valuable pathways for Aboriginal participation in, and management of, their communities, they cannot be equated to institutions that exercise self-governmental rights. AMS provides health services for Aboriginal people, often administered by Aboriginal people, but it does not provide an avenue to governing the provision of health services to Aboriginal communities.¹² The difference lies in the ability to govern without external interference. Participating partially in government and community—most often under direction and policy determined by non-Aboriginal decision makers—does not equate to self-government. This distinction is important because, as will be outlined further, the right to self-determine depends heavily on the ability of Aboriginal communities to govern their internal affairs autonomously, without the explicit external direction of non-Aboriginal policy makers.

The ability of Indigenous peoples to self-govern is significantly curtailed by the continuing effects of colonisation. As such, Indigenous self-government requires continuing co-operation from the dominant colonial government to be successful.¹³ Self-determination therefore requires the right

¹⁰ Alison Vivian et al, 'Indigenous Self-Government in the Australian Federation' (2017) 20 *Australian Indigenous Law Review* 215, 222.

¹¹ See 'Council of Elders', *Nisga'a Lisims Government* (Web Page) <<https://www.nisgaanation.ca/council-elders>>.

¹² Bethne Hart, Miriam Cavanagh and Denise Douglas, 'The "Strengthening Nursing Culture Project": An Exploratory Evaluation Study of Nursing Placements Within Aboriginal Medical Services' (2015) 51(2) *Contemporary Nurse: A Journal for the Australian Nursing Profession* 245, 246.

¹³ Katie Saulnier, 'Aboriginal Self-Determination: A Comparative Study of New Zealand, Australia and the United States of America' (ISID Aboriginal Policy Study Paper No PB-2014-02, Institute for the Study of International Development, 2014) 1.

to self-government, and an effort on the part of colonial governments to provide the support needed—including material resources—to facilitate the establishment and maintenance of self-government in Australia.¹⁴ Scholars, such as Saulnier, suggest that governments take after efforts in New Zealand to improve education and healthcare outcomes for Aboriginal peoples.¹⁵ The New Zealand Government gave a wide degree of discretion to Indigenous groups in determining the best models of improvement and subsequently assisted the Indigenous groups in effecting these improvements.¹⁶ Saulnier’s views reflect the recommendations made by the Royal Commission into Aboriginal Deaths in Custody in Australia, which noted that empowerment of Aboriginal communities to self-govern and self-determine was dependent on governments providing ‘material assistance to make good past deprivations’ while also giving sufficient control to Aboriginal communities in deciding how, and for what reason, these resources were used.¹⁷

B *Self-Determination*

The United Nations (‘UN’) recognised self-determination as a right in the *International Covenant on Civil and Political Rights* (‘ICCPR’)¹⁸ in 1966. The *ICCPR* provides that self-determination is the right of all people to, without external direction, control their own economic, social and cultural development and determine their own political status.¹⁹ Indigenous peoples’ right to self-determination is expressly recognised in the *UNDRIP*.²⁰ The *UNDRIP* is, at present, non-binding.²¹ The *UNDRIP* described the right of indigenous peoples to self-determination as including ‘the right to autonomy

¹⁴ Ibid 32.

¹⁵ Ibid 33.

¹⁶ Ibid.

¹⁷ *Royal Commission into Aboriginal Deaths* (n 9) vol 1 [1.7.34].

¹⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976).

¹⁹ Ibid art 1(1).

²⁰ *UNDRIP* (n 1) art 3.

²¹ Law Council of Australia, *Indigenous Australians and the Legal Profession* (Policy Statement, February 2010) 6.

or self-government in matters relating to their internal and local affairs'.²² As above, this demonstrates further that self-government is vital to achieving self-determination.

It is evident that both self-government and self-determination go beyond the right to 'self-management'. Self-management was an idea that was widely promoted by the 1983 Australian Federal government²³ and other past governments,²⁴ and has been a common theme in the policies of following governments.²⁵ Although self-management was considered a step towards self-determination; in practice, the policy only provided support to allow Aboriginal Australians to participate in colonial society on a more or less equal ground.²⁶ Clyde Holding, the Minister for Aboriginal Affairs in 1983, described the right to self-management for Aboriginal Australians as the right 'to make choices as to their lifestyle, to have a say in their community affairs, to provide services to themselves, to conduct businesses, and, within the law, to make their own decisions'.²⁷ This government pointed to the establishment of incorporated Aboriginal-controlled corporations as a measure of success in promoting self-determination.²⁸ However, this interpretation of self-determination was considered both at the time and, in hindsight, to be unaligned with the definition of self-determination in international law and the self-determination requested by Aboriginal communities of the time.²⁹ Self-determination, by agreement from the UN and Aboriginal Australians, requires that Indigenous peoples possess the right to

²² UNDRIP (n 1) art 4.

²³ See Pamela Ditton, 'Self Determination or Self-Management' [1990] (2) *Australian International Law News* 3, 4.

²⁴ John Gardiner-Garden, 'From Dispossession to Reconciliation' (Research Paper No 27, Parliamentary Library, Parliament of Australia, 29 June 1999) 9.

²⁵ Patrick Sullivan, *Belonging Together: Dealing with the Politics of Disenchantment in Australian Indigenous Policy* (Aboriginal Studies Press 2011) 4.

²⁶ Gardiner-Garden (n 24) 9.

²⁷ *Ibid.*

²⁸ *Ibid.* 27.

²⁹ *Ibid.* 9.

self-govern their local and internal affairs, rather than simply the right to these affairs.³⁰

III ABORIGINAL AUSTRALIANS AND SELF-GOVERNMENT

A *Self-Determination vs Paternalism*

It is well documented that Aboriginal Australians have not been granted access to the right to self-determine or self-govern in the more than 200 years since colonial first contact. Despite the lessons afforded by the explicit self-management policy of previous governments, modern governmental policy regarding Aboriginal Australians in more recent years remains obstructive towards the achievement of Aboriginal Australian self-determination. Instead, the theme of Aboriginal policy has consistently been one of paternalism.³¹

Existing examples of paternalism in Australia are evidenced by the current disproportionate enforcement of policies to remove children and separate families for the purpose of child protection against Aboriginal families.³² This policy is viewed by some as a continuation of the assimilatory policies of the Stolen Generation.³³ Additionally, certain Aboriginal people are subject to income management, colloquially known as the ‘cashless welfare card’, and Aboriginal communities in the Northern Territory and Western Australia have been closed without the consent of, or consultation with, the communities themselves.³⁴ The cashless welfare card was partly the result of consultation but the broad application and mandatory nature of the program was not the version of the policy discussed in these consultations,

³⁰ Ibid.

³¹ Jessie Dorfmann, ‘Undermining Paternalism: UNDRIP and Aboriginal Rights in Australia’ (2015) 37(1) *Harvard International Review* 13, 13.

³² Sonia Harris-Short, *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children: Protecting the Vulnerable Under International Law* (Taylor & Francis, January 2012) xvii.

³³ See *ibid* 5–6.

³⁴ Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jimenez, *The Neoliberal State, Recognition and Indigenous Rights: New Paternalism to New Imaginings* (ANU Press, July 2018) 14.

and Australian state governments were accused of implementing the program before consultation had begun.³⁵

These examples illustrate little in terms of more overtly oppressive actions taken by governments, such as the 2007 Northern Territory Intervention ('the NT Intervention'). Here, the military was sent into Aboriginal communities in the Northern Territory (compulsorily and without consultation) to respond to allegations of child sexual abuse and neglect in these communities.³⁶ The closure of communities in Western Australia was effected on a similar basis to the NT Intervention, where dysfunction (including allegations of sexual and family violence) was used as a partial excuse to cease funding services that were essential to the survival of those communities.³⁷ External economic considerations formed the other part of this justification, with consultation coming long after colonial economic analysis, and only between a small number of elders and communities in the Kimberley and Pilbara regions.³⁸ The NT Intervention resulted in more expansive interventions not limited to the imposition of compulsory income management for Aboriginal people receiving welfare payments and restrictions on the sale of alcohol.³⁹ Certain measures, such as the alcohol and land controls, are expected to continue into 2022.⁴⁰

The above policies have regularly been articulated as empowering Aboriginal communities to self-determine.⁴¹ Yet, paternal policies continue

³⁵ Shelley Beilefeld, 'Cashless Welfare Cards: Controlling Spending Patterns to What End?' (2017) 8(29) *Indigenous Law Bulletin* 28, 28.

³⁶ Dorfmann (n 31) 14.

³⁷ Dennis Eggingting and Sarouche Razi, 'The Bogeyman in the Mirror: White Australia and the Proposal to Close Remote Communities in Western Australia' (2015) 8(20) *Indigenous Law Bulletin* 26, 27.

³⁸ *Ibid.* 28.

³⁹ *Ibid.*

⁴⁰ See *Stronger Futures in the Northern Territory Act 2012* (NT); Joint Committee on Human Rights, Parliament of Australia, Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 (Report No 11, 27 June 2013) 3.

⁴¹ Harris-Short (n 32) 6–7. See also Royal Commission into Aboriginal Deaths in Custody (National Report, April 1991) vol 1 [1.7.34]; Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (Report, April 1997): 'Our principal finding is that self-determination for Indigenous peoples provides the key to reversing the over-representation of Indigenous children in the child welfare and juvenile justice systems of the States and Territories and to eliminating unjustified removals of Indigenous children from their families in communities.'

to be enforced upon Aboriginal Australians without appropriate consultation. Adequate consultation is crucial to implementing Aboriginal affairs policies. Without it, how can it be said that Aboriginal communities have had a say in their affairs at all, let alone be empowered to govern them? The report that led to the NT Intervention called for ‘a thoughtful consultative process’ rather than the militaristic and controlling actions seen.⁴² The NT Intervention was criticised for the reason that Aboriginal people are not empowered by removing control of their communities and children.⁴³

Self-determination has occasionally been on the government agenda regarding Aboriginal affairs. However, this concept is often reduced to standards below international and Aboriginal understanding to suit governmental need and is enforced without consent, as was evidenced above. It is therefore evident that paternalistic policies are not effective in promoting Aboriginal empowerment and combatting the issues that Aboriginal people face. However, self-determination may provide a path forward to achieving these ends.

B *The Importance of Self-Government for Aboriginal Australians*

The importance of self-government has been widely acknowledged in the context of addressing systemic issues faced by Aboriginal Australians today.⁴⁴ One of the most prevalent themes emerging from the 1991 Royal Commission into Aboriginal Deaths in Custody (‘the 1991 Royal Commission’) was the need for greater Aboriginal Australian control over their own lives and communities in order to help address the rates of Aboriginal incarceration and deaths in custody and their underlying systemic causes.⁴⁵ The 1991 Royal Commission found that Aboriginal self-

⁴² Melissa Sweet, ‘Australian Efforts to Tackle Abuse of Aboriginal Children without Consultation Raise Alarm’ (2007) 335(7622) *The British Medical Journal* 691, 691.

⁴³ Ibid.

⁴⁴ Vivian et al (n 10) 221.

⁴⁵ *Royal Commission into Aboriginal Deaths* (n 9) vol 1 [1.7.6].

government was ‘the most obvious route to indigenous empowerment’ and, subsequently, to addressing over-incarceration and deaths in custody.⁴⁶ The Royal Commission placed significant emphasis on empowering Aboriginal Australians to identify and resolve the issues faced by their communities rather than having the government continue to enforce paternalistic policies that attempt to combat issues that Aboriginal Australians know best how to resolve.⁴⁷

Scholarly research has largely supported the sentiments of the 1991 Royal Commission. Hunt and Smith assert that Aboriginal self-governance will provide ‘a critical foundation for ongoing socio-economic development and resilience’.⁴⁸ While researching the factors that lead to positive outcomes in Aboriginal community and service-delivery organisations, Hunt identified community ownership as one such factor.⁴⁹ Hunt identified that organisations that were created and led by Aboriginal people, that solved problems identified by Aboriginal communities, were ultimately more successful and were accompanied by positive outcomes in the community.⁵⁰ These positive outcomes included a reduction in crime, an improvement in the physical and mental health of those living in the community, and the creation of employment, which then in turn fostered career progression.⁵¹ O’Faircheallaigh further identified Aboriginal self-government as a significant factor in increasing Aboriginal economic participation, fuelled in part by improving access to education, training, health and housing, among

⁴⁶ Michael Murphy, ‘Representing Indigenous Self-Determination’ (2008) 58(2) *University of Toronto Law Journal* 185, 200.

⁴⁷ *Royal Commission into Aboriginal Deaths* (n 9) vol 2 [20.1.1].

⁴⁸ Janet Hunt and Diane Smith, ‘Understanding and Engaging with Indigenous Governance: Research Evidence and Possibilities for Engaging with Australian Governments’ (2011) 14(2-3) *Journal of Australian Indigenous Issues* 30, 31.

⁴⁹ Janet Hunt, ‘Let’s Talk About Success: Exploring Factors Behind Positive Changes in Aboriginal Communities’ (Working Paper No 109, Centre for Aboriginal Policy Research, 2016) 5.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* 4.

other things.⁵² These findings suggest that self-determination is critical to improving many of the prominent issues facing Aboriginal Australians today.

The social, economic and cultural enhancements articulated by Hunt, Smith and O’Faircheallaigh are further supported by the examined outcomes of self-government policies introduced in other international jurisdictions. In the US, for example,⁵³ research found that First Nations societies thrived where they had ‘decision-making controls over their internal affairs’,⁵⁴ and where they were ‘supported by effective and culturally legitimate institutions of self-government’.⁵⁵ According to Cornell and Kalt, First Nations US communities have shown ‘sharp and resolute’ economic progression that has led to further improvements in housing, positive health outcomes—such reduced infant mortality and infectious disease rates— and investment in infrastructure long-neglected by US governments after the transition from federal administration to tribal administration.⁵⁶

Additionally, research by the Harvard Project on US–Indian Economic Development has shown that there has been a positive correlation between economic and social development and natural measures of non-assimilation among First Nations communities, such as the use of language and other indicators of strong adherence to cultural practice.⁵⁷ The Harvard Project isolated the move of US First Nations policy towards self-determination as the central reason for the ‘significant and sustained development progress’ now visible in First Nations communities, specifically through actions of ‘self-rule’.⁵⁸ These actions included establishing courts and legal systems,

⁵² Ciaran O’Faircheallaigh, ‘Native Title, Aboriginal Self-Government and Economic Participation’ in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment* (The Federation Press, 2015) 158–9.

⁵³ Stephen Cornell and Joseph Kalt, ‘American Indian Self-Determination: The Political Economy of a Successful Policy’ (Working Paper No 1, Native Nations Institute and Harvard Project on American Indian Economic Development, November 2010) 13.

⁵⁴ Vivian et al (n 10) 221.

⁵⁵ *Ibid.*

⁵⁶ Cornell and Kalt (n 53) 8–9.

⁵⁷ *Ibid.* 11.

⁵⁸ *Ibid.*

remaking school curricula, and generating greater revenue through First Nations-run businesses.⁵⁹

IV BARRIERS TO SELF-DETERMINATION THROUGH A TRADITIONAL TREATY FOR ABORIGINAL AUSTRALIANS

Establishing institutions that are run by Aboriginal Australians and possess the power to make policies to self-govern would assist with redressing the continuing and historical imbalance of power between Aboriginal and non-Aboriginal Australians. In the case of US and Canadian First Nations peoples, this power has been founded both from public policy and legally recognised treaties. Formal Aboriginal treaties in Australia have historically been hamstrung by a lack of colonially recognised sovereignty. However, as will be explored, other forms of negotiated agreements between Indigenous peoples and Australian governments may provide an alternative pathway to establishing these institutions.

A *Treaties and the Right to Self-Government*

The powers of self-government have traditionally been conferred upon Indigenous peoples through treaties—both historical and newly emerging.⁶⁰ Treaty-making was a staple interaction between First Nations peoples and the Federal Government of the United States since the latter's inception. These treaties conferred rights to self-government that were enforceable by the First Nations peoples.⁶¹ The rights initially conferred commonly related to hunting, fishing, and the lands ceded by the First Nations peoples to the Federal Government.⁶² 'Bad men' clauses, in which both parties agreed to punish and

⁵⁹ Ibid 12.

⁶⁰ Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016) 104–6.

⁶¹ William C Canby, *American Indian Law in a Nutshell* (West Academic Publishing, 6th ed, December 2014) 115.

⁶² Ibid.

compensate for the acts of cross-culture criminals among their own number, were also commonly included.⁶³ Treaties continue to form the basis of the relationship between US First Nations and the Federal Government, and they have been construed as being made between sovereign nations,⁶⁴ albeit with the caveat that First Nations are ‘domestic dependent nations’.⁶⁵

This sovereignty entitles First Nations to self-government rights or, more accurately, entitles them to maintain their self-government rights following colonisation.⁶⁶ This includes the right to organise tribal governments and tribal courts.⁶⁷ In Canada, while Canadian First Nations did make historical treaties with Canadian colonial governments, the predominant form of agreement making between Canadian First Nations and modern Canadian governments is now a form of ‘modern treaty’. These modern treaties are negotiated agreements that give rise to self-government rights and powers while, at the same time, establishing colonially recognised boundaries to First Nations lands.⁶⁸ These rights can include the formation of tribal governments, tribal law-making institutions, rights to govern land use and natural resources on tribal lands, and rights to make decisions over infrastructure and economic projects.⁶⁹ The success and prominence of treaty-making in Canada thus necessitate that it be foregrounded in Australian discussions relating to Aboriginal self-government. However, the lack of colonially recognised sovereignty presents a major barrier to the application of the Canadian treaty-making model in Australia.

B *Sovereignty*

⁶³ Ibid 116.

⁶⁴ Ibid 73.

⁶⁵ *Cherokee Nation v Georgia*, 30 US (5 Pet) 1, 17 (1831).

⁶⁶ Canby (n 61) 1.

⁶⁷ Ibid 63–7.

⁶⁸ Morgan, Castleden and Hawil (n 5) 1343.

⁶⁹ See the discussion of the Nisga’a Agreement below. See also ‘Treaty Implementation’ *Huu-ay-aht First Nations* (Web Page, 2017) <<https://huuayaht.org/treaty-implementation/>>.

Aboriginal Australians hold no recognised sovereignty under colonial law.⁷⁰ Internationally enforceable treaties are generally made between sovereign parties,⁷¹ on the basis that sovereignty indicates an authority to make a binding agreement for a nation or polity.⁷² Aboriginal Australians' lack of recognised sovereignty has frustrated their attempts at entering into a treaty with Australian governments. Former Prime Minister of Australia John Howard famously stated that 'a nation ... does not make a treaty with itself' while discussing the push for recognition of Aboriginal sovereignty.⁷³ This reflects the dominant view in Australia, that 'implicit in the nature of a treaty is a recognition of another sovereignty, a nation within Australia',⁷⁴ which poses a predominant ideological barrier to both the making of a treaty and the recognition of Aboriginal sovereignty.

Aboriginal Australians' sovereignty may never be recognised, which impedes the likelihood of Australia adopting a formal treaty. Classifying an agreement as a conventional treaty has the potential for detractors to claim that the agreement no legal enforceability,⁷⁵ for fear it may challenge the sovereignty and legitimacy of the colonial Australian state.⁷⁶ Doing so further locks the negotiation of a treaty behind a recognition of sovereignty, where a significant avenue for Aboriginal self-determination is dismissed due to the reluctance to recognise Aboriginal sovereignty as an equal power to colonial sovereignty.⁷⁷ Formal treaties are not, however, the only form of agreement

⁷⁰ Isabelle Auguste, 'Rethinking the Nation: Apology, Treaty and Reconciliation in Australia' (2010) 12(4) *National Identities* 425–6, 428.

⁷¹ Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later...: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Feasibility of a Compact or 'Makarrata' Between the Commonwealth and Aboriginal People* (Parliamentary Paper No 107, 1983) 29–30.

⁷² Michael Mansell, 'Finding the Foundation for a Treaty with the Indigenous Peoples of Australia' (2001) 4 *Balay: Culture, Law and Colonialism* 83, 86.

⁷³ Interview with John Howard, Prime Minister of Australia (John Laws, Sydney, 29 May 2000) <www.pm.gov.au/news/interviews/2000/laws2905.htm>.

⁷⁴ Robert French, 'The Constitution and the People' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 60, 78.

⁷⁵ Mansell (n 72) 88; Stuart Bradfield, 'Citizenship, History and Indigenous Status in Australia: Back to the Future, or Toward Treaty?' (2003) 27(80) *Journal of Australian Studies* 165, 167, 171.

⁷⁶ Aparna Jayasekera, 'The Value of Treaty-Making with Indigenous Peoples in Australia' [2018](3) *Perth International Law Journal* 33, 39.

⁷⁷ Mansell (n 72) 86.

that could be used to convey rights of self-government and self-determination to Aboriginal peoples.

V INDIGENOUS SELF-GOVERNANCE AGREEMENTS

The traditional definition of the term ‘treaty’ is beginning to expand to encapsulate agreements made between Indigenous peoples and governments that operate, in substance, in a manner similar to formal treaties.⁷⁸ Hobbs and Williams argue that the definition of treaty—being that of two sovereign nations compacting together in an international agreement⁷⁹—is restrictive and altogether unrealistic. They argue that treaty should instead be defined to include political agreements involving Aboriginal people and governments that are binding by law.⁸⁰ They further contend that an ‘Indigenous treaty’ could be considered another form of agreement, outside the traditional international and sovereign context, albeit one made in the knowledge of the polity of First Nations communities.⁸¹ They contend that a treaty, in this context, must: recognise Indigenous peoples as ‘a distinct political community’; be negotiated; and be binding on both sides.⁸² Such a treaty would effectively acknowledge that ‘we are all here to stay’.⁸³ As such, agreements occasioning self-government rights and ‘Indigenous treaties’ will be referred to interchangeably.

Agreements are being recognised as the prominent method of conferring self-government rights upon Indigenous peoples in many jurisdictions. In Australia, research has confirmed that such agreements are critical in fostering the socio-economic development of Aboriginal

⁷⁸ Marcia Langton, Maureen Tehan and Lisa Palmer, ‘Introduction’ in Marcia Langton et al (eds), *Honour Among Nations?: Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004) 1, 2.

⁷⁹ Harry Hobbs and George Williams, ‘The Noongar Settlement: Australia’s First Treaty’ (2018) 40(1) *Sydney Law Review* 1, 4.

⁸⁰ *Ibid* 5.

⁸¹ *Ibid* 5.

⁸² *Ibid* 7, 8, 10.

⁸³ *Delgamuukw v British Columbia* [1997] 3 SCR 1010, [186] (‘*Delgamuukw v British Columbia*’).

communities.⁸⁴ Australian academics have recognised agreement-making as the ‘option that could empower communities to take control of their lives’, without the need for ‘constitutional alteration’.⁸⁵ This is reflected in the research regarding the US First Nations peoples that came to a similar conclusion discussed above.⁸⁶ Agreement-making is, therefore, fast becoming the preferred method of interaction between Indigenous peoples and the descendant colonial nations in other international jurisdictions.⁸⁷ Given the similarities between the Canadian and Australian legal systems, the experiences of the Canadian First Nations may help direct the effective introduction of self-government agreements in Australia.

A *Self-Government in Canada*

Canadian First Nations policy has fast become intertwined with the recognition of self-government and negotiated agreements that recognise the rights to self-government and self-determination. Section 35(1) of the *Canadian Constitution* recognises and affirms the ‘existing aboriginal and treaty rights’ of Canadian First Nations peoples.⁸⁸ Section 35(3) further states these ‘treaty rights’ may exist historically or ‘may be so acquired’ through land claim agreements.⁸⁹

Prior to 1973, ‘treaty rights’ were considered to be the rights conferred to Canadian First Nations by historical treaties made during and after the first contact between Canadian First Nations and the colonists.⁹⁰ In 1973, ‘Aboriginal rights’ were first recognised in the landmark case, *Calder v*

⁸⁴ Vivian et al (n 10) 220.

⁸⁵ Referendum Council, *Final Report of the Referendum Council* (Final Report, 30 June 2017) 14.

⁸⁶ Cornell and Kalt (n 53).

⁸⁷ Siegfried Wiessner, ‘Indigenous Self-Determination, Culture and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples’ in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, 2012) 31, 52.

⁸⁸ *Canada Act 1982* (UK) sch B para 35(1) (‘*Canada Act*’).

⁸⁹ *Ibid* para 35(3).

⁹⁰ Petrie (n 4) 5.

British Columbia (AG).⁹¹ It was found in this case, ultimately within a dissenting judgment, that there existed a historical recognition of ‘aboriginal rights’ to possession and enjoyment of land in Canadian common law outside of historical ‘treaty rights’.⁹² This recognition was similar, in many ways, to Aboriginal Australian native title rights, in that both rights arose from continuing, recognisable cultural rights not granted by historical agreements.⁹³ Modern Canadian self-government agreements were recently found to be protected by s 35 of the *Canadian Constitution* as they conferred rights that fell within the meaning of ‘aboriginal and treaty rights’.⁹⁴ Such protection prevents the Canadian government from infringing upon these rights except in pursuit of a valid legislative objective, and only where the relevant First Nations are fairly compensated, and consulted or informed.⁹⁵ Although the majority of Canadian agreements reached since the amendment of the *Canadian Constitution* in 1982 have been land claim agreements in which self-government rights have been negotiated as part of a continuing cultural connection to land; independent self-government agreements have also been made.⁹⁶ As a result, negotiation and agreement have become the most prominent method of governmental interaction with Canadian First Nations.

Indigenous rights policies in Canada are far ahead of those found in Australia and represent an aspirational step in the right direction. In 1995, the

⁹¹ *Calder v British Columbia (AG)* [1973] SCR 313.

⁹² *Ibid* 376.

⁹³ See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*‘Mabo (No 2)’*) 41–2 (Brennan J): ‘... the common law of Australia ... accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty. Those antecedent rights and interests thus constitute a burden on the radical title of the Crown’ and ‘Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of the territory’.

⁹⁴ *Ibid*; see also *R v Sparrow* [1990] 1 SCR 1075 (*‘R v Sparrow’*).

⁹⁵ *R v Sparrow* (n 94) (McIntyre, Lamer, Wilson, La Forest, L’Heureux-Dube and Sopinka JJ): ‘Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented’.

⁹⁶ See, eg, the Nisga’a Final Agreement, the Kwanlin Dun First Nation Self-Government Agreement, the Sioux Valley Dakota Nation Governance Agreement, and the Gwets’en Nilt’i Pathway Agreement.

Canadian government affirmed Canada's First Nations peoples' inherent right to self-government as an acknowledged and recognised right under the *Canadian Constitution*.⁹⁷ The Canadian government preferences self-government for First Nations communities over existing governing legislation, such as the *Indian Act*, RSC 1985, c I-5 ('the Indian Act'). The *Indian Act* is blanket legislation that was made before the recognition of the First Nations' inherent right to self-government, which the Canadian Government concedes 'does not take into account the specific circumstances of individual communities'.⁹⁸ In the case of the Nisga'a Nation, the *Indian Act* considered and treated the four pdeeks or clans of the Nisga'a Nation as separate political entities, rather than part of the same Nation, and did so without consultation or correct knowledge of the physical boundaries between the pdeeks.⁹⁹

At Canadian common law, the right to self-government has been acknowledged not only as a protected right under the *Canadian Constitution*, but as a right that both existed prior to colonisation and after the 'assertion of British sovereignty'.¹⁰⁰ Furthermore, Canadian courts have recognised the 'desirability of concluding treaties with Aboriginal peoples'.¹⁰¹ It is important to recognise that the First Nations right of self-government in Canada remains qualified with reference to *UNDRIP*, in that this right is recognised in relation 'to matters that are internal', and 'integral to their unique cultures ... and institutions'.¹⁰² While self-determination has been promoted in Australian Aboriginal policy in the past, it has been promoted as an end-goal for policies

⁹⁷ 'The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government', *Government of Canada* (Web Page, 15 September 2010) <<https://www.rcaanc-cirmac.gc.ca/eng/1100100031843/1539869205136>>; *Canada Act* (n 88) sch B para 35(1).

⁹⁸ 'Self-Government', *Government of Canada* (Web Page, 12 July 2018) <<https://www.rcaanc-cirmac.gc.ca/eng/1100100032275/1529354547314>>.

⁹⁹ Ross Hoffman and Andrew Robinson, 'Nisga'a Self-Government: A New Journey Has Begun' (2010) 30(2) *The Canadian Journal of Native Studies* 387, 390.

¹⁰⁰ *Delgamuukw v British Columbia* (n 83) [59].

¹⁰¹ See, eg, *Chief Mountain v British Columbia (Attorney General)* [2011] BCSC 1394 [99].

¹⁰² Sean Brennan, Brenda Gunn and George Williams, "'Sovereignty" and Its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments' (2004) 26(3) *Sydney Law Review* 307, 331.

that are more aptly described as promoting self-management. The importance of self-determination has further been recognised in the Final Report of the 1991 Royal Commission and the *Bringing them Home Report*.¹⁰³ Still, it has frequently been protested by governments, with no real recognition of the right beyond the signing of *UNDRIP*. Australian policy remains paternalistic and ineffective. The Canadian position on self-government is preferential, as it not only formalises the right to self-government but also recognises it as inherent, rather than one whose existence is to be negotiated and agreed upon.

B *The Nisga'a Final Agreement*

The Nisga'a Final Agreement ('Nisga'a Agreement') is a prime example of a negotiated Canadian self-government agreement. After pushing for recognition for over a century,¹⁰⁴ on 27 May 1998, the Nisga'a Agreement was signed and came into effect on 11 May 2000. Under the Nisga'a Agreement, between 2000–2015, the Nisga'a Nation received CAD190 million in total from both the Government of Canada and the Government of British Columbia, which consists of both a settlement benefit and the costs incurred by the Nisga'a Nation when negotiating the treaty.¹⁰⁵ A once-off amount of CAD40.6 million was also awarded to the Nisga'a Nation to support its transition to self-government.¹⁰⁶

The Nisga'a Agreement sets out the Nisga'a Nation's right to self-govern and establishes the Nisga'a Nation as a distinct legal entity that stands apart from Canada's federal and provincial governments.¹⁰⁷ The Nisga'a Agreement was entered into on the basis that the Nisga'a Nation would

¹⁰³ Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, April 1997).

¹⁰⁴ Edward Allen, 'Our Treaty, Our Inherent Right to Self-Government: An Overview of the Nisga'a Final Agreement' (2004) 11 *International Journal on Minority and Group Rights* 233, 234.

¹⁰⁵ Hoffman and Robinson (n 99) 395.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Nisga'a Final Agreement*, signed 27 May 1998 (entered into force 11 May 2000) ch 11 ss 1, 5 ('*Nisga'a Final Agreement*').

willingly share its lands, so long as its claim to these lands was recognised.¹⁰⁸ It allows for Canada's federal and provincial laws to operate concurrently with Nisga'a laws and any inconsistency is to be resolved in favour of the Nisga'a.¹⁰⁹ Further, the Nisga'a Agreement explicitly acknowledges its nature as both a treaty and an agreement within the meaning of ss 25 and 35 of the *Canadian Constitution*.¹¹⁰

The Nisga'a Agreement specifies that the peoples of the Nisga'a Nation no longer fall under the jurisdiction of the *Indian Act*, while remaining Aboriginal people for the purposes of the *Canadian Constitution*, and the Nisga'a people are therefore entitled to the 'aboriginal rights' specified in ss 25 and 35.¹¹¹ The claim and further agreement are explicitly stated to fall within the meaning of ss 25 and 35 of the *Canadian Constitution*.¹¹² Section 25 of the *Canadian Constitution* recognises that the rights and freedoms it affords to Canadians will not abrogate or derogate the 'aboriginal and treaty' rights of Canadian First Nations peoples,¹¹³ and s 35 recognises existing and future First Nations rights that have been obtained through both negotiation and historical treaties.¹¹⁴

The Nisga'a Agreement confers significant and necessary powers that allow, inter alia, the Nisga'a People to exercise the right to self-govern.¹¹⁵ The self-government rights provided through the Nisga'a Agreement are extensive, establishing Village Governments for individual communities and the Nisga'a Lisims Government for the Nation as a whole.¹¹⁶ Additionally, the Nisga'a Agreement allows Nisga'a governments to make laws regarding a wide array of matters relating to Nisga'a aboriginal rights and the

¹⁰⁸ Ibid.

¹⁰⁹ Ibid ch 2 s 13.

¹¹⁰ Ibid ch 2 s 1.

¹¹¹ Hoffman and Robinson (n 99) 392.

¹¹² Ibid 236.

¹¹³ *Canada Act* (n 88) sch B para 25.

¹¹⁴ Ibid sch B para 35.

¹¹⁵ Hoffman and Robinson (n 99) 388.

¹¹⁶ Nisga'a Final Agreement (n 107) ch 11 s 2.

governance of the Nisga'a people.¹¹⁷ The Nisga'a Nation's right to make laws encompasses the ability to make laws in relation to administrative matters such as the establishment of Nisga'a institutions,¹¹⁸ Nisga'a land management,¹¹⁹ and education for Nisga'a citizens (which includes primary, secondary, and tertiary education).¹²⁰ Numerous such laws have been enacted.

For example, the Wilp Si'ayuukhl Nisga'a, the Nisga'a Lisims Government's executive arm, enacted the *Nisga'a Government Act* in 2006,¹²¹ which sets out the various roles of the members of the new Nisga'a governments.¹²² The *Nisga'a Forest Act* governs development approvals and forestry operations in Nisga'a owned forests. The Act focuses on ecological sustainability in line with traditional practice, with provisions for reforestation, employment in land management roles, and the development of Land Use Plans.¹²³ The *Nisga'a Forest Act* is administered by the Nisga'a Lands Department, which also governs matters that include land use planning, title registry and transfer, and subsurface and mining developments.¹²⁴ The Nisga'a Lisims Government under the Nisga'a Agreement can also make laws governing a wide range of additional matters. These matters include Nisga'a citizenship, Nisga'a language and culture, Nisga'a property in Nisga'a lands, public order, peace and safety, employment, traffic and transportation, Nisga'a marriage, and child, family, social and health services.¹²⁵ Numerous positive benefits have resulted for the Nisga'a peoples.

¹¹⁷ Ibid ch 11 s 34.

¹¹⁸ *Nisga'a Final Agreement* (n 107) ch 11 s 34(a), sub-s (c).

¹¹⁹ Ibid ch 11 s 44.

¹²⁰ Ibid ch 11 ss 100, 101.

¹²¹ *Nisga'a Government Act*, NLGSR 11/2006 <<https://www.nisgaanation.ca/legislation/nisgaa-government-act>>.

¹²² Hoffman and Robinson (n 99) 398.

¹²³ 'Forest Management', *Nisga'a Lisims Government* (Web Page) <<https://www.nisgaanation.ca/forest-management>>.

¹²⁴ 'Nisga'a Land Management', *Nisga'a Lisims Government* (Web Page) <<https://www.nisgaanation.ca/nisgaa-lands-management>>.

¹²⁵ Hoffman and Robinson (n 99) 394.

In 2010, 10 years after the conclusion of the Nisga'a Agreement, the majority of the Nisga'a peoples considered that the provision of health services by self-governed institutions had improved compared to health services prior to the Agreement.¹²⁶ Eight per cent of the Nisga'a's traditional lands are now held in fee simple by the Nisga'a,¹²⁷ and while this is a small portion of the land lost through colonisation, it conveys progress. While the Nisga'a Agreement was, in part, a recognition of existing rights, these rights were defined and expanded by negotiation and further solidified and recognised in Canadian law in the process.¹²⁸ The Nisga'a Agreement also demonstrates how First Nations self-government and continuing colonial governance can coexist.¹²⁹

Although legal challenges have been levelled at the Nisga'a Agreement, each challenge has resulted in an affirmation of the Nisga'a's right to self-govern.¹³⁰ In the process, the Nisga'a's right to self-govern has been held to be derived from multiple sources. In *Campbell v British Columbia*,¹³¹ it was found that the right to self-government was constitutionally protected and derived from the rights enjoyed by the Nisga'a Nation prior to colonisation.¹³² In *Chief Mountain v British Columbia (Attorney General)*,¹³³ however, the Court acknowledged that even with constitutional protection of the right to self-government, the powers granted by this right might also be validly considered to have been 'delegated to the Nisga'a Nation by the federal

¹²⁶ Joseph Quesnel, 'A Decade of Nisga'a Self-Government: A Positive Impact, But No Silver Bullet' (2010) 31 *Inroads: First Nation Governance* 47, 52. It is worth noting that while Nisga'a peoples were at this time more trusting of their governments and hopeful for the future, statistically, they were split on whether education provision had improved or worsened. The majority felt that the governments were not consulting with communities enough and that the Nisga'a economic position had worsened. However, this could also be attributable to economic downturns and features such as the remoteness of Nisga'a lands. Self-government alone is not a panacea.

¹²⁷ Hoffman and Robinson (n 99) 394.

¹²⁸ Allen (n 104) 236.

¹²⁹ *Ibid.*

¹³⁰ See, eg, *Chief Mountain v British Columbia (Attorney General)* (n 101) and *Sga'nisim Sim'augit (Chief Mountain) v Canada (Attorney-General)* [2013] BCCA 49.

¹³¹ (2000) 189 DLR (4th) 333.

¹³² *Ibid* [124].

¹³³ [2011] BCSC 1394.

government and provincial government'.¹³⁴ The right to self-govern can, therefore, be considered both inherent and delegable from colonial governments.

The author posits that the court's flexibility in interpreting how the right to self-government arises reflects an acceptance of the inherent Aboriginal right to self-govern. It evidences that a Westminster-based legal system can accommodate multiple sources of the right to self-government and other Aboriginal and treaty rights, despite recognition of Canadian First Nations sovereignty remaining elusive. As such, this flexibility demonstrates one of the notions of legal pluralism, being that traditional law—based on the continued observance of tradition and custom—can coexist with Western and colonial systems of law.¹³⁵

VI THE BEGINNING OF INDIGENOUS SELF-GOVERNMENT IN AUSTRALIA

We are beginning to see agreements between Aboriginal people and Australian governments that resemble the modern treaties discussed above. Australia lags behind Canada in officially recognising a right to self-government for Aboriginal Australians. However, increasing efforts between Australian governments and Aboriginal communities to establish agreements are evident.¹³⁶ Some of these agreements can be seen to give rise to self-government rights.¹³⁷ This part will discuss the Noongar Settlement and explore the reasons that have led to it being considered by some as the first

¹³⁴ Ibid [11].

¹³⁵ Jean-Guy Belley, 'The Protection of Human Dignity in Contemporary Legal Pluralism' in René Provost and Colleen Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism* (Springer, 2013) 99, 101.

¹³⁶ See, generally, Aboriginal Treaty Working Group, Parliament of Victoria, *The Design of the Aboriginal Representative Body* (Final Report, March 2018) and *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) ('ATPAV Act').

¹³⁷ See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2014* (Report, 20 October 2014) [5.5]. The discussion at [5.5] relates to the Ngarrindjeri Regional Authority, which can negotiate with local governments on behalf of the Ngarrindjeri Nation. See also the Barunga Agreement and Memorandum of Understanding made between the Aboriginal Land Councils and the Northern Territory Government, which was signed on 8 June 2018.

Australian Aboriginal treaty, by virtue of the similarity of the rights it confers to those contained in modern treaties such as the Nisga'a Agreement, albeit more limited. Other current and past negotiated agreements between Australian governments and Aboriginal Australians will similarly be explored to consider how, if at all, self-government rights are being negotiated.

C *The Noongar Settlement*

The South West Native Title Settlement ('Settlement'), also known as the Noongar Settlement, is the largest, most comprehensive negotiated agreement between an Australian government and Aboriginal Australians in Australian history,¹³⁸ and has been hailed by some as the first Aboriginal treaty.¹³⁹ The Settlement was negotiated between the Government of Western Australia ('WA Government') and the South West Aboriginal Land and Sea Council ('SWALSC'), representing a number of Noongar claimant groups. The Settlement area spans 200,000 square kilometres, and it confers upon the Noongar claimant's rights to the management of land, resources, finances, and cultural heritage in exchange for the resolution of all native title claims over the area.¹⁴⁰ The WA Government and the SWALSC negotiated the Settlement out of court following the success¹⁴¹ and subsequent overturning¹⁴² of native title claims over Perth and its surrounding areas. The Settlement also established legislation that recognised the Noongar people as the traditional owners and occupiers of the South West region of Western Australia and acknowledged their continuing relationship with the land.¹⁴³

¹³⁸ Robert Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 2019) 934.

¹³⁹ Hobbs and Williams (n 79) 35.

¹⁴⁰ 'South West Native Title Settlement', *Western Australian Department of Premier and Cabinet* (Web Page, 11 February 2019) <<https://www.dpc.wa.gov.au/swnts/South-West-Native-Title-Settlement/Pages/default.aspx>>.

¹⁴¹ *Bennell v Western Australia* (2006) 153 FCR 120.

¹⁴² *Bodney v Bennell* (2008) 167 FCR 84.

¹⁴³ *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA) s 5.

Some scholars contend that the Settlement is Australia's first Aboriginal treaty because it recognises the Noongar people as a 'distinct polity',¹⁴⁴ includes 'nation to nation dialogue',¹⁴⁵ was politically negotiated on good and equal standing,¹⁴⁶ and contains explicit recognition of Noongar authority over the land and benefits in a manner similar to Canadian agreements.¹⁴⁷ Just as in the Nisga'a Agreement, the Settlement involved the exchanging of native title claims and rights for a package of benefits, including rights to land and land management (though these rights are non-exclusive), enhanced cultural heritage protection, and a sustained financial contribution from the colonial government that could be utilised to improve the Noongar people's independent economic base.¹⁴⁸

The Settlement also gives rise to potential self-government rights, establishing the Noongar Regional Corporations, and a Central Services Corporation that will receive extensive funding from the WA Government.¹⁴⁹ These corporations serve to maintain and protect Noongar culture and tradition on the Noongar Land Estate, while also negotiating with government parties and other parties for the benefit of Noongar communities.¹⁵⁰ Such corporations give the Noongar peoples a representative in discussions regarding policy affecting their land¹⁵¹ and a vehicle to maintain a significant amount of authority over this land through Co-operative and Joint Management responsibilities shared with the WA Government.¹⁵²

Co-operative Joint Management responsibilities include assisting to amend existing land use plans while also identifying and creating new land use plans over the Land Estate handed back to the Noongar people through

¹⁴⁴ Hobbs and Williams (n 79) 7.

¹⁴⁵ Ibid 35.

¹⁴⁶ Ibid 36.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid 32.

¹⁵⁰ Ibid.

¹⁵¹ Ibid 37.

¹⁵² See, eg, *Whadjuk People Indigenous Land Use Agreement*, signed 8 June 2015 (registered 17 October 2018) 153.

the Settlement.¹⁵³ While there is no scope within the Settlement for the creation of Noongar governmental institutions or law-making by the Noongar peoples in the same way that the Nisga'a Agreement provides, Hobbs and Williams assert that the Noongar Regional Corporations could institute a 'limited form of self-government'.¹⁵⁴ Hobbs and Williams appear to base this on the idea that recognition of the value of cultural governance in Noongar affairs—such as the use of traditional land—the input into cultural and land-use policy, and the sustained resourcing of institutions and bodies to achieve these goals, constitutes a step towards self-government.¹⁵⁵ The accommodation of the Settlement within Western Australian legislation and the Western Australian governmental system is just one signal that self-governance rights can coexist with the dominant systems of Australian government.

D *Other Self-Government Initiatives in Australia*

Other states have similar initiatives that indicate a tolerance among Australian governments and legal systems to Indigenous self-governance.¹⁵⁶ In Victoria, strides have been taken to legislate and establish a Treaty Authority to govern treaty negotiations between the Government of Victoria and Victorian Indigenous communities.¹⁵⁷ Both the relevant legislation¹⁵⁸ and the Victorian Government¹⁵⁹ acknowledge the right of Indigenous communities to self-determination and, subsequently, self-government.

Furthermore, in South Australia, the Ngarrindjeri Nation has established agreements that serve as legally binding contracts for dialogues

¹⁵³ Ibid 602–4.

¹⁵⁴ Hobbs and Williams (n 79) 36.

¹⁵⁵ Ibid 37.

¹⁵⁶ See generally Treaty Working Group on Queensland's Path to Treaty, *Path to Treaty* (Report, 3 February 2020).

¹⁵⁷ *ATPAV Act* (n 136) s 28.

¹⁵⁸ Ibid s 22.

¹⁵⁹ See generally Government of Victoria, *Victorian Government Aboriginal Affairs Report 2019* (Report, November 2019) 10.

with the Government of South Australia and local governments. These agreements, and the negotiations undergone to reach them, are similar to Indigenous treaty negotiations in other jurisdictions.¹⁶⁰ These agreements have been recognised to be intergovernmental in nature,¹⁶¹ evidencing that these negotiations are taking place in a context where the government acknowledges the right to self-government of the Ngarrindjeri. Additionally, through its Minister for Aboriginal Affairs and Reconciliation, the Government of South Australian has delegated the power to grant authority to disturb or interfere with Aboriginal objects and sites on Ngarrindjeri lands¹⁶² to the Ngarrindjeri Regional Authority.¹⁶³ Whilst this power does not necessarily confer onto the Ngarrindjeri the right to govern the entirety of their cultural affairs, it does give the Ngarrindjeri a say in relation to the legislative enforcement of their own heritage matters and further reflects a legal system that can accommodate Aboriginal authority.

VII THE COEXISTENCE OF INDIGENOUS AUSTRALIAN AND AUSTRALIAN GOVERNANCE STRUCTURES

The reoccurring obstacle that tends to hinder discussions relating to Aboriginal treaties and Aboriginal self-government in Australia is the question: from where is an Aboriginal group's power to internally govern derived?¹⁶⁴ While a number, if not the majority, of Aboriginal Australians do not accept that Aboriginal sovereignty was legally ceded in Australia,¹⁶⁵ a formal recognition of this sovereignty has been viewed by some as a detraction from the dominant Australian legal narrative that said sovereignty

¹⁶⁰ Vivian et al (n 10) 238.

¹⁶¹ Daryle Rigney and Steve Hemming, 'Is "Closing the Gap" Enough? Ngarrindjeri Ontologies, Reconciliation and Caring for Country' (2014) 46 *Educational Philosophy and Theory* 536, 542.
¹⁶² *Aboriginal Heritage Act 1988* (SA) s 23.

¹⁶³ Vivian et al (n 10) 239.

¹⁶⁴ See *Coe (on behalf of the Wiradjuri tribe) v Commonwealth of Australia* (1993) 118 ALR 193, 200 ('*Coe v Commonwealth*').

¹⁶⁵ See, eg, the Uluru Statement from the Heart in Referendum Council (n 85) i.

was extinguished during colonisation.¹⁶⁶ Subsequently, it is feared that recognition will remove the authority of Australian governments to include Aboriginal peoples within their laws, deconstructing the centralist legal idea that Australian colonial law governs all Australian peoples.¹⁶⁷ However, the recognition of multiple legal systems, formal and informal, coexisting within the same society, is not novel,¹⁶⁸ and goes some way to demonstrating how the Aboriginal right to self-govern can coexist with colonial law in Australian society.

A *Legal Pluralism*

The concept of legal pluralism explains in part how multiple sources of Aboriginal authority and self-governance rights can coexist with Australian central governance. Legal pluralism describes the ‘practical reality that society is constituted of coexisting communities with allegiances to laws other than those of the central government’.¹⁶⁹ In a more general sense, legal pluralism means ‘that more than one law is observed at the same time in the same space’.¹⁷⁰ Often, legal pluralism refers to traditional laws, being set out in customs and traditional practice, as legal systems that successfully coexist with Western ideas of law.¹⁷¹ As a theory, legal pluralism allows for a right to Indigenous self-government, in that it disregards issues associated with a singular colonial sovereignty and implies that a coexisting ‘shared sovereignty’ exists,¹⁷² one which allows for the self-governance of the smaller polity while allowing for the observation of the laws of the larger.

¹⁶⁶ See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44].

¹⁶⁷ Vivian et al (n 10) 219.

¹⁶⁸ John Griffiths, ‘What is Legal Pluralism?’ (1986) 18(24) *Journal of Legal Pluralism and Unofficial Law* 1.

¹⁶⁹ Alexander Reilly, ‘A Constitutional Framework for Indigenous Governance’ (2006) 28(3) *Sydney Law Review* 403, 404.

¹⁷⁰ Ralf Seinecke, ‘What is Legal Pluralism and What is it Good For?’ in Marju Luts-Sootak et al (eds), *Legal Pluralism: Cui Bono?* (University of Tartu Press, 2018) 13, 14.

¹⁷¹ Ibid.

¹⁷² George Williams, ‘Does Constitutional Recognition Negate Aboriginal Sovereignty?’ (2012) 8(3) *Indigenous Law Bulletin* 10, 10.

This notion reflects what one might see in Canada's acknowledgement of continuing, pre-colonial, First Nations' self-government rights.

A key issue the Australian government has expressed with acknowledging Aboriginal sovereignty is the threat of secession or the undermining of the Crown's own sovereignty.¹⁷³ As was noted in Part IV(B), there has been a past association between 'treaty' and 'another sovereignty, a nation within Australia'.¹⁷⁴ This traditional concept of sovereignty presents an obstacle to a coexisting Aboriginal authority with Australian federal authority, as 'it is tied to the idea that a government ... has an over-riding and authoritative decision-making power'.¹⁷⁵ The traditional concept of sovereignty refers to sovereignty in the colonial view, where Aboriginal sovereignty undermines the sovereignty of the Commonwealth, leading to a country within a country with external affairs powers and conflicting laws and boundaries. However, if power over external affairs, seen in the traditional definition of sovereignty,¹⁷⁶ is disregarded, 'there is ... little difference between sovereignty and an inherent right of self-government'.¹⁷⁷ Disregarding traditional definitions of sovereignty, or acknowledging that sovereignty has gained a significantly different meaning from the colonial definition in recent years,¹⁷⁸ gives rise to the idea of 'internal' or 'shared sovereignty', in which power is divided between central governments and constituent governments, such as state or provincial governments.¹⁷⁹ This idea of sovereignty, in the theory of treaty federalism, is essential to the

¹⁷³ Vivian et al (n 10) 229; see also Mick Dodson and Sarah Pritchard, 'Recent Developments in Indigenous Policy: The Abandonment of Self-Determination?' (1998) 4(15) *Indigenous Law Bulletin* 4, 4, which includes the following quote from the then Foreign Minister: 'We don't want to see a separate country created for Indigenous Australians'.

¹⁷⁴ Brennan, Gunn and Williams (n 102) 308. See also French (n 74).

¹⁷⁵ Frank Cassidy, 'Canadian Update: The Modern Treaty Process and Aboriginal Governments in British Columbia' (1993) 3(64) *Aboriginal Law Bulletin* 10, 10.

¹⁷⁶ Brennan, Gunn and Williams (n 102) 311.

¹⁷⁷ Cassidy (n 175) 10.

¹⁷⁸ See *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1 [52], wherein Gleeson CJ, Gaudron, Gummow and Hayne JJ stated that it has long been recognised that sovereignty is 'a notoriously difficult concept which is applied in many, very different contexts'.

¹⁷⁹ Vivian et al (n 10) 230.

foundation of Commonwealth nations such as Canada and Australia,¹⁸⁰ where federal and state governments have shared responsibilities and distinct authority over different aspects of governance.

Furthermore, we see in Canada that First Nations self-government rights give rise to ‘rights that may be at variance with the broader legal regime of society’¹⁸¹ that are resolved in different areas with preference being given either to First Nations sovereign laws or Canadian federal or state laws. This concept forms a key part of legal pluralism and is already a fundamental part of Australian governance between the nation and the states.

As such, there appears no reason why, in combination with the principles of legal pluralism, Aboriginal sovereignty could not be recognised, explicitly or implicitly, in the form of the conferral of the right to self-govern, without resulting in the feared fracturing of the Australian central law.

B *Coexistence*

A number of contemporary examples suggest Aboriginal self-government rights—as derivatives of continuing Aboriginal sovereignty—can effectively coexist with Australian colonial sovereignty without conflict. *Mabo v Queensland (No 2)* (*‘Mabo (No 2)’*),¹⁸² which historically forms the foundation for Aboriginal native title claims in Australia, can be argued to have predicated a range of existing Aboriginal governance practices and arrangements. Further, *Mabo (No 2)* recognises ongoing Aboriginal traditional custom, which could form the basis of a legal plurality in Australia. The increasing recognition in Australian common law that the traditional, colonial definition of sovereignty lacks accuracy as a singular definition suggests that ‘shared sovereignty’ is plausible in Australia. Lastly, the

¹⁸⁰ Ibid.

¹⁸¹ Chris Thornhill et al, ‘Legal Pluralism? Indigenous Rights as Legal Constructs’ (2018) 68(3) *University of Toronto Law Journal* 440, 441.

¹⁸² *Mabo (No 2)* (n 93).

authority by which Australian local governments operate and govern could also allow the delegation of sovereign authority and governance rights to Aboriginal peoples. In addition to providing support for the recognition of Aboriginal rights to self-government in Australia, it is contended that these examples could form the foundation from which further, more expansive self-government rights could be developed.

1 *Mabo (No 2) and Australian Aboriginal Legal Rights*

Native title rights, which form the basis of Aboriginal legal rights,¹⁸³ and self-governance in forms like the Noongar Settlement, confirm that Aboriginal self-government rights can coexist with current Australian central law.¹⁸⁴ The process of claiming native title assumes and acknowledges that there are distinct Aboriginal communities with rules to determine membership, traditional country, and community representatives;¹⁸⁵ and recognises property rights arising from a different system of laws.¹⁸⁶ At least in part, the construction of native title rights in *Mabo (No 2)* assumes that there are existing organisational and governance structures within Aboriginal communities that can manage native title after a successful claim.¹⁸⁷

In *Coe v Commonwealth*, Gibb's J confirmed that *Mabo (No 2)* does not imply '[Indigenous] sovereignty adverse to the crown'.¹⁸⁸ Furthermore, the majority of the High Court rejected the assertion of a continuing, unextinguished Aboriginal sovereignty, as based on sovereignty adverse to the Crown.¹⁸⁹ However, while *Coe v Commonwealth* indeed affirms the Court's rejection of adverse Indigenous sovereignty, it does not reject the existence of Aboriginal rights to self-government altogether. In contrast, the

¹⁸³ Vivian et al (n 10) 219.

¹⁸⁴ Jayasekera (n 76) 39.

¹⁸⁵ Reilly (n 169) 421.

¹⁸⁶ *Mabo (No 2)* (n 93) 86–95 (Deane & Gaudron JJ).

¹⁸⁷ Reilly (n 169) 421.

¹⁸⁸ *Coe v Commonwealth* (n 164) 129–31 (Gibbs J).

¹⁸⁹ *Ibid* 133.

assumptions of limited self-governance emerging from the *Mabo (No 2)* decision implicitly recognise Aboriginal communities as politically and legally distinct from colonial Australia, with rights arising from a different system of laws,¹⁹⁰ and reflects this article's previous discussion of Indigenous treaties and legal pluralism.

Legal pluralism supports the idea of negotiation between two distinct polities and the coexistence of two or more forms of law. The landmark case of *Mabo (No 2)* recognises limited forms of self-government powers similar to the explicit powers of self-government enshrined in the Noongar Settlement.¹⁹¹ Furthermore, the Court's findings in *Coe v Commonwealth* does not infer rejection of Aboriginal rights to self-government.¹⁹² Conversely, the implicit recognition of self-government powers in *Mabo (No 2)* exemplifies that self-government rights already exist at common law, albeit in a limited capacity. The fact that such mechanisms are already prescribed at common law supports the viability of further, more expansive, Aboriginal self-government rights effectively coexisting with Australian central law.

2 *Shared Sovereignty*

In addition to acknowledging the need for Aboriginal self-government, Australian common law has also implicitly recognised that 'sovereignty' no longer has a singular definition as conceptualisations of internal and external sovereignty have arisen. Australian case law suggests that 'internal sovereignty'—the right to manage your own affairs as a distinct polity—can coexist with 'external sovereignty'—the right to deal externally with other nations—which is most consistently defined as 'traditional sovereignty'.¹⁹³ By recognising that different definitions of sovereignty exist, including by

¹⁹⁰ *Mabo (No 2)* (n 93) 86–95 (Deane & Gaudron JJ).

¹⁹¹ Reilly (n 169) 421.

¹⁹² *Coe v Commonwealth* (n 164) 133.

¹⁹³ Jane Robbins, 'A Nation Within? Indigenous Peoples, Representation and Sovereignty in Australia' (2010) 10(2) *Ethnicities* 257, 258–9.

recognising an implicitly different Aboriginal definition of sovereignty, this author posits that Australian common law can allow for shared sovereignty.

For example, in *Shaw v Wolf*,¹⁹⁴ the Court was required to determine an issue relating to Aboriginal identity regarding a challenge to a person's eligibility to be elected to the Aboriginal and Torres Strait Islander Commission. Merkel J noted that it was unfortunate that the Court was to answer such a question as it was highly personal and one unsuitable to be determined by the Court given the Court was not 'representative of Aboriginal people'.¹⁹⁵ His Honour noted further that, ideally, such questions should be determined by 'independently constituted bodies or tribunals which are representative of Aboriginal people'.¹⁹⁶ The fact that State governments are now tending towards adopting policies of self-determination and agreement-making with Aboriginal Australians is perhaps a reflection, at least in part, of the issue identified by Merkel J.

Additionally, courts have not only acknowledged distinct meanings of sovereignty; they have also questioned the existence of exclusive Crown sovereignty. In *New South Wales v Commonwealth*, Barwick CJ noted that the meaning of sovereignty seemed to change depending on the context in which it was used.¹⁹⁷ In 2001, Kirby J considered in *Commonwealth v Yarmirr* that the 'very claims to sovereignty in the Crown ... had a similar metaphorical quality' to the native title claimants' assertion of exclusive rights over 'sea country'.¹⁹⁸ Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth* even asserted that the 'imperial' definition of sovereignty had ended with the *Australia Act 1986* (Cth) and 'ultimate sovereignty resided in the Australian people'.¹⁹⁹ A move away from the

¹⁹⁴ (1998) 163 ALR 205 ('*Shaw v Wolf*').

¹⁹⁵ *Ibid* 268.

¹⁹⁶ *Ibid*.

¹⁹⁷ *New South Wales v Commonwealth* (1975) 135 CLR 337, 364 ('*Seas and Submerged Lands Case*').

¹⁹⁸ *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1 [304].

¹⁹⁹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136.

traditional idea of sovereignty affirms the idea that ‘the indigenous concept of sovereignty’ is not necessarily related to its ‘Western connotation of original power over people and territory’.²⁰⁰

While the courts have asserted that Aboriginal sovereignty is a political issue and, therefore, not determinable at common law, the acknowledgement of distinct forms of sovereignty promotes the principles of legal pluralism in Australia. The court’s persuasive recognition of distinct forms of sovereignty—a source of legal power—can exist without impassable conflict. Furthermore, the court’s flexible interpretation of sovereignty also suggests Australia’s willingness to accommodate ‘shared sovereignty’ or an Aboriginal Australian right to self-government in its current federal system in a manner similar to that of Canada.²⁰¹

3 *Delegable Governance*

Finally, Australia’s current system of delegated governmental authority could accommodate Aboriginal government institutions in the same manner that it accommodates local governments.²⁰² Local governments are not dealt with in the *Commonwealth of Australia Constitution Act 1900* (‘*Australian Constitution*’),²⁰³ and federal governments do not often interact with them directly.²⁰⁴ Instead, Australia’s state and territory governments institute local governments through legislation. Local governments, therefore, operate with delegated authority rather than any inherent or independent power.²⁰⁵

The role of local government was not recognised until 2006,²⁰⁶ but had continued in similar form for long before this—similar to past and present

²⁰⁰ Wiessner (n 87) 1167.

²⁰¹ Ibid 1166.

²⁰² Vivian et al (n 10) 233.

²⁰³ *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, cl 12, s 9 (‘*Australian Constitution*’).

²⁰⁴ Lyndon Megarrity, ‘Local Government and the Commonwealth: An Evolving Relationship’ (Research Paper No 10 2010-11, Parliamentary Library, Parliament of Australia, 31 January 2011) 14.

²⁰⁵ Vivian et al (n 10) 233.

²⁰⁶ Megarrity (n 204) 21.

traditional practices and self-governance practiced by Aboriginal peoples. While local governments do not have independent status and cannot exercise power solely of their own accord,²⁰⁷ they can make ordinance regarding local issues. As such, the power of local governments to make laws is qualified in a manner similar to the way in which the *UNDRIP* qualifies the right of Indigenous peoples to self-government—each must be exercised with respect to the Indigenous peoples’ and local governments’ ‘internal and local affairs’.²⁰⁸ It can be argued that the successful coexistence of local and state governments within the federal system ‘demonstrate[s] fluidity in the allocation and exercise of jurisdiction across the tiers of government’.²⁰⁹

The parallel characteristics and operation of local governments with Aboriginal systems of self-government suggests that recognition of Aboriginal institutions of government could operate in a similar fashion—through legislative or other delegation. Such fluidity in the federal system indicates that self-government arrangements could be accommodated within Australia’s current systems of governance, albeit without the recognition of an inherent right to self-govern.

VIII SOVEREIGNTY AND CONSTITUTIONAL RECOGNITION: BARRIERS TO SELF-GOVERNMENT?

The recognition and conferral of Aboriginal self-government rights in Australia is often mired in political discussions, which divert attention and resources from the government-provided assistance that is necessary for sustainable and effective self-government for Aboriginal peoples.²¹⁰ As has been alluded to above, one major stumbling block for the conferral of self-government rights in Australia is the lack of colonially recognised

²⁰⁷ Ibid.

²⁰⁸ *UNDRIP* (n 1) art 4. See also the discussion in Megarrity (n 204) 1–2.

²⁰⁹ Vivian et al (n 10) 234.

²¹⁰ *Royal Commission into Aboriginal Deaths* (n 9) vol 1 [1.7.11].

sovereignty for Aboriginal Australians. Another issue has been the debate over the constitutional recognition of Aboriginal Australians. However, as has already been partly seen, these two issues can be resolved without the need to halt the development of Aboriginal self-government rights and, at least in the case of the discussion around sovereignty, may actually assist with the progression of these rights. Each issue will now be explored in turn.

A *Sovereignty*

Aboriginal self-government in Australia has often been impeded by claims that the right to self-government confers recognition of another sovereignty, which some fear could lead to either secession or a challenge to Australia's legal foundations.²¹¹ Australian courts have conclusively shown that arguments against the validity of the Crown's sovereignty will not be determined at common law.²¹² Aboriginal claimants must instead, as is the case with any legal action, bring forward claims based on 'some immediate right, duty or liability',²¹³ rather than the general denial of Aboriginal sovereignty.²¹⁴ However, it is contended that singular sovereignty, or the fear of undermining the validity of Australian sovereignty, do not constitute barriers to the creation of self-government agreements or to the conferral of further self-government rights. According to Vivian et al, the conferral of an 'Aboriginal jurisdiction' would not necessitate the removal or undermining of Australian sovereignty but would instead recognise a shared sovereignty founded in the principles of legal pluralism.²¹⁵ As was considered pt IV,

²¹¹ Brennan, Gunn and Williams (n 102) 308.

²¹² Noel Pearson, 'Reconciliation: To Be or Not to Be? Separate Aboriginal Nationhood or Aboriginal Self-determination and Self-government within the Australian Nation?' (1993) 3(61) *Aboriginal Law Bulletin* 14, 14; see also *Shaw v Wolf* (n 194) 268 (Merkel J); *Coe v Commonwealth* (n 164) 200 (Mason CJ); and *Thorpe v Commonwealth (No 3)* (1997) 144 ALR 677, 683 (Kirby J).

²¹³ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.

²¹⁴ Martin Flynn and Sue Stanton, 'Another Failed Sovereignty Claim: *Thorpe v Commonwealth of Australia (No 3)*' (1997) 4(7) *Indigenous Law Bulletin* 19.

²¹⁵ Vivian et al (n 10) 228.

preliminary forms of these types of agreements already exist within the current Australian system of singular sovereignty.

Further, in both Australia and Canada—both of which are western, colonised, liberal democracies with laws and institutions inherited from England²¹⁶—the issue of sovereignty has been set aside in efforts to achieve Indigenous self-governance and self-determination. In Australia, the Joint Select Committee on Constitutional Recognition noted that while sovereignty was significant to Aboriginal Australians, the question of sovereignty could be decided outside deliberations for constitutional recognition²¹⁷ and, subsequently, Aboriginal self-determination.²¹⁸ In Canada, the Royal Commission on Aboriginal Peoples acknowledged differing views on the definition of sovereignty, but ultimately decided to set the question aside in favour of ‘resolving the practical issues of coexistence’.²¹⁹ The Nisga’a Agreement demonstrates that Canadian First Nations are not prevented from achieving self-government simply because Canada has not conclusively acknowledged their Indigenous sovereignty.²²⁰ It therefore follows that the failure to formally recognise the sovereignty of Aboriginal Australians does not necessarily undermine their ability to achieve self-government through a practical agreement-making process.

B *Constitutional Recognition*

The constitutional recognition of Aboriginal Australians has formed a major part of advocacy efforts to achieve Aboriginal self-determination in Australia. Constitutional recognition could improve the context in which laws and

²¹⁶ Petrie (n 4) 3.

²¹⁷ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (Final Report, June 2015) [7.7].

²¹⁸ Peter Dawson, ‘On Self-Determination and Constitutional Recognition’ (2015) 8(16) *Indigenous Law Bulletin* 3, 3.

²¹⁹ Brennan, Gunn and Williams (n 102) 331.

²²⁰ *Ibid* 332, 336.

policies regarding Aboriginal people are made as most proposed models of constitutional recognition seek to enshrine the continuation of Aboriginal languages, cultures, and heritage, thereby helping to secure these in future policy and law-making.²²¹ However, the most relevant form in which constitutional recognition could help promote Aboriginal self-determination is through the enshrining of models of participation, such as Aboriginal advisory boards, of Aboriginal people in decision-making that directly affects them.²²² By extension, constitutional recognition could provide some form of self-government rights or, similarly to Canada, recognise a formal right to self-government.

At present, Aboriginal Australians, and their continuing connection to land and cultures, are not recognised in the *Australian Constitution*. This lack of recognition of Australia's first peoples in the *Australian Constitution* is a distinct difference from the Canadian position.²²³ Further, the Canadian constitutional position appears unlikely to be emulated in Australia in the near future due to Australia's historic difficulty of passing constitutional reform by referendum and the current stances of Australia's political parties.²²⁴

Additionally, questions have emerged regarding the form of such constitutional recognition. Most recently, Aboriginal groups have advocated for an Aboriginal representative body to be enshrined within the *Australian Constitution*.²²⁵ The federal government, on the other hand, has shown support for recognition only.²²⁶ Scholars have expressed concerns with both approaches. Some are concerned that any recognition or acknowledgement of Aboriginal Australians will be a merely symbolic change would fail to

²²¹ Dawson (n 218) 3.

²²² Ibid 3–5.

²²³ *Canada Act* (n 88) sch B para 35(1).

²²⁴ Vivian et al (n 10) 235.

²²⁵ Referendum Council (n 85) i.

²²⁶ Dan Conifer, 'There's Bipartisan Support for Constitutional Recognition of Indigenous Australians But How Can it be Achieved?', *ABC News* (online, 11 July 2019) <<https://www.abc.net.au/news/2019-07-11/indigenous-recognition-in-constitution-referendum-explained/11300740>>.

progress Aboriginal rights substantively.²²⁷ Referendums are also costly, and the federal government would be put to significant expense in electing to hold one.²²⁸ As such, the addition of another Aboriginal layer of governmental authority in the *Australian Constitution* has been identified as ‘the least probable’²²⁹ of all proposed constitutional reforms.

However, the Noongar Settlement demonstrates that a lack of constitutional recognition will not necessarily hinder self-government agreements.²³⁰ Further, it is arguable that the constitutional enshrinement of an Aboriginal Australian right to self-determination would be an ‘ineffective guarantee’²³¹ of such a right. If constitutional recognition were to be implemented in the immediate future, there are fears that there could be insufficient time for the necessary consultation with Aboriginal communities,²³² and proper negotiations between these groups and the federal government,²³³ with respect to the specific form and wording of proposed amendments. Instead, the terms and operation of the relationship between the Aboriginal-state relationship should be defined through agreement-making.²³⁴ Without agreement, consultations by the federal government with Aboriginal communities would leave any rights to govern Aboriginal affairs solely with the government.²³⁵

In Canada, self-government rights have been conferred through the use of policy and negotiation rather than expressly being recognised in Canada’s

²²⁷ Melissa Castan, ‘Constitutional Recognition, Self-Determination and an Indigenous Representative Body’ (2015) 8(19) *Indigenous Law Bulletin* 15, 17.

²²⁸ *Ibid.*

²²⁹ Vivian et al (n 10) 240.

²³⁰ Hobbs and Williams (n 79) 38.

²³¹ Dylan Lino, ‘The Politics of Inclusion: The Right of Self-Determination, Statutory Bills of Rights and Indigenous Peoples’ (2010) 34(3) *Melbourne University Law Review* 839, 840.

²³² *Ibid* 839.

²³³ *Ibid* 855.

²³⁴ *Ibid* 856.

²³⁵ See *ibid* 864, where Lino stated that ‘statutory bills of rights give power to the state to define the content of Indigenous self-determination, to decide whether or not to abide by the precepts established in relation to Indigenous self-determination, and ultimately to determine whether the right will continue to exist in statutory form. This continues the state domination of Indigenous peoples ...’.

constitution. The self-government rights from any agreements reached are then protected under the constitutional 'aboriginal rights' rather than solely by agreement subject to later negotiation. Accordingly, while constitutional recognition has the potential to protect Aboriginal people's right to self-govern, in the author's view, constitutional recognition is not necessary for Aboriginal Australians to achieve self-government through the use of negotiated agreements.

IX CONCLUSION

The preliminary recognition of Aboriginal rights to self-government in Australia has been expressed implicitly and explicitly by the *Mabo (No 2)* decision and the more recent negotiation of the Noongar Settlement. Given the flexibility of the Australian legal jurisdiction, combined with the observable outcomes seen in Canada, it does not appear that self-government outcomes are precluded by the current lack of acknowledgement of sovereignty or constitutional recognition of Aboriginal Australian peoples. Indeed, it appears that Aboriginal Australian communities can achieve a measure of self-government and, subsequently, self-determination through agreement-making and negotiation to coexist alongside Australian governmental authority.

Internationally, agreements and Indigenous treaties have been the primary method of enacting self-government rights and are recognised in Canada as the preferable method of First Nations empowerment and dealing with First Nations lands. Such agreements can give rise to the expansive self-government rights exhibited in the Nisga'a Final Agreement, which operates concurrently with Canadian federal and provincial authority. The theory of legal pluralism, the flexibility of the Australian governmental system to accommodate existing forms of preliminary self-government, differing sources and definitions of sovereignty, and the delegation of state sovereignty

to local governments all indicate an accommodating environment for Aboriginal self-government rights to coexist with Australian governments, as exemplified by the Noongar Settlement. Subsequently, the stage may be set for agreement-making between Aboriginal Australians and Australian governments to drive meaningful pathways to Aboriginal self-determination further.