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# AUSTRALIA'S "NEW ARRANGEMENTS IN INDIGENOUS AFFAIRS": A NEW APPROACH OR A NEW PATERNALISM?

Joshua M. Piper<sup>†</sup>

*Abstract:* The Aboriginal and Torres Strait Islander Commission ("ATSIC") opened its doors in 1990 with the main objectives of advising the Australian Commonwealth Government ("Government") on Indigenous policy and providing services for Indigenous communities and individuals. Fifteen years later, with Indigenous living standards still well behind other Australians, the Government deemed ATSIC a failure and abruptly gutted and abolished the Commission. At the same time, the government transitioned to its New Arrangements in Indigenous Affairs program ("New Arrangements").

The New Arrangements are based on two fundamental ideas: better coordination between governments and agencies; and, most important, engaging and empowering Indigenous communities to run their own affairs and find their own solutions. To implement these ideas, the Government relies on negotiated agreements as the best way to reformulate Indigenous-State relations. Under this model, Government Indigenous Coordination Centers will negotiate agreements directly with local Indigenous representative bodies to remedy issues identified by Indigenous peoples themselves. As such, the New Arrangements framework successfully incorporates the principles of *modern* contractualism, which has potential to fulfill Indigenous peoples' desires for sovereignty and justice.

However, in transitioning to the New Arrangements, the Government acted hastily and unilaterally, potentially undermining the success of its new program. With some adjustments and additions, the Government can strengthen the new policy and redress any harm caused by the quick and uncompromising transition.

## I. INTRODUCTION

In the East Kimberly region of Western Australia, on the edge of the Tanami Desert, lives a remote Indigenous<sup>1</sup> community of about 150 people known as the Mulan.<sup>2</sup> In 2003, the Mulan found themselves with two serious problems to confront: their fuel pump and storage tanks were corroded, requiring a ninety kilometer round trip to the next community to get fuel; and the community's children had one of the world's highest rates of trachoma—a bacterial infection of the eyes and the most common cause

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<sup>1</sup> As a matter of brevity and uniformity, I use the terms "Indigenous" and "Indigenous Australians" throughout the Comment when referring to the Aboriginal peoples of Australia and the Torres Strait Islands.

<sup>2</sup> See Stuart Rintoul, *Long Walk Pushes Accord Talk*, WEEKEND AUSTRALIAN, Dec. 11, 2004, Features, at 20.

of preventable blindness in the world.<sup>3</sup> For the fuel facilities, the Mulan leadership approached the Commonwealth Government (“Government”) for replacement funds but was denied.<sup>4</sup> To combat the trachoma, the community instituted a twice-daily face-washing program at school; eighteen months later, trachoma infection rates among children had dropped from eighty percent to sixteen percent.<sup>5</sup>

As the Mulan (and many other Indigenous communities) confronted pervasive and enduring poor living standards, the Government’s Indigenous Affairs program was in upheaval.<sup>6</sup> The Government had introduced legislation to abolish the Aboriginal and Torres Strait Islanders Commission (“ATSIC”), a national Indigenous *representative* body responsible for delivery of a major portion of the Government’s Indigenous services.<sup>7</sup> At the same time, the Government rapidly instituted what it called the New Arrangements in Indigenous Affairs (“New Arrangements”).<sup>8</sup> This purely administrative reform was based on the principles of better government coordination and “shared responsibility” in achieving tangible improvements for Indigenous Australians.<sup>9</sup> The New Arrangements relied heavily on negotiated agreements to ensure this shared responsibility.<sup>10</sup>

These two narratives converged in December 2004 when the Mulan signed the first publicized Shared Responsibility Agreement (“SRA”) under the New Arrangements.<sup>11</sup> Under the agreement, the Mulan received new fuel facilities—worth \$172,260—from the Government in exchange for promises to continue and expand their hygiene program; children had to shower daily in addition to washing their faces twice a day, and everyone

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<sup>3</sup> Amanda Banks & Paige Taylor, *Routine Routs Eye Disease*, AUSTRALIAN, Dec. 10, 2004, Local, at 1; Rintoul, *supra* note 2. Four out of five Mulan children aged 10 to 16 were infected with Chlamydia trachomatis bacterium. See Banks & Taylor, *supra*.

<sup>4</sup> See Steve Pennells, *Rules Unfair, Say Proud Mulan People*, THE AGE, Dec. 10, 2004.

<sup>5</sup> Banks & Taylor, *supra* note 3.

<sup>6</sup> See *infra* Part II.B.

<sup>7</sup> See Aboriginal and Torres Strait Islander Commission Amendment Bill 2004, No. 04090 (Cth.).

<sup>8</sup> Press Release, Senator Amanda Vanstone, Dep’t for Immigration and Multicultural and Indigenous Affairs, New Service Delivery Arrangements for Indigenous Affairs (Apr. 15, 2004), available at <http://www.atsia.gov.au/media/media04/v04012.htm>; OFFICE OF INDIGENOUS POLICY COORDINATION, DEP’T OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, NEW ARRANGEMENTS IN INDIGENOUS AFFAIRS (2004) [hereinafter NEW ARRANGEMENTS IN INDIGENOUS AFFAIRS].

<sup>9</sup> NEW ARRANGEMENTS IN INDIGENOUS AFFAIRS, *supra* note 8, at 1-2.

<sup>10</sup> *Id.* at 17-18.

<sup>11</sup> Emma Macdonald, *Washing Hands of Responsibility: Carr*, CANBERRA TIMES, Dec. 9, 2004, at A5; DEP’T OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, SHARED RESPONSIBILITY AGREEMENT FACT SHEET, MULAN, WESTERN AUSTRALIA, available at [http://www.indigenous.gov.au/sra/wa/fact\\_sheets/wa08.pdf](http://www.indigenous.gov.au/sra/wa/fact_sheets/wa08.pdf).

had to reduce the amount of rubbish in the town.<sup>12</sup> This first SRA was a fitting inaugural agreement because it embodied both the potential for positive outcomes through the New Arrangements, as well as the Government's seeming insensitivity and carelessness in implementing them. Initially, the Mulan have seen beneficial results in terms of physical health (trachoma rates are now at zero) and economics, as well as exercising some form of self-determination. However, the cries from many Indigenous leaders of paternalism, assimilation, and social engineering inherent in the Mulan agreement highlight how haphazard and unplanned the transition has been.<sup>13</sup>

The New Arrangements have empirical potential for redressing many Indigenous inequities because their basis in contract theory can engage the structures of self-determination within Indigenous communities.<sup>14</sup> These agreements by themselves should be seen as a first step towards greater self-determination, sovereignty, and justice.<sup>15</sup> The contract model is no panacea, however, and in the Indigenous-State context must be carefully implemented with appropriate protections.<sup>16</sup> If the Government, led by Prime Minister John Howard, truly wishes to "improve the outcomes and opportunities and hopes of indigenous people,"<sup>17</sup> it needs to invest heavily in Indigenous leadership capacity, support a new national Indigenous representative structure, and make the New Arrangements more transparent and independent through legislation.<sup>18</sup>

The next Part of this Comment details the evolution of Commonwealth Indigenous policy in Australia leading up to the New Arrangements, focusing mainly on the operation and eventual demise of ATSIC. Part III examines the increasing scholarship on modern contractualism,<sup>19</sup> which endorses the use of negotiated agreements between Indigenous people and *settler*, or post-colonial, governments as a way to remedy historical inequity and injustice. Part IV explores the New

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<sup>12</sup> Macdonald, *supra* note 11.

<sup>13</sup> See Patricia Karvelas & Stuart Rintoul, *It's Patronising, Declares Lowitja*, WEEKEND AUSTRALIAN, Dec. 11, 2004, Local, at 4; Pennels, *supra* note 4; Pat Dodson & Noel Pearson, Op-Ed., *The Dangers of Mutual Obligation*, THE AGE, Dec. 15, 2004.

<sup>14</sup> See *infra* Parts III.B-C, IV.B.

<sup>15</sup> See *infra* Part IV.B.

<sup>16</sup> See *infra* Part III.E.

<sup>17</sup> Prime Minister John Howard, Joint Press Conference with Senator Amanda Vanstone (Apr. 15, 2004), <http://www.pm.gov.au/news/interviews/Interview795.html>.

<sup>18</sup> See *infra* Part V.B-D.

<sup>19</sup> I use the term "contractualism" interchangeably with "agreement making" throughout most of the Comment to refer to the process of negotiated agreements.

Arrangements in detail, concluding that they are a successful implementation of contractual principles and hold unique promise for Indigenous Australians seeking self-determination and meaningful justice. Part V argues that, because the Howard government acted hastily and unilaterally in completely abolishing ATSIC and implementing the New Arrangements, it needs to take immediate and earnest steps to repair any potential damage.

## II. THE COMMONWEALTH GOVERNMENT HAS ATTEMPTED TO REDRESS INDIGENOUS INEQUITIES IN THE PAST THROUGH SELF-DETERMINATION

Since 1967,<sup>20</sup> the Government has attempted to implement Indigenous policies reflecting self-determination and self-management, as well as provide a national representative voice for Indigenous Australians.<sup>21</sup> These attempts were in response to the inequitable living standards of Indigenous peoples across Australia.<sup>22</sup> Prior to ATSIC, the most notable attempts were the National Aboriginal Consultative Committee, created in 1973 and succeeded by the National Aboriginal Conference in 1977, the members of which were elected solely by Indigenous Australians.<sup>23</sup> However, because these organizations remained primarily advisory bodies and were not always well-connected to their constituents, they proved less successful than expected.<sup>24</sup> When it created ATSIC in 1989, the Hawke Government<sup>25</sup> sought a body with a much closer relationship to government and the power and responsibility to deliver programs and services.<sup>26</sup> Unfortunately, due to structural conflicts created at its inception and frequent amendments, ATSIC failed to achieve broad, meaningful results for Indigenous Australians.<sup>27</sup>

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<sup>20</sup> A 1967 Constitutional referendum allowed Parliament to legislate specifically towards Indigenous issues without violating prohibitions against racial preference. AUSTRALIAN CONSTITUTION, § 51(xxvi).

<sup>21</sup> See Kingsley Palmer, Australian Institute of Aboriginal and Torres Strait Islander Studies, Research Discussion Paper No. 12, *ATSIC: Origins and Issues for the Future, A Critical Review of Public Domain Research and Other Materials* 4-5 (2004).

<sup>22</sup> See DEP'T OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, INDIGENOUS FACT SHEET § 2.8, [http://www.atsia.gov.au/facts/docs/OIPC\\_FactSheet.pdf](http://www.atsia.gov.au/facts/docs/OIPC_FactSheet.pdf) (last visited Nov. 28, 2005) [hereinafter INDIGENOUS FACT SHEET].

<sup>23</sup> SENATE SELECT COMMITTEE ON THE ADMINISTRATION OF INDIGENOUS AFFAIRS, AFTER ATSIC—LIFE IN THE MAINSTREAM? 17 (2005) [hereinafter LIFE IN THE MAINSTREAM?].

<sup>24</sup> See *id.* at 17-18.

<sup>25</sup> The Hawke Government held office from March 1983 to December 1991.

<sup>26</sup> HON. JOHN HANNAFORD ET AL., IN THE HANDS OF THE REGIONS—A NEW ATSIC: REPORT OF THE REVIEW OF THE ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION 16 (2003).

<sup>27</sup> See LIFE IN THE MAINSTREAM?, *supra* note 23, at 28-37.

A. *Legislative Compromises Permanently Hindered the Commission*

The Hawke Government envisioned ATSIC as a major advance in the administration of Indigenous affairs.<sup>28</sup> The proposed legislation sought a body combining representative and executive duties, administering the Government's Indigenous programs through a system of Regional Councils and a national board (Commission) elected by Indigenous people.<sup>29</sup> ATSIC's guiding purpose was to ensure that Indigenous Australians participated in decision-making processes on matters that affected them.<sup>30</sup>

This proposed body was controversial, combining as it did executive and representative powers.<sup>31</sup> Because ATSIC was seen by some as setting up an alternate government, beyond the control of the Parliament, it "suffered heavily at the hand of the Opposition party during the passage of the Bill."<sup>32</sup> In fact, at the time, the bill to create ATSIC received the second-most number of amendments in Australian history.<sup>33</sup>

Parliament finally passed the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth.) ("ATSIC Act") on November 4, 1989, two years after it had been proposed.<sup>34</sup> To maintain the desired perception of greater Commission autonomy, the bill's supporters agreed to several measures—mainly increased accountability—that ensured ATSIC would remain answerable to the Parliament.<sup>35</sup> Years later, this rigid system of accountability "was [often] cited as a serious (and unnecessary) impediment to ATSIC's operations, one which inhibited progress in the achievement of better outcomes for Indigenous Australians."<sup>36</sup>

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<sup>28</sup> See Angela Pratt & Scott Bennett, Parliamentary Library Information and Research Services, *The End of ATSIC and the Future of Administration of Indigenous Affairs*, Current Issues Brief No. 4 2004-05, at 6 (Aug. 2004).

<sup>29</sup> See *id.*

<sup>30</sup> See HANNAFORD ET AL., *supra* note 26, at 16. According to section 3 of the Aboriginal and Torres Strait Islander Commission Act 1989 (Cth.), the objectives of the Commission were: 1) to ensure maximum participation of Aboriginal and Torres Strait Islander people in government policy formulation and implementation; 2) to promote Indigenous self-management and self-sufficiency; 3) to further Indigenous economic, social and cultural development; and 4) to ensure co-ordination of Commonwealth, state, territory and local government policy affecting Indigenous people.

<sup>31</sup> See Pratt & Bennett, *supra* note 28; Palmer, *supra* note 21, at 6 (citing M. Dillon, *Institutional Structures in Indigenous Affairs*, in SHOOTING THE BANKER: ESSAYS ON ATSIC AND SELF-DETERMINATION 94 (P. Sullivan ed., 1996)).

<sup>32</sup> Palmer, *supra* note 21, at 6; see also Pratt & Bennett, *supra* note 28.

<sup>33</sup> See LIFE IN THE MAINSTREAM?, *supra* note 23, at 20; Pratt & Bennett, *supra* note 28, at 7.

<sup>34</sup> See Aboriginal and Torres Strait Islander Commission Act 1989 (Cth.); LIFE IN THE MAINSTREAM?, *supra* note 23, at 20.

<sup>35</sup> See Pratt & Bennett, *supra* note 28.

<sup>36</sup> Palmer, *supra* note 21, at 6.

The resultant Commission retained the basic dual structure envisioned by its proponents. ATSIC's representative component consisted of 35 popularly elected Regional Councils and a National Board of Commissioners elected by the Regional Councils.<sup>37</sup> The administrative arm was responsible for the delivery of ATSIC programs, the majority of which targeted economic development and improved social and physical health.<sup>38</sup> Nonetheless, over the next fifteen years, the concessions and amendments made to the ATSIC Act would hinder the Commission and its goals.<sup>39</sup>

*B. Despite Its Successes, ATSIC Experienced Controversy and Became a Political Scapegoat*

ATSIC had many successes during its 15 years of existence, despite much reporting to the contrary.<sup>40</sup> ATSIC's record of political participation, representation, and innovation on behalf of Indigenous Australians was unmatched by any mainstream agency.<sup>41</sup> At the national level, ATSIC achieved increased participation of Indigenous leaders in several national policy bodies.<sup>42</sup> Many programs administered by ATSIC focused clearly on the needs of Indigenous people and brought appreciable gains—the Community Development Employment Projects (“CDEP”) and the financial agency Indigenous Business Australia among the most notable.<sup>43</sup> In 2002-03, ATSIC funds built roughly 500 houses, renovated 760, and made 537 home loans, housing more than 1600 people.<sup>44</sup> These are only a few examples of ATSIC's impact.<sup>45</sup>

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<sup>37</sup> See Pratt & Bennett, *supra* note 28, at 8.

<sup>38</sup> See *id.* at 8-9. Indigenous-specific programs in many areas, including social security, education, health, and welfare were to be delivered by or through the auspices of other federal, state, and territory governments. See *LIFE IN THE MAINSTREAM?*, *supra* note 23, at 14.

<sup>39</sup> As a result of persistent criticism, ATSIC underwent several major changes during its life, not least of which was the separation of the administrative arm into a separate agency. See *LIFE IN THE MAINSTREAM?*, *supra* note 23, at 20; HANNAFORD ET AL., *supra* note 26, at 18-20.

<sup>40</sup> See Palmer, *supra* note 21, at 7-9.

<sup>41</sup> See *LIFE IN THE MAINSTREAM?*, *supra* note 23, at 38.

<sup>42</sup> See *id.* Such policy bodies included, among others, the National Health and Medical Research Council and the Australian Seafood Council. *Id.*

<sup>43</sup> See *id.* at xvii. CDEP is the largest Indigenous program funded by the Government. It provides employment and training opportunities to Indigenous participants in a range of activities that benefit both individuals and their communities. *Id.* at 13.

<sup>44</sup> See *id.* at 39.

<sup>45</sup> Dr. Will Sanders identifies at least five areas of achievement for ATSIC: political participation of Indigenous peoples, a national Indigenous voice increasingly independent of Government, distinctive and culturally appropriate programs, using regional planning, and working with States and Territories. Will Sanders, Centre for Aboriginal Economic Policy Research, *ATSIC's Achievements and Strengths*:

ATSIC also had its share of controversies and failings over the years, though some were undeserved.<sup>46</sup> One review of its history showed that ATSIC had “laboured under much criticism, and despite many positive statements by its senior representatives, ha[d] been forced into a defensive position and . . . had to use time and resources to do so.”<sup>47</sup> By the time of its demise, only 20% of Indigenous Australians were participating in elections.<sup>48</sup> Several Commission members, including the Chairperson, became embroiled in political corruption scandals.<sup>49</sup> Moreover, a significant 2003 Government report documented the still pervasive poor living standards of most Indigenous Australians, including a twenty year gap in life expectancy.<sup>50</sup> There had been seemingly little progress in the 13 years since ATSIC’s creation.<sup>51</sup>

Accordingly, the Government took up a comprehensive review of ATSIC.<sup>52</sup> This report, released in 2003, documented widespread Indigenous support for the concept of ATSIC and recommended that its national representative structure be retained, although modified.<sup>53</sup> The report’s main recommendation was to move much of the decision-making into the hands of the Regional Councils who were more connected to their constituencies.<sup>54</sup>

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*Implications for Institutional Reform* (2004), at 1, <http://www.anu.edu.au/caepr/Publications/topical/SandersATSICAchievement.pdf>.

<sup>46</sup> A common perception of ATSIC was that it controlled all Government services and programs that affected Indigenous peoples and was wholly responsible for poor living standards. See *LIFE IN THE MAINSTREAM?*, *supra* note 23, at 13. In health and education, for example, where Indigenous policy and service delivery have been provided by mainstream agencies for many years, Indigenous Australian’s circumstances continue to lag well behind those of other Australians. See *id.* at xvi-xvii.

<sup>47</sup> Palmer, *supra* note 21, at 10.

<sup>48</sup> *LIFE IN THE MAINSTREAM?*, *supra* note 23, at 130. In fact, “in some regions of the country, the relationship between ATSIC and the people it is designed to serve is tenuous at best.” HANNAFORD ET AL., *supra* note 26, at 28.

<sup>49</sup> See, e.g., Tony Koch, *Clark Facing Dismissal as ATSIC Chair*, *COURIER MAIL*, July 16, 2003, News, at 1; Kirsten Lawson, *ATSIC Deputy Quits, Vows To Clear His Name*, *CANBERRA TIMES*, June 26, 2003, at A2; Maria Moscaritolo, *ATSIC Leaders Under Scrutiny*, *HERALD SUN*, Mar. 22, 2003, News, at 22.

<sup>50</sup> STEERING COMMITTEE FOR THE REVIEW OF GOVERNMENT SERVICE PROVISION, *OVERCOMING INDIGENOUS DISADVANTAGE, KEY INDICATORS REPORT 2003 passim* (2003) [hereinafter *KEY INDICATORS REPORT*]. Indigenous Australians have a life expectancy 20 years less than other Australians; a higher rate of disability resulting from environmental and trauma-related factors; significantly lower average incomes and much higher unemployment rates; a significantly higher suicide rate; disproportionate victim rates from crime; and a disproportionate prison population. *Id.* at xxiv-xxxiii.

<sup>51</sup> See *id.* at v (“Notwithstanding many years of policy attention, this Report confirms that Indigenous Australians continue to experience marked and widespread disadvantage.”).

<sup>52</sup> Press Release, Minister Philip Ruddock, *ATSIC Review Panel Announced* (Nov. 12, 2002), available at <http://www.atsicreview.gov.au/media.html>.

<sup>53</sup> See HANNAFORD ET AL., *supra* note 26, at 8.

<sup>54</sup> See *id.*



Despite the recommendation of the 2003 Review, ATSIC could not escape the rhetoric of blame and became the target of both sides of the 2004 Commonwealth election.<sup>55</sup> Both the Labor Party and Coalition Government singled out ATSIC as an impediment to change and a waste of tax-payer's money.<sup>56</sup> The Howard government won reelection in 2004 and quickly moved to abolish ATSIC by legislation.<sup>57</sup> The Opposition referred the bill to a Senate Committee for an investigation into the changes.<sup>58</sup> In February 2005, the Senate Committee tabled its report,<sup>59</sup> which, although extremely critical of the legislation and the Government's other reforms, did little to stop the bill's passage the following month.<sup>60</sup> On March 24, 2005, ATSIC ceased to exist.<sup>61</sup>

C. *Politics Aside, ATSIC Would Never Have Achieved Its Full Potential Without Reforming Its Representative Structure*

ATSIC suffered from at least two conditions that plagued its attempt to address Indigenous inequity, both recognized by the 2003 Review.<sup>62</sup> First, ATSIC contained a dual system of accountability, uniquely responsible to both its constituents and the Government.<sup>63</sup> It was committed to the ideology of self-determination while also being an institution of the Government, responsible for the development and implementation of public policy.<sup>64</sup> ATSIC could not sufficiently separate these dual responsibilities in both the administration of programs and the representation of interests.<sup>65</sup> This unusual arrangement inhibited progress and was "primarily responsible

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<sup>55</sup> See Andrew Fraser, *We'll Abolish ATSIC, Says Labor Party*, CANBERRA TIMES, Mar. 31, 2004, at A3; Mark Phillips, *PM to Make Aborigines Mainstream*, DAILY TELEGRAPH, Apr. 1, 2004, Local, at 2.

<sup>56</sup> See *Few Would Mourn End of ATSIC*, WEST AUSTRALIAN, Apr. 1, 2004, at 18. Both the Coalition and Labor Party promised to abolish ATSIC if elected to run the government.

<sup>57</sup> Aboriginal and Torres Strait Islander Commission Amendment Bill 2004, No. 04090 (Cth.).

<sup>58</sup> See LIFE IN THE MAINSTREAM?, *supra* note 23, at 1.

<sup>59</sup> *Id.*

<sup>60</sup> Aboriginal and Torres Strait Islander Commission Amendment Act 2005 (Cth.); see Press Release, Senator Amanda Vanstone, Dep't for Immigration and Multicultural and Indigenous Affairs, ATSIC Bill (Mar. 16, 2005), available at <http://www.atsia.gov.au/media/media05/v0505.htm>.

<sup>61</sup> See Press Release, Senator Amanda Vanstone, Dep't for Immigration and Multicultural and Indigenous Affairs, ATSIC Now History—A Better Future Ahead for Indigenous Australians (Mar. 24, 2005), available at <http://www.atsia.gov.au/media/media05/v0506.htm>.

<sup>62</sup> See HANNAFORD ET AL., *supra* note 26, at 5-7.

<sup>63</sup> Palmer, *supra* note 21, at 6.

<sup>64</sup> *Id.* at 12.

<sup>65</sup> See *id.* at 5; LIFE IN THE MAINSTREAM?, *supra* note 23, at 29; Pratt & Bennett, *supra* note 28, at 8. In an attempt to cure these perceived conflicts of interest and possible corruption within the Commission, the Government turned ATSIC's administrative arm into a separate agency in 2003 known as Aboriginal and Torres Strait Islander Services ("ATSIS"). See *id.*

for the numerous contradictions, conflicts, and dilemmas facing the Commission.”<sup>66</sup>

Second, ATSIC's power was concentrated in the National Commission, sidelining the local communities as *stakeholders* as opposed to directly involved parties.<sup>67</sup> Representation at the community level had always been considered impractical, and a formal electoral system was imposed, substantially different from the grass roots approach some saw as more culturally appropriate.<sup>68</sup> Moreover, ATSIC actually neglected community development in concentrating so heavily on program and service delivery.<sup>69</sup>

In sum, ATSIC was a body unique in the world and the culmination of thirty years of national Indigenous representation.<sup>70</sup> The Commonwealth government created ATSIC with much hype about its novelty and much hope for its ability to help resolve the mounting issues affecting Indigenous Australians.<sup>71</sup> In spite of its novelty, ATSIC's creators were wrong about its ability to achieve substantial, widespread improvements for Indigenous Australians. Although some explanations involve external forces on the Commission, at least part of the problem involved the basic structure of ATSIC as the embodiment of the Indigenous-State relationship.

### III. NEGOTIATED AGREEMENTS ARE THE WAY FORWARD FOR INDIGENOUS PEOPLES AND SETTLER GOVERNMENTS

Australia is not alone in confronting issues of Indigenous inequality. Around the world, Indigenous peoples and the *settler states* that displaced them are struggling with how to resolve the myriad problems that arise from the injustice and discrimination that typically accompany such displacement.<sup>72</sup> Recently scholars and politicians have championed the use

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<sup>66</sup> Palmer, *supra* note 21, at 6, 10.

<sup>67</sup> See HONOUR AMONG NATIONS: TREATIES AND AGREEMENTS WITH INDIGENOUS PEOPLE 251 (Marcia Langton et al. eds., 2004) [hereinafter HONOUR AMONG NATIONS].

<sup>68</sup> See Palmer, *supra* note 21, at 6 (citing H. C. Coombs, *Towards a National Aboriginal Congress*, at 18-22 (extracts from a report to the Hon. Clyde Holding, Minister for Aboriginal Affairs, April 1984) (1986)); HANNAFORD ET AL., *supra* note 26, at 29.

<sup>69</sup> Palmer, *supra* note 21, at 12.

<sup>70</sup> See HANNAFORD ET AL., *supra* note 26, at 16; Pratt & Bennett, *supra* note 28, at 6.

<sup>71</sup> See GERRY HAND, MINISTER FOR ABORIGINAL AFFAIRS, POLICY STATEMENT, FOUNDATIONS FOR THE FUTURE 1-3 (1987).

<sup>72</sup> See generally STUDY ON TREATIES, AGREEMENTS AND OTHER CONSTRUCTIVE ARRANGEMENTS BETWEEN STATES AND INDIGENOUS POPULATIONS, FINAL REPORT BY MIGUEL ALFONSO MARTÍNEZ, SPECIAL RAPPORTEUR, U.N. Commission for Human Rights, 51st Sess., Agenda Item 7, U.N. Doc. E/CN.4/Sub.2/1999/20(1999) [hereinafter U.N. STUDY ON TREATIES] (examining the origins, contemporary

of negotiated agreements as the best way to achieve a peaceful, workable, and mutually beneficial solution to these problems.<sup>73</sup>

A. *Agreements with Indigenous Peoples Have Been Used Throughout History*

Agreements between Indigenous peoples and settler states can take many forms and use different names, but are by no means a new concept.<sup>74</sup> From the beginnings of European expansion into the New World through the era of colonialism, European settlers consistently relied on emerging concepts of international law to form treaties with Indigenous polities.<sup>75</sup> This system of treaty making “developed *ad hoc* to justify conquest, trade, safe passage and other exigencies of imperialism.”<sup>76</sup> Eventually encapsulated by such colonial regimes, and subsequently, settler states, Indigenous peoples also resorted to negotiation for their rights of sovereignty, as well as the recognition and redress of injustices.<sup>77</sup> However, as the need for alliances for security purposes receded and the settler groups began to recognize and rationalize their dominance, the use of treaties waned.<sup>78</sup>

Interestingly, Australia never witnessed such historical treaty making. Various attempts by colonial and post-Federation agents to establish agreements with particular Indigenous leaders failed because the colonial governments deemed the Aboriginals incapable of recognition at law.<sup>79</sup> For these governments’ ideological, political, demographic, and geographical ambitions, “it was more advantageous to regard Aboriginal people as unworthy of treaty like arrangements than to make commitments that might

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significance, and potential value of concluding treaties, agreements, and other constructive arrangements between Indigenous peoples and States).

<sup>73</sup> See generally HONOUR AMONG NATIONS, *supra* note 67 (describing and analyzing a diversity of treaty and agreement-making instances between Indigenous peoples and others in settler states).

<sup>74</sup> See Marcia Langton & Lisa Palmer, *Treaties, Agreement Making and the Recognition of Indigenous Customary Polities*, in HONOUR AMONG NATIONS, *supra* note 67, at 34, 40.

<sup>75</sup> HONOUR AMONG NATIONS, *supra* note 67, at 4 (“The history of treaty making in the ‘New World’ extended over 400 years for the British and French, and over 500 years for the Spanish, Dutch and Portuguese, with divergent outcomes throughout the colonies. . . . The reach of the European powers into the “New World” brought new peoples and civilisations within the ambit of a new international code of European regulation.”).

<sup>76</sup> HONOUR AMONG NATIONS, *supra* note 67, at 4.

<sup>77</sup> *Id.* at 1.

<sup>78</sup> See U.N. STUDY ON TREATIES, *supra* note 72, at paras. 190-200.

<sup>79</sup> Langton & Palmer, *supra* note 74, at 41.

have become obstacles to the unfettered land appropriation in colonial Australia.”<sup>80</sup>

*B. Scholars Endorse a Modern Approach to Agreement Making as a Means of Addressing Indigenous Inequities*

In spite of the often unjust results of these historical agreements, academics, Indigenous leaders, business leaders, and politicians alike, champion a modern form of contractualism (or agreement making) meant to rearrange the Indigenous-State relationship for the benefit of all parties.<sup>81</sup>

For the purposes of this Comment, contractualism refers to the language and practice of contract—the ordering of relations by negotiated agreement.<sup>82</sup> In the traditional legal sense, a contract refers to an exchange of consideration and the establishment of a legally enforceable obligation—an obligation which flows from the free choice of the parties.<sup>83</sup> More specifically, a contractual relationship should involve: 1) parties with autonomy in their roles, 2) the identification of specific issues, 3) agreement or free consent to the terms, 4) transparency, and 5) consequences for action or inaction.<sup>84</sup> Contractualism is also generally characterized by the principles of choice, voice, participation, and consent.<sup>85</sup>

Modern contractualism is not much different. Although historically confined to the realm of liberal political theory, commercial law, and economic exchange, today the language and practice of contractualism are “used to manage diverse problems in public administration, employment, schooling, ordering of private (marriage or marriage-type) relationships, women’s rights and minority rights.”<sup>86</sup> In studying these newer realms,

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<sup>80</sup> *Id.*

<sup>81</sup> See, U.N. STUDY ON TREATIES, *supra* note 72, at paras. 260-63; Ciaran O’Faircheallaigh, *Evaluating Agreements between Indigenous People and Resource Developers*, in HONOUR AMONG NATIONS, *supra* note 67, at 303, 303-04; Bruce Harvey, *Rio Tinto’s Agreement Making in Australia in a Context of Globalisation*, in HONOUR AMONG NATIONS, *supra* note 67, at 237, 240; Stefan Matiation, *Impact Benefit Agreements Between Mining Companies and Aboriginal Communities in Canada: A Model for Natural Resource Developments Affecting Indigenous Groups in Latin America?*, 7 GREAT PLAINS NAT. RESOURCES J. 204, 205 (2002).

<sup>82</sup> See Barbara Sullivan, *Mapping Contract*, in THE NEW CONTRACTUALISM? 1, 1 (Glyn Davis et al. eds., 1997).

<sup>83</sup> See *id.*, at 2; see also Patrick S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q. REV. 193, 194-5 (1978).

<sup>84</sup> See Alex Matheson, *The Impact of Contracts on Public Management in New Zealand*, in THE NEW CONTRACTUALISM?, *supra* note 82, at 164, 168-69.

<sup>85</sup> See John Buick, *A Contractual Approach to Indigenous Self-Determination in Aotearoa/New Zealand*, 20 UCLA PAC. BASIN L.J. 113, 118 (2002).

<sup>86</sup> See Sullivan, *supra* note 82, at 1.

scholars have attempted to redefine the basic elements of contractualism.<sup>87</sup> One political scientist describes four necessary conditions for modern contractualism: 1) obligation based on individualized consent, 2) explicit dialogue between the parties which informs that consent, 3) negotiation based on mutual adjustment on the terms of the contract, and 4) accountability for actions based on the first three conditions.<sup>88</sup> These requirements do not materially differ from previous conceptions of the contract model, although they certainly involve important new concepts.<sup>89</sup> Therefore, *modern* contractualism refers less to a change in the process of making contracts, than to the diversity of issues to which that process is applied.<sup>90</sup>

When applied to the realm of Indigenous-State relations, the process of negotiating agreements provides a model approach to achieving Indigenous self-determination within the realities of international law and politics in the 21st century.<sup>91</sup> Those realities dictate that if Indigenous peoples are to peacefully and effectively realize self-determination, they will most likely have to exercise it within existing State structures and orders.<sup>92</sup> Scholars, and others, support negotiated agreements because they allow Indigenous peoples to *contractualize* the nature of their relationship with the State, thereby opening up opportunities to “(re)establish and (re)orient Indigenous-State relations” upon those principles of choice, voice, participation, and consent.<sup>93</sup>

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<sup>87</sup> See Gaby Ramia, *The “New Contractualism,” Social Protection and the Yeatman Thesis*, 38 J. SOC. 49, 50 (2002) (Austl.).

<sup>88</sup> See Sullivan, *supra* note 82, at 6 (citing Anna Yeatman, *Interpreting Contemporary Contractualism*, in JONATHAN BOSTON, *THE STATE UNDER CONTRACT* (Jonathan Boston ed., 1995)).

<sup>89</sup> For example, modern contractualism tends to radically disaggregate and individualize governance into a series of contractual relationships, as opposed to the generic “social contract” historically associated with governance. See *id.*, at 6-7.

<sup>90</sup> See Buick, *supra* note 85, at 117-18; Sullivan, *supra* note 82, at 6-7; Ramia, *supra* note 87, at 51.

<sup>91</sup> Buick, *supra* note 85, at 114.

<sup>92</sup> *Id.* at 113; see also S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 9 (2d. ed. 2004) (“It is generally assumed that [international] norms [of self-determination and human rights], like indigenous self-determination more generally, will ordinarily be applied within the frameworks of existing states.”). Anaya also notes that the tendency to equate self-determination with independent statehood has prevented widespread acceptance of the notion that self-determination, as an international legal principle, applies to Indigenous peoples. See *id.* at 7-9.

<sup>93</sup> Buick, *supra* note 85, at 118. Indeed, experience has shown that agreements between Indigenous peoples and settler states have avoided much conflict. As such, “agreement making has become a preferred, sometimes unavoidable part of the political and economic landscapes of settler states in which Indigenous and local peoples make their case for restitution of their inherent rights as peoples.” HONOUR AMONG NATIONS, *supra* note 67, at 25.

C. *Negotiated Agreements Promise Sovereignty and Justice for Indigenous Peoples*

At their core, Indigenous peoples' claims against settler states revolve around self-determination.<sup>94</sup> This can be broken down into two distinct demands: the demand for sovereignty over their own affairs and the demand for justice.<sup>95</sup> The concept of sovereignty is not uniform among Indigenous groups, but generally involves self-determination of membership, religious practice, child rearing, economics, and perhaps most importantly, land use.<sup>96</sup> As for justice, Indigenous groups generally seek some or all of the following: reconciliation (and perhaps reparations) for past injustices, the means to cure ongoing occurrences of injustice, and a commitment and plan to prevent future injustices.<sup>97</sup>

According to many commentators, the mere process or act of negotiating agreements contributes greatly to the goals of sovereignty, regardless of the outcome.<sup>98</sup> The negotiation and agreement process presupposes each party to be *sovereign* in their own right and equals in relation to each other, despite potential or real disparities in bargaining power.<sup>99</sup> By engaging in the contractual process, each party is exercising its choice to make a contract and its power to give or withhold consent to the terms.<sup>100</sup>

The process of contractualism also fulfils Indigenous goals for obtaining justice by employing and adhering to principles of choice, voice, participation, and consent during the negotiating process.<sup>101</sup> The power of this process is that, "while it goes some way towards making amends for

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<sup>94</sup> See ANAYA, *supra* note 92, at 97.

<sup>95</sup> Buick, *supra* note 85, at 119. Buick notes that scholar Garth Nettheim identified ten classes of claims for self-determination advanced by Indigenous peoples since the 1970s. *Id.* at 114, n.3. However, for his argument supporting contractualism, Buick consolidates these claims into two types—sovereignty and justice—despite the danger of overgeneralization. *Id.* (citing JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 4-5 (1995)). This Comment adopts Buick's generalization of Indigenous self-determination into sovereignty and justice. *Accord* ANAYA, *supra* note 92, at 103-110 (distinguishing between the substantive and remedial aspects of Indigenous self-determination).

<sup>96</sup> See ANAYA, *supra* note 92, at 129 (noting that Indigenous norms regarding self-determination generally include concerns over cultural integrity, social welfare and development, self-government, and land and resources).

<sup>97</sup> See Buick, *supra* note 85, at 119.

<sup>98</sup> See *id.* at 120; Lisa Strelein, *Symbolism and Function: From Native Title to Aboriginal and Torres Strait Islander Self-Government*, in HONOUR AMONG NATIONS, *supra* note 67, at 189, 190; Parry Agius et al., *Comprehensive Native Title Negotiations in South Australia*, in HONOUR AMONG NATIONS, *supra* note 67, at 203, 203.

<sup>99</sup> Buick, *supra* note 85, at 120.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

past injustices, it also redefines future interactions between victims and perpetrators and attempts to negotiate improvements on existing social injustices.”<sup>102</sup> Without good process, the parties will not have ownership of their agreement. A paper agreement will exist, “but relationships on the ground—and the structures and processes of governance—will remain reflective of historical injustice.”<sup>103</sup> Process is particularly important because its broader lessons can create justice elsewhere, whereas substantive issues are often tailored to the particular parties.<sup>104</sup>

Nevertheless, the substantive outcomes of negotiated agreements also aid in fulfilling Indigenous demands for sovereignty and justice. The actual terms of the agreement will identify and define the parties and the areas of their sovereignty, and spell out their sovereign rights and duties within the contractual relationship.<sup>105</sup> At present, this will usually be a limited form of sovereignty for the Indigenous party, but this does not necessarily connote inferiority: “As arrangements elsewhere in the world demonstrate, there is compatibility between a nation’s sovereignty and a state’s sovereignty. This is the essence of federalism.”<sup>106</sup>

Altogether, as long as the procedural contractual principles of choice, voice, participation, and consent are upheld, an agreement embodies substantive justice because it represents “what has been contracted for, participated in, negotiated upon, and consented to by the parties.”<sup>107</sup> Such an agreement cannot reasonably or justly be rejected by any party to that agreement.<sup>108</sup>

*D. Native Title Negotiations Exemplify the Benefits of the Contractual Process with Regards to Sovereignty*

Australia has already to some extent witnessed the varied and mutual benefits of Indigenous-State contractualism through Native Title determinations.<sup>109</sup> In 1992, the High Court finally recognized the existence

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<sup>102</sup> HONOUR AMONG NATIONS, *supra* note 67, at 1.

<sup>103</sup> Agius et al., *supra* note 98, at 204.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> HONOUR AMONG NATIONS, *supra* note 67, at 16; *see also* Sean Brennan et al., “Sovereignty” and Its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments, 26 SYDNEY L. REV. 307, 309 (2004) (concluding that the concept of sovereignty need not be an impediment to treaty-making in Australia).

<sup>107</sup> Buick, *supra* note 85, at 120.

<sup>108</sup> *Id.* at 121.

<sup>109</sup> *See* Press Release, National Native Title Tribunal, National Trend Gathering Momentum with 200th Agreement (Oct. 3, 2005), [http://www.nntt.gov.au/media/1128302683\\_3736.html](http://www.nntt.gov.au/media/1128302683_3736.html). Other instances

of "Native Title" to land, giving Indigenous Australians significant legal power over their ancient land base for the first time.<sup>110</sup> The next year, Parliament passed the Native Title Act, 1993<sup>111</sup> ("NTA"), which created procedures for determining where Native Title exists and where it has been wholly or partially extinguished.<sup>112</sup> One of the underlying principles of the NTA, which is more evident (at least in terms of legislative language) since its amendment in 1998,<sup>113</sup> is the emphasis on agreement making as the preferred method of dealing with Native Title issues, and on mediation as a means of encouraging agreements.<sup>114</sup> This emphasis "has provided a platform on which much negotiation, both Native Title and non-Native Title, has been built."<sup>115</sup> For the first time, large groups of Indigenous Australians are engaged in a process that recognizes their jurisdiction.<sup>116</sup>

Native Title agreements have cultivated the exercise of previously suppressed Indigenous sovereignty such that the process itself is an exercise in self-determination.<sup>117</sup> These negotiations and agreements also have the potential to protect social, cultural, and economic interests.<sup>118</sup> This often revitalizes the rural and remote areas in which Indigenous peoples constitute

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besides Native Title certainly exist. For example, in October 2001, the Western Australia Government signed a *Statement of Commitment* with Indigenous peoples in that state, focusing on recognition of the continuing rights and responsibilities of Indigenous Australians, legislative protection of Indigenous rights, and regional and local approaches to address issues that impact Indigenous communities. The *Statement* formalizes its reforms through agreements. See Strelein, *supra* note 98, at 196.

<sup>110</sup> *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 2 (Austl.). Prior to *Mabo*, Australian common law held that the continent was *terra nullius* (no man's land) at the time of Federation. *Id.* at 32-34. Negotiation and agreements making was not unknown prior to the famous *Mabo* decision; before 1992, statutory land rights schemes and, to a lesser extent, heritage legislation both provided a framework for some negotiation and agreement making. HONOUR AMONG NATIONS, *supra* note 67, at 17.

<sup>111</sup> Native Title Act, 1993 (Cth.).

<sup>112</sup> One commentator argues that the NTA, as interpreted by the High Court of Australia, significantly constrained the breadth of Native Title as envisioned by the *Mabo* decision. Noel Pearson, *Land is Susceptible of Ownership*, in HONOUR AMONG NATIONS, *supra* note 67, at 83, 83.

<sup>113</sup> See Native Title Amendment Act, 1998 § 24c (Cth.) (creating Indigenous Land Use Agreements; consolidated into Native Title Act, 1993).

<sup>114</sup> Graeme Neate, *Agreement Making and the Native Title Act*, in HONOUR AMONG NATIONS, *supra* note 67, at 176, 179. As part of the 1998 amendments to the NTA, the Indigenous Land Use Agreement ("ILUA") provisions sought to meet the needs of smaller ventures for agreements with Indigenous communities. The ILUA provisions also recognized the desire on the part of commercial and Indigenous interests to be able to deal directly with each other in relation to particular projects, removing government entirely from some negotiations. Strelein, *supra* note 98, at 193.

<sup>115</sup> HONOUR AMONG NATIONS, *supra* note 67, at 16-17.

<sup>116</sup> *Id.*

<sup>117</sup> Agius et al., *supra* note 98, at 215. Native title stimulated a culture of agreement making, "and it is this culture, within and outside the Native Title process, that begins to engage Aboriginal polities and Aboriginal jurisdiction." HONOUR AMONG NATIONS, *supra* note 67, at 20.

<sup>118</sup> See HONOUR AMONG NATIONS, *supra* note 67, at 252.



significant majorities.<sup>119</sup> Moreover, this modern agreement making allows the recognition of Indigenous Australian polities that statutes and common law have not.<sup>120</sup> Indeed, one scholar urges that the success of the Native Title system be evaluated by both the legal conclusions of Native Title as well as its place in the recognition of Indigenous self-government.<sup>121</sup>

However, Native Title negotiation can also go further than mere recognition of the traditional scope of Indigenous authority. The process of negotiating Native Title has resulted in the extension of the jurisdiction of “surviving Aboriginal customary polities into postcolonial commercial and legal domains.”<sup>122</sup> This provides mutual gain in that the State or industry gains access to resources in Indigenous territory, while the Indigenous people extend their property based “customary rights” into the modern economic and political sphere.<sup>123</sup> Accordingly, there is broad and politically bipartisan support for agreement making, and Indigenous peoples, government, and industry are devoting substantial financial and other resources to the negotiation of agreements.<sup>124</sup>

*E. To Ensure the Success of Agreement Making, a Number of Challenges Must Be Overcome*

Agreement making is not without its shortfalls, especially in the context of Indigenous-State relations. Poor leadership, unequal bargaining positions, cultural bias, and failure to plan for implementation and enforcement can sabotage the process and outcomes of negotiated agreements. None of these drawbacks, however, is insurmountable or unavoidable.

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 13.

<sup>121</sup> Strelein, *supra* note 98, at 189-90. For Strelein, Native Title is important in Australia’s legal and political structures because it is a measure of Australia’s ability to accommodate the rights of Indigenous peoples. *Id.* For Indigenous Australians, “it is not merely a form of title: it is a fundamental recognition of the distinct identity and special place of the first peoples.” *Id.*

<sup>122</sup> HONOUR AMONG NATIONS, *supra* note 67, at 13. For a specific example of how the evolving recognition of Native Title has nurtured a distinctive approach to agreement making involving new sorts of relationships, co-operative exploration of a wide range of issues, and emphasis on process as a vehicle for exercising Aboriginal self-determination, see Agius et al., *supra* note 98, at 203.

<sup>123</sup> Langton & Palmer, *supra* note 74, at 49.

<sup>124</sup> O’Faircheallaigh, *supra* note 81, at 303-04.

1. *Indigenous Parties Must Have Leadership and Capacity, and Bargaining Positions Must Be Maintained*

To ensure sound contractual relations and outcomes, Indigenous peoples must possess leadership skills and be conversant in the language and practice of contracts.<sup>125</sup> Modern contractualism tends to disaggregate and individualize governance into a series of contractual relationships.<sup>126</sup> Thus, to operate effectively within such a framework, individuals<sup>127</sup> must be able “to make rational choices about their own interests, and be able to understand, negotiate, and adhere to contracts”—they must have *capacity*.<sup>128</sup> For Indigenous peoples engaged in negotiations with a settler state, capacity implicates the governance abilities and cultural authority of Indigenous governing institutions.<sup>129</sup>

Indigenous governing institutions vary in capacity. For some, capacity may not exist at all—many groups have not managed to maintain their traditional organization in the face of colonialism.<sup>130</sup> In this situation, outsiders must encourage and support the creation of culturally appropriate and effective representative structures to ensure mutually beneficial agreements. This may prove easier than imagined given that “[a] people do not desist from their political aspirations merely on the grounds of doctrinal denial of their existence or their capacity to engage politically with external entities.”<sup>131</sup> However, appropriate funding and accountability measures should be a part of such encouragement and support.

Beyond negotiating skills, the legal and political power behind Indigenous groups plays an important role. Any negotiation proceeds based on the bargaining position of each party—a position often dictated by the legal rights of those parties and the political atmosphere of the time. The *ad hoc* nature of individual agreements does little for the larger Indigenous community's position; any agreements will only be binding on those parties and will not advance the legal position of Indigenous peoples in general.<sup>132</sup> In addition, the terms of many privately negotiated agreements are confidential, providing little guidance for similarly-situated Indigenous

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<sup>125</sup> Buick, *supra* note 85, at 118.

<sup>126</sup> *Id.*

<sup>127</sup> “Individuals” refers to individual persons as well as organizations.

<sup>128</sup> Buick, *supra* note 85, at 118.

<sup>129</sup> *See id.*; HONOUR AMONG NATIONS, *supra* note 67, at 252.

<sup>130</sup> *See* U.N. STUDY ON TREATIES, *supra* note 72, at paras. 204, 206.

<sup>131</sup> Langton & Palmer, *supra* note 74, at 43.

<sup>132</sup> *See* Donna Craig, *Native Title and Environmental Planning: Indigenous Land Use Agreements*, 17 ENVTL. & PLANNING L.J. 440, 450 (2000) (Austl.).

communities as to what they can or should expect from agreements.<sup>133</sup> Accordingly, maintaining the bargaining position of Indigenous parties and ensuring they are adequately resourced for the exercise are crucial factors to achieving outcomes that will have lasting benefit to Indigenous Australians.<sup>134</sup>

Despite the shortcomings of the Native Title Act,<sup>135</sup> both the Government and NGOs have experience in building capacity within Indigenous groups through the Native Title system. The Government created the National Native Title Tribunal to, among other things, facilitate mediation relating to Native Title and assist people in negotiating Indigenous Land Use Agreements (“ILUAs”).<sup>136</sup> The Act also provides for the recognition of Native Title representative bodies around the country.<sup>137</sup> In South Australia, an NGO helped create local representative structures (“Committees”) for Indigenous groups involved in a state-wide settlement of Native Title claims. These Committees proved important to the Native Title groups in providing an appropriate and accountable avenue for claim management that was reflective of the group’s kinship and traditional decision-making processes.<sup>138</sup> This type of support for nascent Indigenous governance and capacity is essential for the success of agreement-making.

On the other hand, the Native Title system in Australia may suffer from severe unequal bargaining positions. Noel Pearson, an Indigenous leader in Queensland, argues that despite the success of ILUAs, the negotiation process is still inherently one-sided.<sup>139</sup> Under the current Native Title system, non-Indigenous parties are allowed to oppose claims for Native Title even though they have no rights or interests that are vulnerable. All of their rights and interests are guaranteed by the common law and by validating legislation and the Attorney-General pays for their legal costs; thus, they have nothing to lose by refusing to consent to a finding of Native Title when the system assumes most claims can be settled by mediation and

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<sup>133</sup> See *id.* at 449.

<sup>134</sup> *Id.* at 448.

<sup>135</sup> One author notes that the *NTA* does not provide for any formal recognition of Aboriginal self-government, and it does not anticipate the resources that are required for effective Aboriginal governance associated with Native Title. See Agius et al., *supra* note 98, at 217. That said, finding the resources needed for Native Title groups to build strong capacity for self-government is often a struggle. *Id.*

<sup>136</sup> Native Title Act, 1993, Part 6 (Cth.).

<sup>137</sup> *Id.*; Neate, *supra* note 114, at 181.

<sup>138</sup> Agius et al., *supra* note 98, at 208.

<sup>139</sup> See Pearson, *supra* note 112, at 85 (“What is not understood about native title claims after *Mabo*, and certainly after the *NTA*, is that it is simply not possible for non-Indigenous parties to lose any legal rights or title as a consequence of a native title finding. These land claims are not true litigations in the sense that either party may suffer loss as an outcome.”).

negotiation.<sup>140</sup> Not only does such unequal positioning limit the potential outcomes for Indigenous peoples; it also provides less incentive for one party to negotiate in the first place.

While this may be an extreme example, contractualism can still be beneficial even when the bargaining position of Indigenous peoples is particularly weak. If parties are willing to set aside seemingly intractable disputes over matters like sovereignty, “then practical mechanisms and creative wording contained in skilfully negotiated treaties and agreements can allow the focus of negotiations to shift to defined and achievable goals of mutual concern while at the same time preserving each party’s legal position.”<sup>141</sup>

## 2. *Accommodating Competing Discourses Must Defeat Euro-centric Domination*

Some critics argue that contractualism involves a Euro-centric discourse and overly economic model which inherently disfavors Indigenous peoples.<sup>142</sup> Such criticism contends that contractual principles are altogether foreign to Indigenous peoples—a notion based in part on the historically unjust outcomes of treaties and agreements.<sup>143</sup> Conflicting Indigenous-State discourses also support the idea that Indigenous peoples are at a cultural disadvantage. Today States often seek to silence the past and tame the future of Indigenous-State relations, hoping to achieve a definitive result and move forward.<sup>144</sup> By contrast, Indigenous discourse seeks to reestablish and reorient the relationship with the State while maintaining continuity with the past.<sup>145</sup> Given this apparent disjuncture of discourse, the Euro-centric nature of contractualism might allow the State to force its own view on the other, making the agreement an instrument of domination, rather than of coexistence.<sup>146</sup>

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<sup>140</sup> *Id.* at 85-86.

<sup>141</sup> HONOUR AMONG NATIONS, *supra* note 67, at 24.

<sup>142</sup> See Sullivan, *supra* note 82, at 12; Paul McHugh, *Crown-Tribe Relations: Contractualism and Coexistence*, in THE NEW CONTRACTUALISM?, *supra* note 82, at 200. One author wonders whether “agreements [are] essentially a rhetorical and ideological device designed by non-Indigenous interests to create the impression that Indigenous concerns are being addressed, while in reality they constitute a vehicle for continuing dispossession of Indigenous peoples.” O’Faircheallaigh, *supra* note 81, at 304.

<sup>143</sup> See Buick, *supra* note 85, at 127-28.

<sup>144</sup> See McHugh, *supra* note 142, at 204.

<sup>145</sup> *See id.*

<sup>146</sup> Tim Rowse, *Reflections on Contractualism and Coexistence in an Intercultural Context*, in THE NEW CONTRACTUALISM?, *supra* note 82, at 217.

These concerns are misplaced. Initially, building capacity among Indigenous leaders will help avert the claimed disfavor. But moreover, there is little support for the assertion that Indigenous peoples in the past did not understand the nature of the relationships they were forming through treaties.<sup>147</sup> The systems of commerce and trade that gave rise to contractual principles are not modern or even European/American creations and “have been ‘part of the human condition for at least as long as *Homo sapiens* has been a species.’”<sup>148</sup>

Unfortunately, “[d]ispossession and disruption, international and domestic laws, and the never-ending expansion of the market and modern urban settlement into Indigenous domains, have all had an impact on the capacity of Indigenous peoples to sustain ancient livelihoods and lifeways.”<sup>149</sup> This does not mean that Indigenous peoples are not willing to change. In fact, today, Indigenous peoples often “want to benefit from the economic projects that consume their resource base, and moreover want to develop economically in their own right.”<sup>150</sup> This is demonstrated by the wide range of agreements, covering an immense breadth and scope, between Indigenous groups and others in Australia.<sup>151</sup> Although agreement-making has undoubtedly been a tool of European domination of Indigenous peoples in the past, “today it [can] become a means of facilitating that encounter on the principles of consent and choice, fairness and mutual respect.”<sup>152</sup>

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<sup>147</sup> Buick, *supra* note 85, at 127-28. “[W]hat they misunderstood, if anything, were the frequently changing and contradictory intentions of the State parties, the trickery employed by these parties in the process and product of contractualism, and the underlying absence of good faith bargaining. That was not something to be immediately gleaned from negotiations or the text of the agreement, but rather from the course of the subsequent history of relations.” *Id.* at 128.

<sup>148</sup> Buick, *supra* note 85, at 127 (quoting MATT RIDLEY, *THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION* 200 (1997)).

<sup>149</sup> HONOUR AMONG NATIONS, *supra* note 67, at 25.

<sup>150</sup> *Id.*

<sup>151</sup> These include agreements relating to mineral resources, education and health service delivery, Native Title determinations, local government, arts and tourism, national parks and environmental management. HONOUR AMONG NATIONS, *supra* note 67, at 252. Similarly, though ILUAs were conceived as a means for providing contractual security for small commercial interests, this has not stopped Indigenous Australians from pushing the limits of the ILUA process: “Native title claimants in South Australia, for example, have entered into direct negotiations with the South Australian Government and peak industry bodies under the ILUA process to negotiate a ‘state wide comprehensive settlement’ of native title issues, with a view toward progressive legislative, administrative, constitutional and procedural reforms.” Strelein, *supra* note 98, at 194.

<sup>152</sup> McHugh, *supra* note 142, at 214.

### 3. *Implementation and Enforcement of Agreements Must Be Arranged at the Outset*

Often parties to an agreement concentrate exclusively on the goals they hope to achieve. However, "the mere fact of an agreement does not of itself guarantee equitable outcomes for Indigenous parties."<sup>153</sup> The prospects for success are greatly influenced by the degree to which agreements contain the means for their own implementation and enforcement.<sup>154</sup> Drafting clear, specific provisions is important<sup>155</sup>; but effective implementation and enforcement also echoes the call for organizational capacity of all parties to sustain their commitments.<sup>156</sup>

Similarly, the enforceability of such agreements must be assured. Many historical agreements failed to protect Indigenous interests because they had no means of effective enforcement, and where an enforcement mechanism existed, Indigenous peoples often had negotiated agreements (re)interpreted in favor of powerful non-Indigenous interests.<sup>157</sup> Modern agreements must be structured so that should implementation or performance under the agreement become a problem, the harmed party can avail itself of the benefits of the legal order within which the contractual relationship operates.<sup>158</sup>

Some authors argue that the problems of implementation and enforcement implicate a party's change of will, and not a failing of the process of contractualism itself.<sup>159</sup> Nonetheless, a culture of agreement-making can induce Indigenous reliance on the good faith of the State. If the State has a change of will, an agreement might in fact leave an Indigenous party worse off than before.<sup>160</sup> Accordingly, implementation and enforcement are essential to successful outcomes from negotiated agreements.

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<sup>153</sup> HONOUR AMONG NATIONS, *supra* note 67, at 252.

<sup>154</sup> O'Faircheallaigh, *supra* note 81, at 325.

<sup>155</sup> *See id.* at 306-08.

<sup>156</sup> *See id.* at 325 ("The prospect that an agreement will actually be put into effect is influenced by a range of factors. . . . A critical issue involves the general human and organisational capacities of Indigenous and other parties, which shapes their ability to sustain commitments they have made under agreements.").

<sup>157</sup> *See* U.N. STUDY ON TREATIES, *supra* note 72, at paras. 125-27, 299-301.

<sup>158</sup> *See* Buick, *supra* note 85, at 122.

<sup>159</sup> *Id.* at 126.

<sup>160</sup> *See* O'Faircheallaigh, *supra* note 81, at 304.

F. *Although Alternatives to Agreement Making Should Be Utilized, Only Contractualism Provides a Comprehensive Solution to Indigenous Inequities*

Despite these potential shortfalls of Indigenous-State agreement making, an overview of the alternatives reinforces the wisdom of using such agreements in the modern world. For example, physical resistance has obvious consequences, including death and destruction of property. As perhaps a more acceptable alternative, Indigenous groups have the option of refusing to bargain for rights, and instead pursuing such rights in the settler state legal/political system. Common law courts, however, have generally been unresponsive to the needs of Indigenous communities.<sup>161</sup> “Although test cases are necessary to resolve outstanding legal questions (to create a clearer legal landscape in which to negotiate), . . . [a] litigated outcome is likely to be more costly (in financial, personal and temporal terms) than a mediated outcome, and the issues that are resolved are likely to be narrower.”<sup>162</sup> Indigenous groups as well as judges have articulated this concern over the costs of litigation.<sup>163</sup> Only contractualism provides a peaceful, coherent, and effective framework for Indigenous peoples to participate in, and consent to, the nature and terms of coexistence with States in their quest for self-determination.<sup>164</sup>

In Australia, alternative methods of achieving self-determination are undoubtedly important arrows in the quiver. Noel Pearson of the Northern Territory has argued that both radical and moderate strategies must be used in order to secure results.<sup>165</sup> However, the existing tools, including Native Title negotiations, have limitations—some practical, others going much

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<sup>161</sup> The *Mabo* decision and subsequent Native Title cases in Australia are a good example. For a discussion on the role of the courts and Native Title, see Carlos Scott López, *Reformulating Native Title in Mabo's Wake: Aboriginal Sovereignty and Reconciliation in Post-Centenary Australia*, 11 TULSA J. COMP. & INT'L L. 21 (2003). See also Geoffrey Robert Schiveley, Note, *Negotiation and Native Title: Why Common Law Courts Are Not Proper Fora for Determining Native Title Land Issues*, 33 VAND. J. TRANSNAT'L L. 427 (2000).

<sup>162</sup> Neate, *supra* note 114, at 183. Indeed, experience has shown that these typical litigation costs are exaggerated in Native Title cases. See *id.*

<sup>163</sup> See O'Faircheallaigh, *supra* note 81, at 303-04 (“[Indigenous s]upport for agreement making results from a conviction that in comparison to the alternatives (essentially litigation or a resolution involving political conflict), negotiation of agreements is less time consuming, less costly, and more likely to permit ‘win-win’ situations that allow benefits to be channeled to Indigenous people without creating a backlash from competing interests that have incurred a commensurate loss.”); Neate, *supra* note 114, at 182 (“There have been some very strong statements from superior courts about the importance of agreement making.”).

<sup>164</sup> See Buick, *supra* note 85, at 119, 122; McHugh, *supra* note 142, at 214.

<sup>165</sup> Strelein, *supra* note 98, at 199 (quoting Noel Pearson, *Aboriginal Law and Colonial Law Since Mabo*, in ABORIGINAL SELF DETERMINATION IN AUSTRALIA 157 (Christine Fletcher ed., 1994)).

deeper, to the heart of the colonial relationship.<sup>166</sup> Inconsistent government responses exacerbate these limitations.<sup>167</sup> As such, some scholars have recently called for coordinated Indigenous-State negotiations covering a wider range of issues, whereby Indigenous Australians can address issues not as a corporate interest, but as a collective, self-governing, and sovereign interest.<sup>168</sup> The New Arrangements in Indigenous Affairs attempt to answer that call.

#### IV. IN EMBRACING THE MODEL OF CONTRACTUALISM, THE NEW ARRANGEMENTS HOLD MUCH PROMISE FOR INDIGENOUS AUSTRALIANS

The Government recently embarked on a new course in Indigenous affairs. The New Arrangements are, in part, a response to the crisis of underdevelopment that is emerging because of increasing population growth and the failure of service delivery to meet the needs of Indigenous peoples.<sup>169</sup> The Government hopes “to improve the outcomes and opportunities and hopes of Indigenous people in areas of health, education and employment.”<sup>170</sup> Empirically and rhetorically, these New Arrangements are an innovative and promising approach to eradicating Indigenous inequity and injustice in Australia.

##### A. *The New Arrangements Seek Better Government Coordination and Empowerment of Indigenous Communities*

The New Arrangements consist of an entirely new administrative structure and appear to be based on two fundamental ideas: better coordination of the part of governments and agencies; and, most important, engaging and empowering Indigenous communities to run their own affairs and find their own solutions to problems through negotiated agreements.<sup>171</sup>

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<sup>166</sup> *Id.* For example, agreement making has had wavering success with respect to the elimination of racial discrimination and protection of copyright; this is due largely to the cultural biases and entrenched racism that continue to permeate settler societies' responses to the recognition and protection of Indigenous rights and interests. HONOUR AMONG NATIONS, *supra* note 67, at 253.

<sup>167</sup> Strelein, *supra* note 98, at 199.

<sup>168</sup> *Id.* at 200. In looking past Native Title, one author suggests that the effectiveness of these agreements could be enhanced by moving beyond a sole focus and developing better links to the whole-of-government decision-making processes as this relates to a range of other key social and economic indicators. See HONOUR AMONG NATIONS, *supra* note 67, at 23.

<sup>169</sup> HONOUR AMONG NATIONS, *supra* note 67, at 251; see also COMMONWEALTH GRANTS COMMISSION, REPORT ON INDIGENOUS FUNDING, at xiv-xvii (2001).

<sup>170</sup> Prime Minister John Howard, *supra* note 17.

<sup>171</sup> Fred Chaney, *Common Ground Key to Moving Ahead*, TALKING NATIVE TITLE, Dec. 2004, at 4; see also NEW ARRANGEMENTS IN INDIGENOUS AFFAIRS, *supra* note 8, at 1.



To facilitate the coordination of government services, the New Arrangements implement several structural changes. First, Indigenous specific programs formerly administered by ATSIC are now administered by Government mainstream agencies under a “whole-of-government” approach.<sup>172</sup> For example, ATSIC’s largest program, CDEP, is now run by the Commonwealth Department of Employment and Workplace Relations.<sup>173</sup> The ATSIC employees who ran the CDEP program were moved to the mainstream agency office. Second, at the national level a Ministerial Taskforce on Indigenous Affairs (“Taskforce”) now provides “leadership and strategic direction” for Commonwealth Indigenous policy.<sup>174</sup> The Taskforce is advised by a Secretaries’ Group and a National Indigenous Council (“NIC”), an appointed body of Indigenous Australians chosen for their expertise and experience in a range of policy areas.<sup>175</sup> Third, at the regional level the Government established thirty Indigenous Coordination Centres (“ICCs”) throughout the country, usually in the locations of former ATSIC Regional Councils, which are managed nationally by an Office of Indigenous Policy Coordination (“OIPC”).<sup>176</sup> The ICCs are the backbone of the New Arrangements, intended to be the community and regional level coordinator of all Government activity and the single point of Government contact for Indigenous peoples and communities.<sup>177</sup> ICCs manage the delivery of most of the Government’s Indigenous programs and work with local Indigenous communities to develop innovative, flexible responses to local needs through negotiated agreements.<sup>178</sup>

The more promising transformation that the New Arrangements bring to Indigenous Affairs is the focus on local Indigenous representation and empowerment and regional planning. This is accomplished partly through

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<sup>172</sup> NEW ARRANGEMENTS IN INDIGENOUS AFFAIRS, *supra* note 8, at 1, 9. “Whole-of-government” means “all government policies and funds must be coordinated and used efficiently and strategically in cooperation with local communities.” *Id.* at 2.

<sup>173</sup> *Id.* at 22.

<sup>174</sup> *Id.* at 1, 11-12.

<sup>175</sup> *Id.* at 12-13, 27-30. The NIC is required to provide expert advice to the Government on improving the socio-economic status of Indigenous Australians, including improvements in Government program performance and service delivery. *Id.* at 12. The Council advises on the appropriateness and effectiveness of programs within the Indigenous community and promotes constructive relations between government and Indigenous people, communities, and organizations. *Id.* It is also responsible for alerting the Government to current and emerging policy issues. *Id.*

<sup>176</sup> *Id.* at 15-16.

<sup>177</sup> *Id.* at 5; ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER, SOCIAL JUSTICE REPORT 2004, at 81 (2004) [hereinafter SOCIAL JUSTICE REPORT 2004], available at [http://www.hreoc.gov.au/social\\_justice/sjreport04/index.html](http://www.hreoc.gov.au/social_justice/sjreport04/index.html).

<sup>178</sup> NEW ARRANGEMENTS IN INDIGENOUS AFFAIRS, *supra* note 8, at 15; INDIGENOUS FACT SHEET, *supra* note 22, § 3.6.

Shared Responsibility Agreements (“SRAs”).<sup>179</sup> Negotiated between Indigenous communities and the Government, SRAs address the needs and desires identified by Indigenous groups themselves.<sup>180</sup> SRAs detail what all parties will contribute to achieve desired outcomes; in exchange for Commonwealth services and investment, Indigenous groups must offer commitments and undertake changes that benefit their community.<sup>181</sup> The New Arrangements also call for “real partnerships” between governments, communities, NGOs, and the private sector as part of this shared responsibility.<sup>182</sup> To facilitate SRA negotiations, the Government has pledged to identify new representative structures among Indigenous communities and negotiate with those entities as they arise.<sup>183</sup>

In addition to localized SRAs, Regional Partnership Agreements (“RPAs”) between Indigenous representatives and Government are another focus of the New Arrangements. RPAs allow for a coherent Government intervention strategy across a region, elimination of overlaps and gaps, and promotion of coordination to meet regional priorities.<sup>184</sup> RPAs may also incorporate State and Territory commitments, as they play a vital role in servicing Indigenous Australians.<sup>185</sup> The RPAs and ICCs bring a major shift in focus to the regional level, recognizing that different communities have widely different needs and resources.

*B. The New Arrangements Are an Effective Implementation of the Principles of Contractualism and Will Create More Meaningful Outcomes for Indigenous Peoples Compared to ATSIC*

The New Arrangement’s emphasis on negotiated agreements by itself demonstrates an endorsement of contractual principles. However, five principles also underpin the New Arrangements—collaboration, flexibility, regional need, accountability, and leadership<sup>186</sup>—and each echoes the contractualist principles discussed earlier.<sup>187</sup> Contractualism allows parties to have: 1) a collaborative, as opposed to adversarial, relationship; 2) flexibility in designing solutions; 3) the ability to tailor the terms to

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<sup>179</sup> NEW ARRANGEMENTS IN INDIGENOUS AFFAIRS, *supra* note 8, at 18.

<sup>180</sup> INDIGENOUS FACT SHEET, *supra* note 22, § 3.8.

<sup>181</sup> NEW ARRANGEMENTS IN INDIGENOUS AFFAIRS, *supra* note 8, at 18.

<sup>182</sup> *Id.* at 2.

<sup>183</sup> *See id.* at 17; INDIGENOUS FACT SHEET, *supra* note 22, § 3.2.

<sup>184</sup> NEW ARRANGEMENTS IN INDIGENOUS AFFAIRS, *supra* note 8, at 17.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 5-7.

<sup>187</sup> *See supra* Part III.B.

specific needs; 4) defined and specific areas of accountability; and 5) an opportunity to exercise self-determination and leadership.

These principles, and the New Arrangements in general, should be seen as an attempt to embody the notion that negotiated agreements achieve the best results for Indigenous peoples. They flow from a belief that those people whose rights are at stake should be the decision makers in negotiations, with capacity to hold representatives and advisors accountable.<sup>188</sup> In other words, the Indigenous groups should be the ones making decisions about outcomes, rather than having to accept outcomes negotiated by others.<sup>189</sup>

The New Arrangements have real potential for fulfilling the goals set for, but not achieved by, ATSIC.<sup>190</sup> First, in terms of political involvement and self-government, Indigenous Australian communities will be creating their own Indigenous representative models under the New Arrangements. These may be at the community, clan, or family level, or may even approximate the former ATSIC Regional Councils; but whatever model is chosen, it will be chosen by the community and not imposed by the Commonwealth government. Second, such representation, coupled with the proven benefits of negotiated agreements, should further Indigenous economic, social, and cultural development. Finally, ATSIC's last objective—government service coordination—is infused through every aspect of the New Arrangements.

Beyond the stated ATSIC goals, the local focus of the New Arrangements acknowledges the diversity of Indigenous Australians, and thereby accommodates the needs, demands, and potential of each community more than ATSIC ever did.<sup>191</sup> Additionally, because the SRAs involve Indigenous peoples “as consensual parties, rather than as ‘stakeholders,’” the terms and conditions of the agreements will help build a future relationship that is inherently more just than the imposed administrative solutions to which Indigenous Australians have been subjected since colonization.<sup>192</sup>

While ATSIC was itself a unique and giant leap forward for Indigenous self-determination, in the end its structure was not as responsive to Indigenous communities as it needed to be. ATSIC had no recognized

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<sup>188</sup> Agius et al., *supra* note 98, at 216.

<sup>189</sup> *Id.*

<sup>190</sup> *See supra* note 29.

<sup>191</sup> *See* Strelein, *supra* note 98, at 200.

<sup>192</sup> HONOUR AMONG NATIONS, *supra* note 67, at 251.

local representative structures and even the Regional Councils lacked the power to make program decisions for their regions. By using agreement making at the local level, the New Arrangements present an opportunity for Indigenous Australian communities to cautiously take steps towards full self-determination.<sup>193</sup>

The New Arrangements, however, are not without their problems and inconsistencies. As of June 2005, more than 70 SRAs have been recorded by ICCs.<sup>194</sup> As shown in the Introduction above, however, some agreements have been controversial. Many observers have understandably attacked such agreements as paternalistic and assimilationist.<sup>195</sup> The concept of “shared responsibility,” while meant to include Indigenous Peoples in making sure their communities succeed, unfortunately carries the connotation that they are somehow responsible for their own disenfranchised condition. In addition, all the assurances and good intentions of the New Arrangements are mere rhetoric at this point. The real test will be whether the Government follows through with funding and implementation of its promises.

#### V. THE GOVERNMENT NEEDS TO TAKE STEPS TO BUTTRESS THE NEW ARRANGEMENTS

The Government transitioned to the New Arrangements hastily and unilaterally, creating tension among the Indigenous community and undermining the potential for success of its new program. Moreover, the uncompromising move appears directly contrary to the process the Government has embraced with contractualism—while the New Arrangements aim to engage and empower Indigenous peoples and their rights, the transition from ATSIC to the New Arrangements demonstrated a considerable lack of consensus or even openness by the Government. By vigorously supporting the development of local and national Indigenous governance institutions, as well as initiating legislation to reinforce its

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<sup>193</sup> These negotiated agreements are not the comprehensive “treaties” sought by some Indigenous groups and advocated by experts. However, they may be an important springboard for a Government previously closed to any form of treaty. Once the Government gains some experience with the negotiations and outcomes of these agreements, it may be less fearful of relinquishing power to Indigenous communities.

<sup>194</sup> INDIGENOUS FACT SHEET, *supra* note 22, § 3.8.

<sup>195</sup> See *The “New Arrangements” in Indigenous Affairs*, ANTAR N.S.W. NEWSL., (Australians for Native Title and Reconciliation, N.S.W., Austl.), Apr. 2005, at 6 [hereinafter ANTAR N.S.W. NEWSL.], available at [http://www.antar.org.au/nsw\\_news-ltr\\_04-05.pdf](http://www.antar.org.au/nsw_news-ltr_04-05.pdf) (“SRAs have been variously described by respected Indigenous leaders, Patrick Dodson and Noel Pearson as ‘not sufficiently well-developed and funded’, and by Professor Larissa Behrendt as ‘reactive and aimed at interventions rather than proactive and aimed at prevention.’”).

commitments, the Government can strengthen the new policy and redress any harm caused by the quick and uncompromising transition.

A. *The Government Acted Unilaterally in Abolishing ATSIC and Rearranging the Indigenous Affairs Program*

As Reconciliation Australia<sup>196</sup> put it, “[p]olitics has determined the timing of the current re-shaping of Indigenous affairs at the national level.”<sup>197</sup> With the ATSIC Board embroiled in controversy, the Government took the opportunity to announce its plans to abolish ATSIC. Two and one-half months later the Department of Immigration, Multicultural and Indigenous Affairs revealed most of the details of the New Arrangements, which began formally the next day, July 1, 2004.<sup>198</sup> The Government quickly moved to abolish the ATSIC Board, “leaving the 35 Regional Councils in place until 30 June 2005, with skeleton staff and miniscule operating budgets, to assist the transition on the ground.”<sup>199</sup>

In abolishing ATSIC and the Regional Councils so abruptly, the Government created friction throughout the Indigenous community and its supporters. Even though ATSIC was not an Indigenous creation, it operated as and was considered by many to be the voice of Indigenous Australia.<sup>200</sup> Many Indigenous organizations expressed grave concerns regarding the complete lack of consultation with Indigenous people about the changes.<sup>201</sup> Their sentiments were exacerbated by the fact that, “with limited

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<sup>196</sup> Reconciliation Australia is a non-government foundation established in January 2001 to provide a continuing national focus for reconciliation between Indigenous and non-Indigenous Australia. See Reconciliation Australia, About Us, <http://www.reconciliationaustralia.org/aboutus/recaus.html> (last visited Jan. 5, 2005). It is the continuing incarnation of the Council for Aboriginal Reconciliation aimed at a formal reconciliation process established in 1991, by a unanimous Commonwealth Parliament. *Id.* (follow “what is reconciliation?” hyperlink).

<sup>197</sup> RECONCILIATION AUSTRALIA, 2004 RECONCILIATION REPORT 7 (2004) [hereinafter RECONCILIATION REPORT].

<sup>198</sup> See Press Release, Senator Amanda Vanstone, Dep’t for Immigration and Multicultural and Indigenous Affairs, Australian Government Changes to Indigenous Affairs Services Commence Tomorrow (June 30, 2004), available at <http://www.atsia.gov.au/media/media04/v04039.htm>.

<sup>199</sup> ANTAR N.S.W. NEWSL., *supra* note 195.

<sup>200</sup> RECONCILIATION REPORT, *supra* note 197, at 5. The Senate Indigenous Affairs Committee found “considerable support” for the continued existence of ATSIC, if modified: “Certainly, the support for the continued existence of a national Indigenous representative body was overwhelming.” LIFE IN THE MAINSTREAM?, *supra* note 23, at 60.

<sup>201</sup> See LIFE IN THE MAINSTREAM?, *supra* note 23, at 5. The Senate Report restates the testimony of Professor Mick Dodson: “It was like we did not exist. . . . [P]olitical figures . . . talking about our future without and reference to us . . . seemed to deal with us as totally irrelevant and to ignore us.” *Id.* The Australian Institute of Aboriginal and Torres Strait Islander Studies made the logical statement that “Indigenous peoples’ own representative structures [should] be withdrawn only with the consent of Indigenous peoples.” *Id.* at 63.

explanation and no discussion,” the reforms went well beyond the recommendations of the \$ 1.4 million 2003 ATSI Review.<sup>202</sup> That Review, based on extensive collaboration with Indigenous communities, had presented the Government with a model to reform, rather than abolish, ATSI.<sup>203</sup> Furthermore, some worried that the mainstreaming of Government programs would squander ATSI’s extensive bureaucratic and cultural experience in Indigenous program and service delivery.<sup>204</sup>

In addition, the actions of the Government preempted any Parliamentary decision on the future of ATSI. As noted above, ATSI was created through a lengthy and thorough debate in the Parliament, and many felt it was for Parliament to decide what, if any, changes were to be made.<sup>205</sup> The Government defended that the immediate changes were administrative in nature and did not require legislative amendment by Parliament.<sup>206</sup> However, minority members of the Senate felt that while legally accurate, this was disingenuous, since “the Government’s changes dismantled ATSI in all but name.”<sup>207</sup>

After the transition, the accusations against the Government continued. Many Indigenous Australians complained that apart from not being consulted, the changes were effected without adequate information being provided to them.<sup>208</sup> Additionally, although the Government had promised to consult with the Regional Councils in creating new regional representative structures, evidence showed that the Councils were not being involved and that very little progress had been made.<sup>209</sup> After calling the post-transition period “chaos,” one NGO noted that many mainstream departments “were unprepared for the transfer of staff, resources and programs” and that many community organizations had their funding delayed or interrupted.<sup>210</sup>

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<sup>202</sup> See *id.* at 6; HANNAFORD ET AL., *supra* note 26.

<sup>203</sup> See HANNAFORD ET AL., *supra* note 26, at 8; LIFE IN THE MAINSTREAM?, *supra* note 23, at 6.

<sup>204</sup> See ANTAR N.S.W. NEWSL., *supra* note 195, at 7.

<sup>205</sup> See LIFE IN THE MAINSTREAM?, *supra* note 23, at 8.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> See *id.* at 5; Angela Erini, *Fed: Aborigines Left in the Wilderness Over Changes*, AAP NEWSFEED, Apr. 8, 2005.

<sup>209</sup> See SOCIAL JUSTICE REPORT 2004, *supra* note 177, at 97.

<sup>210</sup> See ANTAR N.S.W. NEWSL., *supra* note 195. One Senator even commented in a floor debate that “utter chaos does reign as a result of hasty distribution of many of ATSI’s functions to government departments. Even the new policy dealing with mutual obligation through shared responsibility is unclear. No minister of public servant has been able to say what SRAs actually are, produce guidelines on how departments and communities should go about making them, or even confirm that they are legal, enforceable contracts.” Commonwealth, *Parliamentary Debates*, Senate, Mar. 8, 2005, at 71 (Sen. Ridgeway).

Most of all, the quick transition created a sense that the Government had not fully considered its changes.<sup>211</sup> As Senator Claire Moore related, “[The real concern is that,] once again, we may be experimented on and that in another five to ten years we will come back and discuss exactly what went wrong.”<sup>212</sup> Thus, although the New Arrangements provide an opportunity for better outcomes for Indigenous Australians, significant hurdles remain for the Government to ensure that this is not another “experiment.”

*B. Substantial Investment in Leadership Capacity in Indigenous Communities Is Necessary to the Success of the New Arrangements*

As mentioned above, the substantive outcome of negotiated agreements is often affected by the sophistication of the parties at the negotiating table.<sup>213</sup> Some fear that, like previous attempts to remedy Indigenous inequities, “current attempts will fail also if competent, legitimate Indigenous structures are not equipped to fulfill their end of the deal.”<sup>214</sup> Encouragingly, many Indigenous communities have experience with self-governance and agreement-making, both historically in the inter-Indigenous context and later extended to dealings with white settlers.<sup>215</sup> This experience is extremely relevant to modern agreement-making as a source of Indigenous legal customs and traditions.<sup>216</sup> Some Indigenous groups have even demonstrated their ability to organize into simultaneous local and regional representation in modern Australia.<sup>217</sup> This has been

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<sup>211</sup> See SOCIAL JUSTICE REPORT 2004, *supra* note 177, at 85 (“It is clear that the various components of the new arrangements were not finalised at that time and have continued to be developed as the arrangements have been introduced.”). In fact, the New Arrangements were modeled after ten ongoing pilot programs, the results of which have yet to be evaluated. See NEW ARRANGEMENTS IN INDIGENOUS AFFAIRS, *supra* note 8, at 19-20; RECONCILIATION REPORT, *supra* note 197, at 7 (“[T]here is great danger in applying as a model for universal change approaches such as the COAG trials, which are still highly experimental and have not yet yielded quantifiable outcomes.”).

<sup>212</sup> Commonwealth, *Parliamentary Debates*, Senate, Mar. 8, 2005, at 69 (Sen. Moore) (quoting ATSIC Commissioner Alison Anderson).

<sup>213</sup> See *supra* Part III.E.1.

<sup>214</sup> Chaney, *supra* note 171, at 4.

<sup>215</sup> See Langton & Palmer, *supra* note 74, at 46.

<sup>216</sup> In the Northern Territory, for example, principles of Larraika law, which require visitors to show respect for cultural authority of the traditional owners, underpins a regional agreement which seeks to address issues facing Indigenous “itinerants” visiting Darwin from remote communities. The anti-social behavior of many “itinerants” in Northern Territory shopping districts had been a perpetual grievance for the business community. Moreover, the “itinerants” themselves are denigrated and demonized. The settler state has turned to, and effectively recognized, the legal and cultural authority of the traditional owners over the Darwin region. See *id.* at 46.

<sup>217</sup> See Agius et al., *supra* note 98, at 210; *infra* text accompanying notes 233-34.

apparent in the context of Native Title agreements.<sup>218</sup> Even so, the comprehensive arrangements envisioned by the New Arrangements will require especially sophisticated negotiations.

Accordingly, the Government needs to encourage and support Indigenous Australians in developing and maintaining strong governance structures at the regional and local levels. If not, many will only be in a position to engage with government on an *ad hoc* basis that will achieve little.<sup>219</sup> While this period of change will require time—many supporters of the New Arrangements have appealed for patience<sup>220</sup>—sufficient resources are the key to building and strengthening Indigenous leadership and to achieving objectives which are common to Indigenous people, government, and the broader Australian community.<sup>221</sup> As such, the Government needs to allocate funds to expand opportunities for Indigenous leadership, governance, and administration training and development. It has begun this funding with its 2005-2006 Budget submission, allocating “\$85.9 million over four years (\$23.1m in 2005-06) to develop [SRAs] with Indigenous communities.”<sup>222</sup> As witnessed by many generations of Indigenous Australians, however, funding does not automatically ensure beneficial outcomes.<sup>223</sup> Moreover, an apparent conflict of interest arises when one side of the negotiating table is charged with the duty of empowering the other side of the table. Thus, aside from funding, the actual development of capable Indigenous representation needs to be regularly evaluated by an independent body.

C. *The Government Needs to Support a Representative Indigenous Body at the National Level*

The absence of a replacement national body for ATSIC has a substantial impact on Indigenous peoples across Australia. ATSIC had the authority to consult with many agencies whose actions would affect

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<sup>218</sup> See *supra* Part III.E.1.

<sup>219</sup> RECONCILIATION REPORT, *supra* note 197, at 8.

<sup>220</sup> See, e.g., Chaney, *supra* note 171, at 4 (“Leaders must allow sufficient time for effective governance structures to be developed regionally and nationally which will be central to the success of this most worthwhile initiative.”); see also RECONCILIATION REPORT, *supra* note 197, at 6.

<sup>221</sup> RECONCILIATION REPORT, *supra* note 197, at 5-7.

<sup>222</sup> Press Release, Senator Amanda Vanstone, Dep’t for Immigration and Multicultural and Indigenous Affairs, Government’s Indigenous Reforms Paying Dividends for First Australians—More Than \$3 billion in 2005-06 (May 10, 2005), available at <http://www.atsia.gov.au/media/media05/v0510.htm>. See generally AUSTRALIAN GOVERNMENT INDIGENOUS BUDGET 2005, available at <http://www.atsia.gov.au/budget/budget05/index.asp>.

<sup>223</sup> See KEY INDICATORS REPORT 2003, *supra* note 50, at i.



Indigenous peoples.<sup>224</sup> Such a national voice “is important both to help shape policy and give it legitimacy and for enabling Indigenous Australians to call governments to account when their interests are not addressed.”<sup>225</sup> The “individualized, short-term, reactive agreements” of the New Arrangements cannot address the more complex and systemic causes of disadvantage and discrimination.<sup>226</sup> Moreover, ATSIC represented a major force in advocating for Indigenous Australian rights in the international arena.<sup>227</sup> The U.N. recognized ATSIC as a non-governmental organization legitimately capable of representing citizens in international fora.<sup>228</sup> Without a national body to represent the interests of Indigenous Australians, these opportunities and safeguards are lost.<sup>229</sup>

A National Congress of Indigenous representative structures should be put in place because local representative institutions cannot effectively attack the systemic and institutionalized aspects of the impediments to Indigenous socioeconomic and political development.<sup>230</sup> For example, “Australia now stands alone among settler common law countries in its failure to introduce a Bill of Rights that would entrench the prohibition of race discrimination under Australian law.”<sup>231</sup> Instead, Australia’s commitment to the prohibition is legislative,<sup>232</sup> which “may be repealed, amended, or possibly ‘suspended’ by a government that lacks a commitment to human rights.”<sup>233</sup> A national Indigenous body can more successfully advocate for a constitutional rights framework than can one particular Indigenous group.

To be fair, the Government does not oppose the idea of a national Indigenous body. The Government is open to a new national representative

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<sup>224</sup> See Aboriginal and Torres Strait Islander Commission Amendment Act 2005, sched. 4 (Cth.).

<sup>225</sup> RECONCILIATION REPORT, *supra* note 197, at 6.

<sup>226</sup> See Ruth McCausland, Ngiya Institute for Indigenous Law, Policy and Practice, *Briefing Paper No. 1: Shared Responsibility Agreements*, Feb. 2005, at 28, available at [http://www.jumbunna.uts.edu.au/research/shared\\_responsibility.pdf](http://www.jumbunna.uts.edu.au/research/shared_responsibility.pdf)

<sup>227</sup> See LIFE IN THE MAINSTREAM?, *supra* note 23, at 63-65.

<sup>228</sup> See *id.* at 64. ATSIC had official U.N. ECOSOC Special Consultative Status since 1995. See U.N. ECOSOC-NGO Database, <http://esa.un.org/coordination/ngo/search/esangosearchengine.asp> (search for Aboriginal and Torres Strait Islander Commission) (last visited Nov. 12, 2005).

<sup>229</sup> See LIFE IN THE MAINSTREAM?, *supra* note 23, at 55 (noting the several lost opportunities for consultation and participation with government bodies).

<sup>230</sup> Larissa Behrendt, *Indigenous Self-Determination: Rethinking the Relationship Between Rights and Economic Development*, 2001 U.N.S.W. L.J. 70, para. 26 (2001) (Austl.), available at <http://www.austlii.edu.au/au/journals/UNSWLJ/2001/70.html>.

<sup>231</sup> Hannah McGlade, *Race Discrimination in Australia: A Challenge for Treaty Settlement?*, in HONOUR AMONG NATIONS, *supra* note 67, at 273, 275-76.

<sup>232</sup> See Racial Discrimination Act 1975 (Cth.).

<sup>233</sup> McGlade, *supra* note 231, at 276.

structure, but believes that it should be left to Indigenous communities to form their own representative bodies.<sup>234</sup> While this position has merit and is in line with self-determination principles, there are significant hurdles that face Indigenous communities in doing so.<sup>235</sup> One may note that the NIC serves a purpose somewhat similar to that of ATSIC. However, the NIC is not a representative body and cannot speak for the Indigenous community at large.<sup>236</sup> Many Indigenous people are troubled by an advisory committee hand-selected by the Government itself.<sup>237</sup>

Encouragingly, some Indigenous groups have already demonstrated their ability to at least organize into simultaneous local and regional representation in modern Australia. During Native Title negotiations in South Australia involving several Indigenous groups throughout the state, the groups debated diverse issues, attempting to construct a “united voice” with which to speak to government and industry groups.<sup>238</sup> In the end, they put in place a structure, in the form of a Congress, which embodied that “united voice” while providing for each individual Native Title group to retain autonomy in its own decision making.<sup>239</sup> With encouragement and financial support from the Government, a similar process could lead to a national Congress of Indigenous Australians.

#### *D. The Government Should Pass Legislation to Guarantee Its Promises and Ensure Accountability*

One feature of the New Arrangements stands out from all previous attempts to organize a Government response to Indigenous issues: it is strictly an arrangement of administrative units, procedures, and promises by the Government—not legislative reform. Reforming through administrative procedures fulfills the Government’s goal of flexibility in implementing the New Arrangements. However, it also makes the New Arrangements less transparent, more difficult to scrutinize, and potentially makes it more difficult to hold the Government accountable for its performance.<sup>240</sup>

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<sup>234</sup> See *LIFE IN THE MAINSTREAM?*, *supra* note 23, at 131.

<sup>235</sup> The Senate Committee on Indigenous Affairs felt it “unreasonably optimistic to expect that Indigenous Australians will be able to organise and lobby in the same way as other national organisations” due to “distances involved, the limited access to telecommunications facilities, and the poverty experienced by many Indigenous communities.” *LIFE IN THE MAINSTREAM?*, *supra* note 23, at 67.

<sup>236</sup> See *NEW ARRANGEMENTS IN INDIGENOUS AFFAIRS*, *supra* note 8, at 12-13; *RECONCILIATION REPORT*, *supra* note 197, at 6.

<sup>237</sup> See *LIFE IN THE MAINSTREAM?*, *supra* note 23, at 74.

<sup>238</sup> Agius et al., *supra* note 98, at 210.

<sup>239</sup> *Id.*

<sup>240</sup> *SOCIAL JUSTICE REPORT 2004*, *supra* note 177, at 96.

Insufficient monitoring and evaluation processes exacerbate these problems.<sup>241</sup> Experience has shown that where agreements are often confidential and without criteria for evaluating and addressing eventual outcomes, those outcomes have been mixed.<sup>242</sup>

The Government needs to pass legislation that provides transparency and accountability for the New Arrangements and forces agencies to create systematic evaluation criteria. “Just as it is dangerous to make assumptions about lack of capacity within Indigenous communities, it is potentially even more dangerous to assume capacity within government agencies to deliver this level of change,” especially given past Indigenous experience with mainstream agencies.<sup>243</sup> In creating evaluation criteria, it is important to incorporate Indigenous measures of success—after all, it is Indigenous lives that these proposed changes are intended to improve.<sup>244</sup> The “now fashionable ‘ideology of agreement making’ in Australia” needs to be tempered through examination of the equity and sustainability of actual outcomes of agreements.<sup>245</sup>

Beyond measured outcomes, the standards by which performance will be measured should be addressed through legislative action. These will necessarily be generalized standards, but should clarify the recourse should either party fail to meet its obligation. Indigenous parties need to know who will determine whether a failure has occurred, whether the entire community will be held responsible for a community SRA failure—which will penalize those who fulfilled their obligation—or just particular individuals, and what penalty, if any, will apply. More importantly, legislation should clarify how

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<sup>241</sup> *See id.*

<sup>242</sup> *See* O’Faircheallaigh, *supra* note 81, at 304 (empirically noting that outcomes have been highly variable in agreements between Indigenous Australians and resource developers).

<sup>243</sup> RECONCILIATION REPORT, *supra* note 197, at 7. “[P]ast experience tells us: the natural tendency of mainstream agencies is to cater to the mainstream. Without strong and consistent political and administrative leadership, agencies generally fail Indigenous communities; mainstream service delivery which is not delivered in culturally appropriate ways is unlikely to succeed . . . Indigenous organisations which are culturally appropriate and have authority in the community are essential to obtaining engagement of those communities.” *Id.*

<sup>244</sup> “Otherwise, how are Indigenous people to gauge whether a proposed agreement is likely to generate positive results for them? How are they to hold accountable negotiators who act on their behalf unless there is some basis on which to assess performance? How can Indigenous leaders and professional negotiators demonstrate that they have achieved optimum outcomes in specific contexts . . . ? How can Indigenous people evaluate the extent of concessions being proposed in one area or the gains being offered in another?” O’Faircheallaigh, *supra* note 81, at 310. Eventually, external accountability and independent analysis of progress are roles that should be played by a well established, legitimate national Indigenous body with solid policy and advocacy capacity. In the meantime, appropriate agencies should be engaged in the review process.

<sup>245</sup> HONOUR AMONG NATIONS, *supra* note 67, at 253.

an Indigenous community enforces an agreement if the government and its agencies fail to meet their obligations.

Additionally, because SRAs only apply to “discretionary” benefits, the classification of a benefit as an entitlement or discretionary presents a potential source of conflict. The line between the two can be fine, and such distinctions remain subject to non-transparent individual government officer/agency judgments.<sup>246</sup> Finally, the New Arrangements create an obvious conflict of interest in Native Title determinations—the Government is now directly involved in funding both opposing parties in a native title claim.<sup>247</sup> Accordingly, the Government should, via transparent legislation, ensure the enforceability of SRAs and RPAs, establish a process for dispute resolution, publish categories of benefits, and remove any conflicts of interest.

## VI. CONCLUSION

All Australians stand at the brink of momentous promise in the struggle to eliminate Indigenous inequity. The New Arrangements in Indigenous Affairs are a large part of that promise because they embrace the policy of negotiating agreements and engaging the sovereignty of Indigenous Australian groups. Positive outcomes are emerging under the New Arrangements, albeit slowly and on a small scale. For the Mulan community, trachoma rates are now at zero percent and the community has already signed another SRA to get training and supplies to refurbish their run-down basketball court.<sup>248</sup> With honesty, transparency, and dedication, the Government can correct its own missteps, alleviate the discomfort associated with this change, and finally move forward in fulfilling its promise to eradicate Indigenous inequity.

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<sup>246</sup> See *LIFE IN THE MAINSTREAM?*, *supra* note 23, at 102.

<sup>247</sup> See *ANTAR N.S.W. NEWSL.*, *supra* note 195.

<sup>248</sup> Kathryn Shine, *Blacks Lured to Sign Contracts*, *WEEKEND AUSTRALIAN*, Apr. 9, 2005, Local, at 6.