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**ICWA DOWNUNDER: EXPLORING THE COSTS AND BENEFITS OF ENACTING AN AUSTRALIAN VERSION OF THE UNITED STATES' INDIAN CHILD WELFARE ACT**

**Marcia Zug\***

*Australian Indigenous Advocates have long sought the passage of Indigenous child-welfare legislation similar to the United States's Indian Child Welfare Act. Recently, the Australian government has indicated it is receptive to the enactment of such legislation. However, an Australian version of the ICWA is not as simple as it sounds. The legal status of the Indigenous communities of Australia and American Indian tribes is vastly different thus, many of the ICWA's provisions, particularly those based on a recognition of Indigenous sovereignty, would require significant modifications before they could be applied in Australia. These modifications mean an Australian ICWA could not be as robust as the American version of the Act. Nevertheless, with these changes, an Australian version of the ICWA is feasible and could significantly reduce Indigenous child removals and the break up of Indigenous families and communities in Australia.*

## INTRODUCTION

In the fall of 2019, I stood outside my flat in Canberra, Australia and looked up as the words “I’m Sorry, 10” were slowly written across the sky. The words commemorated the ten years since Former Prime Minister Kevin Rudd issued his official apology for the Australian government’s role in the “Stolen Generation”, the decades-long policy of removing Indigenous children from their families and communities.<sup>1</sup>

Rudd’s apology was of monumental importance.<sup>2</sup> It was the first time the Australian government had ever

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<sup>1</sup> Abbie O’Brien, “‘We Say Sorry’: Today Marks More than a Decade Since Kenvin Rudd’s National Apology”, *SBS News* (13 February 2018), online: <[www.sbs.com.au/news/we-say-sorry-today-marks-more-than-a-decade-since-kevin-rudd-s-national-apology](http://www.sbs.com.au/news/we-say-sorry-today-marks-more-than-a-decade-since-kevin-rudd-s-national-apology)>. See also Andrew Gunstone, “Reconciliation, Reparations and Rights: Indigenous Australians and the Stolen Generations” in Damien Short & Corinne Lennox, eds, *Handbook of Indigenous Peoples’ Rights* (New York: Routledge, 2016) 301.

<sup>2</sup> See Danielle Celermajer, *The Sins of the Nation and the Rituals of Apologies* (Cambridge: Cambridge University Press, 2009) at 212. Celermajer notes that “even people who had expressed cynicism about the apology or who were not sympathetic to the new government found themselves profoundly involved and affected.” See also Don Watson, speaking in Geraldine Doogue, “Reflections on the Apology Saturday”, *ABC News* (16 Feb 2008), online: <[www.abc.net.au/radionational/programs/saturdayextra/reflections-on-the-apology/3284448](http://www.abc.net.au/radionational/programs/saturdayextra/reflections-on-the-apology/3284448)>. Watson stated, “I think it’s a different

apologized for the terror and devastation it had inflicted on generations of Aboriginal and Torres Strait Islander families.<sup>3</sup> At the same time, Rudd's apology had little practical effect. More than ten years after the apology and decades after the official end of the child removal policy, Indigenous families in Australia continue to face unjustifiably high rates of separation.<sup>4</sup> Thus, it seemed fitting that the word "apology" began disintegrating before it was even fully written against the sky.<sup>5</sup>

I was in Australia because I hoped to help Indigenous families affected by Australia's child removal policies. More specifically, I was there to research whether an American law, a statute known as the *Indian Child Welfare Act* or *ICWA*, might model a potential solution.<sup>6</sup>

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country since [the apology] . . . I think it's a bit different in most of our heads, whether we're for or ag[ainst] it. And I think that Kevin Rudd has given a sort of moral compass to the matter of our relations with Aboriginal Australia."

<sup>3</sup> See e.g. Elizabeth Keenan, "Australia Learns to Say 'I'm Sorry'", *Time* (1 February 2008) (discussing the decision to issue a national apology).

<sup>4</sup> See Gunstone, *supra* note 1 at 309 (explaining that the government had previously acknowledged the removal of Indigenous children, but that this was the first time it had specifically apologized for doing so).

<sup>5</sup> See e.g. *ibid* at 309. They note that notwithstanding the apology, "Indigenous peoples and communities impacted upon by the legislation, policies and practices that resulted in the stolen generations, continued to be refused substantial justice by the Federal government."

<sup>6</sup> In this article, I primarily use the term *Indian* or *American Indian* rather than *Native American*, *First Nations*, or *Indigenous* when discussing the indigenous people of the United States. I recognize that this term

The *ICWA* is an American law passed to address the legacy of the United States' [US] own Indigenous family-separation policies. The law helps ensure Indigenous family preservation through provisions that prevent the unnecessary removal of Indian children as well as provisions that help families regain custody of their children when they are removed.

For decades, Aboriginal advocates and their supporters have pushed for the passage of an Australian *ICWA*.<sup>7</sup> More recently, non-Indigenous groups such as the

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can be controversial. However, because it is common in both the academic literature and in the majority of statutes and case law, I have chosen to use it in this article. See also Michael Yellow Bird, "What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels" (1999) 23:2 *American Indian Q* 1, citing Hilary N Weaver, "Introduction" in Marvin D Feit, John S Wodarski & Hilary N Weaver, eds, *Voices of First Nations People: Human Services Considerations* (New York: Haworth Press, 1999) for further information on this topic. Yellow Bird notes that both the terms "'American Indian' and 'Native American' are the most common racial and ethnic labels used to identify the general population of Indigenous Peoples in the United States" and that "neither term has been without controversy, and no clear consensus exists on which label is most preferable." In addition, I will primarily use the term *Aboriginal* and *Torres Strait Islander* when discussing Indigenous people of Australia. However, I will also use the term *Indigenous* while recognising that this term may not adequately capture the rich and diverse cultures of Aboriginal and Torres Strait Islander peoples.

<sup>7</sup> See Richard Chisholm, "Aboriginal Child Welfare and the Possibility of Federal Laws" (1982) 1:6 *Aboriginal L Bull* 6. Chisholm notes that he was asked by representatives of Aboriginal Child Care Agencies "whether it would be possible for the Commonwealth Parliament to pass legislation similar to the *Indian Child Welfare Act* 1978 of the USA." See also Brian Butler, "Aboriginal Child Protection in The Practice of Child Protection: Australian Approaches" in Gillian

Australian Law Reform Commission have also suggested that the Commonwealth “should establish a national inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children.”<sup>8</sup> However, an Australian version of the *ICWA* is not as simple as it sounds. The legal status of the Indigenous communities of Australia and American Indian tribes is vastly different. Most significantly, the US federal government recognizes the sovereignty of American Indian nations, albeit in a limited and precarious way,<sup>9</sup> while the Australian government does not recognize Aboriginal or Torres Strait Islander sovereignty. Many of the *ICWA*’s provisions are based on a recognition of tribal sovereignty, consequently,

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Calvert, Adrian Ford & Patrick Parkinson, eds, *The Practice of Child Protection: Australian Approaches* (Sydney: Hale and Iremonger, 1992) at 19. They state: “[o]ur organisation also seeks the enactment of national legislation along the lines of the Indian Child Welfare Act.” See also Paul Grey, “Protecting Indigenous Children: 3 Lessons Australia Could Learn from the United States”, *Medium* (29 October 2017), online: <[medium.com/@AbSecNSW/protecting-indigenous-children-3-lessons-australia-could-learn-from-the-united-states-5b4e076c10d9](https://medium.com/@AbSecNSW/protecting-indigenous-children-3-lessons-australia-could-learn-from-the-united-states-5b4e076c10d9)>. They ask the Australian government to pass legislation similar to *ICWA* to strengthen protections for Aboriginal families. See generally Linda Briskman, *The Black Grapevine: Aboriginal Activism and the Stolen Generations* (Sydney: Federation Press, 2003) at 110–19. Briskman discusses the various efforts to secure national legislation similar to *ICWA*.

<sup>8</sup> Austl, Commonwealth, Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133) (Canberra: Australian Government Publishing Service, 2017) at 18.

<sup>9</sup> See Part II.A of this article for a discussion of the history of and current limitations on the exercise of tribal sovereignty in the United States.

the Act cannot simply be imported into Australia. An Australian *ICWA* would require significant modifications.

This article examines how the *ICWA* would have to change to operate in Australia and whether, so modified, it could still effectively protect Aboriginal families. Ultimately, this article concludes that an Australian *ICWA* would not be as robust as the American version of the Act, but that it could still significantly reduce Indigenous child removals and strengthen Indigenous families and communities in Australia. Part I will demonstrate why an Australian *ICWA* is needed. Part II will describe the history of Aboriginal and Torres Strait Islander rights. Part III will examine the limitations of an *ICWA* created pursuant to delegated authority and how an Australian *ICWA* could potentially avoid or overcome these drawbacks. Part IV will evaluate the weaknesses of the Indigenous child protection in the United States and suggest how an Australian *ICWA* could avoid these problems. Part V will discuss the benefits and potential advantages of an Australian *ICWA* as compared with the US version. Finally, the conclusion will consider how the passage of an Australian *ICWA* could affect Indigenous self-determination rights more generally.

## **I. THE NEED FOR AN AUSTRALIAN *ICWA***

### **A. A SECOND STOLEN GENERATION?**

As mentioned above, Australian Indigenous advocates have long sought the passage of legislation resembling the *ICWA*. However, an examination into the potential benefits of an Australian *ICWA* is now particularly timely and important due to the fact that Australia's long-standing

aversion to permitting the adoption of any Australian children, and Indigenous Australian children in particular, is quickly disappearing.<sup>10</sup> In March 2018, the House of Representatives Standing Committee on Social Policy and Legal Affairs began an inquiry into the possibility of creating a national framework for domestic adoption.<sup>11</sup> The Standing Committee inquiry noted the significant variation in the legislation and practices that apply to adoptions throughout Australia.<sup>12</sup> Eight months later the Committee published its report. It recommended implementing a national adoption framework to provide uniformity to Australian adoption law and to increase the rate of Australian children being adopted.<sup>13</sup> This recommendation

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<sup>10</sup> See Austl, Commonwealth, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Breaking Barriers: A National Adoption Framework for Australian Children – Inquiry into Local Adoption* (October 2018) at 5–6 [*Breaking Barriers*]. The report noted that the most frequently cited barrier to domestic adoption “was fear of repeating the mistakes of past forced adoption policies and practices that were in place from the 1950s until the 1980s.” See also Jeremy Sammut, “Our Reluctance Towards Adoption is Hurting Children”, *ABC News* (21 April 2015) (explaining how past removal policies have affected current Australian attitudes towards adoption); Leigh Cambell, “The Current State of Adoption in Australia”, *Huffington Post* (9 November 2016) (discussing how Australians’ “negative attitudes towards adoption” effect adoption rates).

<sup>11</sup> See Parliament of Australia, Media Release, “Inquiry into Local Adoption” (2018), online: <[www.aph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_and\\_Legal\\_Affairs/Localadoption](http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Localadoption)>.

<sup>12</sup> See *Breaking Barriers*, *supra* note 10 at 8.

<sup>13</sup> See *ibid* at 32 (Recommendation 2).



appears to herald a major shift in how domestic adoption is viewed in Australia.<sup>14</sup>

The renewed adoption interest in Australia raises particular concerns for Aboriginal and Torres Strait Islander children.<sup>15</sup> Currently, these children are subject to extremely low rates of adoption.<sup>16</sup> However, that could change if a national adoption law is implemented. Although the Parliamentary Inquiry into Adoption recognized that Australia's history of forced Aboriginal and Torres Strait Islander child adoptions creates unique concerns regarding the adoption of these children, it still included them in the inquiry and ultimately recommended

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- <sup>14</sup> The shift towards easing adoptions restrictions can also be seen in recently enacted legislation, such as recent laws passed by the New South Wales Parliament permitting children to be adopted without parental consent. See Lorena Allam, "Adoption without Parental Consent Legalised in NSW", *The Guardian* (23 November 2018), online: [www.theguardian.com/australia-news/2018/nov/23/adoption-without-parental-consent-legalised-in-nsw](http://www.theguardian.com/australia-news/2018/nov/23/adoption-without-parental-consent-legalised-in-nsw). See also Patrick Wood, "Adoptions on the Rise After Dropping to Record Low Last Year", *ABC News* (11 December 2017), online: [www.abc.net.au/news/2017-12-12/adoption-rates-on-rise-after-dropping-to-record-low/9248958](http://www.abc.net.au/news/2017-12-12/adoption-rates-on-rise-after-dropping-to-record-low/9248958) (*Adopt Change* CEO Renee Carter noted "an encouraging shift in thinking [about adoption] in Australia").
- <sup>15</sup> Critics such as Professor Terri Libesman have noted that this move towards adoption may also be motivated by financial and political concerns. In recent years, the number of Australian children in out-of-home care has grown at alarming rates and the cost of this care was estimated at 2.2 billion Australian dollars in 2013–14. See Terri Libesman, "Indigenous Child Welfare Post Bringing Them Home: From Aspirations for Self-Determination to Neoliberal Assimilation" (2015) 19:1 *Austl Indig L Rev* 46 at 54.
- <sup>16</sup> Since 1993, only 125 Aboriginal and Torres Strait Islander children have been adopted and half of those children were adopted by Indigenous families. See *Breaking Barriers*, *supra* note 10 at 58.

including them in the proposed national framework.<sup>17</sup> Due to this inclusion, the need for national Aboriginal and Torres Strait Islander child protection legislation is now more pressing than ever.

It is possible that when national adoption legislation is ultimately enacted it will contain specific protections or exceptions for Indigenous children, however, it would be unwise to rely on such possibilities. In fact, expecting such protections is especially risky given the fact that recent adoption reforms enacted at the state level did not exempt Aboriginal and Torres Strait Islander families. For example, in November 2018, the New South Wales government passed *The Children and Young Persons (Care and Protection) Amendment Bill 2018*.<sup>18</sup> This Act expands the ability of family and community services to permanently remove children from their families and, most worryingly, places a two-year time limit on finding a permanent placement for such children.<sup>19</sup>

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<sup>17</sup> The Committee Report noted that the organizations consulted regarding the possibility of aboriginal child adoptions all advised against it. See *Breaking Barriers*, *supra* note 10 at 5–6, 29, 56, 65–74, 83–84. *Breaking Barriers* ignored this advice, stating that although “family preservation and cultural considerations are important”, they are “not more important than the safety and wellbeing of the child.” The Committee then recommended the enactment a national adoption law for all children. See *Breaking Barriers*, *supra* note 10 at xvii.

<sup>18</sup> See *Children and Young Persons (Care and Protection) Amendment Act 2018* (NSW) 2018/81.

<sup>19</sup> The most important of the proposed changes are the following: (1) Placing a two-year time limit on creating a permanent arrangement for the child (*ibid*, Schedule 1, s 20, amending s 79); (2) making guardianship order by consent outside of court (*ibid*, Schedule 1, s 19,

These reforms were fiercely opposed by Indigenous advocates<sup>20</sup> who warned they would create a second Stolen Generation. Unfortunately, their objections were ignored and the changes were instituted with no exceptions or additional protections for Indigenous children.<sup>21</sup> Consequently, an Australian ICWA is needed not only to address the continuing effects of the original “stolen generation,” but to also prevent the creation of a second one. However, because the legal position of American Indians and Australian Aboriginal and Torres Strait

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amending s 74); (3) amending how families can apply for restoration (*ibid*, Schedule 1, throughout); (4) removing parental consent to adoption for children on permanent orders. See Alison Whittaker & Terri Libesman, “Why Controversial Child Protection Reforms in NSW Could Lead to Another Stolen Generation”, *The Conversation* (12 November 2018), online: <[theconversation.com/why-controversial-child-protection-reforms-in-nsw-could-lead-to-another-stolen-generation-106330](http://theconversation.com/why-controversial-child-protection-reforms-in-nsw-could-lead-to-another-stolen-generation-106330)>.

<sup>20</sup> See e.g. Pip Hinman, “NSW Law Will ‘Lead to a New Stolen Generation’”, *Green Left Weekly* (3 December 2018), online: <[www.greenleft.org.au/content/nsw-law-will-lead-new-stolen-generation](http://www.greenleft.org.au/content/nsw-law-will-lead-new-stolen-generation)>. Hinman notes that “Indigenous groups, unions, the NSW Greens and the Labor Party oppose the new law and organized several protests outside NSW Parliament. Seventy-nine organizations and more than 2000 individuals signed an open letter to the Premier, urging her ‘to put these reforms on hold and engage in genuine dialogue with all stakeholders, including Aboriginal communities and community organisations supporting children in families.’”

<sup>21</sup> See *ibid*. See also Marlene Longbottom et al, “Indigenous Australian Children and the Impact of Adoption Legislation in New South Wales” (2019) 393 *Lancet* 1499, online (pdf): <[www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(19\)30252-1.pdf](http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(19)30252-1.pdf)>. Longbottom notes that “[f]or Indigenous Australian children, this new law risks permanently separating another generation from their families.”

Islander people is not equivalent, it is necessary to first understand the history and application of the *ICWA* in the United States before considering how the Act could be imported into Australia.

## **B. THE HISTORY AND PURPOSE OF THE *ICWA***

In 1978, the United States Congress enacted the *ICWA* in response to the shockingly high rates of Indian child removals that were continuing through the country.<sup>22</sup> The legislative reports noted that these removals were frequently based on biased views about proper child rearing and that Indian families, following traditional child rearing practices, were particularly vulnerable. According to these reports, state welfare workers viewed these families as backward, uncivilized, and unfit to raise children.<sup>23</sup> The reports also noted that some state welfare

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<sup>22</sup> By the 1970s, US removal policies had decimated Indian communities. At least one-third of all American Indian children were being separated from their families which was substantially higher than the removal rates for non-Indian children. In Minnesota, Montana, South Dakota, and Washington, the removal rates for Indian children compared with non-Indian children was five to nineteen percent higher. In Wisconsin, the rate of removal for Indian children was 1,600 times greater. See Lorie M Graham, “The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine” (1998) 23:1 *Am Ind L Rev* 1 at 24. See also Elizabeth MacLachlan, “Tensions Underlying the Indian Child Welfare Act: Tribal Jurisdiction over Traditional State Court Family Law Matters” (2018) 2 *BYUL Rev* 455 at 456–57. They note that “[t]he purpose of *ICWA* is to reverse the historic and recent effects of removal of Indian children from their homes and tribal communities.”

<sup>23</sup> See US, *Establishing Standards For The Placement Of Indian Children In Foster Or Adoptive Homes, To Prevent The Breakup Of Indian Families, And For Other Purposes* (HR Rep No 95-1386)

workers removed children simply because they were living on an Indian reservation which, as one California case worker put it, “is an unsuitable environment for a child.”<sup>24</sup> These reports prompted Senator James Abourezk, one of the main sponsors of the *ICWA*, to vigorously advocate for the law’s passage.<sup>25</sup> Abourezk believed that a national Indian child welfare law was the only way to counteract the harms caused by state welfare agencies “operat[ing] on the

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(reprinted in 1978 USC CAN 7530, 7532) (documenting the discriminatory practices of state and private adoption, welfare agencies, and state court’s abuse of their power) [HR Rep]. See also Sarah Krakoff, “They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum” (2017) 69:2 Stan L Rev 491 at 506. Krakoff iterates that “Congressional reports documented the ignorance and hostility of state social workers and judges toward tribal culture and its benefits. . . . [S]tates asserted exclusive jurisdiction and denied due process in state proceedings brought to remove Indian children from their families”, quoting Nell Jessup Newton, Felix Cohen & Robert Anderson, eds, *Cohen’s Handbook of Federal Indian Law* § 11.01[2] at 832 [*Cohen’s Handbook*].

<sup>24</sup> Graham, *supra* note 22 at 27.

<sup>25</sup> See Patrice H Kunesh, “Borders Beyond Borders - Protecting Essential Tribal Relations Off Reservation Under the Indian Child Welfare Act” (2007) 42 New Eng L Rev 15 at 41:

The Indian Child Welfare Act of 1977, S. 1214, introduced on April 1, 1977 by Senator James Abourezk (S.D.), Chairman of the Committee on Interior and Insular Affairs, was co-sponsored by Senators Hubert Humphrey (Minn.) and George McGovern (S.D.), and referred to the Select Committee on Indian Affairs. Senator Abourezk sponsored a similar bill, S. 3777, in the 94th Congress, which was referred to the Senate Committee on Interior and Insular Affairs and later referred to the Subcommittee on Indian Affairs where no action was taken.

premise that most Indian children would really be better off growing up non-Indians.”<sup>26</sup>

The *ICWA* vigorously rejects the idea that Indian children are better off growing up away from their Indian families and tribes. As the preamble states, the goal of the Act is to:

protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.<sup>27</sup>

The Act seeks to achieve this goal of protecting Indian families in a number of different ways but one of the most important is by placing limitations on discretion of state court judges presiding over cases involving Indian children.<sup>28</sup> It does this by recognizing and expanding the authority of tribal courts over Indian child cases and by requiring state courts to apply specific protections and procedures when such cases are not removed to tribal court.

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<sup>26</sup> James Abourezk, quoted in Graham, *supra* note 22 at 25.

<sup>27</sup> *The Indian Child Welfare Act of 1978*, Pub L No 95-908, 92 Stat 3069 (codified as amended at 25 USC §§ 1901–1963).

<sup>28</sup> See Paul David Kouri, “In re M.J.J., J.P.L., & J.P.G: The ‘Qualified Expert Witness’ Requirements of the Indian Child Welfare Act” (2005) 29:2 Am Indian L Rev 403 at 406.

The Act protects tribal court authority and power by recognizing tribes' exclusive jurisdiction over child custody determinations involving Indian children residing or domiciled within an Indian reservation.<sup>29</sup> It also requires state courts to transfer jurisdiction to the tribal courts in any proceeding for foster care placement or parental rights terminations involving Indian children not domiciled within the reservation.<sup>30</sup> In addition, the Act guarantees tribes or any "Indian custodian of the child" the right to intervene "at any point" in any state court proceeding for the foster care placement or termination of parental rights of an Indian child<sup>31</sup> and it requires states to give full faith and credit to tribal court proceedings.<sup>32</sup>

For Indian child custody cases that are not transferred to tribal court, the Act includes numerous requirements that limit the discretion of state courts. For example, the Act requires that state courts apply specific placement preferences when determining the custody of Indian children.<sup>33</sup> In addition, the Act mandates that notice is given to both the child's parents and tribe of any pending action,<sup>34</sup> that "active efforts" are made to "provide remedial services and rehabilitation programs" to help

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<sup>29</sup> See 25 USC § 1911(a).

<sup>30</sup> See 25 USC § 1911(b). There are some exceptions to this transfer provision. Specifically, the provision requires that neither parent objects to the transfer and that there is an absence of good cause not to transfer. The tribe may also decline to take jurisdiction in such cases.

<sup>31</sup> 25 USC § 1911(c).

<sup>32</sup> See 25 USC § 1911(d).

<sup>33</sup> See 25 USC § 1915(a).

<sup>34</sup> See 25 USC § 1912(a).

prevent breaking up the Indian family, and that any court order placing an Indian child in foster care<sup>35</sup> or terminating the rights of an Indian child's parents, is supported by sufficient evidence including testimony of a qualified expert witness.<sup>36</sup>

These *ICWA* protections, those recognizing and protecting tribal court authority and those limiting state court discretion, have been instrumental in helping combat the legacy of the US's Indian child removal policies.

### **C. AUSTRALIA'S INDIGENOUS CHILD REMOVALS AND RESPONSE**

The Indigenous child removals currently taking place in Australia share many similarities with those occurring in the US shortly before *ICWA*'s passage. At that time, differences between Indian and non-Indian conceptions of the family and "good" child rearing practices, were routinely used to justify breaking up Indian families. In Australia, such negative perceptions about Indigenous families are common and similarly used to justify the removal of Aboriginal and Torres Strait Islander children.<sup>37</sup>

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<sup>35</sup> 25 USC § 1912(d).

<sup>36</sup> This must be demonstrated "by clear and convincing evidence" in the case of foster care placement. See 25 USC § 1912(e). See also 25 USC § 1912(f) ("beyond reasonable doubt" in termination proceedings).

<sup>37</sup> Although there seems to be an increasing willingness to recognize past injustices towards Aboriginal people, the most recent reconciliation barometer survey (a survey conducted every two years), revealed troubling statistics about the levels of racial prejudice that Indigenous people currently face. According to the survey "[o]ne in three



Studies such as the *Bringing Them Home Report*<sup>38</sup> note that modern Indigenous child removals are frequently caused by divergences between Indigenous and Western conceptions of kinship and good child rearing practices.<sup>39</sup> A highly public example of such divergence was recently demonstrated on episode of the Sydney morning show, *Sunrise Sydney*. In that episode, the program's two hosts advocated for expanding the adoption of Aboriginal children by white families, because they believed it was the best way to "save" them. The hosts recognized that their suggestion sounded similar to the policies that created the Stolen Generation. However, instead of being apologetic, they embraced this comparison stating, "[j]ust like the first Stolen Generation, where a lot of children were taken because it was for their well-being, we need to do it

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Indigenous respondents to the survey said they had endured verbal racism in the past six months. Almost half (43 percent) of First Nations people said they had been subjected to some form of racial prejudice during the same period." Ben Smee, "Truth Telling: 80% Say Past Injustices Against Indigenous People Should Be Recognised", *The Guardian* (10 Feb 2019), online: <[www.theguardian.com/australia-news/2019/feb/11/truth-telling-80-say-past-injustices-against-indigenous-people-should-be-recognised](http://www.theguardian.com/australia-news/2019/feb/11/truth-telling-80-say-past-injustices-against-indigenous-people-should-be-recognised)>.

- <sup>38</sup> See Austl, Commonwealth, Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Canberra: Australian Government Publishing Service, 1997) [*Bringing Them Home*].
- <sup>39</sup> See *ibid* at 478–80, 486. They note that the Australian family law system conflicts with Aboriginal child rearing values. See also John Dewar, "Indigenous Children and Family Law" (1997) 19:2 *Adel L Rev* 217 at 221. Dewar notes that Indigenous "conceptions of kinship and good child-raising practice are significantly different from the nuclear model."

again.”<sup>40</sup> The hosts also scoffed at the idea that keeping Indigenous children connected to their culture was important. Instead, in a comment dripping with sarcasm, they asked: “We need to be . . . putting them back into that culture, what culture are they growing up seeing?”<sup>41</sup>

These types of biases regarding the benefits of assimilation and a devaluing of Indigenous culture remain common in Australia.<sup>42</sup> As historian Tim Rowse has noted, Australia’s history of and desire for assimilation is “built into the very fabric Australian society . . . we cannot say that it came to an end.”<sup>43</sup> Professor Terri Libesman has echoed this point, noting that in recent years, there has been an increasing shift away from the recognition of “collective histories and rights” to a greater focus on “mainstream

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<sup>40</sup> Emma Reynolds, ““You Should Know Better, Sunrise””, *The Morning Bulletin* (14 March 2018), online: <[www.themorningbulletin.com.au/news/you-should-know-better-sunrise-breakfast-show-slam/3360362/](http://www.themorningbulletin.com.au/news/you-should-know-better-sunrise-breakfast-show-slam/3360362/)>. Reynolds states that “Sunrise is facing a backlash after a discussion on taking Aboriginal children out of abusive family environments sparked accusations of ‘blatant racism’ and ‘bottom feeding.’”

<sup>41</sup> *Ibid.*

<sup>42</sup> Other examples of such views in the popular press include shock jock radio host Alan Jones’s claim on radio 2GB that “we need another stolen generation.” See Graham Richardson, “Alan Jones Isn’t Racist, He Wants Aboriginal Kids to Be Safe”, *The Australian* (19 February 2016), online: <[www.theaustralian.com.au/commentary/opinion/alan-jones-isnt-racist-he-wants-aboriginal-kids-to-be-safe/news-story/9f1d66361ec70caa0c111f9eb9595c93](http://www.theaustralian.com.au/commentary/opinion/alan-jones-isnt-racist-he-wants-aboriginal-kids-to-be-safe/news-story/9f1d66361ec70caa0c111f9eb9595c93)>.

<sup>43</sup> See Tim Rowse, “Introduction” in Tim Rowse & Richard Nile, eds, *Contesting Assimilation* (Perth: API Network, 2005) 19, cited in Anna Haebich, “Neoliberalism, Settler Colonialism and the History of Indigenous Child Removal in Australia” (2015) 19:1 *Aus Indig Rev* 20 at 21.

measures of well-being.”<sup>44</sup> Professor Libesman believes this has led to a “greater prevalence of populist racist characterisations of neglect and abuse as pertaining to cultural and individual Indigenous deficits.”<sup>45</sup>

Distressingly, these types of biases against Indigenous families are even held by the organizations and agencies tasked with helping them. In their work on Indigenous child removals, Professors Kyllie Cripps and Julian Laurens have demonstrated that bias against Indigenous families and culture has led child welfare agencies to devalue the importance of keeping Indigenous children connected to their culture and communities and to promote beliefs about Indigenous “dysfunctionality” in order to justify government intervention.<sup>46</sup>

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<sup>44</sup> Haebich, *supra* note 43 at 28.

<sup>45</sup> *Ibid.*

<sup>46</sup> In this study, Kyllie Cripps and Julian Laurens argue that the child welfare system’s bias towards permanency hurts Indigenous children by preferring the mainstream child welfare goal of permanency over connection to community. They suggest that the general neoliberalism that currently defines Australia’s child welfare policy is used to both “justify intervention” into Indigenous people’s lives and that it relies upon and promotes the narrative of Indigenous “dysfunctionality.” Kyllie Cripps & Julian Laurens, “The Protection of Cultural Identity in Aboriginal and Torres Strait Islander Children Exiting from Statutory Out of Home Care via Permanent Care Orders: Further Observations on the Risk of Cultural Disconnection to Inform a Policy and Legislative Reform Framework” (2015) 19:1 *Austl Indigenous L Rev* 70 at 77. See also Jacyntha Krakouer, Sarah Wise & Marie Connolly, “‘We Live and Breathe Through Culture’: Conceptualising Cultural Connection of Indigenous Australian Children in Out-of-Home Care” (2018) 71:3 *Australian Social Work* 265 at 269. They found “that

Scholar and social worker Doctor Steve Rogowski has made similar observations. Rogowski notes that organizations, like the Cape York Family Responsibility Commission, offer support to Indigenous families, but condition it on a willingness of the recipients to change their lifestyles by joining the market economy and becoming “responsible citizens.”<sup>47</sup>

It is difficult to prove that such biases are responsible for the high rates of Indigenous child removals in Australia. However, there is little question that Aboriginal and Torres Strait Islander children are removed at disproportionately high rates when compared with their non-Indigenous peers. These children made up approximately 36 percent of all children living in out-of-home care (OOHC) in 2015, a rate nearly ten times that of other children.<sup>48</sup> Moreover, as this disproportionate representation continues to grow,<sup>49</sup> it is becoming

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Indigenous agencies and workers believed that family, community, and cultural connection was a primary fundamental need for Indigenous children in care, whereas non-Indigenous agencies and workers saw cultural connection as just ‘one of many hierarchical needs.’”

<sup>47</sup> Steve Rogowski, “From Child Welfare to Child Protection/Safeguarding: A Critical Practitioner’s View of Changing Conceptions, Policies and Practice” (2015) 27:2 *Social Work in Action* 97 at 97.

<sup>48</sup> See Cripps & Laurens, *supra* note 46 at 70. The number of Indigenous children removed and placed in OOHC now is higher than it was in 2008 at the time of the National Apology.

<sup>49</sup> See Robyn Mildon & Melinda Polimeni, *Parenting in the Early Years, Effectiveness of Parenting Support Programs for Indigenous Families* (Canberra: Australian Institute of Health and Welfare, 2012). See also Cripps & Laurens, *supra* note 46 at 70 noting that “the rate of

increasingly clear that the only significant nationwide attempt to combat bias against Aboriginal families, the Aboriginal Child Placement Principle (ACPP), is not working.<sup>50</sup>

The ACPP is a set of guidelines first articulated by Aboriginal and Torres Strait Islander Care Agencies concerning the care and custody of Indigenous children.<sup>51</sup>

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Indigenous children entering OOHC was 9.5 times that for non-Indigenous children.”

<sup>50</sup> See also Fiona Arney et al, *Enhancing the Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and Practice Considerations* (Melbourne: Child Family Community Australia, 2015). They note “the lack of adherence to the Principle,” “that the best interests of children have not been considered paramount in determining placements for Indigenous children,” and “that cultural identity and connection have not always been a consideration when making decisions about the best interests of children.” See also Cripps & Laurens, *supra* note 46 at 76 describing the “haphazard” application of the Placement Principles.

<sup>51</sup> Austl, Commonwealth, Australian Institute of Family Studies, *Enhancing the Implementation of the Aboriginal Child Placement Principle* by Fiona Arney et al (Melbourne: AIFS, 2015), online: <[aifs.gov.au/cfca/publications/enhancing-implementation-aboriginal-and-torres-strait-islander-child/export](http://aifs.gov.au/cfca/publications/enhancing-implementation-aboriginal-and-torres-strait-islander-child/export)> (noting “[t]he Aboriginal and Torres Strait Islander Child Placement Principle grew from a grassroots community movement initiated by Aboriginal and Islander Child Care Agencies (AICCA) during the 1970s”). The guidelines were derived from the proceedings for the First Australian Conference on Adoption which occurred in 1976. See Austl, Commonwealth, Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws?* (Report No 31) (18 August 2010), online: <[www.alrc.gov.au/publication/recognition-of-aboriginal-customary-laws-alrc-report-31/16-aboriginal-customary-laws-aboriginal-child-custody-fostering-and-adoption/an-aboriginal-child-placement-principle/](http://www.alrc.gov.au/publication/recognition-of-aboriginal-customary-laws-alrc-report-31/16-aboriginal-customary-laws-aboriginal-child-custody-fostering-and-adoption/an-aboriginal-child-placement-principle/)>, s 352 (the section entitled “The Application of the

The Principle states that “Aboriginal and Torres Strait Islander children should be raised in their own families and communities and if placed in out-of-home care . . . , should be placed with Aboriginal or Torres Strait Islander carers.”<sup>52</sup> Each Australian state and territory has enacted a version of the Principle into their adoption and child welfare legislation. Unfortunately, compliance is low. Studies indicate there is a 34 percent “non-compliance rate” with the placement principle and that it is increasing.<sup>53</sup>

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‘Paramount Consideration’ to Aboriginal Children: Policy Guidelines”).

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- <sup>53</sup> See also Calla Wahlquist, “Number of Indigenous Children in Care to Triple Unless Spending Changes—Report”, *The Guardian* (28 November 2017), online: <[www.theguardian.com/australia-news/2017/nov/29/number-of-indigenous-children-in-care-to-triple-unless-spending-changes-report](http://www.theguardian.com/australia-news/2017/nov/29/number-of-indigenous-children-in-care-to-triple-unless-spending-changes-report)>, noting that as of 2016, only sixty-seven percent of Aboriginal and Torres Strait Islander children removed from their parents were placed with “family, kin, or an Aboriginal and Torres Strait Islander carer.” In addition, the rate of placement with Aboriginal and Torres Strait Islander carers (excluding non-Indigenous family and kin) was only 50.5 percent. See also Krakouer, Wise & Connolly, *supra* note 46 at 268–69, noting that “[i]n Victoria, the Commission for Children and Young People . . . recently found ‘a lack of evidence to demonstrate that Aboriginal children are being placed at the highest level of the placement hierarchy’. The Taskforce 1000 project, where the files of almost 1000 Indigenous children in care in Victoria were audited, found that more than 60 percent of Indigenous children live in OOHC with non-Indigenous carers.” See also Commission for Children and Young People, “In the

As discussed above, in 2008, Prime Minister Kevin Rudd apologized to Aboriginal and Torres Strait Islander people for the Stolen Generation and promised to take action to protect Indigenous families. Notably, Rudd ended the Apology by stating, “We take this first step . . . in laying claim to a future where we embrace the possibility of new solutions to enduring problems.”<sup>54</sup> Sadly, in the decade since Rudd’s apology, the Commonwealth has offered no new solutions.<sup>55</sup> Consequently, it is time to reconsider the enactment of an Australian *ICWA*. In the US, the Act has successfully helped combat unjustified

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Child’s Best Interests: Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria” (2015), online (pdf): <[ccyp.vic.gov.au/assets/Publications-inquiries/In-the-childs-best-interests-inquiry-report.pdf](http://ccyp.vic.gov.au/assets/Publications-inquiries/In-the-childs-best-interests-inquiry-report.pdf)>. See also Austl, Commonwealth, Australian Institute of Health and Welfare, *Child Protection Australia Report: 2014–15* (Child Welfare Series No 63) (Canberra: AIHW, 21 April 2016) at 54–55 (noting that 66 percent of Indigenous children were placed in accordance with the ATSI CPP).

<sup>54</sup> Kate Grenville, “A True Apology to Aboriginal People Means Action as Well”, *The Guardian* (14 February 2010), online: <[www.theguardian.com/commentisfree/2010/feb/14/australia-aboriginals-apology-disadvantaged](http://www.theguardian.com/commentisfree/2010/feb/14/australia-aboriginals-apology-disadvantaged)> (quoting Kevin Rudd).

<sup>55</sup> See e.g. Austl, Senate, Community Affairs References Committee, *Out of Home Care* (19 August 2015), online: <[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Out\\_of\\_home\\_care/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Out_of_home_care/Report)>, discussing the overrepresentation of Aboriginal and Torres Strait Islander children and making recommendations that have not been implemented. See Dan Conifer, “Bringing them Home, Twenty Years After Report Indigenous Children are Worse Off Than Before”, *ABC News* (25 May 2017) (noting “key recommendations from the national inquiry have not been implemented and Aboriginal and Torres Strait Islander children now make up a larger part of the out-of-home care system”).

Indian child removals.<sup>56</sup> A similarly structured act could have a comparable impact in Australia, but only if Australia's long-standing opposition to Indigenous self-determination begins to decline. Luckily, there are indications this may be occurring.

## II. CHILD WELFARE AND ABORIGINAL AND TORRES ISLANDER SELF-DETERMINATION

As Part I of this article discussed, Indigenous advocates in Australia have long sought an Australian version of the *ICWA*<sup>57</sup> and the recently proposed changes to Australia's

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<sup>56</sup> See e.g. Sheri L Hazeltine, "Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska's Child in Need of Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act" (2002) 19:1 Alaska L Rev 57 at 59 (describing the *ICWA* as "one of the most important and far-reaching pieces of legislation protecting Indian tribes"). See also Alex Tallchief Skibine, "Indian Gaming and Cooperative Federalism" (2010) 42:1 Ariz St LJ 253 at 284 (describing the *ICWA* as "perhaps the most important legislation enacted during this era"); Barbara Ann Atwood, "Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance" (2002) 51:2 Emory LJ 587 at 621 (noting that "[t]he *ICWA* has achieved considerable success in stemming unwarranted removals by state officials of Indian children from their families and communities"); Christine Basic, "An Overview of the Indian Child Welfare Act of 1978" (2007) 16:1 J Contemp L Iss 345 at 349 (stating that "the Act is a success with regard to its goal of giving Indian tribes more power over their members in general, over their children in particular"); Graham, *supra* note 22 at 34 (stating that "there is a general consensus among Native American nations and organizations that the *ICWA* provides 'vital protection to American Indian children, families and tribes'").

<sup>57</sup> See e.g. *supra* note 7 presenting numerous requests for *ICWA*-type legislation. See also Terri Libesman, *Decolonising Indigenous Child Welfare: Comparative Perspectives* (Abingdon: Routledge, 2014) at



federal adoption law have made the need for such protective legislation more pressing than ever. Moreover, although previous efforts to enact *ICWA*-type legislation were unsuccessful, there is reason to believe future efforts may enjoy greater success.

Previous attempts to enact *ICWA*-like legislation were stymied by a lack of public and government support for Indigenous self-determination.<sup>58</sup> However, recent Indigenous child welfare initiatives, such as those implemented in Victoria and Queensland, appear to indicate that despite the previously discussed biases, there is also an increasing receptiveness for Aboriginal and Torres Islander self-determination, particularly in the area of child welfare.

#### **A. SOVEREIGNTY, AMERICAN INDIAN TRIBES, AND THE *ICWA***

The purpose of the *ICWA* is to keep Indian children with their families and communities or, failing this, with other Indian families or communities. The Act achieves this goal by ensuring the majority of Indian child welfare decisions are made by the child's tribe. Under the Act, the term "tribe" refers to "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the

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116 [Libesman, *Decolonising Indigenous Child Welfare*] (describing how the *ICWA* has "served as an inspiration to Indigenous children's [welfare] groups internationally").

<sup>58</sup> See Briskman, *supra* note 7 at 119–21 describing the decades long efforts by Indigenous advocacy groups to pass national Aboriginal child welfare legislation.

Secretary because of their status as Indians.”<sup>59</sup> Such tribes are recognized as possessing the inherent right to make decisions concerning the care and welfare of their members. Specifically, they are treated as quasi-sovereigns,<sup>60</sup> which means they enjoy a special relationship with the federal government and that they can pass laws and have those laws enforced within their reservation.<sup>61</sup> However, quasi-sovereignty also means that tribes do not possess the full powers of sovereignty.<sup>62</sup> Instead, they are subject to the overriding control of the United States and may not exercise any sovereign powers abrogated by Congress in the exercise of its plenary power over Indian

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<sup>59</sup> 25 US § 1903(8) (the definition of “Indian tribe”).

<sup>60</sup> See *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831) [*Cherokee Nation*]. The concept of limited sovereignty was first presented by Chief Justice John Marshall in *Cherokee Nation*, in which he described Indian tribes as “domestic dependent nations” at 2. See also *United States v Kagama*, 118 US 375 (1886) (noting that although tribes are physically within the territory of the United States, they nonetheless remain “a separate people, with the power of regulating their internal and social relations” at at 381–82).

<sup>61</sup> See e.g. *Washington v Confederated Bands and Tribes of the Yakima Indian Nation*, 439 US 463 (1979) at 500–01 [*Washington v Yakima Indian Nation*], quoting *Morton v Mancari*, 417 US 535 (1974) at 551–52 (“the unique legal status of Indian tribes under federal law’ permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive” (challenging Mancari’s application to the ICWA)).

<sup>62</sup> See *United States v Wheeler*, 435 US 313 (1978) at 323 (describing Indian tribes’ sovereignty as “unique and limited [in] character. . . exist[ing] only at the sufferance of Congress and is subject to complete defeasance”).

affairs.<sup>63</sup> Nevertheless, even within these limitations, the sovereignty American Indian tribes continue to possess and wield is significant.

As the US Supreme Court explained in *Williams v Lee*, unless tribes have been divested of a particular right, they retain the inherent “right [. . .] to make their own laws and be ruled by them.”<sup>64</sup> Moreover, although Congress may divest tribes of various aspects of their sovereignty,<sup>65</sup> states are prohibited from exercising powers that would intrude on Indians’ right to sovereignty.<sup>66</sup> These long-accepted ideas regarding Indian sovereignty were incorporated into the ICWA. Specifically, the Act recognizes that the care and control of Indian children is one of the core areas of tribal sovereignty, that this right

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<sup>63</sup> See e.g. *Oliphant v Suquamish Indian Tribe*, 435 US 191 (1978) [*Oliphant*] (holding that tribes had been implicitly divested of criminal jurisdiction over non-Indians because the federal government did not intend for non-Indian citizens to be adjudicated by tribal governments under tribal laws that might treat such defendants unfairly or impair their liberty interests).

<sup>64</sup> *Williams v Lee*, 358 US 217 (1959) at 220 [*Williams*].

<sup>65</sup> In fact, Congress has the ability to eliminate all sovereign rights of Indian tribes. This power was clearly demonstrated through the policy of termination which terminated the federal tribal relationship and left the affected tribes on the same footing as any other group or community of people in the United States. See generally Charles F Wilkinson & Eric R Biggs, “The Evolution of the Termination Policy” (1977) 5:1 Am Indian L Rev 139 at 151–54 (discussing the devastating effects of termination legislation). See also *Cohen’s Handbook*, *supra* note 23 at § 3.02[8][b] (discussing the effects of termination on the tribal statuses of specific tribes).

<sup>66</sup> *Williams*, *supra* note 64 at 220 (confirming that state action is prohibited if it undermines “the right of reservation Indians to make their own laws and be ruled by them”).

has never been eliminated, and tribes may exercise this right free from state or federal interference.<sup>67</sup>

## B. INDIGENOUS SOVEREIGNTY IN AUSTRALIA

Australia does not have the United States' history of recognizing Indigenous sovereignty and the right of native people to make and be governed by their own, separate laws. In fact, such ideas actually conflict with the long-held view that Indigenous people in Australia should not have special rights.<sup>68</sup> As Australian Professor Richard Chisholm noted, in Australia, it is a commonly held view that “the only future aboriginal people can, or should, have is as ordinary members of the Australian community with exactly the same legal rights and responsibilities.”<sup>69</sup>

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<sup>67</sup> The fact that Congress could eliminate this right does change the fact that a recognition of tribal sovereignty is an essential aspect of how the ICWA operates in the United States.

<sup>68</sup> One arguable exception is native title property rights. See *Mabo v Queensland (No 2)*, [1992] HCA 23. See also Lisa Strelein, *Compromised Jurisprudence, Native Title Cases Since Mabo* (Canberra: Aboriginal Studies Press, 2009) (discussing native title cases since Mabo). See also Sean Brennan et al, eds, *Native Title From Mabo to Akiba: A Vehicle for Change and Empowerment?* (Sydney: Federation Press, 2015).

<sup>69</sup> Richard Chisholm, “Towards an Aboriginal Child Placement Principle: A View from New South Wales” in Bradford W Morse & Gordon R Woodman, eds, *Indigenous Law and the State* (Dordrecht, Holland: Foris, 1988) 315 at 318. Rob Riley posits that Indigenous Australians are often treated as a minority with no rights or at best, only those rights “that the majority group will allow, those rights that will not interfere with the administration and development of the country in the best interests of the majority.” See Rob Riley, “Aboriginal Law and its Importance for Aboriginal People: Observations on the Task of the Australian Law Reform Commission” in *ibid* 65 at 66.

Consequently, Australia's strong support of Indigenous assimilation has long hampered efforts to pass national Indigenous child welfare legislation.<sup>70</sup> However, recently enacted Indigenous child welfare programs in Victoria<sup>71</sup> and Queensland<sup>72</sup> demonstrate that opposition to Indigenous control over child welfare is decreasing.<sup>73</sup>

For example, under the new Victorian program, the guardianship of Aboriginal children has been transferred from the state to the chief executive of an Aboriginal

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<sup>70</sup> Briskman, *supra* note 7 at 116 noting a reason “for the resistance is the broader question of Aboriginal self-determination.”

<sup>71</sup> See Calla Wahlquist, “Victoria Pledges Record Funds to Keep Indigenous Children in Community Care”, *The Guardian* (26 April 2018), online: <[www.theguardian.com/australia-news/2018/apr/26/victoria-pledges-record-funds-to-keep-indigenous-children-in-community-care](http://www.theguardian.com/australia-news/2018/apr/26/victoria-pledges-record-funds-to-keep-indigenous-children-in-community-care)> [Wahlquist, “Victoria Pledges”].

<sup>72</sup> See Noel Niddrie & Kylie Brosnan, “Evaluation: Aboriginal and Torres Strait Islander Family Led Decision Making Trial” (October 2017), online (pdf): <[www.snaicc.org.au/wp-content/uploads/2018/05/Evaluation\\_Report\\_ATSIFLDM-2018.pdf](http://www.snaicc.org.au/wp-content/uploads/2018/05/Evaluation_Report_ATSIFLDM-2018.pdf)>.

<sup>73</sup> These new programs do not give Indigenous communities decision-making power and thus, cannot be considered a sufficient substitute for a national legislation akin to the *ICWA*. However, they do indicate growing support for Aboriginal involvement in implementing the child welfare policies that affect their children and communities. See Libesman, *Decolonising Indigenous Child Welfare*, *supra* note 57 at 117 (noting that many of these programs were inspired by the Canadian practice of delegating case management control to tribes; that led to the development of memorandums of understanding between Australian state child welfare departments and Australian Indigenous Organizations).

community-controlled organization (ACCO).<sup>74</sup> Previously, all children in care worked solely with the State government through the Department of Health and Human Services (DHHS). Under the new program, Aboriginal child cases will now be handled by ACCOs and it is expected that by 2021,<sup>75</sup> 100 percent of such cases will be under the supervision of these organizations.<sup>76</sup> Victoria's strong commitment to this plan is apparent in the progress that has already occurred. In a March 2018 statement, Victoria's Minister for Families and Children, Jenny

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<sup>74</sup> Austl, Victoria, *Transitioning Aboriginal Children to Aboriginal Community-Controlled Organisations: Transition Guidelines* (Melbourne: Health and Human Services, October 2018), online (word): <providers.dhhs.vic.gov.au/transitioning-aboriginal-children-aboriginal-community-controlled-organisations-transition> [*Transitioning Aboriginal Children*] (stating “[t]he Victorian government is committed to self-determination and self-management for Aboriginal people. This commitment includes enabling Aboriginal children and young people subject to protection orders and placed in the out-of-home care service system to be case managed, wherever possible, by an ACCO” at 4). Under this change, Muriel Bamblett, chief executive of the Victorian Aboriginal Child Care Agency, became the legal guardian of dozens of Aboriginal children formerly under state guardianship. See Wahlquist, “Victoria Pledges”, *supra* note 71.

<sup>75</sup> The Aboriginal Children's Forum (ACF) was established as a result of an Aboriginal Children's Summit convened by Minister Mikakos in August 2015. The ACF is a representative forum of Aboriginal Community-Controlled Organizations (ACCOs), the community sector, and is government-convened quarterly. The forum was established to drive the safety and well-being of Aboriginal children and young people in or at risk of entering OOHC.

<sup>76</sup> These recommendations were set by the ACF. See *Transitioning Aboriginal Children*, *supra* note 74 at 4–5. See also Austl, Victoria, “Aboriginal Children's Forum” (26 June 2019), online: <www.vic.gov.au/aboriginal-childrens-forum>.

Mikakos, noted “the significant progress we have made in transitioning Aboriginal children on protection orders to Aboriginal organisations, . . . in fact we have reached a milestone of a quarter of those children having transitioned.”<sup>77</sup>

Like Victoria, Queensland has also made concerted efforts to increase Aboriginal control over child welfare cases. Recently, the state trialled a model of family-led decision-making and then committed to its state-wide implementation. According to Queensland’s action plan, the state recognizes that in order to ensure all Indigenous children in Queensland “grow up safe and cared for in family, community and culture,” there is a “need to ‘change tracks’” and try a new way of protecting Aboriginal and Torres Strait Islander families.<sup>78</sup> As part of this new approach, Queensland has promised to “share power and responsibility with Aboriginal and Torres Strait Islander leaders.”<sup>79</sup> It has also agreed to “[i]nvest in Aboriginal and Torres Strait Islander community-controlled organisations [and] to implement Aboriginal

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<sup>77</sup> Jenny Mikakos, “Aboriginal Children’s Forum” (8 March 2018), online: *Jenny Mikakos: Member for Northern Metropolitan* <[www.jennymikakos.com.au/parliament/aboriginal-childrens-forum/](http://www.jennymikakos.com.au/parliament/aboriginal-childrens-forum/)>.

<sup>78</sup> Austl, Queensland, “Changing Tracks: An Action Plan for Aboriginal and Torres Strait Islander Children and Families” (2017), online (pdf): <[www.communities.qld.gov.au/resources/campaign/supporting-families/changing-tracks.pdf](http://www.communities.qld.gov.au/resources/campaign/supporting-families/changing-tracks.pdf)> at 2.

<sup>79</sup> *Ibid* at 20.

and Torres Strait Islander family-led decision-making across the state.<sup>80</sup>

The Victoria and Queensland programs are the most significant state efforts to increase Indigenous control over child welfare decisions. However, other states have also made progress. For example, New South Wales outlined its vision for greater Aboriginal control in its *Plan on a Page for Aboriginal Children and Young People 2015-2021*<sup>81</sup> and through a set of *Guiding Principles*.<sup>82</sup>

The *Plan on a Page* seeks to create a strong safety net of Aboriginal-controlled organizations that would meet the needs of Aboriginal children and their families.<sup>83</sup> Similarly, the *Guiding Principles* aim to foster collaboration and cooperation between Family and

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<sup>80</sup> *Ibid* at 21.

<sup>81</sup> See Aboriginal Child, Family and Community Care State Secretariat (AbSec), “Delivering Better Outcomes for Aboriginal Children and Families in NSW” (May 2018), online (pdf): <[www.absec.org.au/~abab2882/images/downloads/NSW-Election-Platforms-AbSec-May-2018\\_final.pdf](http://www.absec.org.au/~abab2882/images/downloads/NSW-Election-Platforms-AbSec-May-2018_final.pdf)> at 4; AbSec, “Plan on a Page for Aboriginal Children and Young People 2015-2021”, online (pdf): <[www.absec.org.au/images/downloads/Plan-for-Aboriginal-Children-and-Young-People.pdf](http://www.absec.org.au/images/downloads/Plan-for-Aboriginal-Children-and-Young-People.pdf)> [*Plan on a Page*]. It should also be noted that although the NSW government has committed to this plan, they have not yet provided funding.

<sup>82</sup> See Grandmothers Against Removals (GMAR), “Guiding Principles for Strengthening the Participation of Local Aboriginal Community in Child Protection Decision Making” (Aug 2015), online (pdf): *Family & Community Services* <[www.facs.nsw.gov.au/about/media/news/archive?a=373233](http://www.facs.nsw.gov.au/about/media/news/archive?a=373233)> [GMAR, “Guiding Principles”].

<sup>83</sup> See *Plan on a Page*, *supra* note 81.



Community Services (FACS) offices and Aboriginal communities.<sup>84</sup> This collaboration would then enable Aboriginal communities to “participate with FACS in decision making regarding the care and protection” of their children.<sup>85</sup> According to AbSec,<sup>86</sup> both initiatives “[lay] a strong foundation for . . . the development of an Aboriginal-led service system to meet the needs of Aboriginal children and families.”<sup>87</sup>

These initiatives indicate growing political and popular support for Indigenous decision-making in the child welfare context and suggest the likelihood of increased receptivity to national Indigenous child protection legislation. This change, combined with Australia’s potential new adoption policies suggest that it may be time for Indigenous advocates in Australia to renew their efforts to enact *ICWA*-type legislation.<sup>88</sup> Nevertheless, before beginning such advocacy, it is

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<sup>84</sup> See GMAR, “Guiding Principles”, *supra* note 82 at 3.

<sup>85</sup> *Ibid* at 6.

<sup>86</sup> The Aboriginal Child, Family and Community Care State Secretariat (AbSec) is a not-for-profit incorporated community organization that is recognised as the peak New South Wales Aboriginal Organization providing child protection and out-of-home care policy advice on issues affecting Aboriginal children, young people, families, and carers.

<sup>87</sup> AbSec, “Sector-Led Change Priorities for NSW”, online (pdf): <[www.absec.org.au/images/downloads/FamilyMattersNSW\\_Final\\_Digital.pdf](http://www.absec.org.au/images/downloads/FamilyMattersNSW_Final_Digital.pdf)>.

<sup>88</sup> See Libesmen, *Decolonising Indigenous Child Welfare*, *supra* note 57 (noting that “[l]eading Indigenous groups have called for national legislation, inspired by the ICWA in the United States, to provide a framework for the provision of child welfare services to Australian Indigenous communities for many years” at 145).

important to understand how an Australian *ICWA* would differ from the American version and whether these differences will impact the effectiveness, as well as the desirability, of such legislation.

### III. AN AUSTRALIAN *ICWA*

In the United States, tribes exercise decision-making authority over Indian child welfare cases due to their inherent sovereign authority. This authority is neither delegated by the state or federal government nor is it subject to state or federal oversight. Consequently, rather than giving tribes rights, the Act protects rights tribes already possess. In contrast, in Australia, Aboriginal and Torres Strait Islander peoples do not enjoy recognized sovereignty.<sup>89</sup> As a result, the decision-making powers necessary for an Australian *ICWA* to function would need to be delegated by the Commonwealth.<sup>90</sup> The first question,

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<sup>89</sup> They also do not have constitutionally protected rights of any kind, unlike the Indigenous people in both Canada and the United States. See e.g. *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (providing constitutional protections to the Indigenous peoples of Canada). See also US Const art I, § 8, stating “The Congress shall have Power. . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”

<sup>90</sup> See Gaynor Macdonald, “Indigenous Treaties are Meaningless Without Addressing the Issue of Sovereignty”, *The Conversation* (14 June 2018), online: <[theconversation.com/indigenous-treaties-are-meaningless-without-addressing-the-issue-of-sovereignty-98006](http://theconversation.com/indigenous-treaties-are-meaningless-without-addressing-the-issue-of-sovereignty-98006)> (discussing the problems with the proposed state treaties). While it remains possible that Indigenous sovereignty could be recognized by federal government, it is unlikely. Moreover, although some states and territories, most notably Victoria and the Northern Territory, have expressed willingness to enter into treaties with Aboriginal and Torres

therefore, is whether the Commonwealth possesses the authority to delegate such powers.

### A. THE POWER TO CREATE ICWA

Since 1967, when s. 51 of the Australian Constitution was amended,<sup>91</sup> the federal government has had the power to legislate with regard to Aboriginal and Torres Strait Islander people and, accordingly, to pass legislation akin to the *ICWA*.<sup>92</sup> In fact, in 1997, the New South Wales Law Reform Commission specifically noted that the Commonwealth had the power to enact such legislation stating:

The Commonwealth Government arguably already has the power to implement such legislation under s 51(xxvi) of the Constitution which gives the Commonwealth “special powers” to legislate for Aboriginal people. The Commonwealth also

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Strait Islander communities, as states and they do not actually possess the sovereignty necessary to enter into treaties with sovereign nations.

<sup>91</sup> See *Constitution Alteration (Aboriginals) 1967* (Cth), 1967/55, s 2.

<sup>92</sup> The amendment empowered the Commonwealth Government (concurrently with the states) to enact “special laws” in respect to Indigenous Australians. Before this amendment, the Commonwealth could only enact such laws with regard to other racial groups. Section 51 does not require the Commonwealth to exercise these powers. However, it is important to note that when the Commonwealth has used this power, it has been to enact laws relating solely to Indigenous Australians. See Shireen Morris, “Undemocratic, Uncertain and Politically Unviable? An Analysis of and Response to Objections to a Proposed Racial Non-Discrimination Clause as Part of Constitutional Reforms for Indigenous Recognition” (2014) 40:2 *Monash UL Rev* 488 at 492.

unquestionably has the power under s 51 (xxix) of the Constitution which allows the Federal Government to legislate to bring into effect treaties, such as the United Nations Convention on the Rights of the Child (“UNCROC”), which Australia has ratified. Australia is obliged under Article 4 of UNCROC to undertake all legislative, administrative and other measures for the implementation of rights under UNCROC.<sup>93</sup>

Cases like *Gerhardy v Brown*,<sup>94</sup> also suggest that a law like the ICWA, which singles out Indigenous people for special treatment, is permissible.<sup>95</sup> As the court held in

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<sup>93</sup> Briskman, *supra* note 7 at 115.

<sup>94</sup> See *Gerhardy v Brown*, [1985] HCA 11 [*Gerhardy*]. The court in *Gerhardy* held that it is permissible to single out Aboriginal people for special benevolent treatment without violating the *Racial Discrimination Act 1975* (Cth), 1975/52 [*RDA*]. It should be noted that this power is highly controversial in part due to the fact that the court has held it permits race-based legislation that both advantages and discriminates against Indigenous people. See generally Sarah Pritchard, “The Race Power in Section 51 (XXVI) of the Constitution” (2011) 15:2 *Austl Indigenous L Rev* 44.

<sup>95</sup> See *Gerhardy*, *supra* note 94. *Gerhardy* is a case in which a defendant, who was not a member of the Pitjantjatjara and thus had no right to enter lands restored to Pitjantjatjara communities under the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA), 1981/20, challenged his prosecution for illegal entry by arguing that the statute limiting his access violated the *RDA*. The court disagreed, finding that under the *International Convention on the Elimination of All Forms of Racial Discrimination*, 12 March 1966, 660 UNTS 195 (entered into force 4 January 1969) [*ICERD*], this statute was excluded from the category of racial discrimination. See also Morris, *supra* note 92 (“the

*Gerhardy*, “[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals . . . in order to ensure such groups or individuals equal enjoyment of human rights and fundamental freedoms” are excluded from the category of racial discrimination.<sup>96</sup>

Furthermore, even if the courts were to conclude the Commonwealth does not currently possess the constitutional power to enact an *ICWA*, it would still be possible for states to refer this power to the federal government and have the Act passed pursuant to this delegation. A similar cross-vesting scheme occurred with regard to federal jurisdiction over ex-nuptial children. Under s. 51 (xxi) of the Constitution, the Commonwealth has law-making power over marriage and the children of married couples, but not over de facto couples or their children. This was problematic because the Family Court could only deal with separations and custody disputes between legally married couples. The court had no jurisdiction over the de facto families. To solve this problem, most of the states referred responsibility for these

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High Court has indicated that the Race Power can probably be used for beneficial or adverse use against particular races” at 492).

<sup>96</sup> See *ICERD*, *supra* note 95. In fact, under the *ICERD*, such an exception is required. See *ibid*, art 2 (“State Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms” at s 2).

families to the Commonwealth.<sup>97</sup> If needed, a similar political solution could be used to provide federal jurisdiction over Indigenous child welfare cases.

Given the above options, the enactment of national Indigenous child welfare legislation should be legally permissible. The thornier question is how a law written to protect American Indian families would have to change to work in Australia and whether these changes would defeat the overall purpose of the Act.

#### **B. SIMILARITIES AND DIFFERENCES BETWEEN THE LEGAL RIGHTS OF INDIAN TRIBES AND ABORIGINAL AND TORRES STRAIT ISLANDER COMMUNITIES**

The US Congress passed the *ICWA* to stop the widespread termination of Indian parents' rights and to reduce the number of Indian children placed with non-Indian foster and adoptive families. To achieve this goal, the Act contains numerous protections against the unjustified removal of Indian children. Many of these protections, particularly the ones directed at state courts, appear fairly easy to apply to Australian courts. For example, one of the most important state court directed provisions is § 1915, which contains the placement preferences and is very

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<sup>97</sup> All states except Western Australia have referred powers regarding de facto couples. The reason Western Australia is an exception is that it set up its own family court under state law. See Robert S French, "The Referral of State Powers" (2003) 31:1 UWA L Rev 19.

similar to the Aboriginal Child Placement Principle which already applies to Indigenous child placements.<sup>98</sup>

Other provisions, such as the Act's "active efforts" requirement, which requires child welfare workers to take additional steps to attempt to reunite Indian families after a child has been removed,<sup>99</sup> its notice requirements and its heightened evidentiary standard should also be fairly easy to adapt to the Australian legal system. None of these provisions contain concepts foreign to Australian law or are based on legal or judicial structures that do not exist in Australia. Nevertheless, many other areas of the *ICWA* are less easily imported. The three most difficult concern reservation lands, tribal membership, and tribal jurisdiction.

### 1. Reservations

Many of the *ICWA*'s provisions protect a tribe's sovereign right to make decisions concerning the care and welfare of its members, particularly when those members reside within the boundaries of the tribe's reservation.<sup>100</sup> Indigenous communities in Australia do not enjoy

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<sup>98</sup> By itself, the ACPP has had only limited success. However, as part of an Australian *ICWA*, it should have greater impact. See Part IV, *above*, for a discussion on the creation of Indigenous tribunals to implement the *Act*.

<sup>99</sup> 25 USC § 1912(d).

<sup>100</sup> The US Supreme Court's definition of "Indian reservation" is land "validly set apart for the use of the Indians as such, under the superintendence of the government." *United States v Pelican*, 232 US 442 (1914) at 449. Under the *ICWA*, tribes have exclusive jurisdiction to determine the care of custody of a child "who resides or is domiciled" on a reservation. See 25 USC § 1911(a).

recognized sovereignty or reservations of land over which they may exercise sovereignty.<sup>101</sup> This is potentially problematic because reservation boundaries often determine whether a tribal or state court has the authority to determine the custody of an Indian child under the ICWA. However, it is well-established that reservation boundaries are not perfectly aligned with the boundaries of tribal sovereignty.<sup>102</sup> Moreover, this is particularly true with regard to child custody cases. As an example, the US Supreme Court held in *Mississippi Band of Choctaw Indians v. Holyfield*, a tribe's right to exert exclusive jurisdiction over an Indian child-custody case is not limited to instances where an Indian child is born or physically

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<sup>101</sup> See Leon Terrill, "Converting Aboriginal and Torres Strait Islander Land in Queensland into Ordinary Freehold" (2015) 37:4 Sydney L Rev 519 at 521. Terrill explains that Indigenous people own 22.4 percent of the land in Australia, including approximately 45 percent of the landmass in the Northern Territory. But, "[n]either statutory land rights nor native title convey any form of jurisdictional authority, in the way that reserve land in North America does." *Ibid* at 533. Indigenous ownership does come with certain additional rights, however, these mostly relate to "control over exploration and mining and additional protection from compulsory acquisition." *Ibid*.

<sup>102</sup> Tribal sovereignty may be limited within reservation boundaries. See e.g. *Montana v United States*, 450 US 544 (1981) (holding that the tribe lacked jurisdiction to regulate the hunting and fishing of non-Indians within the reservation's boundaries). See also *Oliphant*, *supra* note 63 at 212 (holding that tribes cannot criminally prosecute non-Indians even for crimes committed within reservation boundaries). In addition, some have suggested that tribal jurisdiction may extend beyond the reservation boundaries, particularly with regard to tribal children. See e.g. Patrice H Kunesh, "Borders beyond Borders - Protecting Essential Tribal Relations off Reservation under the Indian Child Welfare Act" (2007) 42:1 New Eng L Rev 15 at 53-57 (arguing that there should not be any fixed boundaries delimiting tribal jurisdiction over Indian children who are wards of the tribal court).



residing on the reservation.<sup>103</sup> The *Holyfield* Court recognized that the *ICWA* was written to protect the rights of tribes and tribal families and to do so, it must be able to reach outside the reservation boundaries in certain instances.<sup>104</sup>

The determinative factor when faced with questions of the *ICWA*'s applicability is a child's tribal citizenship or eligibility for tribal citizenship, not their physical presence on the reservation. Consequently, Australia's lack of defined Indigenous lands akin to Indian reservations should not prove a significant impediment to the importation of *ICWA* type legislation. However, the issue of how to translate the provisions relying on tribal membership may prove a bit trickier.

## 2. Membership

The *ICWA* only applies to *Indian children*, a term defined as children who are enrolled members of an Indian tribe or eligible for enrollment.<sup>105</sup> As quasi-sovereign entities, American Indian tribes have the inherent power to

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<sup>103</sup> See *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30 (1989) (finding that the Indian children were still "domiciled" on the reservation despite the fact that their mother had left the reservation to give birth) [*Holyfield*].

<sup>104</sup> Specifically, the Court held that despite the fact the mother had physically left the reservation to give birth, she and the children were domiciliaries and thus the tribe had exclusive jurisdiction to determine the adoption petition for her children. See *ibid* at 48.

<sup>105</sup> See 25 USC § 1903(4) (defining *Indian child* to mean "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe").

determine their membership free from federal or state interference.<sup>106</sup> As a result, nearly every federally recognized tribe has established clear enrollment criteria.<sup>107</sup> They also typically compile detailed membership rolls and have genealogy documents covering more than a century.<sup>108</sup> Consequently, the question of whether a particular child is covered by the *ICWA* is typically easy to determine.<sup>109</sup> However, that is not to

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<sup>106</sup> See *Santa Clara Pueblo v Martinez*, 436 US 49 (1978) [*Martinez*].

<sup>107</sup> This membership criteria can vary widely from tribe to tribe. See Rebecca Tsosie, “Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination” (2010) 15:1 *UCLA J Intl L & Foreign Aff* 187 at 219–20. Tsosie states that “[s]ome tribes require that the parents be domiciled on the reservation at the time of the child’s birth. Some tribes require lineal descendency from a male member, or alternately, from a female member. This last requirement may reflect a traditional notion of membership based on patrilineal or matrilineal descent.”

<sup>108</sup> See Addie C Rolnick, “Tribal Criminal Jurisdiction Beyond Citizenship and Blood” (2015) 39:2 *Am Indian L Rev* 337 (noting that almost all tribes have “adopted formal enrollment criteria and document enrollment via certificates or lists of members” at 380). See also Jessica A Clarke, “Identity and Form” (2015) 103:4 *Cal L Rev* 747 (noting that “[m]any base rolls were determined by a federally authorized census of tribal members, taken around the turn of the twentieth century” at 803).

<sup>109</sup> See e.g. *Adoptive Couple v Baby Girl*, 731 SE (2d) 550 (SC Sup Ct 2012) [*Adoptive Couple*]. In that case, there were difficulties determining the child’s eligibility for membership, but this was due to a misspelling of the father’s name and inaccurate birthdate in the adoption attorney’s submission to the tribe rather than any unclear membership criteria on the part of the tribe. Moreover, these inaccuracies may have been intentional. See *ibid* at 554. Today, most controversy surrounding membership tends to focus on challenges to tribal enrollment criteria given that enrollment determines a host of

suggest that tribal membership determinations in the United States are without problems.

Tribal membership rolls grew out of lists compiled by US government officials as a means to determine and limit who would be entitled to tribal money and property. The historic lists were often inaccurate and many excluded large numbers of individuals, who should have been designated as tribal members.<sup>110</sup> In addition, there are

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significant benefits. As a result, there have been many legal challenges filed when tribes have changed enrollment criteria and thus “disenrolled” some portion of their membership. See Joanne Barker, *Native Acts: Law, Recognition, and Cultural Authenticity* (Durham, NC: Duke University Press, 2011) (stating that “[s]pecific rights that issue from [enrolled] membership include voting in tribal elections; holding tribal office; sharing in tribal revenue; the use of tribal lands and natural resources. . . and housing, health care, and education” at 82). See also *Las Vegas Tribe of Paiute Indians v Phebus*, 5 F Supp (3d) 1221 (D Nev 2014) (involving a tribal member involuntarily disenrolled as a result of an internal review of enrollment criteria); *Brackeen v Zinke*, 338 F Supp (3d) 514 (ND Tex 2018) [*Brackeen*] (*sub nom Brackeen v Bernhardt*), rev’d 937 F (3d) 406 (5th Cir 2019), reh’g en banc granted 942 F (3d) 287 (5th Cir 2019). In that case, the issue was not whether the child was eligible for tribal membership but whether, regardless of membership, the Act was unconstitutional. See *ibid* (“A.L.M. is an Indian child under the ICWA and the Final Rule because he is eligible for membership in an Indian tribe—his biological mother is an enrolled member of the Navajo Nation and his biological father is an enrolled member of the Cherokee Nation” at 525).

<sup>110</sup> See Rolnick, *supra* note 108 (“[i]t is difficult to tell whether tribes would have adopted these descent requirements if the federal government had not first refused to recognize anyone as Indian who did not have a sufficient degree of Indian blood” at 431). The controversy over the Cherokee Freeman also highlights this problem. Many of the Freeman likely had Indian blood but we characterized them as “black” based on the racist “one drop” policy of the time. See

entire tribes that are historically, culturally, and genetically “Indian”, yet, because these tribes did not have official dealings with the US government during the colonial or revolutionary period, they lack a recognized federal–tribal relationship and, thus, are ineligible for the benefits of the ICWA or most other federal Indian legislation.<sup>111</sup>

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Cody McBride, “Placing a Limiting Principle on Federal Monetary Influence of Tribes” (2015) 103:2 Cal L Rev 387 (“the rolls were wildly inaccurate, and it is unclear how many people with Cherokee blood were listed on the non-blood rolls simply due to their African American appearance” at 405).

<sup>111</sup> See Mark D Myers, “Federal Recognition of Indian Tribes in the United States” (2001) 12:2 Stan L & Pol’y Rev 271 at 274:

There are many reasons a tribe might remain unrecognized. In some cases, entire tribal groups were never recognized due to their small size or the fact that that they never had significant dealings with the U.S. government. Many of these tribes never made war on the U.S., or they reached agreements only with the British crown or colonial governments. The AIPRC’s final report to Congress identified a variety of “historical accidents” that seem to explain why some tribes have not been federally recognized...

The federal definition of “Indian” is complicated and while most federal statutes require membership eligibility some do not. For example, the *Indian Health Care Improvement Act of 1976*, 25 USC §1601ff covers members of terminated and state-recognized tribes and descendants of members of such tribes, in addition to members of federally recognized tribes. See e.g. Margo S Brownell, “Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law” (2001) 34:1 U Mich JL Reform 275 (describing the nuances of federal laws based on different definitions of “Indian” at 282). See also Sharon O’Brien, “Tribes and Indians: With Whom Does the United States Maintain a Relationship?” (1991) 66:5 Notre Dame

Unlike the US government, Australia did not compile detailed membership or census rolls. Consequently, it could be difficult for Aboriginal and Torres Strait Islander communities to create membership criteria based on documented, historic descent. However, this lack of record keeping may actually be a benefit.<sup>112</sup> As mentioned above, in the US, reliance on historic membership lists has created a system in which tribal membership is often determined in ways that can be underinclusive and even unjust.<sup>113</sup> More importantly, although this historic connection to a federal–tribal relationship has become a legal requirement for all federal

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L Rev 1461 (discussing laws that apply based on blood quantum at 1484).

<sup>112</sup> See notes 116–119 and accompanying body text, below, for a discussion of the three-part aboriginality test.

<sup>113</sup> A federally recognized tribe is one which has a government-to-government relationship with the United States. However, there are many Indian tribes that do not enjoy this relationship. Some of these tribes have state recognition which entitles them to certain state rights, but many have neither state nor federal recognition and, therefore, are not entitled to any special rights. See e.g. Rebecca Tsosie, “Tribal Data Governance and Informational Privacy: Constructing ‘Indigenous Data Sovereignty’” (2019) 80 Mont L Rev 229 at 239 (noting “many Indigenous groups are not protected by the federal trust responsibility, such as state-recognized tribes that lack federal recognition and non-recognized tribes that seek federal and/or state recognition. Indigenous peoples who lack federal recognition also lack the ability to make laws and apply them to a trust territory. They are also unlikely to have the authority to protect the interests of tribal members to the extent that these interests are separate and distinct from the interests of all citizens (such as privacy) and assuming that the federal or state government is unwilling to extend the rules that are applicable to federally-recognized tribal governments.”)

laws pertaining to Indian people in the United States, it is otherwise irrelevant to goals of the *ICWA*.

The purpose of the *ICWA* is to protect modern day connections between an Indian child and their family and tribal community.<sup>114</sup> Consequently, when considering the application of *ICWA*-type legislation to Australian Indigenous groups, documentary proof of a historic connection to a particular ancestor should be unimportant. What matters is that a modern day Aboriginal or Torres Strait Islander community can demonstrate that the child or their parent is a part of that community.

Consequently, the difficulty in translating the applicability provisions of the *ICWA* to the Australian context is not whether a particular Aboriginal or Torres Strait Islander community can prove the child's historic connection to their community but rather, whether their present-day membership determinations will be recognized as legally valid.

For American Indian tribes, the right to set membership criteria free from government interference and

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<sup>114</sup> Simply having an Indian ancestor is not enough for *ICWA* to apply. *ICWA* requires a much more recent connection in the form of membership or eligibility for membership of the Indian child which typically means at least one parent is a member of a recognized Indian tribe. See 25 USC § 1901. See also Kevin Noble Maillard, "The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law" (2007) 12:2 Mich J Race & L 351 at 381 describing the common occurrence of Americans who claim to have an "Indian Princess Grandmother" [which] does not assert a commonality of interests with a pan-Native community. Rather, it announces a connection to an ambiguity of indigenosity that is more historic than personal."

control is well-established. It is recognized as part of the inherent sovereignty of Indian tribes.<sup>115</sup> In Australia, the right to define Aboriginal and Torres Strait Islander membership has been partially delegated to these communities through the adoption of the *three-part definition* which states “[a]n Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he (she) lives.”<sup>116</sup> Although this definition gives some control to Indigenous groups to define their membership,<sup>117</sup>

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<sup>115</sup> See *Martinez*, *supra* note 106 (finding the tribe had the ability to set membership criteria based on otherwise unconstitutional gender distinctions because membership determinations were a core aspect of tribal sovereignty with which the federal government could not interfere).

<sup>116</sup> Austl, Commonwealth, Department of Aboriginal Affairs, *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders* (Canberra, 1981), cited in Austl, Commonwealth, *The Definition of Aboriginality* (Research Note 18, 2000–01) by John Gardiner-Garden (5 December 2000) at 1. Interestingly, this is also the same test used to determine Métis membership in Canada. See *R v Powley*, 2003 SCC 43.

<sup>117</sup> See e.g. *Gibbs v Capewell*, [1995] FCA 1048 at para 21 [*Gibbs*]:

Aboriginal communal recognition will always be important, when it exists, as indicating the appropriateness of describing the person in question as an “Aboriginal person”. Proof of communal recognition as an Aboriginal may, given the difficulties of proof of Aboriginal descent flowing from, among other things, the lack of written family records, be the best evidence available of proof of Aboriginal descent. While it may not be necessary to enable a person to claim the status of an “Aboriginal person” for the purposes of the Act in a particular

the interpretation of the three-part test and in particular, the weight to be given to each of the three criteria typically remains with the Commonwealth.<sup>118</sup> Consequently, it is the government and not the Aboriginal or Torres Strait Islander community that gets the ultimate say in membership determinations.<sup>119</sup>

Having the government define Aboriginal and Torres Strait Islander community membership for purposes of an Australian ICWA is potentially problematic because it would almost certainly limit the scope and protections such an Act.<sup>120</sup> Nevertheless, even if the government

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case, such recognition may, if it exists, also provide evidence confirmatory of the genuineness of that person's identification as an Aboriginal.

<sup>118</sup> See e.g. *ibid* (the court stated "where a person has only a small degree of Aboriginal descent, either genuine self-identification as Aboriginal alone or Aboriginal communal recognition as such by itself may suffice, according to the circumstances" at para 20).

<sup>119</sup> The importance of Aboriginal membership designation recently gained national attention in *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia*, [2020] HCA 3 in which two Aboriginal, non-citizen men were ordered deported but challenged the Australian government's right to deport persons who were members of an Aboriginal community. See Helen Davidson, "Citizenship Test: Court to Decide whether Indigenous People can be Deported from Australia", *The Guardian* (3 December 2019), online: <[www.theguardian.com/australia-news/2019/dec/04/citizenship-test-court-to-decide-whether-indigenous-people-can-be-deported-from-australia](http://www.theguardian.com/australia-news/2019/dec/04/citizenship-test-court-to-decide-whether-indigenous-people-can-be-deported-from-australia)>.

<sup>120</sup> For example, the justices' questioning during oral arguments at the US Supreme Court for *Adoptive Couple v Baby Girl* demonstrated that many had issues with the child's designation as Cherokee and would have limited eligibility for membership if possible. These justices



dictated a less inclusive set of membership criteria than Indigenous communities might desire, this would not negate the overall benefits of an Australian *ICWA*. The Act and its protections would still apply to all the children and families that did meet this definition. The most important question, then, is what court or courts will be applying to these protections.

Many of the *ICWA*'s most critical protections involve tribal courts and tribal decision-making. However, Indigenous communities in Australia do not currently have their own courts or the right to create such courts.<sup>121</sup>

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asked many questions designed to highlight, question, or target the Indian child's blood quantum as a basis for disqualifying her from eligibility for Cherokee Nation citizenship. For example, Chief Justice Roberts inquired:

If—if you had a tribe, is there at all a threshold before you can call, under the statute, a child an “Indian child”? 3/256ths? And what if the tribe—what if you had a tribe with a zero percent blood requirement? They're open for, you know, people who want to apply, who think culturally they're a Cherokee or—or any number of fundamentally accepted conversions.

See *Adoptive Couple v Baby Girl*, 570 US 637 (2013) [*Baby Girl*] (Oral argument at 38–39). The fear of “whites” claiming to be Indigenous has been repeatedly cited as a potential problem with the “three-part test” and a definition of aboriginality based on community recognition. See e.g. Rhiannon Shine, “Claiming Aboriginality, Have Tasmania's Indigenous Services Been ‘Swamped with White People’”, *ABC News* (30 June 2017), online: <[www.abc.net.au/news/2017-07-01/tasmanias-aboriginality-criteria-relaxation-affecting-services/8670254](http://www.abc.net.au/news/2017-07-01/tasmanias-aboriginality-criteria-relaxation-affecting-services/8670254)> (describing the controversy in Tasmania over relaxing the proof of descent requirement).

<sup>121</sup> In certain areas of Australia, courts have been created to be more responsive to Indigenous needs. These courts are often composed of

Therefore, in order for an Australian *ICWA* to be successful, the creation of Indigenous tribunals may be necessary.

#### IV. CREATING AUSTRALIAN *ICWA* COURTS

Arguably, the *ICWA*'s most important provisions are those recognising exclusive tribal court jurisdiction over removal and termination cases involving Indian children domiciled on a reservation and concurrent jurisdiction with the state courts over cases involving Indian children domiciled off the reservation.<sup>122</sup> These provisions rely on the existence of tribal courts and this creates a problem for the Act's implementation in Australia where there are no Indigenous tribunals similar to America's tribal courts.

##### A. TRIBAL DECISION-MAKING

As quasi-sovereigns, Indian tribes have the right to create their own laws and be governed by them. This means they have the right to create independent courts that can apply tribal law and operate free of most state or federal court

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Indigenous decisions makers, but they still operate within the Australian legal system and are created to apply Australian law, albeit in a culturally sensitive way. See Lorana Bartels, "Indigenous-Specific Court Initiatives to Support Indigenous Defendants, Victims and Witnesses", *Indigenous Justice Clearinghouse* (Brief No 17) (April 2015), online: <[www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/rb17-indigenous-specific-courts-bartels-2015-ijc-webv2.v1.pdf](http://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/rb17-indigenous-specific-courts-bartels-2015-ijc-webv2.v1.pdf)>.

<sup>122</sup> See 25 USC § 1911(a), (b) (regarding Indian tribe jurisdiction over Indian child custody proceedings).

review.<sup>123</sup> In child custody cases, this separation from state and federal control provides Indian families with strong protections from non-Indian bias and helps ensure Indian families are judged according to the norms and values of their community. In addition, this separation also allows tribal courts to operate outside a Western judicial model

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<sup>123</sup> The one exception is with regard to tribal court jurisdiction. Federal courts may not review the merits of tribal court decisions. However, they do have the right to review and potentially overturn tribal court determinations regarding their own jurisdiction. Still, even jurisdictional challenges must first be heard in tribal court and may only be challenged in federal court after tribal court remedies have been exhausted. See *Iowa Mut Ins Co v LaPlante*, 480 US 9 at 19 (1987) asserting that federal courts may not review the merits of tribal court decisions: “Unless a federal court determines that the Tribal Court lacked jurisdiction . . . proper deference to the tribal court system precludes relitigating of issues raised by the [tribal members’] bad-faith claim and resolved in the Tribal Courts.” The US Supreme Court case, *Mississippi Band of Choctaw Indians v Holyfield* challenged tribal court jurisdiction under ICWA. The challenge in *Holyfield* was denied. See *Holyfield*, *supra* note 103. However, state assertions of jurisdiction in ICWA cases may be challenged in federal court and have often been overturned. Federal courts have held that a state’s refusal to enforce ICWA creates a federal question that may be heard in federal court. See *Native Village of Venetie IRA Council v Alaska*, 944 F (2d) 548 (9th Cir 1991) holding that federal courts in the 9th Circuit can be used to enforce the provisions of ICWA. See also *United States v Lopez*, 2012 WL 6629601 at 6 (DSD 2012) requiring a non-Indian father seeking to challenge tribal court’s jurisdiction under § 1914 to first raise his claim in tribal court. See also BJ Jones, “The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts” (1997) 73:3 NDL Rev 395 (noting that “[a] party could also challenge a state court’s decree not to transfer jurisdiction over a proceeding to a tribal court based on the best interest of the Indian child, as this is clearly covered by § 1911(b)” at 432).

and make decisions in ways that reflect Indigenous values and norms.

An Australian *ICWA* could include provisions establishing Indigenous tribunals with the authority to enforce the Act and make child custody determinations. However, because the power to create such courts would need to be delegated by the Commonwealth, these tribunals could not have the independence of tribal courts. Instead, they would remain subject to government oversight and influence. In the past, similar forms of government supervision have impeded attempts to increase Indigenous self-determination in Australia. The history of the Australian and Torres Strait Islander Commission (ATSIC or the Commission) is particularly informative and may demonstrate the steps needed to ensure that government supervision of Indigenous decision-making under an Australian *ICWA* does not become similarly detrimental.

## **B. LESSONS FROM THE ATSIC**

The ATSIC was created in 1989 to provide Indigenous people in Australia with a voice in the federal government, particularly with respect to the issues affecting their communities.<sup>124</sup> From the start, one of the Commission's

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<sup>124</sup> See Larissa Behrendt, "Representative Structures—Lessons Learned from the ATSIC Era" (2009) 10 *J Indigenous Pol'y* J 35 at 36. Behrendt noted that:

The objects and function, when read together, established a framework of responsibilities that conferred to ATSIC the *primary role* of advising the Federal Government on any matters relating to Aboriginal and Torres Strait Islander peoples and for

weaknesses was that it operated within a Western political and administrative model alien to Indigenous family/clan/community structures. As one critic of the ATSIC explained, “We are always expected to change to fit into a [W]estern system and way of thinking. We have to compromise our history and language and still the government will refuse to listen to our needs. We are forced into fitting into these models.”<sup>125</sup> An Indigenous ICWA court based on delegated powers would be susceptible to similar criticisms. However, there were other, even more substantial problems with the structure of the ATSIC, and these difficulties also have significant implications for the effectiveness of an Australian ICWA and the Indigenous tribunals attempting to apply it.

### 1. Enforcement

The ATSIC was created to increase Aboriginal and Torres Strait self-determination, but the Commission had no independent power. This meant that its policy suggestions could be dismissed or ignored because it did not have the authority to ensure the cooperation of the Commonwealth,

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the oversight of all government effort in policy development and the provision of services to Aboriginal and Torres Strait Islander peoples.

<sup>125</sup> John Hannaford, Jackie Huggins & Bob Collins, Department of Immigration and Multicultural and Indigenous Affairs (Austl), *In the Hands of the Regions—A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission* (November 2003) at 31, online (pdf): <old.antarqld.org.au/pdf/ATSIC\_review\_report.pdf>.

State, and Territory governments.<sup>126</sup> The Commonwealth could have delegated the Commission the authority that it needed to ensure such cooperation, yet, it did not. This omission was due, in large part, to the fact that the relationship between the ATSIC and the Commonwealth was highly fraught and stemmed from the Commission's dual role within the Commonwealth.

## **2. Dual Loyalties**

Although the ATSIC included an elected branch, the Minister for Aboriginal Affairs remained at the top of the legislative structure with significant power over decisions made by the elected representatives. This resulted in tension between ATSIC's responsibilities to the Commonwealth and its duties to its Indigenous constituents.<sup>127</sup> This tension was especially pronounced

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<sup>126</sup> ATSIC did not have the power under s. 7 of the ATSIC Act to act in a specific coordinating role or ensure the cooperation of the Commonwealth, State, and Territory governments. See Tim Goodwin, "A New Partnership Based on Justice and Equity: A Legislative Structure for a National Indigenous Representative Body" (2009) 10 *J Indigenous Pol'y J* 2 (noting that "the first independent review of ATSIC broadly recommended that more power be shifted to regional councils and that ATSIC be given greater ability to develop more effective relationships with State and Territory governments through multilateral agreements" at 5).

<sup>127</sup> The combination of these roles created tension between its advocacy and service delivery obligations. Specifically, ATSIC was to be accountable to the federal government in its service delivery and monitoring role while its elected arm was to be accountable to its Indigenous constituency. See Angela Pratt, Department of Parliamentary Services, Parliamentary Library, Social Policy Group, Department of Immigration and Multicultural and Indigenous Affairs (Austl), "Make or Break? A Background to the ATSIC Changes and

when the ATSIC's strategies and policies conflicted with the federal government's positions<sup>128</sup> such as the Commission's focus on recognizing specific Aboriginal rights, a goal significantly different from the Commonwealth's policy of "practical reconciliation."<sup>129</sup>

The Commission wanted to increase Aboriginal self-determination while the government was primarily concerned with overcoming specific disadvantages facing Indigenous people.<sup>130</sup> Prime Minister John Howard (who

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the ATSIC Review", Current Issues Brief No 29 2002-03 (May 26, 2003), [online: <www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/CIB/cib0203/03cib29>](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03cib29).

- <sup>128</sup> See Goodwin, *supra* note 126 (explaining that the ATSIC had a mandate to formulate and implement programs for Indigenous Australians and to develop policy proposals at all levels but lacked the freedom to do this effectively at 22–23).
- <sup>129</sup> For a discussion of the government's policy of "practical" reconciliation, see Andrew Gunstone, "The Failure of the Howard Government's 'Practical' Reconciliation Policy", in Hurriyet Babacan & Narayan Gopalkrishnan, eds, *The Complexities of Racism: Proceedings of the Second International Conference on 'Racisms in the New World Order'* (University of the Sunshine Coast, 2008) 34.
- <sup>130</sup> See Behrendt, *supra* note 124 (noting "ATSIC's position had always been that the recognition and enjoyment of rights are required if any real, meaningful and sustainable progress is to be attained" at 37). The Commission also demonstrated its independence from the Commonwealth in several specific ways. For example, it aligned itself with regional land councils, rather than the Commonwealth, over proposed amendments to the *Native Title Act*. It produced its own report for the UN Committee of the Elimination of Racial Discrimination that was independent of the government's report, and it continued to seek a treaty between Indigenous and non-Indigenous Australians despite the Howard government's rejection of this idea.

was in office from 1996 to 2007) was one of the staunchest supporters of “practical reconciliation.” Consequently, the Commission was put in the untenable position of trying to protect and expand Indigenous rights while also seeking the approval of a government strongly opposed to such rights.<sup>131</sup> It was impossible.

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See Will Sanders, “Towards an Indigenous Order of Australian Government: Rethinking Self-Determination as Indigenous Affairs Policy” (Discussion Paper originally delivered at the *Rethinking Indigenous Self-Determination* conference at the University of Queensland, Brisbane, 2001), Discussion Paper No 230, 2002, Centre for Aboriginal Economic Policy Research (CAEPR), The Australian National University at 7–8, online (pdf): <caepi.cass.anu.edu.au/sites/default/files/docs/2002\_DP230\_0.pdf>.

- <sup>131</sup> Even before assuming the role of Prime Minister, Howard resisted the creation of the ATSIC, believing that it gave Indigenous peoples an undesirable “separate” status. In a 1989 parliamentary debate, Howard voiced these beliefs, stating:

I take the opportunity of saying again that if the Government wants to divide Australian against Australian, if it wants to create a black nation within the Australian nation, it should go ahead with its Aboriginal and Torres Strait Islander Commission (ATSIC) legislation. . . . The ATSIC legislation strikes at the heart of the unity of the Australian people. In the name of righting the wrongs done against Aboriginal people, the legislation adopts the misguided notion of believing that if one creates a parliament within the Australian community for Aboriginal people, one will solve and meet all of those problems.

See Commonwealth, House of Representatives, *Parliamentary Debates* (11 April 1989) at 1330, 1332 (Mr. John Howard, Bennelong, Leader of the Opposition), online (pdf):



Due to its support for Indigenous self-determination, the Commission never received the active backing of the Howard Government. This left it unable to effectively represent its Indigenous constituents and, ultimately, led to the Commission being declared a failure.<sup>132</sup> In 2004, the ATSIC was abolished, and its functions were transferred to the governments of the Commonwealth, states, and territories.

### **C. OVERCOMING THE WEAKNESS OF DELEGATED POWERS**

The history of the ATSIC demonstrates the limitations and precariousness of delegated Indigenous rights. The ATSIC was not given enough power to be effective; it lacked the necessary independence from government control; and it had little protection against its own dissolution.<sup>133</sup> However, these problems were not inherent to the ATSIC. Any Indigenous decision-making body relying on delegated powers could face similar problems.

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[parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/1989-04-11/toc\\_pdf/H%201989-04-11.pdf](http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/1989-04-11/toc_pdf/H%201989-04-11.pdf).

<sup>132</sup> ATSIC was tasked with fulfilling a number of different roles. It had regional councils which were elected bodies that were to represent the needs of their local communities and an administrative branch which was supposed to monitor the effectiveness of other agencies and to help develop programs and policies to help Aboriginal people. See generally Behrendt, *supra* note 124 discussing the difficulties that the ATSIC faced.

<sup>133</sup> The commission was abolished in 2004, and this marked the end of “representative structure at the national level chosen by Indigenous people” and a return to handpicked appointments. See Behrendt, *supra* note 124.

Recognizing this problem, recent Indigenous advocacy has focused on securing constitutional rights.

In 2017, over 250 Aboriginal and Torres Strait Islander people met at Uluru to present the Australian Parliament with the “Uluru Statement from the Heart”, a proposal to establish a constitutionally enshrined First Nations representative body that would provide a “Voice to Parliament” by enabling Indigenous Australians to elect representatives who would advise Parliament on policy affecting Indigenous peoples.<sup>134</sup>

Unfortunately, the Commonwealth’s reaction to the “statement from the heart” as well as continued calls for “the Voice”, demonstrate that opposition to Aboriginal and Torres Strait Islander separateness and sovereignty remains significant.<sup>135</sup> The Uluru Statement from the Heart received wide-spread public support yet, the Commonwealth government has, so far, refused to take action. In October 2017, Prime Minister Turnbull stated that the proposal was “neither desirable nor capable of winning acceptance in a referendum.”<sup>136</sup> Turnbull also described it as inconsistent with democratic principles because only Indigenous Australians would be able to be or elect

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<sup>134</sup> See Bridget Brennan, “Referendum Council Advises Government to Hold Vote on Indigenous ‘Voice to Parliament’”, *ABC News* (16 July 2017), online: <[www.abc.net.au/news/2017-07-17/referendum-council-advises-vote-on-indigenous-voice-parliament/8716242](http://www.abc.net.au/news/2017-07-17/referendum-council-advises-vote-on-indigenous-voice-parliament/8716242)>.

<sup>135</sup> See Part I discussing the long-standing Australian opposition to separate rights for Indigenous people.

<sup>136</sup> Calla Wahlquist, “Indigenous Voice Proposal ‘Not Desirable,’ Says Turnbull”, *The Guardian* (26 October 2017), online: <[www.theguardian.com/australia-news/2017/oct/26/indigenous-voice-proposal-not-desirable-says-turnbull](http://www.theguardian.com/australia-news/2017/oct/26/indigenous-voice-proposal-not-desirable-says-turnbull)>.

members of the representative body.<sup>137</sup> When Prime Minister Scott Morrison won the federal election, he promised to end the Commonwealth's opposition to the Uluru proposal and to recognize Indigenous Australians in the constitution. So far, this has not occurred. Despite his promises of change, Morrison has rejected enshrining an Indigenous "Voice to Parliament" in favor of more "pragmatic models."<sup>138</sup>

The failure of the ATSIC, and the Australian government's continuing opposition to Indigenous separateness suggests that the creation of Indigenous tribunals to implement an Australian *ICWA* would face significant challenges. Still, these obstacles are not insurmountable. An examination of the ATSIC's failures, as well as the current government's opposition to Aboriginal self-determination more generally, can be used to craft an Australian *ICWA* with the best chance of success.

### 1. Enforcement Power

The first major problem with the ATSIC was its lack of enforcement power.<sup>139</sup> If an Australian version of the *ICWA* were to be successful, it would need to include a

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<sup>137</sup> See *ibid.*

<sup>138</sup> Shahni Wellington, "Enshrined Voice to Parliament Ruled Out as a Referendum Option", *National Indigenous Television* (22 October 2019), online: <[www.sbs.com.au/nitv/article/2019/10/22/enshrined-voice-parliament-ruled-out-referendum-option](http://www.sbs.com.au/nitv/article/2019/10/22/enshrined-voice-parliament-ruled-out-referendum-option)>.

<sup>139</sup> One of the major criticisms of the ATSIC was that its ministerial advice "fell on deaf ears." See Thalia Anthony, "Learning from ATSIC", *ABC News* (5 January 2010, last modified 28 September 2010), online: <[www.abc.net.au/news/2010-01-06/27934](http://www.abc.net.au/news/2010-01-06/27934)>.

procedure for establishing Indigenous tribunals<sup>140</sup> and a method to ensure that they possessed the power to have their decisions enforced. Such tribunals could not be part of an independent judicial system like those existing on many Indian reservations. However, if they were created and housed within the current Australian court systems, they could have the same judicial powers as any other Australian court.<sup>141</sup> In addition, as judicial rather than administrative bodies, these proposed courts would have independence from executive control and, thus, they could avoid one of the major problems experienced by the ATSIC.<sup>142</sup>

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<sup>140</sup> Although many American Indian tribes have complex court systems, there are currently no Aboriginal or Torres Strait Islander equivalents, and these courts would need to be created. For example, although many Australian jurisdictions have Indigenous sentencing courts, these are not Indigenous controlled and they may not apply traditional or customary law or forms of punishment. See Kathleen Daly & Elena Marchetti, “Desistance and Indigenous Sentencing Courts”, forthcoming in *Northern Territory Law Journal*, online: <[www.griffith.edu.au/\\_\\_data/assets/pdf\\_file/0023/234428/2017-Daly-and-Marchetti-Desistance-and-indigenous-sentencing-courts-paper.pdf](http://www.griffith.edu.au/__data/assets/pdf_file/0023/234428/2017-Daly-and-Marchetti-Desistance-and-indigenous-sentencing-courts-paper.pdf)>.

<sup>141</sup> These Indigenous decision-makers would be exercising judicial functions as part of the judicial system and, thus, would not run afoul of *Brandy v Human Rights and Equal Employment Opportunity Commission*. See *Brandy v Human Rights and Equal Employment Opportunity Commission*, [1995] HCA 10 (requiring strict separation of judicial power from executive and legislative power).

<sup>142</sup> See Michael E Black, “The Federal Court of Australia: The First 30 Years—A Survey on the Occasion of Two Anniversaries” (2007) 31 *Melbourne U L Rev* 1017 at 1022 stating “[t]he point is that there have always been matters of special federal concern that the Parliament has determined should remain within the exclusive jurisdiction of a federal

These proposed Indigenous tribunals could be established as a new branch of the Federal Circuit Court or Family Court or, if the proposed merger of the Federal Circuit Court and Family Court occurs, as a division of this new Family Court system.<sup>143</sup> Another option would be to have these tribunals created by vesting judicial authority in designated Indigenous decision-makers. In Spring 2017, the Turnbull Government began trialing a program to have certain family law disputes determined by psychologists, social workers, or other non-lawyers.<sup>144</sup> It is possible that

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court, whether the High Court of Australia or a court created by the Parliament under Chapter III.”

<sup>143</sup> The merger was set to occur in early 2019, however, it is unclear if the necessary support will materialize. See Michaela Whitborn, “Family Court Dealt Fatal Blow Before Election”, *The Sydney Morning Herald* (4 April 2019), online: <[www.smh.com.au/national/family-court-merger-plan-dealt-fatal-blow-before-election-20190404-p51aoc.html](http://www.smh.com.au/national/family-court-merger-plan-dealt-fatal-blow-before-election-20190404-p51aoc.html)>. See also Matthew Doran, “Sweeping Changes to Family Court Announced as Broader Review of Strained System Continues”, *ABC News* (29 May 2018), online: <[www.abc.net.au/news/2018-05-30/sweeping-changes-to-family-court-as-broader-review-continues/9813434](http://www.abc.net.au/news/2018-05-30/sweeping-changes-to-family-court-as-broader-review-continues/9813434)>. Adding additional divisions to either of these court systems seems possible. Both the federal circuit court and family court were already previously divided. The federal circuit court was divided into the fair work and general divisions. Similarly, the family court was broken up into two divisions, the appellate and general divisions. See Catherine Caruana, Department of Social Services (Austl), “Round-up of Developments in Family Law”, *Family Matters* Issue No 83, Australian Institute of Family Studies (October 2009) at 52, online: <[aifs.gov.au/publications/family-matters/issue-83/family-law-update](http://aifs.gov.au/publications/family-matters/issue-83/family-law-update)>.

<sup>144</sup> “The pilot dispute-resolution project, which will involve parents appearing before multi-disciplinary panels without legal representation, is aimed at providing a quicker and less complex

this program could serve as an example of how judicial authority could be transferred to a panel of Indigenous decisions-makers. A particular advantage of this type of tribunal is that it would enable Indigenous decision-makers to operate outside of a traditional Western judicial setting.<sup>145</sup>

Ideally, the tribunals created to determine *ICWA* cases would be community-specific. There would be one tribunal for each Aboriginal or Torres Strait community consisting of decision-makers from that community. This would allow for community tailored decision-making, but

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alternative to the courts and will have input from experts other than lawyers.” It will also have limited rights of appeal. See Nicola Berkovic, “Family Law Could Bypass Judges in Plan Being Trialled by the Government”, *The Australian* (4 October 2017), online: <[www.theaustralian.com.au/business/legal-affairs/family-law-could-bypass-judges-in-plan-being-trialled-by-government/news-story/03083e9e2fac809d841e0f59ac3967aa](http://www.theaustralian.com.au/business/legal-affairs/family-law-could-bypass-judges-in-plan-being-trialled-by-government/news-story/03083e9e2fac809d841e0f59ac3967aa)>. See also Nicola Berkovic, “Psychologists ‘Better Placed than Judges’ to Decide Kids Custody”, *The Australian* (24 February 2018), online: <[www.theaustralian.com.au/business/legal-affairs/psychologists-better-placed-than-judges-to-decide-kids-custody/news-story/20b59114c6a31b9c16a4987c96523e7c](http://www.theaustralian.com.au/business/legal-affairs/psychologists-better-placed-than-judges-to-decide-kids-custody/news-story/20b59114c6a31b9c16a4987c96523e7c)> quoting Professor Patrick stating: “The idea that a recently appointed judge with a background in commercial law is better at deciding parenting cases than a multidisciplinary panel consisting of a very experienced family lawyer and psychologists, psychiatrists, or others with years of experience in the field needs to be challenged.”

<sup>145</sup> The panels are being promoted as a “fast, informal, non-adversarial dispute resolution mechanism.” See Lydia Campbell, Department of Parliamentary Services, Parliamentary Library, Research Branch (Austl), *Parenting Management Hearings, Budget Review 2017–18* (May 2017), online: <[www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/tp/BudgetReview201718/ParentingHearing](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/tp/BudgetReview201718/ParentingHearing)>.

it would also require the creation of numerous new courts. If the creation of so many new courts is not possible, an alternative would be the establishment of a smaller number of Indigenous courts, consisting of decision-makers from multiple communities within a specific geographic area. In the United States, a tribal court may only apply the law of its particular tribe.<sup>146</sup> Consequently, a court representing multiple tribes is not possible in the US; but in Australia, such a court would be possible. Australian Indigenous courts would apply Australian law and, thus, could also represent more than a single Indigenous community.

The benefit of creating Indigenous Australian courts is not in the application of Indigenous law. Rather, it is in the application of an Indigenous perspective and understanding to Australian law by a tribunal possessing the complete range of judicial powers.<sup>147</sup>

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<sup>146</sup> See generally John J Harte, “Validity of A State Court’s Exercise of Concurrent Jurisdiction over Civil Actions Arising in Indian Country: Application of the Indian Abstention Doctrine in State Court” (1997) 21 *Am Indian L Rev* 63 at 66–67 noting “[t]ribal court jurisdiction is limited through treaty provisions, federal statutes, and, in certain areas, as a result of the dependent status of Indian nations. Tribal court subject matter jurisdiction is also limited to those areas that are necessary to the protection of tribal self-government and continued control over internal relations.”

<sup>147</sup> Specifically, the benefit of Indigenous child welfare courts is that they are part of the Indigenous community and thus, able to approach child welfare cases with a better understanding of the needs and experiences of Aboriginal and Torres Strait Islander children and families. See e.g. Deirdre Howard-Wagner, “Child Wellbeing and Protection as a Regulatory System in the Neoliberal Age: Forms of Aboriginal Agency and Resistance Engaged to Confront the Challenges for Aboriginal

## 2. Lack of Independence

The second problem identified by the ATSIC experience was the organization's lack of independence from Commonwealth control.<sup>148</sup> Indigenous tribunals created to apply an Australian ICWA would be subject to similar governmental control and oversight. These courts would exercise delegated powers and, thus, their decisions would be subject to review and potential reversal by a non-Indigenous court. Consequently, their decisions would lack the finality of most US tribal court child placement decisions, and this appellate oversight is a potential weakness of these proposed tribunals. However, it may also have some advantages.

Instead of undermining Indigenous decision-making, appellate oversight has the potential to create a level of trust and cooperation between Indigenous and non-Indigenous decision-making bodies that is not possible

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People and Community-Based Aboriginal Organisations" (2015) 19 Austl Indig L Rev 88 at 92, noting:

Aboriginal organisations are better placed to [help Aboriginal families] based on their own experience, including the fact that community-based Aboriginal organisations are able to situate the Aboriginal child's well-being and care in a community-like setting, creating a modified kinship environment, and using cultural resources, to respond to the needs of the Aboriginal child and young person.

<sup>148</sup> See Anthony, *supra* note 139 suggesting that the success of any future version of ATSIC must "be measured by its capacity to develop independent and critical positions and the willingness of Governments to engage with these positions." See also Sanders, *supra* note 130 at 7–8 discussing ATSIC's struggles to maintain independence from Commonwealth control.



with the United States' sovereignty-based tribal courts. In the US, the *ICWA* treats state courts as hostile to tribal interests and limits their power over Indian children accordingly. Unfortunately, although this mandated separation between tribal and state courts is intended to protect tribal decision-making, it has also resulted in a climate of distrust that can reduce the effectiveness of the *ICWA*.

State courts often fear that tribal courts will not make the "correct" child custody decisions, and this concern can make them unwilling to cede jurisdiction to the tribe. *ICWA* exceptions like "existing Indian family"<sup>149</sup> and "best interest"<sup>150</sup> stem from such concerns. These exceptions assume that tribally chosen caregivers are less desirable than those chosen by a state court and that tribal assertions regarding the importance of cultural connections are overblown or untrue. These exceptions demonstrate that many state courts do not trust tribes to protect the best interests of their own children, and this is extremely problematic.

Australia's Indigenous tribunals would be subject to appellate review, but it is possible that this oversight could foster a level of trust and understanding that has never developed between tribal and state courts in the United States. Specifically, due to the necessity of

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<sup>149</sup> See Atwood, *supra* note 56 at 625 describing the existing Indian Family exception as being "used to deny transfer in cases in which the court determines that despite the child qualifying as an 'Indian child' under the Act, the *ICWA* is inapplicable because the court determines the child has not been removed from an 'existing Indian family.'"

<sup>150</sup> See Part V.B.2 of this article explaining the best-interests exception.

appellate review, an Australian *ICWA* has the potential to encourage communication and cooperation between the Indigenous courts and non-Indigenous courts. It could direct the appellate courts to view their role as nurturing and supporting Indigenous decision-making rather than policing it.

Lastly, as Part V will discuss in further detail, the availability of appellate review could also help reduce the public's distrust of Indigenous decision-making and thus avoid a problem that has proven a significant obstacle to *ICWA*'s acceptance in the United States.

### 3. Dissolution

The third problem that the ATSIIC faced was its vulnerability to dissolution. Every unpopular decision or recommendation that the Commission made threatened its future and the potential repercussions of offending the Commonwealth prevented the ATSIIC from effectively representing Indigenous interests.<sup>151</sup> The proposed *ICWA* tribunals could suffer the same flaw unless they are

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<sup>151</sup> In the end, it was the Commission's challenges to the federal government that led to its dissolution. See e.g. Virginia Falk, "The Rise and Fall of ATSIIC: A Personal Opinion" (2004) 8:4 *Australian Indigenous L Rep* 17 at 17–19 (arguing that the decision "to abolish ATSIIC [was] based on the fundamental idea that a dissident voice is better silenced. ATSIIC consistently and audibly challenged the Federal Government over a number of major Aboriginal issues, including the Amendments of the *Native Title Act 1998*, and apology to the Stolen Generations, the introduction of mandatory sentencing laws and the formation of a Treaty between Aboriginal nation groups and the Federal Government. Its failure to follow the 'black bureaucracy script' made ATSIIC a prime target for dismantling"). See also *supra* note 133 (discussing the dissolution of ATSIIC).

afforded a comparable level of stability as that enjoyed by other Australian courts.

Specifically, these tribunals must be afforded the ability to issue unpopular decisions without fear of dissolution or other retribution. Their decisions may be reversed by an appellate court but only if reversal can be legally justified. Any proposed Indigenous child protection legislation should, as much as possible, include assurances that Indigenous decision-making will be protected against government retaliation and withdrawal of support. These decision-makers need the freedom to issue potentially controversial decisions without worrying that such decisions will result in a diminishment of their power.

#### **V. THE BENEFITS OF A DELEGATED *ICWA***

For reasons previously discussed in Part II Section D, an *ICWA* based on recognized sovereignty provides more robust and comprehensive protections than one based on delegated power. Nevertheless, if the above recommendations and safeguards are implemented, the benefits of a delegated *ICWA* remain significant. Such legislation would increase Indigenous control over child welfare decisions, reduce the unjustified breakup of Indigenous families, and keep Aboriginal and Torres Strait Islander children connected to their communities and culture. In addition, a delegated *ICWA* has the added benefit of achieving these results in a way that is potentially less controversial than the United States' sovereignty-based approach.

## A. ABORIGINAL CONTROL

In the United States, the *ICWA* reduces the unjustified removal of Indian children and seeks to keep these children connected to their tribes and culture. The Act does this by increasing tribal court control over Indian child welfare cases and by limiting state discretion in the cases that remain in state court. The Australian Indigenous tribunals proposed in this article would not possess the exclusive jurisdiction exercised by American tribal courts, and no Indigenous child welfare decisions could be insulated from non-Indigenous review and potential reversal. Nevertheless, creating Indigenous tribunals to serve as the initial decision-makers in Indigenous child welfare cases would be a big step towards increasing Indigenous control over these decisions.

In other contexts, increasing Indigenous control over family protection and welfare decisions has been shown to be highly beneficial. For example, the AbSec report, *Aboriginal Parenting Programs: Review of Case Studies*, noted the particular effectiveness of “Aboriginal-led practice in the provision of parenting supports.”<sup>152</sup> According to the report, using Aboriginal service providers “strengthened community trust in the service and supported the engagement and ongoing participation of Aboriginal families.”<sup>153</sup> Similarly, prenatal and infant care

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<sup>152</sup> See Aboriginal Child, Family and Community Care State Secretariat (AbSec), *Aboriginal Parenting Programs: Review of Case Studies* (January 2018) at 4, online (pdf): <[absec.org.au/~abab2882/images/downloads/AbSec-Aboriginal-Parenting-Support-Report-Final-January-2018.pdf](http://absec.org.au/~abab2882/images/downloads/AbSec-Aboriginal-Parenting-Support-Report-Final-January-2018.pdf)>.

<sup>153</sup> *Ibid* at 27.

provided by Aboriginal organizations has also been shown to significantly improve outcomes for pregnant Indigenous women and their children.<sup>154</sup> Consequently, it is likely that comparable benefits of increased trust and engagement would attach to child welfare determinations made by Indigenous decision-makers pursuant to an Australian *ICWA*.

In addition, giving initial control over child welfare decisions to Indigenous tribunals should also help reduce the racial biases and cultural misunderstandings that have so often affected these types of cases. Aboriginal and Torres Strait Islander decision-makers will be more familiar with the cultural practices of their communities than their non-Indigenous counterparts, and this should enable them to better evaluate the effects of child-rearing practices and beliefs that differ from Western norms. Moreover, although the decisions of these Indigenous tribunals could be reversed on appeal, it is likely that such reversals will become less frequent as the non-Indigenous courts become more familiar and comfortable with Indigenous decision-making.

## **B. CONTROVERSY AND OPPOSITION**

In the US, tribes and their advocates are strong supporters of the *ICWA*. Nonetheless, the Act is controversial, and opposition appears to be growing. In fact, there is the real possibility that this opposition may soon result in significant limitations on the *ICWA*'s protections and

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<sup>154</sup> See Esther Han, "Tailored Care for Pregnant Indigenous Women Improves Outcomes", *The Sydney Morning Herald* (2 June 2018), online: <[www.smh.com.au/national/nsw/tailored-care-for-pregnant-indigenous-women-improving-outcomes-20180531-p4zikx.html](http://www.smh.com.au/national/nsw/tailored-care-for-pregnant-indigenous-women-improving-outcomes-20180531-p4zikx.html)>.

possibly even its repeal. Three recent developments demonstrate the growing divide between the ICWA's supporters and its critics. The first is the Supreme Court case, *Adoptive Couple v. Baby Girl*;<sup>155</sup> the second is the reactions to the codification of the Bureau of Indian Affairs's (BIA) ICWA guidelines, and the third is the recent federal district court case, *Brackeen v. Zinke*.<sup>156</sup> These three events all demonstrate the vulnerability of the ICWA in face of mounting criticisms that the Act harms Indian children instead of helping them.

### 1. *Baby Girl*

*Baby Girl* involved a custody battle between a Cherokee birth father and a non-Indian adoptive couple. Immediately after Baby Girl's birth, her mother placed her for adoption with the adoptive couple, the Cappobiancos, who named her Veronica. Veronica's birth mother did not inform the father of the adoption but when he found out, he objected and immediately challenged it as a violation of the ICWA. Specifically, the provisions limiting a state court's ability to terminate an Indian parent's custody rights and mandating that Indian children are placed with Indian caregivers before non-Indian families may be considered. Neither of these protections were applied to Baby Girl's adoption and, thus, the case appeared to be a clear violation

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<sup>155</sup> See *Baby Girl*, *supra* note 120.

<sup>156</sup> See *Brackeen*, *supra* note 109. *Brackeen* was subsequently reversed by a panel of the Fifth Circuit Court of Appeals, and is now before the Fifth Circuit en banc. See *Brackeen v Bernhardt*, 937 F (3d) 406 (5th Cir 2019); *Brackeen v Bernhardt*, 942 F (3d) 287 (5th Cir 2019). Regardless of the ultimate outcome of this case, it is clear that the ICWA and the rights it protects are vulnerable to attack.

of the *ICWA*. Nevertheless, when the case reached the Supreme Court, the father lost.

*Baby Girl* was first heard by a South Carolina state family court which held that Veronica's adoption violated the *ICWA* and that she must be returned to her father's custody. This decision was then affirmed by the South Carolina Court of Appeals and the South Carolina Supreme Court. Under the language of the *ICWA*, the decision to return Veronica to her father appeared legally correct yet, it created immense opposition. There were protests and rallies, national television appearances by the adoptive couple, and, eventually, an appeal to the US Supreme Court. The rallying cry of the protesters was, "Save Veronica."<sup>157</sup> These protesters believed it was in Veronica's best interest to remain with the adoptive couple. Consequently, they concluded that if the *ICWA* mandated her removal, then the Act was harmful to her and any other children like her.

When the *Baby Girl* case reached the Supreme Court, numerous advocacy organizations submitted *amicus*

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<sup>157</sup> See "Save Veronica", online: <[www.saveveronica.org/](http://www.saveveronica.org/)> (last visited July 8, 2019). See also Allyson Bird, "Broken Home: The Save Veronica Story", *Charleston City Paper* (26 Sept 2012), online: <[www.charlestoncitypaper.com/charleston/broken-home/Content?oid=4185523](http://www.charlestoncitypaper.com/charleston/broken-home/Content?oid=4185523)>; "Veronica May Not Be Saved", *ABC News* (26 July 2012), online: <[www.abcnews4.com/story/19121303/veronica-may-not-be-saved](http://www.abcnews4.com/story/19121303/veronica-may-not-be-saved)>; "Local Repair Shop Joins Fight to 'Save Veronica'", *ABC News* (6 Jan 2012), online: <[www.abcnews4.com/story/16465999/emily-working-on-this](http://www.abcnews4.com/story/16465999/emily-working-on-this)>; Haley Hernandez, "'Save Veronica' Effort Holds Candlelight Event in Charleston", *Count on 2 News* (28 Jan 2012), online: <[www2.counton2.com/news/2012/jan/28/3/save-veronica-effort-hold-candlelight-event-charle-ar-3131169/](http://www2.counton2.com/news/2012/jan/28/3/save-veronica-effort-hold-candlelight-event-charle-ar-3131169/)>.

(friend-of-the-court) briefs, in which they attacked the Act as a dangerous, race-based law that harmed Indian children and should be abolished. These arguments appear to have influenced the Court's decision.<sup>158</sup> As Professor Bethany Berger notes in her article, *In the Name of the Child*:

Most striking in [*Baby Girl*] was the role of race. Before the U.S. Supreme Court, the [adoptive couple's] attorneys . . . argued that ICWA was unconstitutional, race-based legislation. . . . In the first line of the decision, the Court stated that "[t]his case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee." . . . [T]he statement was untrue on several levels and irrelevant to the legal issues in the case, but it was consistent with an effort that has existed since colonial times to erase Native peoples and their sovereignty by facilitating the assimilation and absorption of Native individuals.<sup>159</sup>

Although the Court did not specifically hold the Act was racially impermissible, it appears that the Court was highly sympathetic to these concerns.

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<sup>158</sup> However, the specific holding of the case was a convoluted and weakly supported interpretation of the Act's "continued custody" provision which the Court held did not apply to the birth father since he was never married to the birth mother and thus Baby Girl was never removed from his custody. See *Baby Girl*, *supra* note 120 at 641.

<sup>159</sup> Bethany R Berger, "In the Name of the Child: Race, Gender, and Economics in *Adoptive Couple v. Baby Girl*" (2015) 67 Fla L Rev 295 at 297–98.



The *Baby Girl* decision was a blow to the ICWA and its supporters, but the actual holding of the case was relatively narrow. It only applied to the relatively small set of ICWA cases in which an Indian child is placed for adoption without ever having been within the “custody” of the objecting Indian parent.<sup>160</sup> However, more recent challenges to the Act pose much greater threats and demonstrate that the concerns articulated in the *Baby Girl* case, that ICWA harms Indian children, are still growing.

## **2. ICWA Exceptions and the Bureau of Indian Affairs Response**

*Baby Girl* was the first time the US Supreme Court appeared highly receptive to the argument that the ICWA harms Indian children. However, there is a long history of state courts embracing these concerns and crafting exceptions to the Act as a result. Some of these exceptions, like the “existing Indian family exception” have largely disappeared.<sup>161</sup> Unfortunately, others, such as the “best interests” exception, remain widespread.

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<sup>160</sup> *Ibid* at 313–14.

<sup>161</sup> See *In re AJS*, 204 P (3d) 543 at 544 (Kan Sup Ct 2009) (overturning the exception and the case that originally created it). However, some scholars have argued that *Baby Girl* revived this exception. See e.g. Shawn L Murphy, “The Supreme Court’s Revitalization of the Dying ‘Existing Indian Family’ Exception” (2014) 46:3 McGeorge L Rev 629 at 647. See also Marcia A Zug, “The Real Impact of *Adoptive Couple v. Baby Girl*: The Existing Indian Family Doctrine Is Not Affirmed, but the Future of the ICWA’s Placement Preferences Is Jeopardized” (2014) 42:2 Cap U L Rev 327 (arguing *Baby Girl* did not affirm the EIF doctrine instead, “the Court found there was no Indian family because the father had no legal or physical relationship with his daughter, but not because he was not Indian enough” at 342).

The “best interests” exception is the state court response to the *ICWA*’s preference for tribal court decision-making<sup>162</sup> and its limitations on state court discretion. Courts use this exception when they wish to avoid transferring an Indian child custody case to a tribal court. The implication behind this exception is that tribal courts are less likely than state courts to make custody determinations that protect the best interest of the child.<sup>163</sup> State courts cannot overturn tribal court custody determinations and state welfare workers cannot enter a reservation to “check-up” on tribal children. Consequently, courts use the “best interest” exception as a way to get around the *ICWA*’s jurisdictional limitations and retain control over Indian child custody cases.

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<sup>162</sup> See Atwood, *supra* note 56 at 657–58 discussing the “perceived conflict between the goals of promoting tribal survival and the child’s interest in becoming or remaining a member of the tribal community, on the one hand, and that same child’s pressing interest in continuity of care.” See also *Holyfield*, *supra* note 103 at 50 (recognizing the possibility of a conflict between the desires of the tribe and those of individual tribal members).

<sup>163</sup> Despite the presumption of transfer in § 1911(b), the Act states that courts may refuse transfer upon a finding of “good cause” and courts have interpreted “good cause” to include their own ideas regarding what best interests means. See *Matter of Adoption of FH*, 851 P (2d) 1361 at 1363–64 (Alaska Sup Ct 1993) holding that the best interests of the child supports good cause to decline to follow *ICWA* placement preferences. See also *In the Matter of MEM*, 635 P (2d) 1313 (Mont Sup Ct 1981) finding best interests constituted good cause; *State of Arizona v Moya*, 667 P (2d) 234 (Ariz Ct App 1983) holding best interests of the child constitutes good cause; *In the Matter of Maricopa County Juvenile Action No JS-8287*, 828 P (2d) 1245 at 1251 (Ariz Ct App 1991) finding best interests applicable in determining good cause; *In the Matter of NL*, 754 P (2d) 863 at 869 (Okla Sup Ct 1988) finding child’s best interests supported good cause denial of transfer.

Not surprisingly, Indian child welfare advocates have long objected to the “best interests” exception and its assumption that tribal courts do not protect Indian children. As Professor Jeanne Carriere has written, “The notion that Native American tribal courts are more likely than state courts to neglect or inflict suffering on Native American children is grounded in suspicion, not in objective evidence.”<sup>164</sup> Professor Carriere is correct, nevertheless, this perception remains widespread.

Recently the BIA attempted to address these negative perceptions about tribal courts by eliminating the “best interest exception” and other *ICWA* workarounds through a set of binding regulations. According to the BIA, the inconsistent application of the *ICWA*<sup>165</sup> was frustrating

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<sup>164</sup> Jeanne Louise Carriere, “Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act” (1994) 79:3 Iowa L Rev 585 at 629. It should be noted that this objection is not limited to *ICWA* cases. It is common for non-Indians to object to tribal court jurisdiction based on a perceived fear of tribal justice systems as inherently unfair. See Marcia Zug, “Traditional Problems: How Tribal Same-Sex Marriage Bans Threaten Tribal Sovereignty” (2017) 43:4 Mitchell Hamline L Rev 761 at 793 discussing how fear of tribal justice influences objections to tribal court jurisdiction.

<sup>165</sup> See MacLachlan, *supra* note 22 (noting “the most important response to the inconsistent state court application of *ICWA* [are the] . . . new *ICWA* guidelines and revised rules” at 458).

Congress's intent.<sup>166</sup> The regulations<sup>167</sup> were intended to address the historic points of contention surrounding the ICWA and, thus, increase compliance with the Act.<sup>168</sup> In 2016, the regulations were enacted, but they have done little to stem the controversy surrounding the ICWA. In fact, the new regulations may have inflamed it. Now, state courts have fewer options to avoid applying the ICWA in individual cases and perhaps that is why attacks against the Act as a whole are gaining traction.

### **3. *Brackeen v. Zinke***

Increasingly, critics of the ICWA claim the entire Act needs to be revised or even eliminated. They argue that the Act impermissibly determines custody based on racial and cultural criteria with little regard for whether such placements benefit individual Indian children.<sup>169</sup> Shortly

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<sup>166</sup> See *Indian Child Welfare Act Proceedings Final Rule*, 81 Fed Reg 38778 (2016) (codified at 25 CFR § 23) at 38782. It reads “[f]or decades, various State courts and agencies have interpreted the Act in different, and sometimes conflicting, ways. This has resulted in different standards being applied to ICWA adjudications across the United States, contrary to Congress’s intent.”

<sup>167</sup> 25 CFR § 23 (2016).

<sup>168</sup> See *Indian Child Welfare Act Proceedings Final Rule*, *supra* note 166. Some of these changes include clarifications for transfers to tribal courts, the establishment of pre-trial procedures for ICWA cases, and defining key terms such as “active efforts,” “custody,” “Indian child,” and “parent.”

<sup>169</sup> See Suzette Brewer, “Indian Country Braces for Battle with Adoption Industry over ICWA Guidelines”, Donaldson Adoption Institute (30 March 2015), online: <[www.adoptioninstitute.org/news/indian-country-braces-for-battle-with-adoption-industry-over-icwa-guidelines/](http://www.adoptioninstitute.org/news/indian-country-braces-for-battle-with-adoption-industry-over-icwa-guidelines/)>. This article discusses opposition to the guidelines.

after the *Baby Girl* case was decided, these arguments began to appear in numerous suits challenging the *ICWA* as unconstitutional racial discrimination.<sup>170</sup> Initially, these lawsuits all failed.<sup>171</sup> However, in October 2018, in *Brackeen v. Zinke*,<sup>172</sup> a Texas district court accepted these arguments and found the *ICWA* unconstitutional. *Brackeen* was reversed by a panel of the Fifth Circuit and is now pending before the Fifth Circuit, en banc, yet regardless of how the case is ultimately decided, *Brackeen* marks a turning point in *ICWA* litigation. It was the first time a federal court declared the entire act unconstitutional.

*Brackeen* involved a non-Indian foster family seeking to adopt an Indian child in violation of the *ICWA*. According to the potential adoptive family, the Act was an unconstitutional, race-based statute not narrowly tailored enough to achieve Congress's stated interests without breaching the equal protection clause. Shockingly, the

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<sup>170</sup> The most concerted effort was the Goldwater class action which alleged that that the application of the Act to Indian children violated their equal protection rights. In March 2017, the Supreme Court denied certiorari in this case, but other challenges have been filed in South Carolina, Virginia, Oklahoma, and Minnesota. See Suzette Brewer, "ICWA: Goldwater Case Thrown Out of Federal Court", *Indian Country Today* (21 March 2017), online: <[newsmaven.io/indiancountrytoday/archive/icwa-goldwater-case-thrown-out-of-federal-court-\\_RAMRUiYHUiSp1ffZ4JROQ](http://newsmaven.io/indiancountrytoday/archive/icwa-goldwater-case-thrown-out-of-federal-court-_RAMRUiYHUiSp1ffZ4JROQ)>.

<sup>171</sup> See *AD v Washburn*, No CV-15-01259-PHX-NVM, 2016 WL 5464582 at 4–5 (D Ariz 2016) (arguing *ICWA* and the BIA guidelines are unconstitutional). See also "Challenging the Constitutionality of *ICWA*: *AD v Washburn*", *Goldwater Institute* (7 July 2015), online: <[goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/case/equal-protection-for-indian-children/](http://goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/case/equal-protection-for-indian-children/)> [*Goldwater Institute*].

<sup>172</sup> *Brackeen*, *supra* note 109.

*Brackeen* court agreed. It concluded that the *ICWA* treats Indian and non-Indian families substantially differently, that the treatment Indian children receive is harmful and that this different treatment renders the Act unconstitutional. Specifically, the court explained the *ICWA* harms Indian children by requiring “courts and agencies to apply the mandated placement preferences, regardless of the child’s best interest.” Like other recent *ICWA* challenges, the assumption underlying the *Brackeen* decision is that *ICWA* allows the child welfare system to treat Indian children differently and worse,<sup>173</sup> than non-Indian children.<sup>174</sup>

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<sup>173</sup> In *Baby Girl*, *supra* note 119, Justice Alito expressed similar concerns. He worried the Act might “dissuade some . . . from seeking to adopt Indian children,” which would “unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home . . . .” See *Baby Girl*, *supra* note 119 at 653–54. Justice Alito’s statement implies that the *ICWA* leaves Indian children vulnerable to the whims of the Indian parent and acts to delay their search for a stable home. See also Allison Krause Elder, “‘Indian’ as a Political Classification: Reading the Tribe Back into the Indian Child Welfare Act” (2018) 13:4 *NW JL & Soc Pol’y* 417 at 433 (discussing Alito’s concerns that the *ICWA* harms Indian children). Similarly, Timothy Sandefur, president of the Goldwater Institute refers to this as “the *ICWA* penalty box,” meaning the ways Indian children are harmed or “penalized for being Indian.” See *Goldwater Institute*, *supra* note 171. See also Homer H Clarke Jr, “Children and the Constitution” (1992) 1 *U Ill L Rev* 1 at 29 arguing that the placement preferences and “other provisions of the Act effectively give tribal political interests priority over the interests of Indian children where adoption is concerned.”

<sup>174</sup> The *Brackeen* decision demonstrates this belief by taking pains to emphasize the legal difference between how placements are required to occur under *ICWA* versus how they would proceed under respective state law. For example, in addition to objecting to the mandated

*Brackeen* was overturned by a three judge panel of the Fifth Circuit and is now before the Fifth Circuit en banc. It is likely that the reversal will be upheld. However, such a “win,” will not stop the attacks on the *ICWA*. In fact, even if the *Brackeen* reversal is affirmed by the US Supreme Court, *ICWA* challenges will likely continue and provide new opportunities for the Act to be gutted or even eliminated.<sup>175</sup> Consequently, although the protection of tribal court independence is an important benefit of the Act, it is one that also makes the *ICWA*’s future uncertain.

Under an Australian *ICWA*, Indigenous child custody decisions would occur within the current Australian judicial system. As a result, the controversy surrounding which court, state or tribal, best protects Indigenous children’s interests could be avoided. Under an Australian *ICWA*, non-Indigenous courts would retain appellate oversight of Indigenous decisions. If such a court believed an Indigenous tribunal issued a harmful or incorrect custody decision, they could reverse it. Consequently, this possibility of review and reversal

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preferences under *ICWA*, that according to the *Brackeen* court do not apply to non-Indian children under state law, the court also noted other differences such as if and when parties may intervene in a child custody proceeding, the length of time before voluntary relinquishment is permissible, and the length of time a final adoption decree may be subject to challenge. See *Brackeen, supra* note 109 at 529.

<sup>175</sup> The influence of the *Brackeen* decision is already being felt. Shortly after the case was decided, another Texas court placed a second Indian child (the sister of the child in the *Brackeen* case) with the Brackeens despite the fact she had Indian relatives ready and willing to take custody of her. See Jan Hoffman, “Who Can Adopt a Native American Child? A Texas Couple vs. 573 Tribes”, *The New York Times* (5 June 2019), online: <[www.nytimes.com/2019/06/05/health/navajo-children-custody-fight.html](http://www.nytimes.com/2019/06/05/health/navajo-children-custody-fight.html)>.

should enable a potential Australian *ICWA* to avoid the most contentious aspects of the US *ICWA*.<sup>176</sup>

### **C. ADDITIONAL BENEFITS OF APPELLATE REVIEW**

By reviewing Indigenous child welfare decisions, Australia's appellate courts would gain repeated exposure to Indigenous decision-making. Hopefully, over time, this familiarity with indigenous decisions will lead to a level of judicial and public trust in these decisions that has not materialized in the United States.

In the US, contact between state and tribal courts is rare, and this has contributed to distrust between the two decision-making bodies. Many of the most controversial *ICWA* cases are those in which non-Indigenous courts and litigants presume an Indian tribunal will decide a case in a manner contrary to what a state court would decide, that is, contrary to the child's "best interest". As discussed previously, loopholes like the "best interest exception" were created because of these fears. However, not only do such exceptions undermine the *ICWA*, they also deny tribal courts the opportunity to demonstrate the falsity of these assumptions.

The US Supreme Court's only other *ICWA* case, *Mississippi Band of Choctaw v. Holyfield*, highlights how a distrust of tribes and tribal courts can undermine the

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<sup>176</sup> See e.g. *Vance v Boyd Mississippi, Inc*, 923 F Supp 905 (SD Miss 1996) refusing to apply the tribal court exhaustion doctrine and taking jurisdiction due to the fear it would be unable to review the tribal court's findings.



*ICWA* and harm Indian children.<sup>177</sup> The 1989 *Holyfield* case concerned the adoption of twin Indian children born off the reservation to an enrolled and domiciled member of the Choctaw tribe. The issue in the case was which tribunal, state or tribal, had the right to determine custody of the twins. Much of the opposition to tribal court jurisdiction was based on the assumption that the tribe would deny the non-Indian couple the right to adopt the twins and place the children, both of whom had special needs, in separate Indian foster homes and with less qualified caregivers.<sup>178</sup>

The Supreme Court decided in favor of the tribe.<sup>179</sup> However, after winning the case, the Choctaw court surprised many *ICWA* critics by granting custody of the children to the adoptive family.<sup>180</sup> The *Holyfield* case demonstrated how fears regarding tribal decision-making are often unfounded. The *Holyfield* tribal court, like the state court, concluded it was in the best interests of the children to remain with the Holyfields. If the state court had been more familiar with the Choctaw court, and more willing to trust it, it is possible that the long, traumatic fight over the Holyfield twins could have been avoided.

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<sup>177</sup> See *Holyfield*, *supra* note 103.

<sup>178</sup> Solangel Maldonado, “Race, Culture, and Adoption: Lessons from *Mississippi Band of Choctaw Indians v Holyfield*” (2008) 17:1 Colum J Gender & L 1 at 10–11 noting these concerns.

<sup>179</sup> The Court held that *ICWA* confers exclusive jurisdiction over the custody of children domiciled on the reservation and found that the children’s birth outside the reservation did not change their domicile which was based on the fact that their mother primarily resided on the reservation.

<sup>180</sup> See Maldonado, *supra* note 178 at 17.

Under an Australian *ICWA*, Indigenous tribunals would be located within the current Australian judicial system and, thus, Indigenous and non-Indigenous tribunals could have the opportunity to build the kind of trust that was lacking in *Holyfield*. Consequently, an Australia *ICWA* could both protect Indigenous children and families while also avoiding the distrust and suspicion that has hampered the Act's success in the US. As a result, it is possible an Australian *ICWA* could enjoy a significantly higher rate of compliance than its US counterpart.<sup>181</sup>

#### **D. THE ROLE OF CUSTOM AND TRADITION**

An Australian *ICWA* would enable Indigenous decision-makers to use their understanding of Indigenous traditions and customs to determine custody placements that meet the best interests of Aboriginal and Torres Strait Islander children. For example, such understanding of Indigenous culture and practices could help a decisionmaker determine

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<sup>181</sup> Lack of compliance with *ICWA* is high in the US and not limited to courts. See also Zug, *supra* note 164 at 796:

As recently as 2015, South Dakota was held to have violated *ICWA* by disproportionately removing Indian children from their families and placing them in white homes. In one particularly telling example, South Dakota Judge Jeff Davis was found to have removed Indian children from their families one hundred percent of the time. Matthew Newman, an attorney at the Native American Rights Fund, stated, "We're often finding states inventing any reason under the sun . . . not to place [the] child with [his or her] family."

See Tanya Asim Cooper, "Racial Bias in American Foster Care: The National Debate" (2013) 97:2 Marq L Rev 215 at 245 discussing lack of compliance with the *ICWA*.

whether leaving a child with an extended family member constituted abandonment or good parenting. However, unlike tribal court judges, Indigenous decision-makers in Australia would not be permitted to apply a different set of laws to the custody cases they decided. Like all other Australian courts, their decisions would be based on applicable Australian law. This is a significant difference from US tribal courts. However, there may be benefits to this limitation.

As explained previously, tribal sovereignty means tribes have the right to make their own laws and be governed by them. These laws can differ significantly from the otherwise applicable state law and federal law and this difference is often used to oppose tribal decision-making. A clear example of this tendency to use tribal difference to attack tribal jurisdiction was demonstrated in the recent US Supreme Court case, *Dollar General Corp v. Mississippi Band of Choctaw Indians*.<sup>182</sup>

### **1. *Dollar General Corp v. Mississippi Band of Choctaw Indians***

*Dollar General* involved a sexual assault against a minor. The alleged assault was perpetrated by a non-Indian employee of a Dollar General store located in Indian country. The child and his family brought a civil suit against Dollar General in tribal court.<sup>183</sup> The company

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<sup>182</sup> 136 S Ct 2159 (2016) [*Dollar General*].

<sup>183</sup> Under US law, only the federal government can prosecute non-Indians for crimes committed in Indian country. In *Dollar General*, as in the majority of Indian sexual assault cases, the federal government declined to prosecute.

objected to tribal court jurisdiction because they believed it was unfair to subject them to tribal law, rather than “actual law,” by which they meant state or federal law.<sup>184</sup> In its briefs, Dollar General emphasised that traditional tribal methods of dispute resolution “differed substantially from state and federal legal systems” and it bemoaned the fact that these methods “require [tribal] courts to apply tribal law, custom, and traditions.”<sup>185</sup>

Dollar General’s repeatedly referenced strange and unfair tribal customs were used as a distraction to elicit undeserved sympathy from the Court. In its amicus brief supporting the Tribe, the federal government exposed this ploy stating, “Here, in particular, there is no suggestion that proving a breach of duty to refrain from sexual molestation would require resort to ‘unique customs, languages, and usages’ of the Tribe.”<sup>186</sup> As the government pointed out, prohibiting child molestation is not some “strange” Indian custom; it is a core tenet of American criminal law.

Dollar General’s arguments regarding the dangers of tribal tradition and custom in the context of a child molestation case should have appeared absurd. Consequently, the fact they did not is telling. As the case demonstrated, non-Indian mistrust of tribal customs and

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<sup>184</sup> Garrett Epps, “Who Can Tribal Courts Try?”, *The Atlantic* (7 Dec 2015), online: <[www.theatlantic.com/politics/archive/2015/12/who-can-tribal-courts-try/419037/](http://www.theatlantic.com/politics/archive/2015/12/who-can-tribal-courts-try/419037/)>.

<sup>185</sup> In fact, the words “tradition” and “custom”—or their derivatives—are mentioned eighteen times in the brief. See *Dollar General* (Brief for the Petitioners).

<sup>186</sup> See *Dollar General* (Brief for the United States as amicus curiae supporting Respondents) at 22.

traditions is so great, the company believed it overcame an otherwise compelling desire to protect children from sexual predators.

## **2. ICWA and Tribal Custom and Traditions**

In recent years, fear of tribal customs and traditions has also been mobilized to attack the *ICWA*. Critics of the *ICWA* routinely argue the Act is unconstitutional because it permits the application of a different set of laws to Indian child custody cases.<sup>187</sup> These attacks intensified during the *Baby Girl* case and are growing stronger. As the recent *Brackeen* case demonstrates, the *ICWA* is under a very real threat, but it is one that an Australian *ICWA* might be able to avoid.

The Australian Indigenous tribunals proposed in this article would be limited to applying Australian law. However, this may not be as significant a weakness as it first appears. Indigenous customs and traditions could still inform the decision-makers' understanding of these laws but, because the law being applied is Australian, the use of custom or tradition is unlikely to create the kind of *ICWA* opposition that has materialized in the US.

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<sup>187</sup> These attacks ignore the long-standing legal precedent permitting finding that the application of different laws for members of recognized Indian tribes are constitutional. See *Morton v Mancari*, 417 US 535 at 547 (1974) finding an Indian employment preference constitutional because it was based on political rather than racial distinctions.

## CONCLUSION

As this article has argued, the lack of recognized Indigenous sovereignty makes a potential Australian *ICWA* less powerful than the US version. Nevertheless, such an act would still increase protections for Indigenous children and their families and could also provide certain advantages over the US *ICWA*. Still, there is one final difference between a sovereignty based and delegated version of the *ICWA* that should be considered before advocating for the passage of an Australian *ICWA*. This difference concerns the cost of failure.

### A. THE NORTHERN TERRITORY INTERVENTION

The perceived failure of an Australian *ICWA* could have significant implications for future efforts to increase Aboriginal and Torres Strait Islander self-determination. In fact, if the implementation of an Australian *ICWA* followed the pattern of the ATSIC and the resulting Northern Territory Intervention, the effects of its perceived failure could be catastrophic.

The ATSIC was Australia's first significant attempt to increase Indigenous self-determination and the fact it was deemed a failure had wide-reaching and long-lasting implications. After the Commission was disbanded, the federal government's belief regarding the importance of consulting with Indigenous people about programs and policies affecting their lives declined exponentially.<sup>188</sup> At

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<sup>188</sup> See Jon Altman, "Neo-Paternalism: Reflections on the Northern Territory Intervention" (2013) 14 *J Indig Pol'y* 31 at 33 discussing how

the same time, the ideology of assimilation gained momentum. Consequently, when the *Little Children Are Sacred* report was released two years after the end of the ATSIC (a report documenting the widespread sexual abuse of Aboriginal children), the government decided to put these new assimilationist ideas into action. The result became known as The Northern Territory Intervention.

The abuse documented in *The Little Children Are Sacred* report was already well known.<sup>189</sup> However, the report finally convinced the government to act on this knowledge. Unfortunately, rather than working with Indigenous communities to address the problem, the government unilaterally decided to enact extreme measures.<sup>190</sup>

The Northern Territory Intervention involved military mobilisation and a set of power moves granting the government direct control of the targeted communities for

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the growing ideology of assimilation was used to justify abandoning the principle of consultation with Aboriginal communities on the issue affecting them.

<sup>189</sup> See e.g. Melissa Sweet, “Australian Efforts to Tackle Abuse of Aboriginal Children Without Consultation Raise Alarm” (2007) 335 *Brit Med J* 691 noting that there had been over twenty years of studies documenting this abuse.

<sup>190</sup> The Northern Territory National Emergency Response Act was “supposedly drafted and enacted in only 10 days—without consultation with aboriginal communities.” See Eddie Cubillo, “The Nine Most Terrifying Words in the English Language Are: ‘I’m from the Government and I’m Here to Help’” (2011) 13:1 *Flinders LJ* 137 at 145.

a period of five years.<sup>191</sup> These measures were instituted without consulting the communities they would affect.<sup>192</sup> Prime Minister Howard justified the government's actions as "exceptional measures to deal with an exceptionally tragic situation"<sup>193</sup> and he insisted that the old policy of Indigenous consultation should be discarded in favor of unilateral intervention. In fact, Howard specifically cited ATSIC when arguing that Indigenous decision-making and self-determination had been tried and failed<sup>194</sup> and that intervention and assimilation was the only remaining

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<sup>191</sup> See Rebecca Stringer, "A Nightmare of the Neocolonial Kind: Politics of Suffering in Howard's Northern Territory Intervention" (2007) 6:2 *Borderlands E-Journal*.

<sup>192</sup> Remarking on this lack of consultation, Aboriginal activist Eduard Cubillo stated, "we members of the First Nations were expected to defer to the wisdom of the colonisers." See Cubillo, *supra* note 190 at 148.

<sup>193</sup> John Howard, "To Stabilise and Protect: Little Children Are Sacred" (2007) 19:3 *Sydney Papers* 68.

<sup>194</sup> Cubillo, *supra* note 190 at 143 noting the damage done to Indigenous self-determination and engagement by the abolition of ASTIC and then the Northern Territory Intervention. See also Stringer, *supra* note 191 stating the Intervention policy was "[o]penly adopting the politics of assimilation and the de-realisation of Aboriginality it entails . . . to transform 'failed societies'" in which there is "no natural social order of production" into "normal suburbs". See also John Altman, "The Howard Government's Northern Territory Intervention: Are Neo-Paternalism and Indigenous Development Compatible?" (Center for Aboriginal Policy Research, Topical Issue No 16, 2007) arguing the abolition of ATSIC helped pave the way for Intervention through an increased emphasis on "Normalisation" for Indigenous Australians.



options for protecting Indigenous people and communities.<sup>195</sup>

## **B. SLIPPERY SLOPE**

The goal of an Australian *ICWA* would be to increase Indigenous control over child welfare decisions. However, if such a law were enacted and then perceived as failing to protect Indigenous children and families, there is the danger it could actually lead to greater government intervention and less Indigenous control. In the absence of recognized sovereignty, there is no presumption that Indigenous communities in Australia possess the inherent right to make decisions concerning the welfare of their members. As a result, when these groups receive decision-making rights, as they did through the ATSIIC, this delegation of power can become a test of Indigenous competence and worthiness to make decisions concerning their lives and families. If these communities are perceived as failing this test, there is the real possibility this failure will be used to justify even greater government intervention.

Australia's experience with ATSIIC and the Northern Territory Intervention shows how laws and policies intended to increase Indigenous self-determination can sometimes create the opposite result. If the enactment of an Australian *ICWA* is seen as encouraging controversial or unjust child welfare decisions, or if it simply doesn't produce significant enough improvements, this "failure"

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<sup>195</sup> Cubillo, *supra* note 190 at 148. See also Haebich, *supra* note 43 noting that these allegations were used "to rationalis[e] for mainstream Australians the invasive actions of the Northern Territory interventions."

could be used to attack Indigenous decision-making in general and justify even more invasive assimilation efforts. Therefore, it is possible, that by passing legislation similar to the *ICWA*, Indigenous communities in Australia could actually wind up worse off than they were before such legislation was enacted. This is a real concern but ultimately, it may be a risk worth taking.

Current methods of protecting Aboriginal and Torres Strait Islander families are not working. Indigenous children continue to be removed at unacceptably high rates and new solutions must be found. The limited examples of Indigenous control over child welfare suggest this is the most promising solution for protecting Indigenous families. Therefore, Australia should consider enacting its own version of the *ICWA*.

An Australian *ICWA* could not offer the same level of protection as the American version of the Act, but it could still reduce family separations and increase Indigenous welfare. In addition, an Australian version of the Act might even offer certain advantages over its US counterpart. Nevertheless, the history of ATSIIC and the Northern Territory Intervention demonstrate that the enactment of an Australian *ICWA* is not without risk. Consequently, it is up to the Indigenous communities in Australia (and their advocates) to determine whether the possible downsides of pursuing such legislation are worth the potential rewards.