

The Treaty Debate 1979–1983 and the Continuing Problem of Federalism

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Acknowledgment

First, let me acknowledge the welcome to country from the Ngunnawal people and thank them for their welcome.

Introduction

Twenty-two years and four days ago, on the 26th of April 1979, Dr. H.C. Coombs called together a number of friends and colleagues in Canberra to discuss a new approach to the public debate about Indigenous affairs. Five months earlier, he had circulated a memo in which he observed a faltering in the pace of reform in Aboriginal affairs. The Fraser government's Aboriginal land rights legislation in the Northern Territory was seriously flawed, he thought, by its privileging of mining, and the 1978 Ranger agreement seemed to him to sell out land-owners interests¹. He asked his friends what they could do to sustain and to entrench the reforms initiated in the 1970s? One of those friends, Judith Wright, later recalled that they agreed to form the 'Aboriginal Treaty Committee, whose objectives would include:

- the establishment of exclusive Commonwealth responsibility for all Aboriginal matters (as against the States),
- pressure for a treaty as providing a kind of constitutional basis for the relationship of Aboriginal Australians to the Commonwealth and Australian society generally, and
- providing a focus for white political support for the Aboriginal cause².

In reviewing what the Aboriginal Treaty Committee did, I will selectively underline the lasting

significance of the first of these objectives – the assertion of Commonwealth power over the States. In recent months, strategic thinking about Indigenous affairs has reiterated that federalism is a central problem for Indigenous Australians to reckon with. Let me quote the first of the six recommendations with which the Council for Aboriginal Reconciliation concluded its recent final report *Reconciliation: Australia's challenge*.

The Council of Australian Governments (COAG) agree to implement and monitor a national framework whereby all governments and the Aboriginal and Torres Strait Islander Commission (ATSIC) work to overcome Aboriginal and Torres Strait Islander people's disadvantage through setting program performance benchmarks that are measurable (including timelines), are agreed in partnership with Aboriginal and Torres Strait Islander peoples and communities, and are publicly reported³.

In similar vein, Bill Jonas, the Aboriginal and Torres Strait Islander Social Justice Commissioner, has recently recommended that the *Commonwealth amend the Commonwealth Grants Commission Act 1973* to require it to enquire, every two years, into State and Territory performance of their responsibilities towards Indigenous Australians⁴. In arguing for this proposal, Jonas noted a recent House of Representatives Standing Committee comment that, in health service delivery, framework agreements among Australian governments have been mere 'gentleman's agreements that apply in principle only and for which there is no recourse if breached'⁵. The Social Justice Commissioner's Human Rights approach seeks to make the States and Territories accountable to the Commonwealth; the Commonwealth is, in turn, internationally accountable by virtue of its commitment to various global human rights conventions and protocols.

The theme of my paper is that one of the benefits of discussing a treaty between Indigenous and non-Indigenous Australians *was and is* that it highlights the defects of Australian federalism and points to a way to address those defects. By re-invigorating the treaty debate in 2001, ATSIC has thus made a distinct contribution to the centenary commemoration of Australian federalism.

I will return to this observation in my conclusion. First I want to take you back to the years 1979 to 1983, when the Aboriginal Treaty Committee (ATC) and the National Aboriginal Conference (NAC) stimulated the first phase of the Australian discussion of a treaty with Indigenous peoples. In opening this window on the past I will deal with the following themes:

- the Aboriginal Treaty Committee's mode of campaigning,
- the relationship between the ATC and the NAC,
- the rise of the 'sovereignty' issues, and
- the problem of federalism
- I want to suggest in my concluding section that there are two 'sovereignty' issues raised by the treaty debate, and that one of them is more significant than the other.

The ATC's campaign

The Aboriginal Treaty Committee's campaign from 1979 to 1983 consisted of four elements: a publications program, a series of public appearances by such ATC 'stars' as Dr. Coombs, a university-based research program, and the encouragement of local activities.

The ATC's publications program began with Stewart Harris's book *'It's Coming Yet...' An Aboriginal Treaty*, published in 1979. On 17 January 1980 Don Dunstan launched it, and on 26 March 1980, the ABC's Broadband program was devoted to the book and to the Treaty proposal. A copy was given to every person who had donated \$5.00 or more in response to the ATC's *National Times* advertisement in August 1979. *'It's coming yet'* quickly exhausted its first print run of 5000.

On May 20 1980, twelve months after its first formal meeting, the Committee published its first *Newsletter*, over Coombs' signature. By October 1980, the Committee could send a copy of the second newsletter to some 2,000 addresses. In April 1981, the *Newsletter* was replaced by a registered quarterly, printed tabloid size, *Aboriginal Treaty News*. The Committee published nine editions of the *News*, the last in October 1983. By then it had progressed from offset 'scissors and paste' (the second *Newsletter*, October 1980) to a professionally typeset page with photographs and maps in an orderly and pleasing layout. In its final issue the *News* was showing signs of evolving from social movement newspaper to something more rarefied; it carried articles of such length and erudition – Russell Barsh's 'International Law and the Miqmaq', Douglas Sanders' 'Indigenous issues in international law' – that the Committee now seemed to be selectively addressing the more academically inclined of its supporters. This was a measure of their success in at least one of their aims: to promote within Australia serious deliberation on the legal instruments available to nation states and indigenous peoples seeking just settlements.

Universities were essential sites for the committee's work. There the concept of a treaty could be clarified and made respectable in seminars and conferences. On 4 June 1980 ATC member Charles Rowley addressed an ANU convocation luncheon on 'Why a Treaty with the Aborigines?' On 17 July 1980 Gervaise Coles of the legal section of the Department of Foreign Affairs joined Coombs, Robert O'Neill and Ralph Harry in a colloquium on the Treaty at the ANU. The second *Newsletter* foreshadowed similar activities at Mt. Lawley CAE, James Cook University and the Universities of Western Australia, New South Wales and Sydney. By April 1982, the Committee could claim to have instigated twelve conferences and seminars exploring the justification and means for a treaty over the 36 months since its inception⁶. Coombs saw the Committee's work as a research program in law and in history, as much as he saw it as a media-based pitch for 'public opinion'. The University-based strand of the Committee's work culminated in a November 1983 conference at the ANU on the application of international law to Indigenous rights in Australia and North America.

Although Coombs was not the only Committee member to speak publicly on their work, he seems to have carried most of the burden of public appearances. He had commenced the campaign in 1979 with three public addresses⁷. On July 8 1980, he joined Roberta Sykes and Tom Kenneally on John Singleton's TV chat show. In June 1980, the *National Times* (8-14 June) carried, in their 'Other Voices' column, one of the three 1979 speeches, Coombs' Amnesty International address of December 1979. The *National Times*, in which the Committee had displayed its original manifesto as a paid advertisement, seems to have been the Committee's most important vehicle. Coombs also found interest from the editors of *Social Alternatives*, the *Catholic Leader* and the *Sydney Morning Herald*. Indeed a feature article by the ATC in the *Sydney Morning Herald* won a gold citation in the UN Media Peace Prize project. It concluded with the following appeal.

In 1988 we celebrate the 200th anniversary of the original British settlement. Do we want that anniversary to be a day of mourning and of hatred for Aboriginal Australians? What a splendid component of that anniversary would be a celebration also of the conclusion of a freely negotiated treaty in which Aboriginal rights were acknowledged, just compensation awarded and Aboriginal status in our society honoured⁸.

While advocating the Treaty, the ATC also publicised reports or studies which drew attention to the deficient performances of governments and pointed the way to better government. Thus the ATC bought space in the *Age* on 30 September 1981 in order to urge those attending the Commonwealth Heads of Government meeting to study the Report of the World Council of Churches Team visit to Australia, June-July 1981; the Reports of the N.S.W. Parliamentary Select Committee on Aborigines, 1980 and 1981; the Reports of the Commonwealth Parliamentary Committee on Aboriginal Health (1979) and on Aboriginal Legal Aid (1980); and the Reports of the Commissioner for Community Relations in 1980 and 1981. On August 13 1981, Coombs wrote to 35 newspapers arguing that the World Council of Churches report on conditions in Aboriginal

Australia added to the justification for a treaty.

In its own organ of publicity, *Aboriginal Treaty News*, the ATC could control the representation of the public debate it was stimulating. The first issue featured on its front page a photo of the mayor of the Gold Coast, Keith Hunt, marking Australia Day 1981 by signing the Treaty supporters' form. Judith Wright contributed an article urging other local support groups to follow the Gold Coast group in organising similar events. From later issues the reader could learn that the Fremantle City Council had formally recognised that its area had once belonged exclusively to Aboriginal people and that Dymphna Clark had persuaded 62 artists to donate work to a Sydney fund-raising exhibition *Ab Origine*, opened by her husband Manning and by Margaret Valadian at the National Trust Centre, Sydney, on January 9, 1981.

Coombs' public speaking engagements continued throughout 1981. In May, he and Rowley took part in a half-day symposium at ANZAAS, University of Queensland. On June 14, Coombs was the guest speaker at a joint meeting of the Treaty committees of Pymble and Gordon, and at the end of August he accompanied Judith Wright to Townsville for a conference on the Prospects for Change at James Cook University. At the invitation of Senator Susan Ryan, Coombs and Rowley met with the ALP's national policy committee on Aboriginal affairs on October 12, 1981. Coombs continued throughout 1982 to accept engagements on the Committee's behalf. They included visits to Perth and Geelong in March, and a two day trip in May to Tasmania, where he addressed a university audience and a Tasmanian writers' luncheon. It was a measure of the impact of the Treaty debate that on September 30 1981 Senator Missen had announced an inquiry by the Standing Committee on Constitutional and Legal Affairs into the feasibility of a formal agreement between the Commonwealth and Aboriginal people. In June 1982, several members of the Committee (Rowley, Wright, Diane Barwick and Stewart Harris) appeared with their legal consultant Peter Bayne before the Senate Standing Committee on Constitutional and Legal Affairs. Coombs also addressed this Senate Committee in September 1982.

Watching the States

By the early 1980s, there had been strong public interest for almost twenty years in the controversies generated by Aboriginal land claims against the Commonwealth: the Yirrkala petition of 1963, the Gurindji walk-off of 1966 to 1967, the Yolngu court action of 1968 to 1971 and then the land rights reforms of the Whitlam and Fraser governments, 1975 to 1976. In this sequence of challenges and responses the State governments had been all but invisible. The Commonwealth was setting what reformers such as Coombs hoped would be an exemplary pattern of national recognition of Indigenous rights. Would the States follow? In the late 1970s, two States Queensland and Western Australia, made it clear that they would not.

When the Aboriginal Land Fund Commission attempted to purchase the Archer River pastoral lease for its Aboriginal owners, the Queensland government blocked the sale, declaring land rights to be contrary to State policy. The case went to the High Court and was resolved in the Commonwealth's favour in 1982 (*Koorwarta v. Bjelke-Petersen*). In Western Australia, the Noonkanbah pastoral lease had been transferred to Aboriginal ownership in 1975. However, the Court government soon put pressure on the new owners to accept petroleum exploration on their property. The Noonkanbah community's resistance aroused considerable public sympathy in 1979 and 1980. The Federal Minister for Aboriginal Affairs, Fred Chaney, while openly critical of the Western Australian government for insisting that minerals exploration prevail over Indigenous land owners' wishes, was not able to bring Commonwealth power to bear on the issue. The Noonkanbah dispute demonstrated to advocates of land rights that the Commonwealth was not willing to challenge 'States rights' over land use. The Fraser government also looked weak when facing up to Queensland. In 1978, the Commonwealth had attempted to flex its constitutional muscles by

passing a law to provide for self-determination on Queensland's reserves (the *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-management Act 1978*). Before the legislation could come into effect, the Queensland government de-gazetted the reserves and declared them to be shires. The Fraser government declined to counter this move, nor would it respond to requests from the remaining Queensland reserves (for example, Yarrabah) for help in implementing land rights and self-management.

By 1980, the Queensland and Western Australian governments had prevailed politically over the Commonwealth, even though the Commonwealth had the constitutional authority to enforce nationally land rights policy. Frank Brennan and James Crawford concluded in a 1990 paper that, notwithstanding the 1967 referendum, there remains a 'hidden constitution' in which the Commonwealth defers to the land-use powers of the States⁹. The pre-eminence of 'States rights' over Indigenous rights had become clear by the time Coombs and his colleagues were into their first year of treaty advocacy.

The ATC therefore had frequent opportunity to argue for a national framework of enforceable fairness in land titles. On 27 July 1980, the *National Times* carried the Committee's advertisement appealing for a five year moratorium on prospecting and mining in the Kimberley and in other areas 'predominantly occupied by Aboriginal Australians'. The ATC's second *Newsletter* told supporters that Coombs had also written to the Western Australian Premier, Sir Charles Court, on April 30 1980, 'asking him to accept the Noonkanbah people's proposal for a three year moratorium and to set up an independent Commission to consider the application of the Woodward Commission's principles to Western Australia'. The ATC called on Fred Chaney to resign over Noonkanbah. Coombs wrote publicly to the B'nai B'rith organisation in Washington to suggest that it would be a mistake to award Malcolm Fraser a medal for his 'humanitarian' services, stating that Fraser's 'record in his own country denies his suitability for it'¹⁰. Coombs also spoke at a preview of a film on the Noonkanbah dispute 'On Sacred Ground'. 'There are going to be a succession of Noonkanbahs unless Land rights laws are passed so that the Federal Government will intervene,' he told the audience.¹¹

The Queensland government also attracted the Committee's watchfulness. In June 1980 Coombs published a letter in the *Courier Mail* warning delegates to the second World Wilderness Congress in Cairns that the Bjelke-Petersen government, in order to pre-empt Aboriginal land claims, might seek their support for a national park in Cape York. In March and May 1981 the Committee paid for an advertisement in the *National Times* pointing out that the Queensland government was planning to alienate remnant reserves from their residents. The Commonwealth had the authority to acquire the reserves compulsorily and to vest them in these communities, the advertisement pointed out, but would it use that power? On May 27 1980 Coombs wrote to Fraser of his concerns about Queensland reserves, and in July he got a letter into the *Age* on this issue and made himself available for media interviews.¹²

Most of *Aboriginal Treaty News* numbers 3 (November 1981), 4 (February 1982) and 5 (May-August 1982) comprised running state-by-state commentaries on land rights abuses, laws and policy developments. Some of the commentary was written (anonymously) by Committee members; other material consisted of reprints of news stories, feature articles and editorials from the daily newspapers, with the *Age*, the *Canberra Times* and the *Courier Mail* particularly prominent. *Aboriginal Treaty News* number 6 (September-October 1982) was a special edition to mark the protests against the Queensland government's hosting of the twelfth Commonwealth Games in Brisbane. The next issue, for the summer of 1982-3, coincided with Fraser's third attempt to seek re-election. In the previous election, October 1980, Coombs had addressed questions to four party leaders and then summarised and criticised their responses. In 1983, he asked, 'Would your Government be prepared to over-ride a State or Northern Territory Government to ensure that land and human rights were provided for Aboriginal Australians?' The Labor Party said that it intended

to do so in Queensland ‘promptly after taking office’; the Coalition would go no further than to state that the Commonwealth ‘has the power to intervene if necessary and appropriate’¹³. The ATC did not advise how to vote, but it charged the Fraser government with having ‘virtually abdicated its responsibilities for Aboriginal rights and land rights’, and with having ‘given way on practically all issues to State Governments such as Queensland and Western Australia’. Worse was possibly to come. The Federal government now looked like capitulating to the Northern Territory government’s proposed amendments to the Land Rights Act. Stewart Harris wrote that Aboriginal people could not be expected to negotiate a Treaty with the Fraser government. The ATC concluded that ‘This election will mean hope or despair for Aborigines everywhere.’¹⁴

The NAC and the ATC

When Coombs first circulated his ideas about a Treaty at the end of 1978, he may or may not have been aware that similar ideas were brewing within the National Aboriginal Conference, the elected advisory body established by the Fraser government in 1977. In April 1979, the same month as Coombs’ first informal gathering to discuss his circulated documents, the NAC leadership announced publicly that it would seek to negotiate a Treaty with the Australian government. Prime Minister Fraser confirmed on August 21 1979, two days after the Committee had held its first Press conference, that the Minister for Aboriginal Affairs was examining the NAC proposal. From the moment of that announcement, Coombs and the others on the Committee were faced with a delicate political task: how to relate their efforts to the NAC’s dealings with the Fraser government?

The ATC’s manifesto in the *National Times* (August 1979) included the outline of a possible procedure for the NAC’s dialogue with government. Soon after it appeared, Coombs wrote to NAC leaders and other Aborigines asking them to comment on the Committee’s initial efforts to establish a national debate on the Treaty. Their response was positive. Coombs ‘reported at a Committee meeting on 3 September that they were pleased with the wording of the advertisement and the publicity gained through the Press conference. It was agreed that separate campaigns, with exchange of information and publications, offered the best chance of success.’¹⁵ Coombs was later to give an account of his understanding with the NAC.

We do not have Aboriginal members because consultation with the N.A.C. and other Aboriginal organisations made it clear that they would not welcome a joint organisation which could be represented as the instrument of ‘white stirrers’ and that they wished a Treaty to be achieved as a result of Aboriginal initiative and effort. They made it equally clear, however, that they would welcome our support and help.¹⁶

The autonomy of the two organisations and of their campaigns was of value to Coombs. In one of his first speeches, on 2 October 1979, he had aired his doubts about the NAC’s present capacities to conduct a Treaty campaign in accordance with the traditions of Aboriginal political process as he understood them.¹⁷

On 12 November 1979, the NAC held a Press Conference on their proposal, announcing that they were forming a sub-committee specially to canvass ideas and to develop a draft. The NAC also announced that the word ‘treaty’ would be dropped and replaced by a word from the languages of north-east Arnhem Land, ‘Makarrata’. At the time, ‘Makarrata’ was glossed as ‘the resumption of normal relations after a period of hostilities’. The next day, Minister for Aboriginal Affairs Senator Fred Chaney welcomed the NAC’s substitution of the term ‘Makarrata’ for ‘treaty’. In the Senate a week later, he explained that the government did not like the term ‘treaty’ ‘because of the implication that one is in some way talking about more than one Australia or more than one nation within Australia’. By discarding ‘treaty’, the NAC had reassured Chaney that Aborigines and Torres Strait Islanders saw themselves ‘as Australians within the Australian nation’. He reported with

evident approval the NAC's wish to take 'something like 18 months for the task it has undertaken'¹⁸.

Judith Wright has recalled that 'We...were worried by the government's suspicious alacrity over the NAC demand.'¹⁹ The ATC had been conceived in apprehension and distrust of the Fraser government, and it had been forthright in its subsequent criticisms, including calling for Chaney's resignation over Noonkanbah. The ATC was now worried by the NAC's shift from 'treaty' to 'Makarrata' and by the short timetable the NAC appeared to be setting. The ATC could therefore be glad of their policy of keeping some distance from the NAC's campaign. However, this protocol did not oblige them to stay away from Aboriginal people. As Coombs explained to NAC Chair Jim Hagan on 26 May 1980, 'we hoped to invite Aboriginal leaders and others to speak for or against the treaty idea and be tape recorded, so that Aboriginal groups could hear their own people giving different views on the subject.'²⁰ To consult Indigenous Australians in this way was consistent with the Committee's view that the NAC lacked the resources to sponsor a widespread Indigenous debate.

Meanwhile the NAC had begun its consultations with Indigenous Australians, circulating a leaflet and a questionnaire. Over 19 days in February 1980 Hagan's sub-committee held fifteen meetings along the eastern seaboard (from Launceston to Thursday Island) and as far inland as Mt. Isa and Mildura. Their efforts were welcomed by the Prime Minister who spoke at a dinner for the NAC on March 25 1980. In April and May, the Makarrata sub-committee was back on the road, visiting fifteen towns and capital cities in Western Australia, South Australia and the Northern Territory over 23 days. On 2 July 1981 the NAC released an interim report on these consultations at a meeting to which Coombs was invited.

It began by reminding readers that 'the Prime Minister has stated that he is now ready to talk to Aborigines about an Agreement, but he will only talk with the National Aboriginal Conference (NAC), because we are elected representatives of the Aboriginal people.' There followed a series of quite specific proposed treaty terms, including reserved seats for Indigenous Australians in Commonwealth and State Parliaments, a quota on employment of Aboriginal people in government 'irrespective of their established skills', and the return of human remains and artefacts from museums.²¹ Coombs made public his critical response to what was evidently a draft treaty. The NAC should take more time to develop a debate among Indigenous Australians, he urged. Coombs added that the NAC would need far more resources than the Fraser government had so far allowed if it were to negotiate on equal terms.

Many of the results of the NAC's first consultations seemed to confirm the wisdom of these remarks. Hagan acknowledged in a letter to the ATC that there was division over the term 'Makarrata', with many Aboriginal people preferring 'treaty'. The ATC gave publicity to these misgivings in its second *Newsletter* (October 1980). In many places, neither concept was yet familiar enough for Aboriginal people to form an opinion. Discussions so far had unearthed doubts that any agreement, whatever it were called, could soon be forged with the Australian government. Among Aboriginal leaders the timetable of consultations and negotiations was now controversial. In a Townsville forum, on October 1 1980, the North Queensland Land Council's Mick Miller was in clear disagreement with the NAC's Bill Bird. According to Judith Wright, on the same platform to speak for the Committee, Bird still thought that a document could eventuate within the term of the current government. Miller was among those preparing for the long haul.²² Central Australian Aboriginal Congress was claiming that if the process of consultation were to result in the necessary 'consensus' among Aborigines, then at least five years of effort would be required, because the NAC did not yet have a mandate for negotiations. The Tasmanian Aboriginal Centre warned against a premature settlement which would nip in the bud an emerging Indigenous political consciousness. 'Any agreement at this point in time will be seen as a charitable one ... Only when we represent such a threat to the stability and power of white Australia that they are forced to negotiate a treaty with us

will a Treaty not be viewed as charitable.’

The NAC sub-Committee’s early consultations had given them reason to reconsider whether eighteen months would be enough time to prepare a treaty. Coombs attempted to reinforce this point in a letter on 22 September 1980 to Hagan answering his question as to ‘who, or what body, on the Aboriginal side should be considered representative in negotiations’²³. Coombs proposed a six step process in which the NAC would first commission and circulate position papers on treaty issues, then call ‘a Convention of representatives chosen by recognised Aboriginal organisations, communities and traditional groups’ to discuss them. These representatives would then return to their organisations. The NAC would recall the Convention to consider a first draft of an agreement to be proposed to the Government, and the Convention would remain in existence to respond to the issues arising from the ensuing negotiations. Final approval or rejection would be a decision of this Convention, not of the NAC by itself. Coombs’ suggestion accorded the NAC a central but not a singular role in Indigenous representation.

The ATC now found itself in the midst of a lively debate among Indigenous people. While the ATC said that it did not ‘want to be seen as influenced by any particular Aboriginal body’, it was effectively taking a position in a debate among Indigenous Australians by arguing for more time and by not fully endorsing the term ‘Makarrata’. A. Barrie Pittock, one of the signatories of the ATC’s first advertisement in the *National Times*, asked in an article titled ‘What is Wrong with a Treaty?’ whether the advocates of a treaty were aware of the danger they courted. His suspicions were aroused by the Fraser government’s keenness to negotiate a Makarrata. He agreed with Kevin Gilbert’s recent assertion in the *Aboriginal-Islander Messenger* that an agreement could be made only between ‘two equal sovereign peoples’. A treaty with teeth, detailed and enforceable in the courts, could not be achieved ‘next year or the year after – probably not for a decade or more, if ever’. Pittock confessed his uneasiness ‘that the Treaty movement originated amongst whites without strong Aboriginal input and seems to have gathered too much superficial support too quickly’. His closing words warned of his conditional continuing support: ‘By all means advocate a Treaty, but make sure it has guts!’²⁴ Coombs took a similar line. On December 11 1980, he joined Jack Davis in addressing a meeting in Perth on the Treaty. There he argued that ‘Aborigines would be at an enormous disadvantage if a Treaty were concluded before all parties were fully informed ... This will take considerable time.’²⁵

But how much time? Was the ATC prepared to commit itself to a timetable? This question was taken up on page one of the first issue of *Aboriginal Treaty News* (April 1981). The ATC judged an agreement unobtainable by Australia Day 1983, as some had suggested. Better to look to the Bicentennial year 1988. The possible significance of the Bicentennial thus began to figure in the ATC’s strategy of persuading non-indigenous Australians that their nationhood was morally flawed. The year 1988 seemed, in 1980-1, to be sufficiently far ahead to accommodate the view that ‘years’ of consultation and negotiation were required.

The timing of the treaty or Makarrata negotiations was not the only issue that had to be resolved. Who were to be the parties to negotiation? On both the Indigenous and the governmental sides, that question was becoming more complicated. In February and March 1981, when the NAC and the Minister for Aboriginal Affairs exchanged letters about the possible contents of a Makarrata, the Minister declared that the NAC should be negotiating with each of the State governments on those parts of the proposed Makarrata in which the States had an interest. So there were seven or more governments for Indigenous Australians to negotiate with. On the Indigenous side, the NAC was becoming embattled with Indigenous Australians who argued that, as a creature of the government, it could never represent their sovereignty.

The NAC issued a position paper to the World Council of Indigenous Peoples (WCIP), assembling in Canberra from 26 April to 2 May 1981, in which it adopted Coombs’ September 1980

recommendations about a six step process of negotiation. That is, the NAC would seek a mandate from a series of Indigenous conventions. That paper also asked the government to confirm the NAC's standing as the Indigenous negotiator by legislating to strengthen the NAC and by granting funds 'not subject to political limitation'. Were Prime Minister Fraser not to meet that demand, suspicions would be confirmed that the NAC was merely 'an organisation set up by his own government'²⁶. This paper did not satisfy the NAC's Indigenous critics. The Aboriginal Treaty News reported Kevin Gilbert's assertion that the NAC was not representative and was at risk of being used by the Australian government. 'The government does not want to recognise that there is a separate Aboriginal nation within Australia,' Gilbert protested. He continued:

This is why the Government is frightened of the word treaty and prefers the use of a more ambiguous word such as makarrata. It appears that the Government believes it will be able to negotiate an agreement with the NAC in which the Aboriginal people give up their claim to being a separate nation, a sovereign race of people.²⁷

Notwithstanding its commitment to a series of conventions, the NAC was continuing its own program of consultations and its dialogue with the Commonwealth government. When Coombs and Judith Wright represented the Committee at a conference in Townsville, 28 through 30 August 1981 on Land Rights and the Future of Australian Race Relations, they heard an alarming report from Les Malezer. In the last few days, the NAC had held a public meeting in Canberra, at one day's notice, to discuss a draft Makarrata document. Malezer, from Queensland, reported his concern about the composition of the meeting, mostly Kooris from Canberra and southern New South Wales. There was no harm in a draft document being discussed now, he had told the Canberra meeting, but time was needed. He had told the Canberra meeting to look to 1988 as 'a date for a final document to actually go to ratification...every year between now and then we should be getting a figure of something like a million dollars to consult.' His warnings appeared to have failed, he told his Townsville audience, for the following day's press had reported that the NAC, on the strength of this Canberra meeting, would now submit a draft treaty to the Commonwealth for comment. Coombs was asked what he thought of these developments. Cautiously, he conceded that 1988 'might be a good target date'. He expressed his sorrow 'that the NAC...should put forward to the Commonwealth, proposals at this stage of any kind'²⁸. On 29 September 1981, the NAC presented an amended Makarrata proposal to the Commonwealth. The following month, the NAC elections were held, and the first phase of NAC activism around the Makarrata drew to a close.

Defining Indigenous Sovereignty

The word 'sovereignty' was beginning to be prominent in the mouths of those who did not trust the NAC to negotiate on behalf of Indigenous Australians. The November 1981 issue of the News quoted one of the leaders of the newly formed Federation of Aboriginal Land Councils, Father Pat Dodson, as flatly rejecting the idea of a Treaty; to him Indigenous 'sovereignty' was the essential basis of any agreement the Federation could entertain. The NAC, said Dodson, was without a mandate²⁹. In the eyes of some Indigenous Australians the NAC, whether hurried or unhurried, could never be vehicle for an argument of sovereignty. Some notion of 'sovereignty' seemed to be present in any strong statement by Aboriginal people at this time. The Tasmanian Aboriginal Centre, Kevin Gilbert and Pat Dodson had strongly asserted that 'sovereignty of the Aboriginal nation' was essential to any treaty or agreement. The NAC was using the language of nationhood. In its paper presented to the WCIP in April 1981, the NAC affirmed that 'our nationhood is fundamental to our bargaining position'. However, in explanation of what form 'nationhood' might take, the NAC had drawn a parallel with the constitutional status of American Indians as 'domestic dependent nations'. Not all of those Indigenous people who used the word sovereignty were as clear as that in explaining what the term meant to them.

Some of the newly elected members of the NAC were soon to admit that the word 'sovereignty' still lacked precise significance in the Indigenous context. Rob Riley acknowledged in 1982 that 'We have never been able to get legal opinion as to how we can pursue the idea of sovereignty and use it as a basis of the argument in relation to the treaty or the Makarrata.'³⁰ His colleague Les Malezer, the NAC's new Director of Research, admitted that 'legally the argument of Aboriginal sovereignty as a nation may have diminished over the years'. The NAC had been 'shifting' among different notions of sovereignty, from full nation-state status to delegated local government autonomy within the nation state. For him, the significance of 'sovereignty' was more 'moral' than 'legal'³¹. Among the competing voices of the Indigenous constituency, it had become essential to one's political credibility to use the language of 'nation' and/or 'sovereignty'. However, these terms' strategic significance, in the argument for a treaty 'with guts', remained unclear in the early 1980s.

The Problem of 'Sovereignty' in Australian Federalism

The Aboriginal Treaty Committee was in only limited sympathy with protestations of Indigenous sovereignty. In Townsville in August 1981, Judith Wright tried to persuade Indigenous Australians that British/Australian sovereignty could be mobilised in their favour.

...however weak the Commonwealth government may be, however traitorous it may be to you people, you have your rights under British law (for you are, at least according to the Commonwealth government, British subjects.) I know actually that most of you don't want to be and indeed quite likely are not in international law subjects of the Australian government, but you can use that fact.³²

She later recalled that 'some of us had not been able to see how the "sovereignty" concept might be usefully defined and asserted in the Australian context'³³. Coombs' view, though he did not highlight it, was that Indigenous Australians must eventually yield to British/Australian sovereignty. In one of his founding statements (*National Times* June 8-14, 1980), he had looked forward to a treaty that recorded Aborigines' 'acceptance of the sovereignty of the Australian Parliament'. Coombs had never expounded the treaty as a means to *perpetuate* Aboriginal sovereignty. The Treaty that he wanted would validly *extinguish* Indigenous sovereignty. The ATC wanted to entrench the gains made in specific pieces of beneficial legislation, to secure them from the ebb and flow of settler-colonial sentiment. Such legal entrenchment did not require a formalisation of Indigenous sovereignty. All that was required, as Coombs told a journalist in October 1981, was a formal change in Indigenous status within the Australian structure of government, so that 'if legislation was inconsistent with the treaty it could be challenged'. In imagining that governments could be so wayward as to provoke such challenge, he cited recent events in Queensland and Western Australia. A treaty would provide a more effective check on the States than the political will of the Commonwealth Government.³⁴

If there were an issue of 'sovereignty' in Coombs' considerations of the treaty, it had more to do with *the maldistribution of sovereign powers within Australian federalism* – the so-called 'States' rights'. This is what I meant by saying earlier that there two 'sovereignty' issues raised in the treaty debate of 1979-1983. I am persuaded by Coombs' arguments that it is more important to redistribute sovereignty within the Australian federation than it is to find a lasting political expression of Indigenous sovereignty. He wanted to a treaty that would bind the Commonwealth to a defence of Indigenous interests from the attacks of the States.

Earlier in this paper I said that the ATC's political activism included their promotion of a program of research into the possibilities of Australian law. One of the fruits of that research program was the Report of the Senate Standing Committee on Constitutional and Legal Affairs *Two hundred*

years later.... The Standing Committee did not argue for or against a treaty. It merely asked: if there were a treaty, how would it fit in to the laws and constitution of the Commonwealth? The Standing Committee's preferred option was that the Constitution be altered by the addition of a s.105B enabling the Commonwealth to negotiate a compact, according to specified principles, with Indigenous Australians. Section 105B would be modelled on the existing s.105A which empowered the Commonwealth to make financial agreements with the States. When tested in the High Court in 1932, s.105A had proved robust; that is, an agreement in accordance with s.105A could not be changed by any law of the Commonwealth or the States.

The proposed s.105B would be just as strong, that is, it would provide that 'laws passed pursuant to the compact' would be 'binding upon the Commonwealth and the States notwithstanding anything contained in the Commonwealth or State Constitutions or in any Commonwealth or State law'³⁵. Having set out this proposal, the Standing Committee went on to examine alternative ways that a treaty or compact might be entrenched in the Constitution. Could it come within the existing 'races' power, s.51 (xxvi) or under the 'external affairs' power, s.51 (xxix)? After pages of learned discussion of the history of judicial interpretation of those two existing powers, the Standing Committee decided that they *would* support 'carefully considered legislation for a compact'. However, such legislation could also, under the same power, be reversed. Impressed by 'the political vulnerability to which any such compact legislation would be subject, due to the possibility of amendment or repeal by subsequent Parliaments'³⁶, the Standing Committee concluded that it would be better to seek from the electorate a specific head of constitutional authority. That power to make a compact would be modelled on the authority that secured inter-governmental financial dealings from any legislation of the Commonwealth or States. Though the Commonwealth and the States would be equally bound by the terms of the new Section, I suggest that this measure would be particularly significant as a check on what 'rogue' State governments might be tempted to do. 'States' rights', in matters Indigenous, would be limited by a national understanding. In my view, it would be worth extinguishing Indigenous sovereignty, if the reward were such an adjustment in the federal apportioning of colonial sovereignty. Indigenous Australians have been ill-served by the extant convention of 'States' rights'.

In 2001, in his lecture in this series, Mick Dodson reiterated the Senate Standing Committee's view that the Australian people should be asked to add to their Constitution, by referendum, a new power under which the Commonwealth could bind the States and Territories to adequate standards of social justice. While the State and Territory governments continue to have as much discretion as they do over land and over service delivery, we should ask for nothing less than such a power.

Footnotes:

¹ For more on Coombs' views on these issues see T. Rowse *Obligated to be Difficult: Nugget Coombs' Legacy in Indigenous Affairs* Cambridge University Press, Melbourne 2000, pp.144-51.

² J. Wright *We Call for a Treaty* Melbourne: Fontana/Collins 1985, p.106. Those present were: Coombs, Wright, Stewart Harris, Charles Rowley, W.E.H. Stanner and Dymphna Clark. Wright refers to the four men as the 'core members', p.103.

³ Council for Aboriginal Reconciliation *Reconciliation: Australia's Challenge* Canberra, 2000, p.105.

⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2000*, pp.131-2.

⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report*

2000, p.90

⁶ Coombs to Senator Alan Missen 7/4/82, in Senate Standing Committee on Constitutional and Legal Affairs, Evidence 1983, Hansard pp.568-9.

⁷ These are available in libraries as: 'Guest of Honour Talk: ABC' CRES Working Paper: HCC/13 1979; 'The proposal for a treaty between the Commonwealth and Aboriginal Australians' CRES Working Paper: HCC/WP14 1979; and 'A treaty with Aboriginal Australians' CRES Working paper: HCC/WP16 1979.

⁸ Sydney Morning Herald 27 November 1980.

⁹ F. Brennan and J. Crawford 'Aboriginality, recognition and Australian law: where to from here?' Public Law Review 1990, pp.145-169.

¹⁰ Aboriginal Treaty Committee Newsletter 2.

¹¹ Canberra Times 9 December 1980

¹² These actions are all reported in Aboriginal Treaty News 2 (August 1981).

¹³ Aboriginal Treaty News no.7

¹⁴ Aboriginal Treaty News no.7.

¹⁵ J. Wright We Call for a Treaty, p.121.

¹⁶ Coombs' responses to a seminar (which he was unable to attend) at the University of Western Australia, April 27-8, 1981. H.C. Coombs 'Aboriginal treaty Symposium - a statement' Anthropology News v.18, no.8 September 1981, pp.117-9, p.117.

¹⁷ H.C. Coombs 'The proposals for a treaty between the Commonwealth and Aboriginal Australians' transcript of a statement made 24 October 1979, Human Rights Council of Australia, CRES Working Paper no.14 Canberra: CRES/ANU.

¹⁸ Senate Hansard 12 November, 18 November 1979. J. Wright We Call for a Treaty, p.123.

¹⁹ J. Wright We Call for a Treaty, p.123.

²⁰ Aboriginal Treaty Newsletter 2 (1 October 1980), p.3.

²¹ The Catholic Leader 13 July 1980.

²² J. Wright We Call for a Treaty pp.141-2.

²³ Wright's gloss of Hagan's letter, We Call for a Treaty p.155.

²⁴ Identity v.4(2) January 1981.

²⁵ Aboriginal Treaty News 1 (April 1981).

²⁶ Extracts from NAC Position Paper (April 1981) published in Aboriginal Treaty News 3, and J. Wright, We call for a Treaty p.152-4.

- ²⁷ K. Gilbert quoted in Aboriginal Treaty News 2 (August 1981).
- ²⁸ H.C. Coombs' responses to discussion, in E. Olbrei (ed) Black Australian: The Prospects of Change Townsville: James Cook University 1982, pp.65-6.
- ²⁹ Aboriginal Treaty News 3 (November 1981).
- ³⁰ Senate Standing Committee on Constitutional and Legal Affairs: Evidence Hansard p.1129.
- ³¹ Senate Standing Committee on Constitutional and Legal Affairs: Evidence Hansard p.1130.
- ³² Wright in E. Olbrei ed Black Australian: The Prospects for Change Townsville: James Cook University, pp.78-9.
- ³³ J. Wright We Call for a Treaty p.240.
- ³⁴ D. Halpin in The Sun-Herald 11/10/81, reprinted in Aboriginal Treaty News 3.
- ³⁵ Senate Standing Committee on Constitutional and Legal Affairs After Two Hundred Years... Canberra, p.74.
- ³⁶ Senate Standing Committee on Constitutional and Legal Affairs After Two Hundred Years... Canberra, p.103.

Discussion session

Russell Taylor: Thank you, Tim. I could see us all mentally revisiting the events and relationships as you were articulating them in your paper Thank you for revisiting those issues.

Rod Pitty: Tim, do you feel sovereignty: can be clarified in terms of the dialogue now with the events of the past by the concept of self-determination?

Tim Rowse: You could begin to give an account of sovereignty in those terms, by saying that it meant the right of self-determination, but I think self-determination now admits to a great variety of expressions. One of the best accounts of this that I have seen is by the political theorist Augie Fleras, in a book edited by Paul Havemann (Augie Fleras 'Politicizing Indigeneity: Ethno-politics in White Settler Dominions' in P. Havemann (ed) Indigenous People's Rights in Australia, Canada and New Zealand Auckland: Oxford University Press,187-234). He actually sets out all the levels at which self-determination could be institutionalised in any settler-colonial nation-state, from the municipal right up to the national. I think that the shift from talking about sovereignty to talking about self-determination as a set of institutional possibilities is a good one. I don't know that you would need to hang on to the notion of sovereignty any longer, though, once you have made that move.

Bill Arthur: I was also interested in Mick Dodson's notion of more than one treaty. Right at the end of your paper you were suggesting that federalism was a problem and the question of bringing the states to the prospect of one treaty. How do you feel about the idea of a treaty with the Commonwealth and a treaty with each of the states?

Tim Rowse: I would feel okay. Repeating the question for the transcript, Bill: how would I feel

about the concept of not only a national treaty but a treaty with each of the states. I think that that would be in accordance with what I have argued. The best outcome would be if the Constitution were such that those treaties with the states had to conform to standards that were set in the agreement with the Commonwealth. The essential task here, it seems to me, is to make federalism work in such a way that the national government holds state and territory governments accountable to certain standards of land tenure law and service delivery.

Ellie Gilbert: I had a lot to do with this process during the '70s and '80s. I would like to take it a step further now. I am very aware that when Kevin Gilbert pushed the concept of treaty he was really pushing the notion of sovereignty. We are at the stage where it is now acknowledged that we have to look at sovereignty. Even within Mabo, Brennan's judgment uses the term 120 times. The Australian government I think is very aware they don't have a legitimate sovereignty and will only get a legitimate sovereignty through a treaty with Aboriginal people. I think we have to look at the many sovereignties that belong to this land, and one treaty now is sort of passé. I know Kevin used it as the instrument to talk up sovereignty. Acknowledging sovereignty, now we have to look at the fact that every Aboriginal nation on this land has its own sovereignty. Because no nation can treat for another, there can't be one treaty any more. I think the debate has to now go further and understand that Aboriginal people can't cede sovereignty. The federal government now has to come to the legitimate holders of sovereignty to get any standing in this country at all.

Tim Rowse: I hear two issues in what you said. One was whether there should be one treaty or many different treaties in order to reflect the regional basis of the Indigenous polity. The other issue was whether or not a treaty should extinguish or perpetuate Indigenous sovereignty.

It seems to me if you advocate that very decentralised model, then you would have to leave it up to each Indigenous polity to decide the second issue, whether their sovereignty was being conceded or maintained by the treaty, because you can't really dictate what the terms are that all those different groups will want to find in their treaty. So the main issue that you are raising, I think, is one that I find it very difficult to comment on, which is the degree to which Indigenous Australians are committed to national representative structures and therefore would be confident in a national framework agreement that set standards for all the agreements that were subsidiary to it.

My own personal view is that your model is too decentralised, that it would not impose any discipline on the states and territories to negotiate to certain standards with the many Indigenous polities that you could identify around the nation, even supposing that you could identify them uncontroversially. I notice in this morning's paper that the agreement over Namadgi is disputed amongst the Ngunnawal, and I suspect that you are going to have that problem all over Australia. One of the good things about the treaty debate as a development within Indigenous political culture is that it does test Indigenous capacities for trying out new, unprecedented forms of political mobilisation and political representation. I think that is a stiff test for them, but I don't think it is one that they can avoid taking.

Ellie Gilbert: That has always been the worry, that maybe people get sold out by not knowing what their rights are. But a proper treaty, under sovereign terms, has to be compliant with the UN standards. So that is your bottom line, all the human rights treaties that are already in place.

Tim Rowse: Well, that adds a further element of centralism into a model that you were originally proposing as a rather decentralised one.

Ellie Gilbert: No, there is a balance between the two.

[Qa]: I am just wondering what the difference would be between a document or an agreement that would set standards, and the treaties or agreements beneath that that implement them. Isn't your

response to these decentralised arguments to say yes, but there is still the central treaty. The purpose of that treaty is to set standards for negotiation for all sorts of agreements. Are you saying that there is still one treaty, there has been a spreading of the treaty process into a dialogue so that, say, there is a treaty and then beneath that there is a dialogue to implement it?

Tim Rowse: Is your question a question about the order in which local and national negotiations proceed?

[Qa]: Not only that, but if you are saying we would have a s.105B process, which as I understand it would set standards then for negotiation between the states or the Commonwealth and each of the elements of Indigenous polity, that still suggests to me that there is one central idea of a treaty that resolves the standards and then beneath that there is a process in the dialogue to implement or express that at local level.

Tim Rowse: Yes, I think that is a fair way to describe what I am saying. Incidentally, I think that I am here reflecting and building on what I would see as a current in contemporary Indigenous political strategic thinking, as reflected in Bill Jonas's recent Social Justice Commission report and in the recommendations of the Council for Aboriginal Reconciliation. What impresses me is the way in which federalism has moved up the agenda. It is sometimes disguised by Public Service jargon. For a while I was confused by the term 'benchmarks'. I didn't know what they were referring to. But I realised that it is a kind of Council for Aboriginal Reconciliation/Canberra Public Service code for trying to make enforceable standards by which state and territory governments can be held accountable to some national standard.

My willingness to, I guess, harp on this theme of a single agreement that is a framework for others is as much a response to Aboriginal political thought as I am now hearing it, as to my own sense of what is wrong with Australian federalism. I think that in this year of Federation there has been far too little talk about how opposed the structures of federalism are to the advancement of Indigenous interests.

Jack Horner: I am thinking of the problems. You can't use as a model treaty-making in New Zealand, where it is a matter of one Maori nation and the Pakeha people. What we have got is a whole range of municipal, state and federal jurisdictions overriding one another and passing the buck, more often than not. In what way can we put our federal jurisdiction face to face with all those interests? It has to be above party politics, because what Mr Howard was doing with his 10-point plan was going against Aboriginal interests.

Tim Rowse: The first part of what you said was that, unlike New Zealand, which has a relatively simple structure of government, we have a complex one with three levels of government, and where would an Aboriginal jurisdiction or an Indigenous jurisdiction fit into those three levels? I suppose I want to distinguish a little bit between the question of what an Indigenous jurisdiction is and the question of how you restructure Australian federalism so that states and territories are held accountable to national standards. I think they are different issues.

I don't think you have to make any commitments to the shape of an Indigenous jurisdiction in order to stiffen federalism in a way that is sympathetic to Indigenous interests. The only thing you have to get right, if you are going to have some kind of national agreement, is structures of representation amongst the Indigenous people that allow a negotiation to be conducted in a way that holds the confidence of Indigenous people and is invulnerable to an attack by interests hostile to a representative process. And that might be just a purpose-built, representative structure which ceases to exist once the compact is in place.

Then you tackle the question of Indigenous jurisdictions in very particular local ways, because I

think it is really a series of very particular and local questions. I don't think there is such a thing as a national Indigenous jurisdiction, but I do think you have questions of how Indigenous organisations can form partnership agreements with municipal, state and federal agencies, and other authorities, in particular places.

So I see the question of Indigenous jurisdiction as something that evolves very slowly – and it has been evolving slowly in the last 30 years, since governments began to confer powers on Indigenous corporations.

Mick Dodson: One of the features of the Aboriginal Treaty Committee's approach was to urge caution, as opposed to a mad rush to form agreements. It seems to me that the present approach of ATSIC has the ATC feature of caution about it. In a sense ATSIC wants to be facilitating a discussion, a debate, a dialogue if you like. They have not drafted anything but are trying to get a discussion going about the idea and also through educating to raise awareness.

I would welcome your views about the approach of Democrats Senator Aden Ridgeway of the introduction of a bill in response to the Reconciliation Council's final report – I understand it is virtually lifted from that final report – to form a framework for the possible negotiation of an agreement or treaty. Do you think this has potential to 'scare the horses' and derail the whole process? What damage would it do?

Tim Rowse: The question is whether Aden Ridgeway's proposal to introduce a bill based on that recommended by the Council for Aboriginal Reconciliation would be politically unwise at this moment, would 'scare the horses', as Mick says.

Yes, of course it will scare the horses. I suppose just about anything will, at the moment. There also needs to be a focus for the non-Indigenous support for Indigenous rights, and I think that it is important to carry the fight to conservatives. I think that anything that comes out of the Council for Aboriginal Reconciliation at the moment has got a lot of bipartisan goodwill behind it. The Council spent 10 years trying to generate an image of itself as a consensus body. It seems to me that if it has created this political artefact called a bill or a set of recommendations, and nobody uses those things or can find a use for them, then its work of consensus-building is going to be squandered. So in general I would support some attempt to take the proposals of the Council for Aboriginal Reconciliation, whether it be that specific bit of legislation or other things that they have recommended, into the public arena and say, 'Well, what would be wrong with trying to do this?' and put the onus on others to say why it would be such a disaster.

Having only read through the bill quickly, my first impression is that perhaps the framers of that bill hadn't thought very much about the difficulties of representation that are going to face anybody who does anything in this field. Whether the bill is crippled by that lack of consideration is another question, but one of the points of my paper is to emphasise how important those structures of political representation are for both sides.

Barry Hindess: Tim, I wonder if you could clarify something for me about the idea of a treaty or agreement process which worked through a form of 105B clause in the Constitution. You speak about the implications of the Senate committee discussions. If the committee suggests that we need a new clause or subclause in the Constitution, is the implication of that saying that at the moment the federal government does not have the power to make such a treaty or agreement?

Tim Rowse: No, it is not. Was that all your question?

Barry Hindess: Well, I wondered what exactly what that implied.

Tim Rowse: No, the Senate committee, after looking at the interpretation of the Constitution in various cases, came to the conclusion that under what is called the races power or the external affairs power you could actually formulate a compact, but the trouble was that those powers were not as entrenched as those that would be afforded by a new head of power specifically designed for the compact negotiations. I am not a good enough constitutional lawyer to be able to reiterate their arguments about that, but perhaps someone else who is on top of that could comment on whether that was a persuasive argument by the Senate committee. That was definitely their view, though, that it was not quite good enough.

Of course, it lifts the bar in one way, because what we are talking about here is a majority of the voters and a majority of the states passing a referendum, and that is always a very big ask in Australia. But you could say that that's probably the only way that it's worth doing it, because anything else is too trivial. One has to be patient and build up support over a very long time until this becomes common sense, that the Constitution really needs this amendment.

Rod Pitty: Just following up quickly on that point: I don't recall the argument of the Senate committee, but any agreement that is made by the executive or any legislation that is enacted by the parliament can be changed by a subsequent executive government or by a subsequent parliament.

Tim Rowse: Yes.

Rod Pitty: But if something has constitutional status – in other words, if there is an amendment to the Constitution – that can only be changed by a subsequent constitutional amendment, which is a much more visible process. So if a treaty to come has constitutional status then it is really enshrined with much greater permanence.

Tim Rowse: Thanks for that.

Mick Dodson: I was going to make the same point. An agreement under the races power, for example, would be an agreement pursuant to legislation and open to change. An agreement under a 105B would have constitutional force, and the only way to change it is by changing the Constitution.

Lisa Strelein: The other comment about a s.105B type provision is that it also provides that constitutional protection without taking the terms of an agreement to a referendum. It is actually putting to the non-Indigenous population the issue of whether a government should be able to enter into agreements that would be protected constitutionally, rather than should we enter into particular agreements and their terms. So it is a little bit simpler to have constitutional entrenchment of 'a treaty'.

Tim Rowse: Yes, though I think that the Senate committee did want to set out some principles that would govern any agreement. So it wasn't completely without content that could be made controversial.

Ellie Gilbert: Could I just add one more thing that I think we are leaving out? In '86, with the Australia Act, the full force of the Magna Carta came into Australian law. So Australia was no longer a conglomeration of prison colonies, but every state and the federal government now have the Magna Carta as the basis of Australian law. Within the Magna Carta it wasn't the giving of rights; it was an acceptance of inherent rights. So there's a clause that talks about the 'undoubted ancient rights'. When you stand back and you look at that, all Aboriginal rights are actually already acknowledged by the Constitution now that the Constitution has got the Magna Carta in it. So we don't have to talk about a change to the Constitution, a referendum that I don't think would ever get through. The process is already there that we can have, that the federalism can actually

accommodate what people are talking about, so that all the different Aboriginal nations maintain their own sovereignty within the federation. I think we really have to look at the Magna Carta and its implications.

Tim Rowse: Notwithstanding the weight of those implications, I don't think they reach as far as the problem that I was trying to identify, which is the ease with which the Commonwealth concedes initiative to state and territory governments. There needs to be something in the Constitution that does not allow the Commonwealth to buckle when a populist Premier pokes fun at Canberra, as Bjelke Petersen did in 1979. In fact, the kind of rhetoric that is associated with the Magna Carta might also be enlisted on the side of populist Premiers who say that they are protecting Queenslanders from big government. I think that the mystique of the Magna Carta is a kind of two-edged sword in debates in a political culture as given to right-wing populism as Australia.

Graeme Ward: There is an interesting domestic parallel to the situation that you were describing here in the ACT. The ACT's constitution, which is the Self-Government Act of the national parliament, provides for the ACT population to entrench matters if they so wish, and there has been a case of that already. The ACT Assembly, acting within its power, enacted electoral legislation for the ACT. The principles of that electoral legislation were subsequently entrenched by a referendum of ACT people held in conjunction with an election, so that the ability of the ACT Assembly to switch away from the electoral legislation it passed is now inhibited by the entrenching of that legislation subsequently by the population as a whole.

Tim Rowse: Thank you.

Bill Bennett: Toward the end of your talk, Tim, you mentioned that a treaty can be a legitimate instrument for the extinction of Indigenous sovereignty and its inclusion into a more general sovereignty. Are you suggesting that in fact the debate may have moved on to a process of actually recognising the ongoing presence of Indigenous sovereignty in the process of treaty-making. Do you have a sense of whether it would make any change in that direction?

Tim Rowse: I know that people infer from the Mabo judgment a weighty judicial authority – through an implied argument, I suppose, rather than an explicit one – that there is an unextinguished Indigenous sovereignty. That is an important argument for certain people, I know. I am trying to work out how important it is for me. I don't think it actually alters the kind of political analysis that I want to make. I think that unless Australia submits itself to some kind of international arbitration about the nature of its sovereignty, then ultimately the sovereignty that is implied in High Court judgments is of no political or legal significance except as strengthening a certain formation of public opinion that wants to be convinced of the deep issue of social justice that we are dealing with here.

My worry about arguments that appeal to a moral absolute like that is that they can also be represented in a hostile way as arguments about institutional formations. What I think needs to be stressed with self-determination as a kind of succeeding concept to sovereignty, in the way that Rod presented it, is that it is talking about quite mild and easy-to-manage institutional reform. The moral weight of the concept of sovereignty has the potential to obscure the moderation of many forms of self-determination. That is my uneasy answer to your question. It is something that I think about a lot and remain uneasy about.

Rod Pitty: I am not sure you can presume that it is a 'mild' thing, because that is making a decision already. It is the process of Indigenous peoples having a choice about how they fit into the constitutional framework that has been imposed here that is the crucial aspect of self-determination. In terms of the earlier response you made, I think there is some prospect of getting international accountability. The issue is how much. But that is another dimension about the need to look back at

the last 20 years, at what has changed in terms of international accountability. A few people in this room have experience about that, and maybe a significant amount has changed, in terms of what even the current government say in Geneva compared with what they say to populist audiences here.

Tim Rowse: True. I take both those points, Rod. Thank you.

Jack Horner: In this morning's paper there was a report that Namadgi National Park was being handed over to local Aborigines as custodians but not owners, with the local ACT government as the proposer. The way the government is run at present, the three levels of government, the federal government could override that just for political reasons, just to be different. Is it this sort of political jockeying all the time that a treaty would be there to prevent?

Tim Rowse: Yes. The question is about to what extent the treaty can prevent shifts of responsibility between levels of government, or actions by one level of government that are hostile to something that another level of government has done in favour of Indigenous interests. How you set out national standards of government behaviour ultimately becomes quite a complex technical question. I refer back to the beginning of my paper. Just one example of a proposal in that line is the Commonwealth Grants Commission's suggestion that every two years there be an inquiry into each state and territory's administration of funds that have been granted in respect of its Indigenous population. If you had political will, there is any number of mechanisms that you could set up like that, which do make governments think twice before they think they can get away with not adhering to agreed national standards.

But the problem of policing standards intergovernmentally will remain long after a treaty is concluded, because that is the nature of public policy-making. Agencies are always trying to do what they want and perpetuate their own corporate interests. That's why we have national auditors and other devices that bring terror into the lives of people like Russ!

Russell Taylor: And joy sometimes! Thank you very much. Today's seminar has been extremely interesting and thought-provoking. I thank Dr Tim Rowse for his paper.