The Political Compatibility of Aboriginal Self-Determination and Australian Sovereignty

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Abstract

It seems inevitable that sovereignty and self-determination engulf any discourse on reconciliation between Australia’s settled population and Aboriginal people. The pervasive myth in politics and public policy is that the concept of Australia’s sovereignty is highly incompatible with the concept of Aboriginal self-determination, because the former can only mean secession, and shy of that, it is impossible for Australia to have a treaty with itself. However, using an expansive view of self-determination, one commonly accepted historically and abroad, this paper demonstrates how Aboriginal self-determination can actually strengthen Australia’s international sovereignty and internal politics.

This paper has been peer reviewed

Introduction

In 1988, John Howard, then-future Prime Minister of Australia, famously called a treaty with Aboriginal people and Torres Strait Islanders an ‘absurd proposition’.1 Questions of Indigenous self-determination within a sovereign Australia have attracted countless critique, legal and political analysis, government investigation and case law, but the issue remains contentious. Of course, the friction between sovereignty and self-determination is not unexpected. The legal and political system of Australia is reluctant to grant recognition to the Indigenous population for fears of reinforcing divides within Australia, and encouraging secessionists. But the obsession with

preserving Australia’s territorial sovereignty suggests to Indigenous and non-Indigenous Australians alike, that territorial autonomy is the only form of self-determination. In reality, the concept is far broader and has had practical application in Australia for many years.

This essay begins by outlining the position of Indigenous sovereignty and the shaky sovereign foundations of the Crown in Australia. It then offers an analysis of Indigenous self-determination, including secession and treaties, but also broader conceptions of Aboriginal self-determination. This paper does not address the policy implications and political desirability of such concepts, but does ultimately decide that Aboriginal self-determination is highly compatible with Australian sovereignty. Further, it argues that such a position is actually desirable and conducive to Australian sovereignty by encouraging national unity and dissuading secessionism, as well as improving human rights and Indigenous wellbeing. Finally, it also acknowledges that the Indigenous population never ceded sovereignty to the Crown at settlement, giving more nuance to the very notion of sovereignty in Australia while working to address the unresolved issues of our colonial past.

**Sovereignty**

Sovereignty and self-determination are two concepts deeply contentious in their own right, in a political sense and on an international scale, though the extent of those issues is beyond this paper’s scope. Sovereignly was first enshrined in the 1933 *Montevideo Convention on the Rights and Duties of States* as the basis of the international state system, providing that a ‘sovereign state’ must

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3 For more detail on the specific international instruments and documentation on self-determination, see e.g. Joshua Castellino and Jeremie Gilbert, ‘Self-Determination, Indigenous Peoples and Minorities’, *Macquarie Law Journal* 3 (2003): 158-64.
have population, territory, government and broad international recognition. These requirements are *prima facie* straight forward and capable of being interpreted broadly, particularly relating to territory, which has no spatial minimum, or stable, precise border. The classic example of entities excluded from statehood includes the nation of Kurdish people who share a culture and tradition, but control no territory. Under *Montevideo*, Australia is unquestionably a sovereign state. Meanwhile, Indigenous sovereign nations like Aboriginal people and Torres Strait Islanders, who have clearly defined land, populations and forms of government, continue to receive only limited international recognition, largely from other indigenous populations, and this has not been enough to attain statehood.

Sovereignty gives each state the right to determine when their territorial rights are encroached, and to make an appropriate response. Despite Aboriginal people and Torres Strait Islanders exhibiting many features of statehood, the Australian legal and political structure is stacked against them exercising such appropriate responses. Section 51(xxvi) of the Australian Constitution gives a *single* national sovereign Commonwealth the ‘race’ power, the power to make laws with respect to the people of any race. The Constitution also vests nationhood power and executive power in a single Commonwealth. There is no legal avenue to spread that out over Aboriginal and non-Aboriginal people. This gives Australia effective control over its population, residing in a particular territory, a concept known as ‘territorial sovereignty’. This is the major bar to an

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8 Patrick Harding Lane, 'Nationhood and Sovereignty in Australia', *Australian Law Journal* 73 (1999), 122; Australian Constitution, ss 51(xxvi), 61.
Aboriginal sovereign state. Territory is fundamental to sovereignty, because if people are to be self-governing, they must govern somewhere; otherwise, like the Kurds, they are subject to the laws of the state in which they find themselves. For Indigenous persons, the imposition of others onto their land does not detract from Indigenous sovereignty, but despite recognition of land rights through native title, the prevailing Western model of sovereignty means that Aboriginal people and Torres Strait Islanders have no land on which to self-govern, because, due to dispossession, all of Australia’s territory is governed by Australia.

There is an ongoing question for non-Indigenous people and the dominant non-Indigenous legal and political system about whether the Indigenous population have some claim of sovereignty over Australia, and whether they have sovereignty over their own people. Perhaps the most influential public display of Indigenous self-determination in Australia was the Aboriginal Embassy of the 1970s and the ensuing court cases by Paul Coe. Coe helped to erect a tent on parliamentary grounds in 1972, and established it as the Aboriginal Embassy. This was a powerful display of the lack of institutionalised power Aboriginal people and Torres Strait Islanders had; they were not equally treated as part of Australia, so it was fitting that they had their own foreign embassy. Coe’s proceedings in the High Court of Australia argued that Australia was wrongly treated as terra nullius, essentially land unclaimed. In fact, they argued, Australia was under the sovereign control of many Indigenous nations, and Crown sovereignty was ‘contrary to the rights, privileges, interests, claims and

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11 Lane, ‘Nationhood and Sovereignty in Australia’, 120.
12 Though Coe’s cases were never decided due to procedural issues, the available hearings offer rich insight into the issue. The Coe cases are as follows: *Coe v Commonwealth* (1978) 18 ALR 592; *Coe v Commonwealth* (1979) 24 ALR 118; *Coe v Commonwealth (The Wiradjuri Clan)* (1993) 118 ALR 193; *Commonwealth v Coe* [2002] NSWSC 94. For more on the Embassy debacle and the Coe cases, see Andrew Schaap, ‘The Absurd Proposition of Aboriginal Sovereignty’ in Andrew Schaap, ed., *Law and Agonistic Politics* (Farnham: Ashgate, 2009), 209-25.
entitlements of the aboriginal people’. Coe submitted that this entitled Aboriginal people and Torres Strait Islanders to recognition, compensation or a treaty. The court held that because Aboriginal people and Torres Strait Islanders were not a distinct political society, separate from others, the idea of even a limited sovereign Indigenous nation was a legal impossibility, and further, that it was ‘fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest’, and therefore, this case could not exist. In this sense, Indigenous sovereignty, the deepest form of self-determination, has been described as politically incompatible with Australia’s sovereignty.

Regardless, the High Court has confirmed that Aboriginal people and Torres Strait Islanders exercised sovereignty before colonisation. Australia’s subsequent occupation was based on the fiction of *terra nullius*, later overturned in the landmark native title case, *Mabo (No 2)*. Thus the argument goes that Aboriginal people and Torres Strait Islanders were sovereign before colonisation, their sovereignty was not extinguished and it remains intact today – and self-determination, which is considered further in the second part of this paper, is a potent reminder of this. Before colonial criminal law was found to apply to Aboriginal people, courts held that 'Aboriginal people’s enjoyment of their customary rights was associated with their status as a domestic dependent nation', labelling them as dependent ‘tribes’ rather than conquered people, and having rights as distinct people to have self-governing communities. The 'domestic dependent nations' idea, which came from the United States of America and its treatment

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14 Coe v Commonwealth (1979) 24 ALR 118.
15 Coe v Commonwealth (1979) 24 ALR 118.
16 See, e.g., Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141, 267; the Coe cases.
18 R v Bonjon (1841) NSWSupC 92.
19 Larissa Behrendt, Chris Cunneen and Terri Libesman, Indigenous Legal Relations in Australia (Oxford: Oxford University Press, 2009), 16.
of Native Americans, was compatible with US and Australian sovereignty; there was no suggestion that either the United States of America or Australia stopped being a sovereign state during that time.

Did Aboriginal people and Torres Strait Islanders had sovereignty over Australia before the British arrived? This is the heart of the complexity and contradiction over Australian sovereignty, and it leads to a questioning of the very legitimacy of Australia’s statehood. In *Mabo (No 2)*, the High Court recognised prior property rights but not other rights of Indigenous peoples. Yet as Henry Reynolds observes, if land rights survived, why was it not the same for Indigenous customs, politics and the right to internal government? If all Indigenous rights survived Crown settlement, then Australia is a sovereign Indigenous state with colonial intruders. The ramifications of this are far-reaching, and the High Court has stated that applying such a continuity doctrine by recognising some sovereignty would lead to ‘unacceptable trauma’ of Australian social structure. The onus would be on the Crown to ‘establish by what principles of law Aboriginal sovereignty was overridden’. Yet this too raises an awkward proposition; though sovereignty is an important domestic issue in Australia, determination of sovereignty relies in part on broad international recognition. Asking the High Court a question of international relations, whether Crown sovereignty in Australia is valid, asks the High Court, which is empowered by the Constitution, to examine its own legitimacy.

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20 Three cases, known as the Marshall Trilogue for the Chief Justice of the US Supreme Court, are particularly relevant: *Johnson v M’Intosh* 21 US (8 Wheat) 543 (1823), *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831) and *Worcester v Georgia* 31 US 515 (1832).
Aboriginal people and Torres Strait Islanders had sovereignty before colonisation, and some level of it even after colonisation, and although Australia’s sovereign foundations may be complex and even contradictory at the international level, no other state denies that Australia has it. This is because, to other states, the sovereignty that matters is external sovereignty. John Howard’s characterisation of sovereignty has an absolute external focus, denying any other form that could lead to treaty-like negotiations. But the matter of sovereignty has an internal aspect too, how power is distributed in a federal system, or where it is distributed in a system of separated powers with different governmental arms. The idea of internal and external sovereignty has been confirmed by courts across the country, particularly that internal sovereignty is necessarily divided by different organs of different governments. The court has explicitly recognised that in Australian public policy, ‘sovereignty is qualified and shared, rather than absolute...for much of the nation's history, Australia's external sovereignty was actually shared with the United Kingdom’. This is significant, because it is clear that within international relations, Australian sovereignty in the traditional, external sense, is unquestioned. It is on this basis that critics like Howard dismiss the idea of a treaty with Aboriginal people and Torres Strait Islanders – because treaties are made between two sovereigns, and Aboriginal people and Torres Strait Islanders are part of one sovereign Australia, a treaty with them would be a treaty with oneself. Yet countries like New Zealand and Canada expose the fallacy in Howard’s rigid thinking. New Zealand's 1840 Treaty of Waitangi and Canada’s multiple treaties with its Indigenous people, dating back to the 1800s, set out various obligations and rights for both parties that make significant inroads to a level of self-government. These treaties do not confer international recognition as a state to Canada’s Inuit, Métis and First Nation population, or to New Zealand’s Māori population.

27 Brennan, Gunn and Williams, ““Sovereignty””, 313.
28 Brennan, Gunn and Williams, ““Sovereignty””, 318.
29 Brennan, Gunn and Williams, ““Sovereignty””, 312.
30 New South Wales v Commonwealth (Seas and Submerged Lands Case) (1975) 135 CLR 337, 479.
31 Brennan, Gunn and Williams, ““Sovereignty””, 320.
because the external dimension of the Western sovereignty model is still a question of international relations. However, the treaty does acknowledge that the consequences of acquired sovereignty in terms of internal power distribution are domestic issues, and acknowledges the internal sovereignty of the Indigenous, as well as giving them a base of power to refer to. This suggests that as a matter of domestic public policy, an internal treaty and other forms of sovereignty are not legal or political impossibilities. This fact is reinforced as Australia continues to stand alone in the common law world, being the only country that has not signed a treaty with its Indigenous population.

**Self-Determination**

In the *Coe* cases, the High Court’s legal position was that there was no Aboriginal nation insofar as being a separate state or exercising sovereignty, but it did not comment definitively on self-determination, an idea often raised as a corollary to sovereignty: that a statehood claim is not valid if made without the consent of the people. Though the lack of a treaty in Australia has made it harder for the Indigenous population to engage in self-determination, as there is no base from which to start on, self-determination has a long history of application in Australia and has meant that Aboriginal people and Torres Strait Islanders have been able to acquire some autonomy and recognition within a sovereign state. Perhaps the most important example is the now-defunct Aboriginal and Torres Strait Islander Commission (ATSIC), the peak Indigenous representative body, which contributed significantly to Indigenous self-determination as a body of elected individuals who oversaw and gave a voice to Indigenous affairs within their own communities.

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33 Brennan, Gunn and Williams, “‘Sovereignty’”, 350.
34 Megan Davis, ‘Treaty, Yeah?’, 127.
existence of such an entity is hardly incompatible with a sovereign Australia, but nevertheless provide for a level of self-determination in that it afforded Indigenous peoples, nations within a state, a limited right to govern themselves.\textsuperscript{39}

Of course, there are caveats to self-determination; who are ‘the people’? What is ‘the territory’ in which they self-govern? Could ‘the people’ mean all the people of a state, or must it mean a minority? Could it be a distinct Aboriginal nation or language group? Could ‘territory’ be a federal division, like Northern Territory? Could it be merely a suburb? These considerations are important, but not for the purposes of this paper.\textsuperscript{40} Another question is whether this concept gives rise for an independent, autonomous Aboriginal state. But this too is not the important question. Theoretically, self-determination might provide for Aboriginal people and Torres Strait Islanders to consolidate their striving for sovereignty into actual independence, despite the continued claim of sovereignty by Australia as the state they seek to escape from.\textsuperscript{41} At its most extrapolated, self-determination is the basis for secession, justifying ‘the assertion of territorial sovereignty for a particular national group’.\textsuperscript{42} But there have


\textsuperscript{40} One of the oft-mentioned caveats is the idea of \textit{uti possidetis}, a principle suggesting that self-determination must be based on existing, perhaps colonial, territorial boundaries within a state; again, using the example of former Yugoslavia, Macedonia was a republic of the Federation; Kosovo was merely a province. See, e.g., Warbrick, ‘States and Recognition in International Law’, 205.

\textsuperscript{41} Consider the case of former Yugoslavia; following its collapse, six entities once belonging to the Republic sought statehood; six republics of the federation, and two semi-autonomous provinces. In what was an unusual method of proceeding, self-determination became a vital factor in the outcome of these entities as putative states undertook consultation on whether they wanted a new state created in their territory of the former Yugoslavian federal state. On that basis, it was determined that Kosovo, merely a province, did not satisfy the self-determination criteria, but Macedonia and the other republics did. See, e.g., Warbrick, ‘States and Recognition in International Law’, 217; the option was only available for federal units, not all ethnic groups, including Kosovo. See also Thomas Grant, \textit{The Recognition of States: Law and Practice in Debate and Evolution} (Westport: Praeger, 1999), 149-213.

\textsuperscript{42} Pavkovic and Radan, ‘In Pursuit of Sovereignty’, 7.
always been more nations than states - Kurds, gypsies, Native Americans, the Inuit - and no process of redistributing them in accordance with self-determination, without destroying the territorial integrity of existing sovereignties. While some of these nations have limited additional rights within the territory they find themselves in, such as commercial land rights for Native Indians in the US, none have achieved statehood. The international instruments that recognise rights to self-determination inevitably include a caveat of territorial integrity of other states. Self-determination of itself does not and need not give rise to dismantling existing countries. Indigenous people have a right to self-determination that does not extend to secession, but instead, focuses on self-government. Australia’s attitude on such an approach, however, is far from agreeable. Such a provision was discussed and largely favoured during the 1999 drafting of the United Nations Declaration on the Rights of Indigenous Peoples, a non-binding international instrument setting out the standard of treatment for Indigenous populations. Yet Australia voted against the adoption of that provision, a telling sign of the representation it sent to the UN and its attitude towards Aboriginal people and Torres Strait Islanders at the time.

Questions of self-determination inevitably rest on the will of the people and although states have exclusive sovereignty over their territory, self-determination suggests people have sovereignty, and the will and right to choose their own state and territory. In this sense, self-determination offers a unique protection of minority rights. For Aboriginal people and Torres Strait Islanders, there are two Australias – one that is an affluent, first world country, and the other where a subset of the population has a significantly lower life expectancy, higher incarceration rate and a brutal history of marginalisation. The

inability of Australia to deal with these pervasive issues is the most potent argument for self-determination. A limited right to self-government within a broader sovereign Australia gives Indigenous populations the right to recognise, prioritise and address their own concerns. The harm minimisation aspect of this is obvious; failure to bring more unity to Australia’s entire population sows the seeds of secessionism. But there are also tangible benefits that can be felt by the Indigenous and non-Indigenous alike. In the context of human rights, addressing important Indigenous issues such as health and education and empowering Aboriginal people and Torres Strait Islanders to participate in that process confirms Australia’s commitment to human rights for its entire population.47

Many nations and indigenous groups declare aspirations of self-determination, but they have quite different expectations on how a right to self-determination might be exercised.48 Some ways to ease tensions between territorial sovereignty and self-determination are vivid in power-sharing ethnically plural societies:

A grand coalition of political leaders that represent all the significant communities and allow elite cooperation to develop; veto power for all communities on legislation that affects their vital interests; a system of proportionality in the parliament, civil service, and key governmental agencies; and a high degree of segmental autonomy for each community.49

These are precisely the questions considered in the report of an expert panel commissioned by the Gillard Government, which undertook consultation on the options available to recognise Aboriginal people and Torres Strait Islanders in the Australian Constitution. That report, Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution (“the Report”), is a veritable treasure trove of self-determination offerings highly compatible with Australia’s external sovereignty, and indeed strengthening it by easing minority

47 Davis, ‘Treaty, Yeah?’, 132; see also Steven Curry, Indigenous Sovereignty and the Democratic Project (Farnham: Ashgate, 2004).
tensions and acknowledging the status of Aboriginal people and Torres Strait Islanders as the first people of Australia. Some of the Report’s recommendations included repealing section 25 of the Constitution\(^{50}\) and repealing or amending section 51(xxvi) or creating a new head of power to legislate on Aboriginal affairs,\(^ {51}\) as well as inserting a preamble or statement of recognition of Aboriginal cultures, languages and heritage.\(^ {52}\) This should not be dismissed as mere symbolism. Though constitutional change as described in the Report would not engender the type of rights-and-obligations relationship that a treaty would, it could realistically offer a similar source of power and acknowledgement on which to base a more tangible self-determination movement.

The spectrum of sovereignty and self-determination, described in this article as beyond merely external sovereignty and secession, is an attitude reflected by the Indigenous peoples. The Report made it clear that sovereignty 'means different things to different Aboriginal and Torres Strait Islander communities',\(^ {53}\) though the federal government conception remains rooted firmly in an obsession with external sovereignty. Indeed, the Report described Indigenous communities at every point on the continuum – some who had maintained high levels of sovereignty and self-sufficiency were primarily concerned with achieving their own government within Australia sovereign, with an official legal dialogue between it and the federal government, something akin to federalism.\(^ {54}\) Others saw recognition as its own starting point for a social process of local Indigenous sovereignty within an Australian nation-state, seeking as much self-determination as possible be provided.\(^ {55}\)

Importantly, the Report also made it clear that some self-determination for Aboriginal people and Torres Strait Islanders is overwhelmingly supported by Australia’s non-Indigenous

\(^{50}\) *Expert Panel, ch 5.*

\(^{51}\) *Expert Panel, ch 5.*

\(^{52}\) *Expert Panel, 126.*

\(^{53}\) *Expert Panel, 210.*

\(^{54}\) *Expert Panel, 211.*

population. And this is not particularly surprising – Australia has a long history of success with Indigenous self-determination dating back to at least the 1970s. Initiatives have included Indigenous-controlled organisations and projects where Aboriginal people and Torres Strait Islanders work with government agencies, particularly the aforementioned ATSIC, in signed regional agreements and programs such as community policing, where Aboriginal people and Torres Strait Islanders partner with local police. These are ideally suited for self-determination and hold genuine potential to reduce the rate of increase in the incarceration of Indigenous people and, indeed, to reverse it.

However, where Australia has a history of Indigenous self-determination, it also has a disheartening pattern of dismantling the very initiatives that hold promise of self-determination, to the point where self-determination is no longer the framework for Indigenous affairs in Australia. Non-Indigenous support for Indigenous self-determination, as described by the Report, makes it curious that the federal government has moved away from self-determination initiatives – a notable example is the abolition of ATSIC in 2004, without any Indigenous consultation. That is an important and seriously discouraging marker, both as a result of and a cause of those who dismiss self-determination as a failure. In some ways, these critics are not wrong. Megan Davis describes the activism of Indigenous women in trying to bring attention and solutions to sexual abuse in rural communities; yet nothing tangible was done until the federal intervention. It took more than the voices of Indigenous women to address such a major issue – but more likely, this is because their voices were ignored until the Crown and the non-Indigenous embraced the issue. This speaks to an issue beyond constitutional remedy – the historic exclusion of Aboriginal people and Torres Strait Islanders from the governance process. The difficulty experienced by

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56 Expert Panel, 109-12.
Aboriginal people and Torres Strait Islanders in participating in the democratic process of Australia, or bringing to attention their issues, is not a failure of self-determination – it is a failure of our democracy to 'make space for Indigenous Australians', and a reinforcement of the division between Indigenous and non-Indigenous populations.

The fluctuating levels of self-determination over time demonstrate the difficulty of enshrining it as a permanent feature of society, and one that cannot be repealed or removed whenever the government fancies. The constitutional consideration of the Report contains some hope in this regard, as constitutional recognition is all but permanent, but the more complex problem of participation in the democratic process by the Indigenous is not an issue that can be legislated away. It requires a more nuanced approach to inclusion of the Indigenous in Australia, as economic and social disempowerment remains strong in indigenous communities, particularly in relation to interaction with the government. But this too is an area prime for self-determination action, with the possibility of dedicated parliamentary seats as in New Zealand or the Scandinavian countries, or a council of indigenous elders in the Senate, or some permanent committee to advise Parliament on laws affecting Aboriginal people and Torres Strait Islanders. Within such a partnership, Aboriginal people and Torres Strait Islanders can be involved in a decision-making process that affects them, and thus directly exercise some self-determination in a much larger system, over which they have no control. An additional stream of self-determination in this respect is for Aboriginal people and Torres Strait Islanders to gradually assume responsibility for matters such as education, health, justice, conservation and language policy through community councils, giving local communities powers of local councils, some state administration powers and a select few federal powers. This view seeks to equalise division of power in areas that Aboriginal people and Torres Strait Islanders see as

60 Davis, ‘Treaty, Yeah?’, 130.
61 Expert Panel, 183.
62 Expert Panel, 177.
64 Pratt and McDonald, ‘Aboriginal Self-Determination’, 351.
65 Reynolds, Aboriginal Sovereignty, 140.
important, and could certainly be compatible with Australian sovereignty, as well as in incorporating rich Indigenous culture into broader society.

Certainly, some Aboriginal people and Torres Strait Islanders consider self-determination only in terms of a new sovereign state, but many see it as a more inherent right to determine their own futures, not resulting from any constitutional grant, but simply the exercise of individual and communal autonomy. This analysis goes to the heart of internal sovereignty, of Aboriginal presence within an Australian sovereign, sharing sovereignty between several parties having ‘qualified power [rather] than the rule of an absolute and monolithic sovereign.’ The important aspects of Aboriginal self-determination are that Aboriginal people and Torres Strait Islanders design their own principles, reflecting on their traditional ways, without having to rely on others, and ultimately, with a view to preserve their culture and to an extent adapt it to effectively interact with non-Aboriginal society. This is certainly not a call for a separate state incompatible with Australia’s statehood. Aboriginal rights can be protected in semi-autonomous systems such as regional agreements or national associations controlling cultural matters, whilst still enabling Australia, the broader sovereign to maintain unity over all of its minority groups through federal political and judicial control.

Returning to John Howard’s ‘absurd’ treaty idea, the word ‘treaty’ implies Australia making an agreement with another sovereign state, raising the question of whether Aboriginal people and Torres Strait Islanders have the power and authority to enter into a treaty. As noted earlier, in the international relations sense, Australia has complete external sovereignty; but as a public policy matter, sovereignty need not be a barrier to Australia making a treaty with Aboriginal people and Torres Strait Islanders, particularly if Australia takes a liberal view of what a ‘treaty’ may be; a comprehensive,

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66 Brennan, Gunn and Williams, “Sovereignty”, 315.
67 Brennan, Gunn and Williams, “Sovereignty”, 316.
68 Brennan, Gunn and Williams, “Sovereignty”, 317.
69 Reynolds, Aboriginal Sovereignty, 142.
70 Pavkovic and Radan, ‘In Pursuit of Sovereignty’, 6; Reynolds, above n 24, 145.
political agreement between Indigenous persons and the Crown including recognition and the binding force of law.\textsuperscript{72} Many other countries, particularly Canada, New Zealand and the United States of America, offer a blueprint of achieving greater self-determination without encroaching sovereignty. As this paper focuses on the theoretical outlook, details of these structures are not provided, but at the next level of discussion, practical application, they would certainly be useful.\textsuperscript{73} The 'narrative of exclusion'\textsuperscript{74} of Indigenous Australians at an institutional level has derailed progress in self-determination, but establishing a treaty, and thus a source of power, could give real meaning to Indigenous sovereignty within a sovereign Australia. It is clear that the failure of Australia and other states to recognise nations within themselves, such as Aboriginal nations, is not really in the best interests of the non-Indigenous, and certainly not the Indigenous. It denies human rights, advocates cultural impoverishment by refusing to recognise Indigenous culture and law, and encourages incredible political instability\textsuperscript{75} through calls for more extreme action, such as secession. A more expansive interpretation of self-determination is a simple way to temper these tensions. Self-determination is not necessary ‘irredentism, secession and the violent renegotiation of territorial frontiers. Promotion of minority rights, devolution, federalism and greater acknowledgment of the legitimacy of cultural self-expression are all expressions of self-determination.’\textsuperscript{76} A liberal view of self-determination gives Australia’s sovereignty flexibility without destruction while at the same time acknowledging an Indigenous population that were Australia’s first peoples, and giving back some of their lost sovereignty.

\textsuperscript{72} Brennan, Gunn and Williams, “‘Sovereignty’”, 309.
\textsuperscript{73} For details on the situation in these countries, see Brennan, Gunn and Williams, “‘Sovereignty’”, 329-44.
\textsuperscript{74} Davis, ‘Treaty, Yeah?’, 131.
\textsuperscript{75} Porter, ‘National Minority Rights’, 51.
Conclusion

Territorial sovereignty remains the central power of external recognition, and Australia’s external sovereignty is unquestioned. But the self-determination continuum, from basic cultural recognition to special semi-autonomous status to the treaty option and secession, offers a rich array of public policy solutions to address an internal division within a domestic framework. This paper has argued the many forms of self-determination shy of secession are not just compatible with Australia’s sovereignty, but actually conducive to it – because lack of self-determination rights for Aboriginal people and Torres Strait Islanders effectively promotes secessionist ideas and a divided state, not to mention human rights abuse and cultural impoverishment. Furthermore, it clear that Australia’s sovereignty is inextricably tied up with the will of its own people, and Aboriginal people and Torres Strait Islanders are part of that force; ‘the legitimacy of [Australia]’s sovereignty depends upon Indigenous people's acceptance of the Constitution, as much as it does the acceptance by non-Indigenous people’.

About the Author

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78 Reynolds, Aboriginal Sovereignty, 138.
80 Brennan, Gunn and Williams, “Sovereignty”, 322.