

Towards an Indigenous order of Australian government: Rethinking self-determination as Indigenous affairs policy

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Foreword

This paper was originally prepared as a contribution to a conference entitled *Rethinking Indigenous Self-Determination* organised by the Centre for Democracy at the University of Queensland and held in Brisbane in September 2001. Hence the sub-title of the paper and the way it begins by focusing on thinking about self-determination in order then to rethink it. Together with some other contributions to that conference, this paper will in time become a chapter in a book tentatively entitled *Rethinking Indigenous Self-Determination in Australia*. In the meantime, however, its circulation as a CAEPR Discussion Paper will make it quickly and widely available to the Indigenous affairs policy community.

Governance has emerged in recent years as a key element of CAEPR's research agenda and Dr Sanders, with his academic background in political science, has been a key contributor. He is currently coordinator of the governance theme of the CAEPR Research Plan 2002, and this Discussion Paper is being released during the course of a CAEPR seminar series on the theme of governance, convened from April to June 2002. The ideas developed in this Discussion Paper are also pertinent to the theme of a major conference, *Indigenous Governance*, which is being convened in Canberra in April by Reconciliation Australia.

Governance should not, however, be thought of in isolation from social and economic issues. One of the key strengths of CAEPR, over the last decade, has been its ability to bring together people from different academic backgrounds to work side by side on the social, economic and political dimensions of contemporary Indigenous affairs. Hopefully this paper will contribute to a continuation of that strength into the future.

Professor Jon Altman
Director, CAEPR
March 2002

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Abbreviations and acronyms

| | |
|---------|---|
| ADC | Aboriginal Development Commission |
| AGPS | Australian Government Publishing Service |
| ANU | Australian National University |
| APG | Aboriginal Provisional Government |
| ATSIC | Aboriginal and Torres Strait Islander Commission |
| CAEPR | Centre for Aboriginal Economic Policy Research |
| CAR | Council for Aboriginal Reconciliation |
| DAA | Department of Aboriginal Affairs |
| HREOC | Human Rights and Equal Opportunity Commission |
| HRSCAA | House of Representatives Standing Committee on Aboriginal Affairs |
| NAC | National Aboriginal Conference |
| NACC | National Aboriginal Consultative Committee |
| NARU | North Australia Research Unit |
| NTSG | National Treaty Support Group |
| RCAP | Royal Commission on Aboriginal Peoples (Canada) |
| RCIADIC | Royal Commission into Aboriginal Deaths in Custody |
| UN | United Nations |
| UNSW | University of New South Wales |

Summary

This paper begins with a historical analysis of both the rhetoric and the institutions of Australian Indigenous affairs since self-determination was first adopted as Commonwealth government policy in late 1972. It then moves on to conceive of these institutional developments, following Rowse, as the emergence of an Indigenous organisational sector. This terminology is, the paper argues, very useful both in tying together diverse institutional developments and in progressing debates about issues of representation and the role therein of the Aboriginal and Torres Strait Islander Commission (ATSIC) and other Indigenous organisations. The language of the Indigenous sector does, however, also have its limitations. It portrays Indigenous interests as comparable with those of other groups who enjoy a corporatist-style relationship with government, such as industry bodies and trade unions. The ultimate strength of Indigenous peoples' political claims lies, however, in their being seen as quite different from those other interests; as being those of 'peoples' or 'nations' who pre-existed the encompassing society and who still, to some extent, form separate communities and political entities within that society.

The latter half of the paper introduces the idea, following the example of Canada, of Indigenous peoples' organisations and their processes of representation as constituting an Indigenous order of Australian government. It is argued that this is perhaps the only philosophically coherent and historically realistic approach to future Indigenous affairs policy. It is also argued that this rethought approach has a number of clear policy implications, both practical and more theoretical. One practical implication is that calls for more ongoing guaranteed financing of Indigenous peoples' organisations should be seen as more reasonable and less exceptional. Another is that accountability processes and representation issues should be seen as matters for consideration within the Indigenous order, as well as being issues between Indigenous peoples' organisations and State or Territory and Commonwealth governments. A more theoretical policy implication is that calls for a treaty from Indigenous Australians should be treated as both well-founded and appropriate.

The paper concludes by reiterating that both 'self-determination' and 'an Indigenous order of Australian government' are indeed appropriate key terms for Australian Indigenous affairs policy in the twenty-first century. With the demise of European imperialism, Australia's Indigenous minorities deserve a path to decolonisation as much as do Indigenous majorities elsewhere.

Acknowledgments

Participants at the *Rethinking Indigenous Self-Determination* conference, held at the University of Queensland in September 2001, made useful comments on a verbal presentation of an earlier draft of this paper. Tim Rowse and Jon Altman provided useful comments on an intermediate written draft. Frances Morphy assisted with editing, Sally Ward with proofreading, and Wendy Forster with layout. Ian Sharpe, of the *Canberra Times*, kindly gave permission for the reproduction of one his cartoons without charge. To all, I am greatly indebted.

Introduction

In order to *rethink* self-determination as Australian Indigenous affairs policy, it is necessary first to *think* about how the term has already been used in this policy area. It is necessary to think about the conceptions and institutions that have been developed under the rubric of self-determination and about the debates that have been waged over its usage. This paper begins, therefore, with some historical analysis of both the rhetoric and the institutions of Australian Indigenous affairs policy since 1972, when self-determination was first adopted by the Whitlam Commonwealth Labor government as official government policy.

The paper then moves on to some possible rethinking of conceptions and institutions. It argues that what is now thought of as an Indigenous organisational sector can also be seen as an emerging, or more correctly re-emerging, Indigenous order of government. Recent use of this terminology in Canada is briefly surveyed and it is then argued that it opens up some slightly different ways of thinking about self-determination as Australian Indigenous affairs policy, both at the practical and at more theoretical levels. At a practical level, the 'order of government' terminology makes demands for a more secure and autonomous funding base for the Indigenous organisational sector seem more reasonable and less exceptional. The terminology also redirects concerns about accountability to relationships within the sector, between Indigenous organisations and their constituents, as well as to relationships of the sector to Commonwealth and State or Territory parliaments and Ministers. More theoretically, the terminology points to the reasonableness of recent Indigenous calls for a treaty.

In the concluding section of the paper, I reinforce the idea that both self-determination and an Indigenous order of Australian government are appropriate central terms for Australian Indigenous affairs policy in the twenty-first century. They will help us to move forward and gradually rethink this important area of Australian public policy, in a decolonising world in which European imperialism has passed into history.

Self-determination in the rhetoric of Australian Indigenous affairs policy, from Whitlam to Howard

When the Whitlam Labor Commonwealth government adopted self-determination as the key term of Australian Indigenous affairs policy in late 1972 it was, at the time, a quite radical political act. Not only did self-determination replace a very different concept—assimilation—as the key rhetorical term of Indigenous affairs policy, but it also quite clearly alluded to recent developments in international law. The 'principle' of 'self-determination of peoples' had been prominently stated in the United Nations Charter of 1945, the UN General Assembly Declaration on the Granting of Independence to Colonial Countries of 1960, and the UN International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights of 1966. Whitlam clearly had a sense that the handling of

Indigenous affairs in Australia was part of a much larger global process of international law-making and decolonisation. And he and his government wanted, through the use of the term self-determination in Indigenous affairs, to make explicit their awareness of this connection. As Whitlam noted in his 1972 policy speech, it was on the 'treatment of her Aboriginal people' that Australia would be judged, above all else, by 'the rest of the world' (1985: 466).

The Fraser Commonwealth Coalition government, which came to power in late 1975, retreated somewhat from the rhetoric of self-determination in Australian Indigenous affairs policy, preferring instead the term 'self-management'. The retreat was to some extent symbolic, as it overlay a continuity of institutional development. However, it did perhaps signal some slight unease with the embracing of a central international law and human rights concept as the key term of domestic Indigenous affairs. Self-management was a somewhat more conservative and guarded concept than self-determination, with an emphasis on responsibilities as much as, if not more than, on rights (see Sanders 1982).

The Hawke and Keating Commonwealth Labor governments, in power from 1983 to 1996, used both self-determination and self-management as the central rhetorical terms of Indigenous affairs policy. It is difficult to discern any clear distinctions in the political usage of the two terms during this period (see Sanders 1994), although some inquiries of the period, such as the Royal Commission into Aboriginal Deaths in Custody, did attempt to do so (RCIADIC 1991a: 504; for another example see House of Representatives Standing Committee on Aboriginal Affairs (HRSCAA) 1990: 4). More importantly however, when that important Royal Commission recommended in 1991 that the 'self-determination principle' be applied in both 'the design and implementation of any policy or program ... which will particularly affect Aboriginal people', all Australian governments of the time, at the State and Territory levels as well as the Commonwealth, supported this recommendation without qualification (Commonwealth of Australia 1992: 718; RCIADIC 1991b: 7). In a similar fashion internationally at that time, Australian governments supported the use of the term self-determination in the Draft Declaration on the Rights of Indigenous Peoples, which was being prepared between 1985 and 1993 by the UN Working Group on Indigenous Populations (Australian Contribution 1992: 80–5, 1993: 82–8). This placed Australia among the more supportive and progressive national governments at this international forum and projected it as being at the forefront, worldwide, of the recognition of Indigenous peoples' rights.

Since the Howard Commonwealth Coalition government came to power in 1996 there has, however, been another retreat from this embracing of self-determination as Australian Indigenous affairs policy rhetoric. The Howard government has preferred to focus its rhetoric on 'practical' matters such as 'overcoming disadvantage' and achieving better 'outcomes' for Indigenous people in areas like employment, housing and health, while seemingly studiously avoiding any reference to self-determination or even self-management (see e.g. Herron 1996; Howard 1999, 2000; and for a commentary see Dodson & Pritchard 1998). The rather quaint term 'self-empowerment' has been deployed in their

stead—a term which scarcely matches the rhetorical power of ‘self-determination’. At the 1999 session of the UN Working Group on Indigenous Populations there was even the suggestion made by the Howard government’s then Minister for Aboriginal and Torres Strait Islander Affairs that the Draft Declaration on the Rights of Indigenous Peoples, and particularly its central self-determination provisions, might be ‘becoming a distraction from the real tasks and priorities’ of Indigenous affairs. The Minister went on to say that the Howard government rejected ‘the politics of symbolism’ and believed instead in ‘practical measures leading to practical results’ (Herron 1999: 11).

The rhetoric of self-determination in Australian Indigenous affairs policy has clearly been a matter of some debate and difference of opinion over the last 30 years. This paper will argue, in its concluding section, that the use of self-determination as the central term of Australian Indigenous affairs policy is entirely appropriate, alongside the use of the concept of an Indigenous order of Australian government. That conclusion, however, is some way ahead and, to progress the argument, it may be useful to review the institutional developments in Australian Indigenous affairs which have accompanied this shifting policy rhetoric. Here the story is much more one of continuity and of gradual, more consistent policy change.

The emergence of an Indigenous organisational sector

Under the rubric of self-determination, the Whitlam government initiated a number of different lines of institutional reform within Australian Indigenous affairs. First, it attempted to strengthen the role of the Commonwealth, vis-à-vis the States, by establishing its own Department of Aboriginal Affairs (DAA) and offering to take over the remnants of the States’ long-established but by then largely discredited Aboriginal welfare authorities; which it did successfully in all cases except Queensland. Second, it encouraged the development of incorporated community-based Indigenous organisations, both for the conduct of Indigenous community affairs and for the delivery of government-funded services to Indigenous community members. Indigenous organisations sprang up across Australia at both local and regional levels, covering matters as varied as health, housing and legal services and, in discrete Indigenous communities, infrastructure provision, land holding and general community management. Third, it established a Royal Commission to inquire into how Aboriginal land rights could be recognised across Australia, particularly in the Northern Territory where the Commonwealth had full jurisdictional control, but also in principle in the States. Lastly, the government established a national elected body of 41 Indigenous people, the National Aboriginal Consultative Committee (NACC), to advise it more generally on Indigenous affairs matters.

Under subsequent Commonwealth governments, the development of all four of these strands of institutional reform in Indigenous affairs has continued. Under the Fraser government, land rights legislation for the Northern Territory was enacted, but elsewhere land rights issues were left to the States. The Fraser

government also passed legislation providing for the incorporation of Indigenous councils and associations under rules and requirements which were somewhat different from those for general councils and associations. The NACC was slightly restructured, under Fraser, into a 35-member national elected advisory body of Indigenous people, the National Aboriginal Conference (NAC). Also, the DAA was split in two with the creation of the Aboriginal Development Commission (ADC), a statutory authority focusing on economic development issues.

Under the Hawke Labor government an initial attempt was made to progress land rights reform nationally. This faltered badly, but did in part push along land rights reform at the State level. Encouragement for Indigenous community organisations to conduct community affairs and deliver government-funded services to community members continued apace. More controversially, the NAC was disbanded under Hawke in 1985, amid the faltering reform of national land rights, but by 1987 a commitment had emerged for its replacement by a statutory authority which would combine the executive and administrative roles of the DAA and the ADC, with both national and regional representative bodies of Indigenous people. The Aboriginal and Torres Strait Islander Commission (ATSIC), as the new authority became known, emerged in 1990 as an Indigenous representative structure of 60 elected regional councils and a 20-member national board of commissioners who, together with the Minister, would have executive control over many Commonwealth-funded Indigenous affairs programs. This was, in short, a hybrid corporatist organisation which could be seen, alternately, as bringing large numbers of Indigenous representatives (almost 800 in all) into government, or as delegating some elements of Indigenous affairs governance to elected Indigenous representatives.

Under the Keating Labor government, land rights reform came back to the fore with the handing down in 1992 of the High Court's *Mabo* native title decision and the passing by the Commonwealth parliament, in the light of that decision, of the national *Native Title Act* in late 1993. Two other elements of institutional reform developed under the later Hawke and then the Keating government were the appointment of an Aboriginal and Torres Strait Islander Social Justice Commissioner within the Commonwealth-created Human Rights and Equal Opportunity Commission (HREOC) and the establishment for ten years from 1991 of a national Council for Aboriginal Reconciliation (CAR). This latter was to consist of half Indigenous and half non-Indigenous appointees and was to deliberate and report by the centenary of Australian Federation in 2001 on how best to achieve 'progress towards reconciliation' and on whether reconciliation 'would be advanced by a formal document or documents' (CAR 1993: 5). In 1993 ATSIC was also slightly reformed under the Keating government: its numbers of regional councils were reduced to 36 and its numbers of councillors to less than 600. The positions of council chairs and commissioners also, however, became full-time and salaried.

Under the Howard Coalition government elected in 1996, many of these institutional developments of the previous few years came under initial, quite intense scrutiny. Under a more assertive style of ministerial involvement, ATSIC's

budget was both cut and more directed in 1996 and the Commission was also hard pressed on accountability issues (see Ivanitz 2000). Following the Wik native title decision in late 1996, amendment of the *Native Title Act 1993* was debated during 1997 and proceeded with in 1998 in a way that did not generally meet with Indigenous people's approval (Brennan 1998). Reconciliation was pushed towards the 'practical' issues favoured by the Howard government in Indigenous affairs and the inaugural, two-term chairperson of CAR, Pat Dodson, indicated in late 1997 that he felt unable to serve for the final three-year term. The position of Aboriginal and Torres Strait Islander Social Justice Commissioner within HREOC was also left vacant for over a year from January 1998 when its first incumbent, Mick Dodson, came to the end of his term.

Relations between the Howard government and Aboriginal leaders like the Dodson brothers were quite strained by the end of 1997, as a *Canberra Times* cartoon of 14 November indicated (see Fig. 1). But the new institutions of ATSIC, the Native Title Act, CAR and the HREOC Aboriginal and Torres Strait Islander Social Justice Commissioner had all survived the new government's initial intense scrutiny. So too had the local and regional Indigenous land councils, legal and health services, general community councils and resource agencies, and other Indigenous organisations funded by ATSIC and other government agencies for the conduct of Indigenous community affairs and the delivery of services to Indigenous people. These new institutions of Indigenous affairs continued to operate and even to flourish, even if somewhat more heavily scrutinised and less overtly endorsed by the Howard government than by previous governments.

This plethora of institutional developments may appear as a rather disparate array—and to some extent it is. But there is also some degree of coherence and continuity in the developments of the last 30 years which can be captured by the idea of the emergence of an Indigenous organisational sector. Tim Rowse notes that the emergence of this sector is a 'defining material product' of the change in public policy from assimilation to self-determination. Without it, he says:

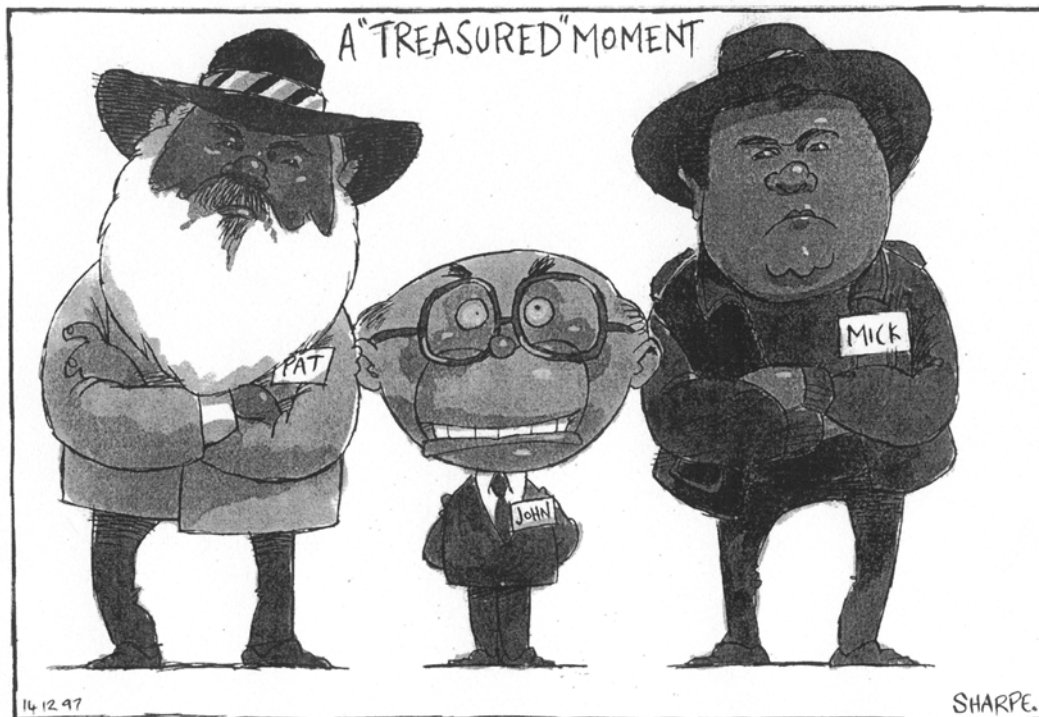
Indigenous Australians would lack public policy recognition of their needs and aspirations; they would be invisible, as Indigenous people, within Australian society and they would be unable to make demands, as Indigenous Australians, on Australian institutions (Rowse 2001b: 39).

The emergence of an Indigenous organisational sector has clearly been crucial to the involvement of Indigenous Australians—as Indigenous Australians—in public policy. As Rowse notes, it 'puts into practical effect' the self in self-determination (Rowse 2001b: 39; see also Rowse forthcoming).

This idea of the emergence of an Indigenous organisational sector needs some further explication in terms of its extent and role. Which organisations can be said to be within the sector and what are their roles in relation to both Indigenous people and government? Rowse has elsewhere written about what he sees as an unresolved tension within the Indigenous sector over the last 30 years over who best represents Indigenous interests (Rowse 2001a: 122–32). Is it the local and regional Indigenous service organisations, like land councils, medical services and

general community councils, or is it the national elected bodies, the NACC, the NAC and the elected arm of ATSIC? This unresolved debate can also be seen as series of claims about the roles of different types of organisations within the Indigenous sector and the linkages they have to both Indigenous people and to largely non-Indigenous State or Territory and Commonwealth governments.

Fig. 1. 'A "treasured" moment', *Canberra Times* cartoon, 14 November 1997



Reproduced courtesy of Ian Sharpe, *Canberra Times*.

Over the last 30 years, most of the running in this unresolved debate has been made by the local and regional Indigenous service organisations. They have enjoyed the image of being much more community-based and community-initiated than the national elected bodies, and of being much more in accord with the highly localised tradition of Indigenous collective decision-making. They have also been regarded as much more directly involved in service delivery functions of relevance to the everyday concerns of Indigenous people. On the basis of these images, proposals for reforming the national government-sponsored Indigenous bodies have often included the recommendation that delegates from local and regional service organisations should act as representatives, rather than separately elected representatives (see e.g. Coombs 1984). These proposals have, however, foundered at least partly on the reactions of Aboriginal people, who have proven more supportive of direct separate elections for national representative

bodies and also somewhat more sceptical of the idea of organisational delegates as representatives (see Rowse 2001a). Despite some early pushes towards an organisational delegates model, ATSIC retained the direct elections model of Indigenous representation, which both the NACC and NAC had also used. ATSIC did, however, allow for far greater numbers of local elected Indigenous representatives by grouping them into regional councils. This was the Hawke government's concession to the idea that more links were needed between the national and local levels of Indigenous political representation.

Even with this concession, ATSIC continued to be heavily criticised in the early 1990s by Indigenous people for not being greatly linked into and representative of local Indigenous polities. Despite the innovation of regional councils, ATSIC was still seen by Indigenous people as primarily a Commonwealth government body operating at the national level. Many within ATSIC tried to change this image by developing the budgetary and planning roles of regional councils, by increasing ATSIC's levels of Indigenous staff, and by aligning ATSIC with regional Indigenous organisations in negotiations with government over important policy issues. In 1993, for example, ATSIC lined up beside the regional Indigenous land councils in negotiations over the proposed native title legislation. ATSIC was keen to be seen to be among the Indigenous organisations negotiating with government, rather than as part of the Commonwealth government negotiating with the Indigenous organisations. Also in 1993, as noted above, the positions of regional council chairs and commissioners within ATSIC became full-time and salaried, thus strengthening the Indigenous elected arm relative to the administration. In the same raft of reforms, however, it was decided that ATSIC staff should remain as Commonwealth public servants and, as also noted above, that the numbers of regional councils and councillors would be reduced. This somewhat compromised the idea of ATSIC becoming more Indigenous and more independent of the government that had created it. But overall, it could be argued, this was indeed what was happening.

Internationally in the early 1990s, ATSIC tried to develop its image of independence from the Australian government by speaking separately at the UN Working Group on Indigenous Populations (see Australian Contribution 1992, 1993). It also applied for non-government organisation accreditation with the UN, which it gained in 1995 thus allowing it, in its own words, 'independent access and an independent voice at United Nations-sponsored international forums' (ATSIC 1996: 130). A year later ATSIC boasted two independent papers to the Working Group on Indigenous Populations (ATSIC 1997: 112).

ATSIC continued its efforts to demonstrate its independence from the Australian government, both domestically and internationally, during the late 1990s and early 2000s. In 1997–98, ATSIC aligned itself once more with the regional land councils, rather than the Commonwealth government, over proposed amendments to the *Native Title Act* (see Brennan 1998). In 1999, after the passing of amendments to the Act which were generally unpopular with Indigenous people, ATSIC produced its own report on the situation in Australia for the UN Committee on the Elimination of Racial Discrimination, independent of the

Commonwealth government's report (ATSIC 1999: 175). And in 2000, primarily through its inaugural elected chairperson Geoff Clark, ATSIC began advocating a treaty between Indigenous and non-Indigenous Australians despite rejection of this idea by the Howard government.¹

By the early twenty-first century, therefore, it would be unrealistic to insist that ATSIC is a mere creation of the Australian Commonwealth government which does not in any way represent Indigenous people's interests independent of the government which created it. It would also be unrealistic to insist that, in distinction to ATSIC, local and regional Indigenous service organisations, largely funded by ATSIC, somehow more genuinely and more independently represent Indigenous interests. The truth is that both sorts of organisations represent Indigenous interests to government without either having a clear monopoly or advantage. Both are, to a very large extent, government-sponsored and government-funded, but both are also very assertive of their independence from the Commonwealth government. There have been, as some have noted, costs to ATSIC's assertion of its independence from government (Dillon 1996). But there can be little argument that ATSIC has strongly asserted that independence over the 12 years since its creation.

To some extent the debate, or tension, within the Indigenous sector over who best represents Indigenous interests has been somewhat futile and unproductive. It has been based on a false premise that the categories 'government' and 'Indigenous' organisation are mutually exclusive, and that the process of demonstrating who best represents Indigenous interests is one of showing that a particular organisation owes nothing to non-Indigenous governments, and everything to Indigenous people (Rowse 1996: 54). All organisations in the Indigenous sector owe much to government and all can also make legitimate claims to representing the interests of Indigenous people. If government is thought of more as a process than as a structure, then there is no need to categorise organisations as either internal or external to government, or indeed as either internal or external to the Indigenous community. Organisations contribute to the processes of government in many different ways, often with different members of the same organisation contributing as differently to public policy processes as people drawn from different organisations. The elected representatives within ATSIC, for example, may contribute quite differently from ATSIC administrators and may indeed make contributions quite like those of office holders within regional and local Indigenous service organisations (Rowse 1996).

The role of the Indigenous sector in the processes of Australian government can be seen, in a rather corporatist fashion, as providing some order and stability to the articulation of Indigenous interests. It can also be seen, following Rowse, as giving some practical shape to the broad policy idea of self-determination. To some that practical shape will never live up to the international ideal of self-determination (Sullivan 1996). To others however, including some prominent Indigenous participants, the sector's role is a realistic accommodation of Indigenous and non-Indigenous interests which does, to some extent, realise

Indigenous self-determination (O'Donoghue 1997; Turner 1997). One way or another, the Indigenous sector has now emerged and now exists as an integral element of the processes of Australian government. It is difficult to imagine this development being reversed in the foreseeable future.

From an Indigenous organisational sector to an Indigenous order of Australian government

The concept of the emergence of an Indigenous organisational sector is a useful way of tying together institutional developments within Indigenous affairs over the last 30 years and of progressing debates about the role of ATSIC and other Indigenous organisations in the representation of Indigenous interests. The language of the Indigenous sector does, however, have its limitations. It projects Indigenous interests as comparable to many other interests in Australian society which enjoy a corporatist-style relationship with government, such as industry bodies, trade unions and even some consumer or promotional groups. However, in many ways, the ultimate strength of Indigenous people's political claims lies in their being seen as quite unique and different from those of these other interests; as the claims of 'peoples' who pre-existed the encapsulating society and who, to some extent, still form separate communities and political entities within that society. To make these claims most effective, a slightly different style of political discourse is necessary.

In Canada, for example, Indigenous interests have in recent years increasingly been cast as those of 'first nations peoples'. This suggests their status as separate societies, which pre-existed the encapsulating society, and which have a history and also an ongoing 'inherent right' of self-government. As a result of the recent recognition of this status, Canadians have increasingly talked of Aboriginal peoples forming a third 'order' of Canadian government, alongside the provincial and federal orders. The recent Canadian Royal Commission on Aboriginal Peoples (RCAP) talked of this historical relationship being 'displaced' and lost sight of in the last 200 years, and of its 'renewal' through 'negotiation' in the last 20 years:

Room must now be made in the Canadian legal and political framework for Aboriginal nations to resume their self-governing status. We see a time when three orders of government will be in place, with Aboriginal governments exercising sovereign powers in their own sphere (RCAP 1996a: 610).

Expanding on this theme in a later volume, the Canadian Royal Commission wrote as follows:

The governments making up these three orders share the sovereign powers of Canada as a whole, powers that represent a pooling of existing sovereignties. Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government (RCAP 1996b: 240).

The Canadian Royal Commission did not suggest that an Aboriginal order of government was currently fully operational in Canada, but rather that one was partly operational and could and should further re-emerge as part of a process of renewing nation-to-nation relationships which were displaced for 200 years by a policy of assimilation. Only in the last 20 years, it argued, has re-recognition and renewal of nation-to-nation relationships begun. And there was, according to the Royal Commission, still a long way to go. Not even the numbers of Aboriginal nations which might be involved in the renewed relationships was as yet clear; the Royal Commission argued that it was up to Aboriginal people themselves to decide how many such nations still existed after 200 years of displacement. The Commission hazarded a guess that between 60 and 80 first nations would emerge, covering some 1,000 Aboriginal communities (1996b: 164 ff.). The Commission also suggested that only some of these would adopt a strictly 'national' model of government. Others, it argued, might adopt 'public government' or 'community of interest' models (1996b: 245 ff.). But these would, nonetheless, be contemporary expressions of the rights to self-determination and self-government of Canada's Aboriginal peoples. Renewal of nation-to-nation relationships was, therefore, to be an innovative and experimental process, rather than a slavish reconstruction of the past. While it would be based on a recognition of history, it would not be unduly constrained by it. Truly new forms of government might emerge from the renewal of the third order of Canadian government.

Much of this analysis can also be applied to Australia. Canadian political theorist James Tully has argued persuasively that the 'vision' of the Canadian Royal Commission is also applicable to Australia (Tully 1998). Several Australian thinkers have also, since the common-law recognition of native title in the *Mabo* judgement of 1992, increasingly argued for the recognition of various aspects of Indigenous law, sovereignty and self-government. If the Australian legal and political system can recognise Indigenous people's common-law land rights, then why, asks Nettheim (1994), can it not also recognise Indigenous peoples' 'political rights' to self-determination and self-government? Would this not in fact, as Reynolds (1996) suggests, be a recognition of Indigenous peoples' partial remaining 'sovereignty' and is this not a logical extension of the reasoning in *Mabo*? Isn't the implication of *Mabo* for Australian 'constitutionalism', suggests Webber (2000), that there are other sources of law and governmental authority in Australia than the colonially-derived written constitutions and the State and Commonwealth legislatures which they created?

Since *Mabo*, the answers to all these questions would seem logically to be that there are other possible sources of law and governmental authority in Australia which pre-date colonial times. Indigenous Australians lived in autonomous self-governing societies before colonial times and never explicitly gave up that right. There is, one can argue, a repressed third order within Australian government, alongside the State and Commonwealth orders. It is an Indigenous order of Australian government which pre-dates the other two orders by many thousands of years, but which, as in Canada, has been denied and displaced for most of the

last 200 years. It is not, however, too late to reinvigorate this third order, and indeed reinvigoration provides perhaps the only philosophically coherent and historically realistic approach to future Indigenous affairs policy. This does not mean Indigenous separatism, since shared jurisdiction is as much a hallmark of Australian as of Canadian federalism. But it does mean that the organisations of the contemporary Indigenous sector should be recognised as somewhat more than either just government advisory bodies or societal pressure groups (Weaver 1983). They are the contemporary manifestations of an Indigenous order of Australian government; and a contemporary expression of Indigenous rights to self-government and self-determination. This contemporary expression has changed considerably from past expressions and may change considerably more in the future. It may also be a somewhat weak manifestation of the order, which is hardly surprising after almost 200 years of displacement. But as we have seen above, the Indigenous organisational sector has been growing in confidence and assertiveness in recent years and may one day stand more strongly as a fully-fledged reincarnation of the Indigenous order of Australian government. Being recognised by the other orders of Australian government as a source of governmental authority within the Australian system of government will help this to happen.

Policy implications, both practical and more theoretical

I turn now to some of the implications which may follow for policy from the recognition of the Indigenous organisational sector as a contemporary manifestation, or expression, of an Indigenous order of Australian government. Two of these are quite practical, relating to how Indigenous organisations are financed and also held accountable. The other is more theoretical, relating to the issue of whether there should be a treaty between Indigenous and non-Indigenous Australians.

One of the commonest calls in Indigenous affairs policy debate of recent years has been for a simplified and more ongoing guaranteed system of financing Indigenous organisations. Currently, with a few important exceptions which I discuss in due course, Indigenous organisations rely for their funding on discretionary annual grants from ATSIC and on a variety of Commonwealth and State or Territory government agencies pursuing particular substantive policy objectives. The grants are often for quite small amounts of money and can be quite large in number, as well as being fairly narrowly directed to the substantive policy concerns of particular programs and funding agencies. Funding is not guaranteed beyond the current year, though some organisations, including ATSIC, have in recent years made slight moves towards forward indications of rolling three-year grants. These are not, however, full-blown forward funding commitments and it would be fair to say that most Indigenous organisations still experience the current funding system as both very complex and very insecure. Hence the prevalence of the calls for a more simplified and ongoing guaranteed source of funding.

I, and others, have recently referred to this funding regime as a 'directed community services model' (Australia Institute 2000). It envisages the activities of Indigenous organisations as the delivery of services to Indigenous communities and their members, and it directs these organisations as to which services are to be delivered and how. The model has become quite deeply entrenched in most government expenditure processes in Indigenous affairs and it seems to be regarded by Commonwealth, State and Territory governments as an appropriate reflection of the status of Indigenous sector organisations as community welfare service deliverers. But if we begin to think of Indigenous organisations as more than this, as part of a re-emerging Indigenous order of Australian government, then the request for simpler, more assured ongoing funding begins to look both more reasonable and less exceptional.

All other organisations which are designated as governments within the Australian federation have an assured ongoing funding base, both through revenue-raising powers of their own and through ongoing general revenue-sharing arrangements with other levels of government. Revenue sharing is primarily with the Commonwealth, since this is the element of Australian government which, through income and goods and services taxes, raises far more money than it directly spends. State, Territory and local governments all have ongoing general revenue-sharing arrangements with the Commonwealth and also their own revenue-raising powers, as well as receiving specific purpose annual grants from Commonwealth agencies pursuing particular policy objectives and programs. Indigenous organisations, with only a few exceptions, currently have only the last of these three sources of funding. But, if we think of these organisations as constituting an Indigenous order of Australian government, a request for some element of guaranteed ongoing formula-based general-purpose funding, and for their own limited revenue raising powers, is neither unreasonable nor exceptional. ATSIC, for example, could be guaranteed a particular percentage of the Commonwealth government revenue take and in turn could then perhaps guarantee ongoing levels of funding to particular local and regional Indigenous organisations, provided they continued to represent and service their acknowledged constituency.

This last proviso, of guaranteed funding for local and regional Indigenous organisations, opens up another possible practical implication of the recognition of the Indigenous organisational sector as an Indigenous order of Australian government: that of the possible internal reform of the sector—or order—in relation to issues of representation and accountability. As the Indigenous organisational sector has grown over the last 30 years it has tended to generate new organisations at a quite rapid pace. The exit option for disaffected people within existing organisations has often seemed easier and more attractive than the option of staying in existing organisations and voicing and resolving differences. Voice combined with loyalty is, in many ways, the more robust political response to disaffection which we expect, or almost demand except as a last resort, of people involved in organisations designated as governments (Hirschman 1970). As a result we also pay considerably more attention to the

internal representativeness and accountability of organisations designated as governments, precisely because we expect that they must both serve and represent all within their constituency.

By contrast, when organisations are designated as being part of a voluntary community sector, we are not only more willing to countenance exit options and the formation of new alternative organisations, but we also tend to be somewhat less concerned with internal organisational processes relating to representation and accountability. These tendencies have been manifest over the last 30 years during the growth of the Indigenous organisational sector. New organisations have established themselves for limited purposes and with relatively limited consideration of the representation of and accountability to their Indigenous constituency. Most attention to the accountability of Australian Indigenous organisations in recent years has been devoted to the question of financial accountability to funding agencies, and through them to Commonwealth and State Ministers and parliaments. Some analysts, however, have suggested that greater attention also needs to be paid to the representation of and accountability to Indigenous constituents (see Fingleton et al. 1996; Martin & Finlayson 1995; Pearson 2000: 97–8; Rowse 2000b).

The requirement that some greater attention be paid by Indigenous organisations to the nature and form of representation and accountability might be developed as a condition of greater funding certainty and hence as part of the conceptual move towards an Indigenous order of Australian government. The current array of Indigenous organisations would continue in existence, but would undergo some internal reform as part of a process of being recognised as an Indigenous order of government and being funded on a more guaranteed ongoing basis.

I have noted above that there are a few exceptions to the short-term, discretionary, directed community services model of Indigenous organisational funding. The most important of these is the funding of the Northern Territory land councils, established under the Commonwealth's 1976 legislation. The Commonwealth passes on to these organisations an amount equivalent to a set proportion of mining royalty receipts from Aboriginal land in the Northern Territory. The statute also specifies that certain percentages of this money will be directed to organisations of traditional owners and residents of areas affected by mining, known informally as royalty associations, and that other percentages may be used for the work of the land councils.

The Northern Territory land councils and royalty associations have been the subject of some quite intense debates about the representation of different Indigenous peoples' interests within their internal structures and processes, and their accountability to those various interests (see e.g. Altman & Levitus 1999; Kakadu Region Social Impact Study 1997; Levitus, Martin & Pollock 1999). Although pressures for smaller breakaway councils have at times been intense, the Central and Northern Land Councils have generally been able to respond internally to these debates about representation and accountability and so to keep their structures and processes intact. Voice and loyalty have generally

prevailed over exit, though two smaller land councils, covering the Tiwi Islands and Groote Eylandt, were allowed to break away from the larger Northern Land Council in 1978 and 1991 respectively. Interestingly, a quite early analysis of the Northern Territory land councils referred to them as ‘para-governmental’ bodies (Altman & Dillon 1988). Assured funding and a willingness to debate internal issues of representation and accountability had, quite early on, given these land councils a greater organisational stature than other bodies within the emerging Indigenous sector. They have, perhaps, been leading and showing the way towards a re-emerging Indigenous order of Australian government.

Two other exceptions to directed, short-term, discretionary funding have been the financing of New South Wales land councils and the Commonwealth Indigenous Land Fund. The former were guaranteed 7.5 per cent of State land tax from 1983 to 1998 and now derive investment income from the resulting portfolio. The latter was guaranteed an income of around \$1 billion in the ten years from 1995 to 2004, in order to build a capital investment base (see Altman & Pollock 2001). These cases also suggest the potential for the wider application of guaranteed ongoing funding models within the Indigenous sector.

A more theoretical policy implication of the recognition of the Indigenous organisational sector as an Indigenous order of government is whether there should be a treaty between Indigenous and other Australians. As noted above, the inaugural elected chairperson of ATSIC, Geoff Clark, began advocating the pursuit of a treaty during 2000, as the deliberations of CAR were coming, somewhat inconclusively, to an end. In an article written for Australia Day 2001, Clark reminded Australians of early British attempts at ‘Aboriginal constitutional recognition’. These had failed, he noted, and had left Aboriginal people as ‘constitutional strangers’ in their own land by the time of Federation in 1901. But he also reminded Australians ‘that the word “federation” comes from an old Latin term for treaty’ and he urged Australians to seek out material being produced by ATSIC on the ‘advantages of a treaty’. ‘All we are asking’, he argued, ‘is for an opportunity to develop a new relationship with the Federation’ (Clark 2001).

The material which Clark was referring to, produced by ATSIC’s National Treaty Support Group (NTSG), asked ‘why a treaty?’ and answered that the ‘occupation, colonisation and federation’ of Australia had occurred ‘without the consent of Indigenous peoples’. It argued that:

[a] modern treaty would provide Aboriginal and Torres Strait Islander people with:

- an opportunity to formalise our relationship with non-Indigenous Australians;
- recognition of and redress for past injustices;
- an opportunity to affirm and protect our rights;
- a way of settling unfinished business;
- the necessary tools for self-determination and self-government (NTSG 2001a: 6).

It then argued that a treaty would give non-Indigenous Australians ‘an historic opportunity to rectify the questionable founding of Australia ... and to redress

past discriminatory practice' (NTSG 2001a: 6). This attempt to address the perspectives of non-Indigenous Australians, as well as those of Indigenous Australians, continued throughout the NTSG's question and answer material. Given ATSIC's Indigenous representative base, however, it was perhaps a dialogue among Indigenous Australians which was uppermost on ATSIC's agenda. In response to the question 'What is Indigenous sovereignty', the NTSG material noted that it referred to the ability of Indigenous people to 'act as a nation or nations ... to be self-determining and to exercise self-government'. It continued:

Even though Australian governments and courts have never recognised Indigenous sovereignty, many Indigenous peoples believe that we have never given up sovereignty and retain it even if it has not been recognised by the Australian state (NTSG 2001a: 17).²

The NTSG noted that concern had been expressed (presumably by Indigenous people), that by entering into a treaty Indigenous sovereignty might be 'extinguished'. However, it continued:

Indigenous people will only cede sovereignty in a treaty if that is what has been agreed. It can even be argued that the capacity to enter into a treaty is a reassertion of our sovereignty and nation-like capacity (NTSG 2001a: 17).

In response to the question what 'will we lose' by entering a treaty, the NTSG argued that the only things 'we could lose' are the things that 'we freely agree to give up'. And in response to the question of whether it is too late to enter into a treaty, it argued that treaty making is a continuing process, both domestically and internationally, and that treaties can be signed at 'any time the parties agree' (NTSG 2001a: 18).

Elsewhere in the NTSG material, it was emphasised that ATSIC was not negotiating a treaty, but merely promoting discussion about a treaty's benefits, difficulties, form and content (NTSG 2001b: 23). It would be fair, however, to say the NTSG and ATSIC were promoting the idea of working towards a treaty as one potential way of re-establishing the idea of nation-to-nation relationships as the philosophical basis of Australian Indigenous affairs policy-making. This would seem entirely appropriate. Working towards a treaty is not the only way of recognising an Indigenous order of Australian government, but it is certainly a very powerful one.³

Since the production of this NTSG material in 2001, ATSIC has moved on in 2002 to begin consultations with Indigenous people on attitudes to a treaty, and there is even the possibility that a referendum, on whether ATSIC should push on further with the idea, may be held in conjunction with ATSIC elections scheduled for late 2002. Again, if we think of the Indigenous organisational sector as a re-emerging third, or indeed first, order of Australian government, these would seem to be entirely appropriate approaches and roles for ATSIC to be taking. The national over-arching instrument of governance within the Indigenous order is consulting with and seeking guidance from its constituents. It is attempting to be both representative of and accountable to those constituents by engaging them in debate and asking for their direction, through the ballot box. These actions will

themselves contribute to the growing sense that there already is, in fact, a re-emerging Indigenous order of Australian government. Practice will lead theory, as much as vice versa.⁴

Conclusion: an appropriate policy terminology

To conclude this paper I wish to reiterate the idea that both the term 'self-determination' and the phrase 'an Indigenous order of Australian government' are appropriate elements of the policy terminology for Australian Indigenous affairs. Gough Whitlam was right, 30 years ago, in his basic insight that Indigenous affairs policy in settler majority countries like Australia was part of a worldwide movement towards decolonisation and the development of international law after the demise of European imperialism.⁵

Critics of self-determination as Indigenous affairs policy terminology have often suggested that it may imply some right for Indigenous minorities to secede from larger nation states, like Australia. But supporters are quick to point out that this is not what the great majority of Indigenous people seem to have in mind, and that even if they did it would be almost impossible for them to achieve. Indigenous minorities, in countries like Australia, are massively interspersed and intermarried with the non-Indigenous population and derive benefits, as well as costs, from their involvement with the larger nation state. The idea of self-determination for Indigenous minorities in settler majority societies like Australia must, almost inevitably, be a largely internal and allegorical one; a search for domestic public policy arrangements which recognise the distinct minority nationalism of Indigenous people while also drawing them into a single larger nation state. But, as Indigenous people are wont to point out, the idea of their having a right to self-determination, as set down in international law, ought not to be given away entirely, either as a principle or as an absolute last resort in response to some horribly oppressive larger nation-state regime. Indigenous minorities in settler majority societies are, as much as Indigenous majorities elsewhere, the subjugated peoples of past imperial expansion, and they too deserve a path to decolonisation.

The use of the phrase 'an Indigenous order of Australian government' can be seen as a logical correlate of the use of the term 'self-determination'. It applies the language of governments and nations to Indigenous organisational processes which have, until now in Australia, been predominantly thought of in terms such as giving advice to governments and delivering services to Indigenous communities. But these processes can, and indeed should be, seen as ones through which Indigenous peoples represent and articulate their own national interests and exercise their own governmental jurisdictions. This is what rethinking self-determination as Australian Indigenous affairs policy in the early twenty-first century can, and should, be about.

Notes

1. ATSIC chairpersons were, until 2000, Commonwealth government appointees who were added to the elected board of national commissioners.
2. This line of argument among Indigenous people has been most prominently made in recent years by Michael Mansell and the Aboriginal Provisional Government (APG). Geoff Clark was quite active within the APG earlier in his political career.
3. This is, of course, not the first time that the possibility of a treaty has been raised in modern Indigenous affairs. From 1979 to 1983, the NAC pursued the idea of a 'Makarrata' between Indigenous and non-Indigenous Australians, meaning 'the end of a dispute and the resumption of normal relations' (*ATSIC News*, February 2001). It was supported in this pursuit by a non-Indigenous Aboriginal Treaty Committee led by H.C. (Nugget) Coombs (See Rowse 2000a). In 1988, as part of the bi-centennial, Prime Minister Hawke promoted the idea of treaty or compact between Indigenous and non-Indigenous Australians and even signed the Barunga Statement committing the Commonwealth government to this goal (see Brennan 1991).
4. Another example of practice leading theory has been the emergence of ATSIC Chairperson's XI versus Prime Minister's XI cricket matches in the last two years. Prime Minister's XI cricket matches are generally against national representative teams from other countries, so the symbolism of having one against an ATSIC Chairperson's XI is quite significant. The matches do indeed seem to imply the distinct 'nations within a nation' status which John Howard has been so unwilling to acknowledge in relation to discussion of a treaty. Yet he seems to have quite readily admitted it on the cricket field.
5. For an overview of the developing position of Indigenous peoples in international law, see Anaya (1996).

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