

Doubts about the treaty: some reflections on the Aboriginal Treaty Committee

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The year is 1980: Malcolm Fraser's Coalition government is in power. Perhaps without clearly realising it, Australians are nearing the end of a period of bipartisan political agreement on Indigenous issues and a shared faith in the ability of Indigenous people to rescue themselves from what they have suffered. The Northern Territory Land Rights Act,¹ begun by Whitlam and completed in modified form by Fraser, is the most obvious achievement, but there are others. The Department of Aboriginal Affairs, in the minds of more radical thinkers like Departmental Secretary Tony Ayers and Minister Fred Chaney, is intended within a few years to be subsumed and incorporated into a peak Aboriginal body under Indigenous control. The Aboriginal Development Commission (ADC), established in 1980 with a strong and independent Act putting it beyond the immediate reach of the Minister, is at the peak of its power. Indigenous agencies such as the Aboriginal Legal Service and the Aboriginal Health Service are significant powerbrokers in their own right, and are seen by Indigenous Australians to be achievements wrought through their own initiative and their own capacity. The Northern Territory Central and Northern Land Councils, growing in political power, are significant influences even in Canberra. The Fraser government has established a Senate sub-committee under Senator Missen to examine the idea of a treaty between Black and White Australians, though without ever seeming to be particularly enthusiastic about it all. The National Aboriginal Conference (NAC) favours a formal agreement of some kind and has drawn up 27 somewhat contentious proposals. And the Aboriginal Treaty Committee is one-year-old.

The modern idea for a Treaty, which later became known also as a *Makaratta* (an Arnhem Land term meaning dispute settlement), was proposed by Dr HC Coombs in a radio broadcast in early 1979. The Aboriginal Treaty Committee, a voluntary non-government private body, was established on 29 April 1979 with Coombs as chairperson. Its purposes were the obtaining and spreading of information on the need for a formal Treaty agreement between the Commonwealth government and Aboriginal representatives to negotiate on their behalf. Its achievements included the publication of newspaper advertisements, Stewart Harris's book, *It's Coming Yet*, a number of pamphlets on land rights, media publicity, the organisation and encouragement of numerous academic and public seminars and conferences, and nine issues of *Aboriginal Treaty News*.

In 1980 I was asked to do some public speaking on behalf of the Committee. Towards the end of that year I was invited to become a member. More than a little overawed to be in such company as Nugget Coombs, Judith Wright and Charles Rowley, I accepted without knowing

¹ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

much about the proposal. Not much effort, in my recollection, was given to persuading Indigenous Australians of the worth of the proposal – whether out of an assumption that they would naturally agree, or because we thought they would work it out for themselves, was not clear. As this paper shows, though, many Aboriginal people prominent in the early 1980s came to oppose the idea and by 1982 their lack of enthusiasm had become something of a problem for the Committee.

The Treaty Committee's basic document, *We Call for a Treaty*, set the proposal in historical and moral terms:

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We, the undersigned Australians, of European descent, believe that experience since 1788 has demonstrated the need for the status and rights of Aboriginal Australians and Torres Strait Islanders, to be established in a Treaty, Covenant or Convention, freely negotiated with the Commonwealth Government by their representatives. Australia is the only former British Colony not to recognise Aboriginal title to land. From this first wrong, two centuries of injustice have followed. It is time to strike away the past and make a just settlement together. We believe this will be a signal to the world that we indeed are one Australian people at last.²

The membership of the Committee ranged between the wise and experienced to (given the magnitude of what we were undertaking) the somewhat uninformed. Of these, however, I was the most naive and probably the youngest member by ten years. My chief memory of our meetings is of the rather splendid lunches we had once a month in Coombs's flat in University House, ANU, in which the various sub-committees (in reality just one or two people) reported on progress since the previous meeting.

My brief was 'the oral programme'. I undertook to make a number of cassette-recorded programmes to be distributed to the national community access network of radio stations and the dozens of Treaty support cells which supported the Canberra Committee. The first programme canvassed the views of Coombs, the social scientist Charles Rowley and the anthropologist Maria Brandl, the second the members of the NAC (especially Lyall Munro, head of the Makaratta task force), and their support staff. The third programme reported the opinions of prominent Aboriginal people not associated with the NAC.

In my interview with him, Coombs's first justification for the proposal was moral: that 'White Australians had a very serious problem' in reconciling the acts of invasion, dispossession and violence with their own moral code. The second was practical: that the grievances of the Indigenous people would not go away unless White Australians removed the causes.

Coombs identified a third reason to pursue a Treaty as the legally weak position of the invaders:

We've become accustomed to think of our occupancy of the land as legal, justified and secure. I think, again, each of those assumptions can be brought into doubt ... And therefore I think we have to consider that the kind of security we feel in the occupation of the

² Reproduced in Harris 1979: 12. The papers of the Aboriginal Treaty Committee are held in the Library of the Australian Institute for Aboriginal and Torres Strait Islander Studies, Canberra. See also Wright 1985.

land at the present time may very well be called into question, certainly by Aborigines, perhaps by White people here, but also by nations overseas ... And therefore if we wish to feel secure, and for our children and grandchildren to feel secure, then I think we have to establish the justification, the legitimacy of our occupation. And that means the legitimacy of our relationship with the original inhabitants, the Aborigines.

As I listen to the interviews again after twenty years, Coombs emerges as the clearest-headed of the Committee members. He respected, he said, Aboriginal suspicions of the Committee proposals, and acknowledged that some were well-founded. He thought that the process of education and negotiation, even if no Treaty eventuated, would be valuable to everyone. Above all, he understood the wide array of Indigenous proposals and demands, already well-developed, which might conveniently be carried forward in a Treaty; but which might equally be negotiated in other arenas.

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Although the elected NAC had in 1979 unanimously called for a Treaty to be negotiated, its members were hampered by their own lack of experience and the means to effectively consult with Indigenous Australia. The Twenty Seven Points developed by its Treaty sub-committee seem now, and seemed then, to be ludicrously naive. They included the recognition by the Australian government of prior and continuing ownership, sovereignty and nationhood, a payment of 5% of the GNP for 195 years (the length of time since the invasion to the time of developing these Twenty Seven Points), land rights based on traditional ownership, an Aboriginal bank, rights to all mineral resources in perpetuity, no tax on businesses, no land tax for 195 years, and all existing Aboriginal houses to be made over to their occupants.

In interviews, though, some cooler thinking emerged. Ossie Cruse of New South Wales wanted land returned not on the basis of demonstrated continuing connection but on a needs basis. Rob Riley stressed the need for practical measures, not moral gestures, especially for the return of land as an economic base. Another NAC member, Peter Yu, did not regard Aboriginal support of Coombs's proposal as guaranteed. The mining industry's invasion of Noonkanbah, he argued, illustrated that no negotiations were worthwhile unless Indigenous governing bodies could enforce their decisions, and were themselves safe from arbitrary abolition.³

Completing the second programme on the proposals, and aware of much dissatisfaction about them outside the NAC, I saw my next task as interviewing a number of other prominent Aboriginal spokespeople, unconnected with the NAC, to elicit their opinions. These interviews formed the third radio programme. The speakers were Charles Perkins, then head of the ADC and Deputy Secretary of the Department of Aboriginal Affairs; Neville Bonner, a Liberal Senator; Eric Willmot, head of the Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS); Pat O'Shane, Secretary of the NSW Department of Aboriginal Affairs; Gary Foley, Information and Public Relations Officer of the Aboriginal Health Service; and Marcia Langton, History Research Officer at AIATSIS. While one or two favoured a treaty in principle, all were united in their condemnation of the NAC's negotiations, while Bonner and Foley were also critical of Coombs's committee. Foley, however, was critical of everybody. He referred derisively to 'what passes for Aboriginal leadership', and reserved his fiercest

³ In 1980 the Western Australian government amended crucial sections of the 1972 *Aboriginal Heritage Act* to enable the mining company Amax to proceed with mining exploration on Noonkanbah station in the Kimberley, despite the protests of the Yungnora people.

invective for the NAC advisers. (*'I wouldn't piss on them if they were on fire'*, and in reference to our own committee, *'the sooner we get rid of the bastards the better'*.) Perkins was almost as critical of the NAC's proposals, pointing out that every Aboriginal in Australia would have to turn up with a wheelbarrow to be paid compensation out of the NAC's demanded 5% of the GNP.⁴ More polite, though almost equally critical, was Neville Bonner, who, grasping for words, finally described the demand for 5 % of the GNP as 'unrealistic'.

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The first shared feature of all the interviews was the belief that governments, even if one were ever to sign a document, could not be trusted to honour it. Bonner was suspicious of the enthusiasm with which non-Aborigines had seized upon the idea of a treaty after it had been suggested by one of their own. He had heard, he said, of so many 'wild, weird and wonderful' promises in the course of his political life, so many grand schemes which had come to nothing. His own Senate motion, recommending that the Parliament acknowledge prior occupation and the need for compensation, was passed unanimously in 1975. It became part of the Preamble to the Act establishing the ADC: but, he asked, so what? In practice it seemed to mean nothing:

I have some reservations about symbolism. It's all very well to say 'Aborigines are entitled to Land Rights'. That's a great statement. A profound statement. Aborigines are entitled to land rights. But implementing them is the basis of everything. Unless the governments of the day, the Commonwealth government, is prepared to say 'We don't only believe in Aboriginal land rights but we're going to ensure that it's going to be possible for Aborigines to have land rights', then it's all superfluous. Symbolism is nothing as far as I'm concerned. What's the good of this being symbolic? Finally the Australian people have accepted the fact that there needs to be a treaty. Well that's all very fine, it looks nice on paper, but implementing it and the Aboriginal people being able to benefit from it – that's what's important.

Bonner found a perhaps surprising ally in Foley, who argued that there could be no faith in democracy, nor in law, (Black or White) nor in documents:

I really don't have any faith in any piece of paper which purports to protect our rights. The only long term protection for Aboriginal people I believe is through their own economic strength and their own ability to exercise true self determination over their own affairs, and the only way that can be achieved is through land rights. Land Rights to me means economic independence which in turn, in the type of society in which we live, means the true ability to be able to determine your own destiny over people. That's the only thing I'm interested in. I'm not interested in pieces of paper which guarantee this and are signed by such and such and so forth. All I'm interested in is true political, and more importantly, in economic independence and that can't be gained through bits of paper.

⁴ After our interview Perkins rang me to ask if I would excise his most personally critical remarks about certain NAC individuals before the programme went to air. I concurred.

Paul Coe claimed a part in an Aboriginal proposal for a Treaty made during the first Tent Embassy in 1972. But ten years later, in 1982, he felt less enthusiastic. The Embassy proposal for a Treaty was intended to be a way to get rid of the status quo established by the English and their successors, who had never acknowledged Indigenous prior ownership, nor the need for negotiated compensation, nor the right to unchallengeable possession of the land. But now, in 1982, he was worried about the implication of symbolic equality if the two sides sat down together. Signing a Treaty without thinking through these implications might achieve no more than signing away an Indigenous birthright:

I think there are dangers for Aboriginal people if and when we negotiate a treaty, if those terms are not suitable and equitable for Aboriginal people. Once having been negotiated, the descendants of the present generation are stuck with the terms of that treaty, and it would be very difficult for any generation of Aboriginal people to negotiate out of that position. So if we are to proceed with the treaty idea, and there are good logical reasons I think why we should continue to canvass it and not dismiss it, we should be very wary as to what the content of that treaty will be. For instance, will it lock us into a future position that we don't wish to be in?

Those most experienced in the mechanisms of Australian government, the civil servants O'Shane and Perkins, pinpointed the serious potential conflict between the federal government and the states. Careful and precise, O'Shane noted that minimum standards for education, for example, were required of Aboriginal people as Australian citizens, not because they were Aboriginal people. Aboriginal people did not, and do not, form a nation. The states owed considerable responsibility to Aboriginal people, and to sign an agreement only with the Commonwealth government would serve to let them off the hook. The reluctance of Western Australia and Queensland (the key states opposed to land rights in the early 1980s) would not be solved by giving all responsibility to the Commonwealth. Yet the states were notoriously difficult to shift. Court challenges in opposition to the 1970 'Blackburn' judgment⁵ would be more effective in forcing them to act:

I'm of the view that all governments have joint responsibility and our task is to ensure that they discharge those responsibilities. I'm of the view that if you want to ensure that the Commonwealth government has greater power and has a firm basis with which to exercise that power then what we need are further changes to the Constitution. But before we go that far, there's no doubt at all that the Commonwealth has exercised far greater power in relation to Aborigines than its constitutional basis would suggest.

Now O'Shane put succinctly a common wariness shared by nearly all the speakers: that progress in Aboriginal affairs was coming, and had come, through hard work, through the incremental. The grassroots efforts, the small scale, had achieved so much without the distraction of large gestures: significant improvements in land tenure, and countering racist repression. Treaties, she reminded listeners, are not legislative documents. A Treaty entered into with the

⁵ *Milipum and Others v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141. The suit was lost by the Aboriginal plaintiffs.

Commonwealth would be the soft option. After its signing, Aborigines would still have to fight just as hard for land and for housing, against unemployment and against discrimination. (*We're powerless, that's our problem.*) Her position was that the confusing and diffusing energies going into the Treaty proposal prevented Aborigines from seeing that. Past tactics had been effective. (*Otherwise we've all wasted 25 years. It's come through sheer hard work.*)

Foley agreed. Everything that had been gained, to him, had been 'fought tooth and nail', and that was the way it would continue to be. (*Those who disagree are pissing in the wind, selling us out or don't know what they're talking about. Fight for it, in the streets if necessary.*)

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Willmot in part concurred. Yes, incremental methods had achieved a great deal over three decades, but who could be certain that the political, or environmental climate would permit the same sort of gains to be made in future? Would incremental progress be able to continue? (*I don't think that Australia is going to remain sufficiently stable to allow them. If a treaty is not concluded by the end of the 1990s, forget it. It's in our interest to settle for a covenant.*)

At this point, interestingly, Willmot shifted the viewpoint to the other side. Echoing Coombs's concern that non-Aborigines had a shaky legal and moral right to sovereignty, he asked to what extent it was in non-Aborigines' own interests to pursue the Treaty proposal:

I don't know if new migrants have to sign it, just the Anglophiles and the Aborigines. [But] the thing that I would say if I were a hypothetical white person, in setting out a treaty that ended hostilities ... is that it's the end of hostilities. The war's over. And we don't say who won. Then we say that as a result of the war being over, these are the deals of settlement of the war, whatever they are: that Aborigines get such and such and such and such as of today, and white people get largely what they have except what they've given over in the treaty. Plus the legal right to be Australian, to be part of this place. Now that's the value of it to a white person, it's the opportunity to settle it once and for all.

But it strikes me that there is a cultural problem with Europeans in general about this. Sooner or later someone's going to stand up and say: now we are being pushed into the sea, and we're allowing a one-percent minority in this country to do it.

Perkins, head of the Aboriginal Development Commission, was rather more pragmatic. It didn't matter, he reasoned, whether Aborigines were a sovereign nation or not, the point was that they were an identifiable group with a grievance. The fact that all known Native American treaties in the United States had failed to protect them didn't worry him. (*So what, it might not happen here? If it's realistic and appropriate it might last, and even if it lasts only 20 years, good things will have been done.*)

'Makaratta', the less confrontational term, was supposedly favoured by Prime Minister Fraser to 'Treaty' because it signified peace after internal conflict without a necessary implication of wrongdoing. But who, asked Bonner, had decided that the conflict was over? Surely it would be better for everyone to work towards the Australian government agreeing to some kind of Treaty at least in principle – which so far it had not. Was there a point to it all? Where were the full

implications of the 1967 Referendum, carried so overwhelmingly? What had happened to his own Senate motion? Current events in the Northern Territory (he referred to the declaration by the Northern Territory government of a huge area around Darwin to be 'urban', and therefore not claimable) showed that governments could undermine an Act even as powerful as the Northern Territory Land Rights Act.⁶ (*Forgive me for being a pessimist, but the only certainty in politics is the uncertainty.*)

How, then, should whatever was required in a Treaty be sealed so that the non-Aborigines could not escape their responsibilities demanded in it? The preoccupation among the Indigenous leaders with the tactics to continue the achievements of the previous decade began to dominate the interview responses. At one point Langton stressed everyday concerns like a guaranteed supply of clean drinking water to every community. At the other, Coe wanted recognition of continuing sovereignty. Could a once-for-all document guarantee either of these polarities, or both, more effectively than the incremental methods which had produced the Aboriginal Legal and Health Services? Langton was proud of the agencies: it was not, she said, until she visited the United Nations that she realised how much in advance of other Indigenous peoples Aborigines had been in creating them:

In the last fifteen years Aboriginal people have achieved a great deal, and also rethought their conditions in Australia, so that in the international arenas we are one of the Indigenous groups who have devised workable strategies. We have, for instance, legal services, health services, housing co-operatives and other organisations which are Aboriginal controlled, which have recognition from the Commonwealth government, and which provide essential services in default of the state and the local governments. That's a tremendous achievement in world terms for Indigenous peoples. Because we have achieved so much and broadened our own outlook on how we can co-exist with other groups in this country ... we may be able to devise yet better strategies on the proviso that we don't lock ourselves into a bounded situation which the ratification of a treaty would bring about.

This returned Langton to Paul Coe's caveat that a grand gesture should not blind the Treaty makers to a changing future. The Treaty proposal was sound so long as it did not lock Aborigines into certain positions which would prevent them, for example, from starting other agencies like the already successful Health Services. Strategically, signing a document would not be sound unless the government were pushed to its utmost limits, narrow though these limits evidently were. Why not, then, she asked, follow Coombs's advice? (*Let's continue to devise strategies for the extension of rights, and wait for a better international moment to push forward with a real treaty.*)

I would prefer that a number of court challenges were run to disprove a number of assumptions about Aboriginal citizenship and in land outside the Northern Territory. The Blackburn decision went against us, and until there is an executive decision by all states in Australia

⁶ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

then we won't have any land. We can't rely on the state governments to make those executive decisions. Not only in relation to land but also in relation to basic human needs like water and housing and food

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The other major discussed alternative to the Treaty in 1982 was an Aboriginal Bill of Rights. Again, those who had experience of the unproductive tensions between state and federal spheres of government pinpointed the weakness of a Treaty agreed to by the Commonwealth alone. Paul Coe favoured a Bill by Constitutional Amendment, to override the states in relation to rights. Aboriginal prior ownership could in this way be acknowledged without surrendering any historical rights. His gut reaction, he said, was caution. Aborigines not only wanted land, but freedom to determine their own future, to put an end to the arrest rate, stolen children, the policy of genocide and of assimilation enforced by welfare agencies. (*'Until that's done it's meaningless.'*) A Bill of Rights could guarantee rights to children, education and land as a protective shield against state legislation. The 1967 Referendum was disappointing because Aboriginal collective rights had not benefited from the new Commonwealth mandate for shared control over Aboriginal affairs. Collective rights, therefore, could be achieved by a Bill of Rights without the potential of surrendering any claims of first nationhood which signing a formal Treaty might imply. The United Nations should be asked to ensure that negotiations were equitable. Like Foley, Coe held that the ultimate goal of any negotiation was to provide for economic power and freehold land essential to enforce self-determination. Two per cent of the GNP might achieve that.

Perkins the pragmatist advised negotiators to forget about claiming nationhood, or denying the rights of the Whites to negotiate at all. (*'That just confuses your position.'*) It was much more important that Indigenous negotiators start again in deciding what they were negotiating for. (*'Let's set our conceptual parameters.'*) Compensation? (*'Compensation for whom, and for what, and for when? Surely the Treaty was not just about land, but economic issues, psychological damage, the future. What's the whole thing exactly for?'*)

It's very difficult, because you have to decide what are your areas in which you're seeking some compensation or restoration or some consideration. You've got cultural, psychological, social, cash compensation, land compensation, and how do you work them out? Talk about cash compensation: cash compensation for what, to whom? For how long? It boggles the mind for anyone to talk off the top of their head for what is adequate compensation. What – for murdering the various tribes that have been poisoned, and women that have been raped, and kids have died because they can't get enough to eat? Who's going to be the judge of cash compensation in those terms? Not one blackfeller in Australia, I can assure you, and no group of blacks, and not one group of whites. It has to be a well researched, well thought out document in order to come up with any proposition in terms of cash. Then you look at cultural. How can we restore Aboriginal culture where it can possibly be restored or even reflected upon with some pride, and how do we place that in a Makaratta or in a treaty. What are the mechanics of that? It's beyond me as an individual to tell you now what is a suitable amount or what are the mechanics of it.

We can now ask – 24 years later – what happened? Neville Bonner’s motion of acknowledgment of prior ownership embedded in the Preamble of the Aboriginal Development Corporation Act was swept away when that agency was itself abolished in 1988. An Aboriginal Bill of Rights is scarcely discussed any longer outside legal circles. State rights have proved as intractable as O’Shane predicted: the Federal Hawke government’s National Uniform Land Rights Preferred Model was destroyed in part by the fierce campaign against it mounted by the Western Australian Burke government. Most involved in the land rights campaigns of the early 1980s seemed unaware that the immense social problems afflicting communities would not evaporate on the granting of title. Few thought much beyond land rights as an end in itself. While the ‘Mabo’ High Court decision⁷ kept the spotlight on land as the fundamental issue in Aboriginal affairs in the early 1990s, the *Native Title Act 1993* unexpectedly, from the viewpoint of 1982, raised the intense intra-Aboriginal dissent which became one of the chief obstacles to workable land title settlement.

There were alternatives. The less controversial, because little known, Aboriginal Land Fund Corporation, chaired by Charles Rowley in the 1970s, became the bureaucratic parent of the Aboriginal Land Corporation which returns land to Aboriginal communities by purchase. The Corporation still carries out in 2005 its important work without either an enabling Treaty or a Bill of Rights.

Another alternative would have led to Aboriginal financial independence. In 1979 Fraser backed a proposal of the framers of the ADC, first suggested by Coombs some years earlier, of a capital fund, whereby the government would add sufficient funds every year, in addition to recurrent spending, to enable Aborigines to be economically independent by the year 2000. The ADC received \$20 million in its first year, 1980, only \$1 million in the second, and subsequently, when Fraser’s nerve was failing and his government unpopular – nothing. It was calculated in 1983 that it would need \$450 million annually to bring the total to the required sum by 2000, and of course that did not happen. The momentum of bipartisan enthusiasm for Aboriginal independence was passing. Probably Hawke, if he ever heard of the proposal, would not have wanted Aborigines to have such independence from the rest of the Australia, nor did Keating. That moment had passed. It’s now clear that, Treaty or not, Aborigines will never now achieve that kind of freedom or independence of which Fraser seemed to approve in the early years of his government.

Eric Willmot’s memorable prediction that the twenty-first century might not be the place for fourth world endeavours seems to have proved accurate so far. Though no one whom I interviewed at the time perceived it, in 1982 we were just passing the apogee of the most creative decade in Aboriginal affairs of the twentieth century.⁸ ATSIC Commissioners enjoyed far fewer powers than the ADC commissioners and much less independence. And ATSIC itself was abolished in 2004 by the same process of which Charles Rowley and Peter Yu had warned.

The current government is less, far less, enthusiastic about a Treaty. Advocates might follow Langton’s preference for court challenges by Indigenous people in anticipation of a better national and international political moment. Perkins’s caveats will be useful here too: to set the

⁷ Eddie Mabo and four other Torres Strait Islanders in 1982 tried to establish through the courts their traditional ownership of their land. Ten years later the High Court of Australia held that the Mer people had owned their land prior to annexation by Queensland.

⁸ The *Native Title Act 1993* is an obvious exception to the generally downward trend since 1982.

conceptual parameters first, to include other issues besides land, cash and sovereignty. Perhaps, in the end, Uncle Neville Bonner was right: the most useful thing that proponents of a Treaty can do now is to try to persuade the federal government, or the federal opposition, that there are sound reasons why the Commonwealth should begin to show interest in such a course.

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Interviews

The interviews with Neville Bonner, Paul Coe, HC Coombs, Gary Foley, Marcia Langton, Pat O'Shane, Charles Perkins and Eric Willmot are held in the recorded sound archives of the Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.