"Indigenous sovereignty-never ceded": sovereignty, nationhood and whiteness in Australia

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Chapter Four: Asserting Indigenous Sovereignty
Within the Australian State: The Coe Cases and the Barunga Statement

[We call on the Commonwealth Parliament to negotiate with us a Treaty or Compact recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedoms (The Barunga Statement, 1988).

When we have become disheartened by the apparent monopoly which states have on power, it is crucial we remember that, despite their claims to the contrary, states are not sovereign. Peoples are sovereign. States do not have rights. Peoples have rights. And when people are not free they will fight for that freedom. And they will continue to fight for that freedom until it is theirs (Dodson 1994: 75).

Introduction

Following the early years of the Aboriginal Tent Embassy’s activism in the mid-to-late 1970s, issues such as Aboriginal land rights became relatively permanent fixtures on the national political agenda. It was in this context that Paul Coe, a young Wiradjuri lawyer who had been involved in the original Embassy establishment during 1972, petitioned the High Court of Australia to recognise Indigenous peoples’ prior and continuing sovereignty over the continent of Australia. For the purposes of this thesis, Coe’s petition to the High Court also represents a difference between two types of activism. On one hand, there is the Tent Embassy, whose activism has generally been described as symbolic, because it is aimed largely (or at least, was initially) at capturing White Australia’s imagination. There is, on the other hand, the type of activism illustrated by Coe’s assertion of Indigenous sovereignty before the High Court, which more directly engages with the institutions of the Australian state.

This chapter focuses on examining occasions on which Indigenous sovereignty has been asserted through the institutions or central organs of the Australian state. These institutions include the judicial system – in the instances of Coe’s case in the late 1970s and a similar case brought by his sister Isabel 15 years later – and what can broadly be described as the executive and legislature – in the instance of the Barunga statement presented to then Prime Minister Bob Hawke by members of the Northern and Central
Land Councils in 1988. I wish to consider these instances in order to examine specifically how the institutions’ responses are mediated by dominant conceptualisations of sovereignty and nationhood and by the operation of hegemonic Whiteness. This examination will show that institutional responses are mediated in the same way as more generalised responses to assertions of Indigenous sovereignty, as discussed in relation to the Aboriginal Tent Embassy in Chapter Three. Thus, this chapter resumes the examination of the continuities across different “discursive repertoires” of Whiteness (Frankenberg 1993: 16), which I have developed in previous chapters. In addition, the chapter also explores the state as a specific sphere in which Whiteness is institutionalised and in which White race privilege is thereby maintained.

This chapter also pays particular attention to questions about legitimacy: as Chapter Two explained, this thesis takes Indigenous and non-Indigenous sovereignty to be two competing claims to, or assertions of, legitimate sovereign authority. Given my basic premise that Indigenous peoples’ sovereignty has never been ceded, I suggest that Indigenous peoples’ willingness to frame their demands for recognition within the institutions of the Australian state may be read as an extraordinarily generous gesture.\(^8\) The obvious counterargument is that Indigenous people have little choice but to employ the institutions of the state in their struggle for recognition, given the enormous difference in power between Indigenous people and the Australian state. My point, however, is to do with the importance of shifting the discursive frame of the debate. With this in mind, the chapter aims to reconceptualise what Connolly describes as existing “operational standards” of sovereignty (1995: xii-xiii). In doing so, it also outlines how the ethics of engagement described in Chapter Two may help to cast the question of legitimacy – and both the actual and possible responses to it – in a considerably new light.

\(^8\) It might be argued that the pursuit of sovereignty demands through the institutions of the Australian state raises a possible tension between Indigenous assertions of sovereignty and the avenues through which recognition is being pursued: on one hand, Indigenous peoples’ assertions of originary sovereignty are in competition with, or at least in dispute with, the legitimacy of the Australian state’s claim to originary sovereignty. Yet, on the other, they seek to employ the institutions of the Australian state to have their assertion of Indigenous sovereignty recognised. As I note above, my response to such an argument would be to suggest that, instead of being a contradiction, the employment of the institutions of the
Few pieces of scholarly literature consider either the High Court judgments examined here or the Barunga statement specifically in terms of the issue of Indigenous sovereignty – the exceptions are work by Curry (2000) and Reynolds (1996a), which discuss the Coe cases. As with the Aboriginal Tent Embassy, when these examples of Indigenous peoples’ assertions of sovereignty are addressed in the academic literature, they tend to be discussed in the context of broader or different sets of concerns. The discussion of these instances of sovereignty being asserted through the institutions of the Australian state in this chapter is obviously also a selective one. I suggest, however, that the general absence of discussion of such examples specifically as assertions of Indigenous sovereignty symptomises the Australian academy’s silence on questions of sovereignty and legitimacy, as I discussed in Chapter One. This chapter aims to fill this gap.

Accordingly, the chapter consists of three parts: the first considers the case brought before the High Court by Paul Coe in 1977 (although the Court’s judgment on the case that I examine here was issued in 1979). By examining the Court’s employment of legal discourses to deny Coe’s assertion of Indigenous sovereignty, this part of the Chapter shows how Whiteness is embedded in the institutions of the Australian state. This part of the chapter also argues that the Court’s judgment in this case can be read as an expression of White anxiety about challenges to the configuration of Whiteness and sovereignty in those institutions. The second part of the chapter discusses the Hawke government’s response to the Barunga statement and explores how this can be read in terms of dominant discursive constructions of White nationhood. The third part of the Chapter addresses the High Court’s response to the assertion of Indigenous sovereignty made by Isabel Coe in 1993. I explain the continuities it exhibits with the White responses to Indigenous assertions of sovereignty discussed in the first two parts of the chapter, as well as with those discussed in Chapter Three.

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Australian state to assert Indigenous sovereignty represents an act of good faith, which the track records of those institutions do not necessarily warrant. 

89 For example, Brennan’s (1994) discussion of the Barunga statement is in the context of a broader discussion about the treaty debates in the 1980s.
The judiciary: Coe v. Commonwealth (1979)

This section of the chapter examines the judgment of the High Court of Australia in Coe v. The Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland (1979) (hereafter Coe v. Commonwealth 1979), the case brought before it by Paul Coe. Broadly speaking, in Coe v. Commonwealth (1979), Coe unsuccessfully sought to have the High Court recognise that Indigenous peoples' sovereignty existed prior to the commencement of British invasion of Australia in 1788, that it continues to exist in the present, and that Indigenous people therefore have certain rights to and interests in land, which flow from their sovereign status.

Other cases in Australian jurisprudence are pertinent to a more general discussion of the issue of Indigenous sovereignty; the most notable of these is the High Court's decision in the Mabo case (1992), which supposedly overturned the doctrine of terra nullius as it had been applied to Australia. There is also a long history of Indigenous sovereignty being asserted in criminal cases. For example, in the Murrell case in the Supreme Court of New South Wales in 1836, an Aboriginal man was alleged to have murdered another Aboriginal man. On this occasion, the defendant's counsel (unsuccessfully) argued that the court did not have jurisdiction "over crimes committed by Aborigines on each other" (Hookey 1984: 2). Conversely, a similar case brought before the NSW Supreme Court in 1841 produced a different outcome, when Justice Willis refused to try Bonjon, an Aboriginal man who had been accused of murdering another Aboriginal person. As Hookey points out, however, Justice Willis' course of action in this case did not set a precedent – and, in fact, probably led to his dismissal from the Supreme Court in 1843 (1984: 7-8). As the more recent case of R. v. Wedge in the NSW Supreme Court in 1976 demonstrates, the courts have tended to

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90 The court rejected this suggestion and ruled that "the aboriginal natives of this Colony are amenable to the laws of the Colony for offences committed within it against the persons of each other and against the peace of our Lord – the King" (cited in Hookey 1984: 3).

91 According to Hookey, Justice Willis was of the opinion that the Aborigines of New South Wales were a domestic dependent nation, internally self-governing, as were the American Indians. The mere introduction of common law, and courts, on the English pattern, was not enough to extinguish Aboriginal customary law and jurisdiction. This could be done only by an express statutory provision, or by the cession of jurisdiction from the Aborigines by treaty. No such treaty or statute existed, while British sovereignty over New South Wales had not been established by conquest (1984: 5).
follow the *Murrell* precedent. In this later case, the defendant argued that the NSW courts had no jurisdiction because "the Aboriginal people were and still are a sovereign people, and as such are not subject to English law" (cited in Reynolds 1996a: 7). When a similar argument was made to the High Court in *Walker v. New South Wales* in 1994 (and therefore after the *Mabo* decision), Chief Justice Mason ruled that in so far as Walker's argument was "couched ... in terms of the legislative incapacity of the Commonwealth and State Parliaments, those pleadings are untenable. ... Such notions amount to the contention that a new source of sovereignty resides in the Aboriginal people. Indeed, *Mabo* ... rejected that suggestion" (*Walker v. New South Wales* 1994: 47-50). Indigenous sovereignty has also been asserted in defences of charges of failing to fill out a census form (McCrae, Nettheim, and Beacroft 1997: 154). A similar case, in which Michael Mansell (a prominent member of the Aboriginal Provisional Government) was charged with failing to enrol to vote, is discussed in Chapter Six.

These cases show some instances where Aboriginal people have sought to have their status as distinct, sovereign peoples recognised by Australian courts. Their attempts have been largely rejected. However, an extensive discussion of all this case law is beyond the scope of this thesis. Because the substantive focus of this thesis is on non-Indigenous responses to Indigenous people explicitly asserting their sovereign status, this chapter therefore addresses judgments in cases in which the assertion of sovereignty has been the primary action brought before the Court. Other cases will only be discussed in so far as they had a bearing on the outcomes of the Coe cases.

**Coe v. Commonwealth (1979): The statement of claim**

In *Coe v. Commonwealth* (1979), Paul Coe attempted to sue the Commonwealth of Australia and the Government of the United Kingdom "on behalf of the aboriginal community and nation of Australia" (*Coe v. Commonwealth* 1979: 120). The basis of

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93 Coe filed a statement of claim in the High Court in July 1977, then, in September 1977, he applied for leave to amend the statement of claim. The proposed amendments, as I discuss below, asserted Indigenous peoples' sovereignty and "claimed common law rights on alternative bases" (*Coe v. Commonwealth* 1979: 118, 131). The application to amend the original statement of claim was dismissed by Justice Mason, following which Coe appealed to the full bench of the High Court. It is this appeal that the High Court is in fact responding to in the *Coe v. Commonwealth* (1979) judgment. Although the judgment is technically in
the case Coe brought before the Court was that Captain Cook, Governor Arthur Phillip, and others in the name of King George had wrongfully claimed sovereignty over and occupation of the continent now known as Australia (Coe v. Commonwealth 1979: 121). Moreover, Coe asserted that these wrongful claims were "contrary to the rights, privileges, interests, claims and entitlements ... of the aboriginal community and nation" (121). This is certainly the central argument or theme in Coe's case, and it is also the key point cited whenever Coe v. Commonwealth (1979) is discussed in the scholarly literature. For the purposes of this chapter, however, it is necessary to summarise some of the other key points included in Coe's statement of claim. This will establish the specific context in which the Court's judgment in this case should be read.

The central elements of Coe's case can be summarised as follows: he made an assertion of originary sovereignty. As Chapter Two explained, this is sovereignty that exists both prior to and continuously with the occupation of the continent of Australia by the British. Therefore, the British wrongfully treated the continent as a terra nullius, which led to the unlawful dispossession of Indigenous people from their land and the unlawful "plundering" of land for mining and other purposes without Indigenous peoples' consent. This has led in turn to the destruction, or near destruction, of Aboriginal cultures, languages, customs, religions, and traditions. Furthermore, Coe argued that the aforementioned series of events could also be seen as wrong under the British common law established by the British themselves. Alternatively and/or additionally, Coe argued that the actions of Cook, Phillip, and others, which led to this series of events, could be considered to amount to claims of conquest over the continent rather than settlement, and this too would provide a basis for the Court's recognition of Aboriginal peoples' rights to land. Accordingly, Coe called on the Court to make declarations to these effects, to issue an injunction to stop further authorisation of

response to Coe's appeal against Justice Mason's refusal to allow him leave to amend his statement of claim, the "matter was by consent treated as though an application had been made to strike out the proposed amended statement of claim as though it were a duly delivered statement of claim" (Coe v. Commonwealth 1979: 118). That is, Coe's proposed amendments to his original statement of claim were treated on their merits, rather than simply on the technical aspects of the appeal question. Therefore, the judgment is generally discussed here in this sense as well.

94 In his statement of claim, Coe does not capitalise "aboriginal"; therefore, when I am directly quoting from his statement of claim, I use the lower case also.
mining and other activities that prevent Indigenous people from exercising their rights to land, and to order the governments of both the Commonwealth of Australia and the United Kingdom to pay Indigenous people compensation for the loss of their lands and the impairment of their rights. Considered within the conceptual framework of this thesis, Coe was asserting Indigenous peoples' originary sovereignty over the continent as the basis for the contemporary exercise of rights to and control over land.

The basis of Coe's assertion of originary Indigenous sovereignty was as follows: Coe argued that, from "time immemorial," the Aboriginal nation has "enjoyed exclusive sovereignty over the whole continent now known as Australia" (Coe v. Commonwealth 1979: 121). He asserted that Aboriginal people had complex social, religious, cultural, and legal systems, under which the various Aboriginal groups had "proprietary and/or possessory rights, privileges, interests, claims and entitlements to particular areas of land" – subject to the usufructuary rights (rights of temporary possession, use, or enjoyment) of other Aboriginal people – which some Aboriginal people still exercise (Coe v. Commonwealth 1979: 121). This system of interlocking rights and responsibilities was the basis of the "sovereign aboriginal nation" (Coe v. Commonwealth 1979: 121). The proclamations of Cook, Phillip, and others "wrongfully treated the continent now known as Australia as terra nullius whereas it was occupied by the sovereign aboriginal nation" (Coe v. Commonwealth 1979: 122).

Aboriginal people, therefore, were and are entitled to enjoyment of their rights in relation to the land of the continent now known as Australia, and they were also entitled "not to be dispossessed without bilateral treaty, lawful compensation and/or lawful intervention" (Coe v. Commonwealth 1979: 122). In the absence of any of these instruments, the dispossessment of Indigenous people from their lands was unlawful and prevented Aboriginal people from the "enjoyment of usufructuary rights in respect of the said lands," thereby substantially destroying Aboriginal peoples' culture, religion, customs, language, and way of life, which "they would have otherwise enjoyed" (Coe v. Commonwealth 1979: 122). Specifically, Coe argued, Aboriginal peoples' enjoyment of their rights to and interests in land has been impaired by the

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95 See, for example, Reynolds (1996a: 4-6) and Curry (2000).
Commonwealth of Australia – which, since Federation in 1901 has “purported to exercise sovereignty over the continent of Australia” – legislating to permit uranium and other kinds of mining on lands of religious significance to Aboriginal peoples. This “plundering” of territory occurred “without the consent of the aboriginal community and nation” (Coe v. Commonwealth 1979: 122, my emphasis). Coe’s case was essentially framed as a dispute between two sovereign nations or entities, in which the legitimacy of the claim to sovereignty is directly related to the consent of those over whom the authority is purported to be exercised.

Coe’s statement of claim gave the Court a series of options for making a positive determination in the case. For example, as a “further or alternative statement of claim,” Coe argued that the common law established by the proclamations of Cook, Phillip, and others entitled Aboriginal people to the continuation of their proprietary and/or possessory rights, which they had prior to 1770 and which had not been taken away by treaty or other means. Aboriginal peoples’ dispossession from their lands was also in contravention of the common law established by the British, and, as a result of their dispossession, Aboriginal people have lost the benefit of their common law rights to land (Coe v. Commonwealth 1979: 123-124). As another “further or alternative statement of claim,” Coe argued that the proclamations of Cook, Phillip, and others amounted to “claims of conquest” (Coe v. Commonwealth 1979: 125, my emphasis). On the issue of conquest, Coe argued that, although the “radical title in the land” would still have been vested in King George III, it would also have been “subject to the rights of occupancy and proprietary and/or possessory rights of the aboriginal people and nation ... unless and until these are taken away by specific act of prerogative. No such act of prerogative was ever exercised” (Coe v. Commonwealth 1979: 125, my emphasis).

The following parts of the chapter examine the way the Court responded to these elements of Coe’s statement of claim. Specifically, I consider the Court’s responses in terms of the central theme of this thesis – the relationship between sovereignty, Whiteness, and nationhood.
The “act of state” doctrine

The High Court decisively rejected the arguments made in Coe’s statement of claim. The majority judgment, written by Justice Harry Gibbs (who, a few years later, would go on to become Chief Justice of the High Court), invoked what is known as the “act of state” doctrine to dismiss Coe’s assertions of Indigenous sovereignty. As I argue here, the “act of state” doctrine and the High Court’s use of it in the Coe case demonstrate both the hegemonic nature of White Western conceptualisations of sovereignty and also the way that these conceptualisations are deeply embedded in Australian institutions.

Gibbs rejected Coe’s argument that Cook, Phillip, and others wrongfully claimed possession of the continent in this way:

[i]t is clear that [these] allegations ... could not form the basis of any cause of action. The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged. ... If the amended statement of claim intends to suggest either that the legal foundation of the Commonwealth is insecure, or that the powers of the Parliament are more limited than is provided in the Constitution, or that there is an aboriginal nation which has sovereignty over Australia, it cannot be supported (Coe v. Commonwealth 1979: 128, my emphasis).

According to Curry and as can be seen here, the “act of state” doctrine is based on the view that “domestic courts derive their authority from the sovereign power” – that is, from the state. Thus, the court system exists because “the sovereign power gives it its authority under law” (Curry 1999: 20). Therefore, domestic courts cannot question acts of state because this would be to question the authority of the state from which the court’s own authority and jurisdiction derives: if the court were to make a judgment upon “the right of the sovereign power to exist it brings into question the origin of the very power it uses to make the determination” (Curry 1999: 20). Curry suggests that this would be akin to “sitting on the branch of a tree while busily trying to saw it off” (1999: 20). That is, the “logic of the court’s position” is such that it cannot question “the legal and constitutional grounds on which it stands” (Curry 2000: 7).

Curry notes that the act of state doctrine is based on the classic or traditional view of sovereignty (2000: 5). As Chapter Two pointed out, this is the view that sovereignty
inheres only in the state and that the state’s sovereign power is “absolute, indivisible, and inalienable.” This means that the courts can only exercise power delegated to them by the state; they cannot be a sovereign power unto themselves. Consequently, the court “can only ensure that the law, once established in [a] territory, is properly applied” (Curry 2000: 5), but it cannot question the establishment of the law itself. This is ostensibly why Justice Gibbs’ judgment rejected the arguments Paul Coe put to the High Court of Australia — because questions of sovereignty are not justiciable within a domestic court. As Justice Jacobs explained in his part of the judgment, these are “not matters of municipal law but of the law of nations and are not cognizable in a court exercising jurisdiction under that sovereignty which is sought to be challenged” (Coe v. Commonwealth 1979: 132). The “net effect of this view of sovereignty” is that “claims for justice within the Australian legal and political systems will always be subject to a limitation in favour of the status quo” (Curry 2000: 5). In other words, as Reynolds suggests, questions about sovereignty are effectively declared “off limits” (1996a: 14). In this way, it happens that

[1] The annexation of Australia, the investing of radical title over all of Australia in the Crown, to the detriment of pre-existing Aboriginal land ownership, and the dispossession of Aboriginal title by grants of freehold are all ... Acts of State beyond the reach of the High Court (Curry 2000: 8).

That is, although they are ordered by the “act of state” doctrine, the “operational standards” employed by the institutions of the Australian state, such as the courts, will always be weighted towards the protection of state sovereignty and therefore towards their own protection. I explore below how the Court’s judgment in this case can be read as an expression of anxiety or panic resulting from the challenge to these operational standards. For the moment, however, it can be seen that the act of state doctrine, which is based on dominant conceptualisations of sovereignty and the state, is one element in the discursive repertoire that functions to protect White sovereignty and hence to reinforce and maintain hegemonic Whiteness. As Chapter Two discussed, this also demonstrates that Whiteness is embedded in Australia’s institutions (Moreton-Robinson 1998c: 11).

For Curry, the restrictions imposed by the act of state doctrine mean that the court’s “hands are tied” on the issue of sovereignty and on related questions (2000: 5). He
argues that the act of state doctrine means that the courts “cannot be expected to deliver either substantial or secure rights to indigenous peoples,” because they essentially cannot adjudicate on the rights and wrongs of questions that are fundamental to the legal and political structure from which their own jurisdiction stems. Therefore, says Curry, this “is not the fault of the courts. It is simply unfair to assert that they could do more” (2000: 12). The courts “disallow these claims only because they have been ruled out in advance, and not because anything has been shown to actually invalidate them. Their potential moral force is undiminished” (Curry 2000: 12). Frank Brennan holds a similar view: he argues that, because of the act of state doctrine, Indigenous sovereignty “is not a legal claim. It is at best a political claim” (Brennan 1995: 127). Accordingly, both Curry and Brennan suggest that we need to look elsewhere – to the political system, for example, through avenues such as the negotiation of a treaty – for ways to resolve outstanding questions of sovereignty and legitimacy in the relationship between Indigenous and non-Indigenous peoples in Australia. I will return to the issue of treaties in the next part of this chapter and in Chapter Six. For now, I wish to consider Curry’s claim that it is “unfair” to expect that the courts could “do more” on questions of sovereignty.

I concur with Curry when he says that, given the act of state doctrine by which the High Court is effectively constituted, the logic of the court’s position means that the scope of its judgment will necessarily be limited in cases such as Coe v. Commonwealth (1979). But I take issue with Curry when he argues that the act of state doctrine means that the courts have been unable, “rather than necessarily unwilling,” to recognise “independent and pre-colonial Aboriginal rights which can be insulated and protected from the operation of governments imposed upon indigenous people against their will” (Curry 2000: 5). In the case of Coe v. Commonwealth (1979), a closer reading of the Court’s judgment (and particularly the majority judgment of Justice Gibbs) reveals a very strong resistance to the idea of recognising Indigenous peoples’ originary sovereignty. This resistance is manifested both in vehement denial that Indigenous sovereignty exists and, when such sovereignty is asserted, it is discernible also in a sense of panic among those Connolly describes as the “established identities” (1995:

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96 See also Brennan (1993).
The following discussion will demonstrate this. For this reason, it is important to examine not only the act of state doctrine in broad terms; we must also consider the specificities of the Court’s application of it. In addition, it is important to make visible not only the fact that the court is geared toward the protection of White race privilege and White sovereignty, as demonstrated by the act of state doctrine, but also to uncover the ways in which this configuration of power is maintained, and continually reinscribed, by hegemonic conceptualisations of sovereignty and by hegemonic Whiteness.

The “domestic dependent nation” doctrine

Having decisively rejected Coe’s assertion of prior and continuing original Indigenous sovereignty by using the act of state doctrine, Justice Gibbs turned his attention to the question of whether Indigenous people in Australia could be considered to be a “domestic dependent nation,” a phrase coined in Chief Justice Marshall’s famous ruling in the US Supreme Court in the 1831 case of Cherokee Nation v. State of Georgia (Tully 1995: 117). The Court’s rejection of the applicability of the “domestic dependent nation” doctrine to Australia constitutes a rejection of the idea that even a limited form of “residual” Indigenous sovereignty might exist in Australia. Consequently, as I argue here, the judgment reinforces important elements of the “incontestability of the state” myth.

As Coe (1994: 11) explains, the concept of “domestic dependent nation” essentially denotes a form of sovereignty that would be internal to the state. This is distinct from external sovereignty, which is the power to deal with other sovereign states on trade, foreign affairs, and other matters. In this view, when a colonial power acquired the territory of Indigenous people, those people “were by necessary implication divested of those sovereign powers which were inconsistent with its new status as a people dependent on the colonial power” (Coe 1994: 11). This means that domestic dependent nations are subject to the “ultimate jurisdiction of the constitution of the colonising power,” but they retain the power to manage their own internal affairs and “can only lose these powers if they are treated away or expressly terminated by legislation” (Coe
1994: 11). That is, the concept of a “domestic dependent nation” is a form of derivative sovereignty, in which some aspects of the practice or exercise of sovereignty – such as the right to self-government – are retained and can be exercised, but the exercise of these rights is limited by the extent to which they are both recognised and mandated or delegated by the colonising power. The ability to exercise sovereignty in this sense is therefore derived from the colonising state.

Although Justice Gibbs considered Chief Justice Marshall’s ruling in the 1831 Cherokee Nation case in Coe v. Commonwealth (1979), he concluded that that case provided “no assistance in determining the position in Australia,” because the “history of the relationships between the white settlers and the aboriginal peoples has not been the same” (Coe v. Commonwealth 1979: 129). Unlike the Cherokee Nation, Justice Gibbs ruled, Indigenous people in Australia are not organised as a “distinct political society separated from others,” and they are consequently subject to the laws of the Commonwealth of Australia and the states and territories in which they live (Coe v. Commonwealth 1979: 129). Furthermore, he noted that

\[\text{[they have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the law of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain (Coe v. Commonwealth 1979: 129, my emphasis).}\\]

This passage from the judgment demonstrates that the Court rejected the “domestic dependent nations” doctrine – that is, the idea that Indigenous people might be able to exercise some form of sovereignty in conjunction with that of the Australian state – as emphatically as it dismissed Coe’s assertion of originary sovereignty. This is why I argue below that the Court’s response to Coe’s statement of claim can be read as an expression of anxiety or panic.

This part of Justice Gibbs’ judgment raises two points that are pertinent to the central themes of this thesis. First, the Court’s failure to recognise even a limited form of derivative Indigenous sovereignty illustrates a key feature of hegemonic

\[97\text{This case is also sometimes referred to as “Worcester v. State of Georgia,” because the Cherokee were represented by Samuel Worcester (Tully 1995: 117).}\]
conceptualisations of sovereignty – the idea that sovereignty can inhere only in the
state. By asserting that Indigenous people have no “legislative, executive, or judicial
organs” by which sovereignty might be exercised, Justice Gibbs is very clearly
premising his conceptualisation of sovereignty on the existence of the state. This is a
key component of the “incontestable state myth,” which I discussed in Chapter Two.
Justice Gibbs’ reliance on a hegemonic understanding of sovereignty is evident in his
ruling that not only are Indigenous people in Australia not a “distinct political society
separated from others,” as Chief Justice Marshall ruled the Cherokee nation were in
1831. It is also evident in his determination that they have never been “uniformly
treated as a state” (Coe v. Commonwealth 1979: 129). This invites the question: by whom
have they never been treated as a state? As discussed above, Coe’s statement of claim
outlined the system of interlocking rights, responsibilities, and recognition between
Indigenous groups in Australia. As Chapter Two discussed, however, White Western
normative understandings of sovereignty emphasise external recognition by others in
the state system – that is, by similarly constituted (in other words, European) sovereigns
(Coe v. Commonwealth 1979: 122). In ignoring the system of Aboriginal law to which
Coe pointed in his statement of claim, Gibbs clearly presupposes an account of
sovereignty that privileges White, Western frameworks and that consequently
reinforces White sovereignty as the norm against which other “claims” to sovereignty
should be compared.

Moreover, Justice Gibbs’ rejection of the applicability of the domestic dependent
nations doctrine to Indigenous people in Australia represents a refusal to entertain the
prospect of recognising any form of Indigenous sovereignty – even, in his own words,
sovereignty “of a limited kind.” It is possible to accept that the logic of his position
meant that Gibbs’ primary concern in Coe v. Commonwealth (1979) had to be with
upholding the security and integrity of the Commonwealth’s legal foundations.
Nevertheless, he still had the opportunity to acknowledge – as the US Supreme Court’s
Chief Justice Marshall did nearly 150 years earlier – that the exercise of Indigenous
sovereignty pre-existed the sovereignty of the Australian state and may still exist –
albeit in a limited form – in the present. Indeed, had Justice Gibbs ruled that the
domestic dependent nation doctrine was applicable to Indigenous peoples in Australia,
this ruling would still have been interpreted as confirmation of the Australian state’s

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sovereignty. This is because it would have effectively affirmed the position of the state as the sovereign power from which any "internal" or "domestic dependent" Indigenous sovereignty would derive. That is, the High Court had the opportunity to afford a limited degree of recognition to Indigenous peoples – one that would not have in any way threatened the sovereignty of the Australian state but would, in fact, have affirmed it – and still the Court did not take the opportunity. This is why I disagree with Curry's argument that the courts' hands are necessarily tied on matters of sovereignty, and that their failure to recognise Indigenous peoples' sovereignty is a function of their inability rather than their unwillingness to do so. If the court's hands are tied on matters of sovereignty, it is because of the pervasiveness of White hegemonic understandings of sovereignty and the failure or refusal of those institutions to come to terms with the racially marked nature of their very constitution.

The centrality of terra nullius

Another important element of Coe v. Commonwealth (1979) for the purposes of this thesis is Justice Gibbs' response to Coe's argument that the British occupation of Australia amounted to conquest (as opposed to "settlement" or cession). It is important because the Court's response to this part of Coe's statement of claim demonstrates that the concept of terra nullius is central to the Australian claim to sovereignty. In doing so, it also demonstrates the continual fortification of hegemonic Whiteness in the Coe v. Commonwealth (1979) judgment.

Gibbs rejected Coe's argument about conquest by reasserting the notion that the continent of Australia was terra nullius before the British arrived in the 1770s:

[For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony acquired by conquest or cession, in which there was an established system of law of European type, and a colony acquired by settlement in a territory which, by European standards, had no civilized inhabitants or settled law. Australia has always been regarded as belonging to the latter class (Coe v. Commonwealth 1979: 129, my emphasis).

Indeed, according to Gibbs, it is "fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest" (Coe v. Commonwealth 1979: 129, my emphasis). This reveals the absolute centrality and pervasiveness of the idea of terra nullius – an idea premised on the inherent superiority
of Whiteness – to the Australian state’s construction of its own legitimacy. As I suggested in Chapter Two, the assertion of the myth that the continent of Australia was *terra nullius* in the 1770s was the first great act of Australian nation-building. This part of Gibbs’ judgment demonstrates the various discursive strategies which institutions of the Australian state draw on to keep the myth of *terra nullius* in tact.

The passage from Gibbs’ judgment quoted above illustrates again the normativity of White conceptualisations of sovereignty. For example, when Gibbs says that Australia “has always been regarded” as being *terra nullius*, he actually means “has always been regarded as such by White people.” The normative nature of Whiteness is also exemplified by Justice Gibbs’ reliance on the precedent set by the Privy Council in the 1889 case of *Cooper v. Stuart* (Syme 2000: 17). In that case, the Privy Council spelt out the distinction between colonies acquired by conquest or cession, “in which there is an established system or law” (meaning, established by White people) and those acquired by “settlement,” where the colony consisted of a “tract of territory practically unoccupied, *without settled inhabitants or settled law*, at the time when it was peacefully annexed to the British dominions” (cited in Syme 2000: 15, my emphasis). In *Cooper v. Stuart*, the Privy Council ruled that the colony of New South Wales (and, by implication, the rest of the continent of Australia) belonged to the latter case. This ruling was based on the assumption that there was no system of “land law or tenure existing in the Colony at the time of its annexation to the Crown” (Syme 2000: 17). Of course, what the Privy Council meant, and what Justice Gibbs meant when he employed its precedent, is that there was no system of land law or tenure that was recognised as being comparable to White systems of land tenure.

It seems remarkable that Justice Gibbs so uncritically followed the precedent of *Cooper v. Stuart* from 90 years before, particularly its ruling that Australia was “practically unoccupied” and therefore empty of “settled inhabitants and settled law.” Indeed, when it interprets the 1889 *Cooper v Stuart* ruling to mean that the continent of Australia had no “civilised” inhabitants before the 1770s, Gibbs’ judgment illustrates

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98 This is despite the Federal Court of Australia’s judgment in *Millirrpan* (1971), in which the Court said that, if ever there was “a government of laws, and not of men,” it was demonstrated in Aboriginal systems of law and governance (cited in Syme 2000: 17). Even
overt White racism. In order to make this determination, the court relies upon a comparison of Indigenous peoples' "civilisation" – particularly as represented in their systems of law and governance – with the European – that is, White – norm. Thus, the White norm of "civilisation" and White understandings of what fundamental concepts such as "law" mean are the standards employed by the Court in the determination of questions of sovereignty. Related questions about the legitimacy of the establishment of British common law in Australia in turn hinge upon hegemonic White norms. This aspect of the High Court's judgment therefore demonstrates the way that existing "operational standards" privilege established or hegemonic identities (Connolly 1995: xv-xvii). In Dyer's terms, these are the standards that White people set, "by which they [we] are bound to succeed and others are bound to fail" (1997: 9-10).

"Absurd and vexatious": Coe as the troublesome indigene

The preceding discussion has considered the Coe v. Commonwealth (1979) judgment with respect to its employment of the act of state, domestic dependent nation, and terra nullius doctrines. The aspects of the judgment that I have considered thus far respond to specific sections of the statement of claim Coe put before the Court, and they demonstrate various discursive strategies that were employed to deny the very existence of Indigenous sovereignty. Rather than discussing the legal and technical aspects of the judgment further, I now wish to consider more generally the Court's response to Coe's assertion of Indigenous sovereignty. In particular, I wish to consider how it can be read as illustrating the "state of panic in the self-confidence of the [hegemonic] identities" (Connolly 1995: xv-xvi), which occurs when existing "operational standards," or the dominant conceptualisations on which hegemonic identities rely, are challenged or disrupted. In this case, this means the panic that ensues when the legitimacy of White sovereignty is challenged by Indigenous people asserting sovereignty of their own.

Justice Gibbs summarised his view of Coe's statement of claim as follows:

though the Federal Court did not find in favour of the Aboriginal plaintiffs in this case, this passage of that judgment demonstrates a significant shift away from the Privy Council's view in 1889. Gibbs chose to completely ignore this part of the Miliirrpum (1971) judgment in Coe (1979).
[l]o read the statement of claim is enough to reveal its deficiencies. It is repetitious, confused and obscure and in some respects inconsistent with itself. ... Even the numbering of its paragraphs is marked by eccentricity. What is more serious, it contains allegations and claims that are quite absurd and so clearly vexatious as to amount to an abuse of the process of the Court (Coe v Commonwealth 1979: 127, my emphasis).

Justice Gibbs took particular exception to a paragraph in Coe’s statement of claim in which Coe asked the Court to recognise the lawfulness of his and others’ proclamation of their sovereignty over the territory of the United Kingdom a few years earlier. Coe explained how, on 2 November 1976, he and other members of the Aboriginal nation had planted the Aboriginal flag on the beach at Dover, England, and, “in the presence of witnesses and natives of the territory [of the United Kingdom and Northern Ireland], proclaimed sovereignty on behalf of the aboriginal nation over all of the territory [of the United Kingdom and Northern Ireland]” (Coe v Commonwealth 1979: 127). In the following April, according to Coe, the Aboriginal nation confirmed this sovereignty “over its land, country and territory known as the Commonwealth of Australia by planting its flag in the presence of witnesses at Kurnell” (Coe v Commonwealth 1979: 127), just as the British had done 190 years earlier.99 Coe’s proclamation was similar to that made by Burnum Burnum 12 years later, during the White Australian Bicentenary celebrations. And, like Burnum’s proclamation of sovereignty, Coe’s request that the Court recognise the legitimacy of his claim to sovereignty over England was treated by the High Court as a stunt.

Following his description of this part of Coe’s statement of claim as “absurd” and “vexatious,” Justice Gibbs went on to say that “no judge in the proper exercise of his discretion” could permit such a pleading to go before the Court (Coe v Commonwealth 1979: 127). Because of the manifest absurdity of the claim, Gibbs was of the view that this part of Coe’s statement of claim required “no discussion” at all. In fact, he said, it was “somewhat surprising” that the statement of claim was even brought before the Court, “since the defects in [it] are so clearly manifest” (Coe v Commonwealth 1979: 131). Similarly, Gibbs’ colleague Justice Murphy described this aspect of Coe’s statement of claim as “exhibit[ing] a degree of irresponsibility rarely found in a statement intended to

99 Kurnell is in Sydney, near to the site where the colony of New South Wales had been first established almost 200 years earlier by Captain Arthur Phillip.
be seriously entertained by a court” (Coe v Commonwealth 1979: 138, my emphasis). Justice Jacobs took a slightly different position when he suggested that this section of Coe’s statement of claim did not require any discussion because he did not think it was meant to be “seriously pressed” (Coe v Commonwealth 1979: 138).

As Noel Pearson points out, it was in fact Captain Cook’s journey down the east coast of Australia in 1770 that led to the “greatest ambit claim for land” in Australian history (1994a: 1). Therefore, the question raised by the ascription of “absurdity” to Coe’s assertion of sovereignty over the UK and the continent of Australia is this: how were the parallel actions by Cook, Phillip, and others 200 or so years earlier any different? The difference in perception, of course, is a result of the fact that the actions of the British two centuries earlier were in accordance with the dominant political norms of the time. That is, these two almost identical sets of actions or circumstances can be so differently perceived—such that Cook’s and Phillip’s proclamations can be seen to constitute the legitimate establishment of British sovereignty over Australia, and Coe’s proclamations can be pronounced “absurd”—because of the hegemony of the dominant set of political norms that privilege White, Western conceptualisations of sovereignty.

Coe’s proclamations of sovereignty challenge this hegemony in two central ways: the first challenge is in the idea that Indigenous people could in fact have sovereignty, an idea that is incongruous with the normative frameworks upon which hegemonic understandings of sovereignty are based. I argue that it is for these reasons that Coe’s assertion of Indigenous sovereignty is also labelled “vexatious”: by virtue of its hegemonic nature, the sovereignty of the Australian state is common sense, taken for granted, and sensible (in opposition to the absurdity of Coe’s “claim”). To question or challenge this common sense is, therefore, in Justice Gibbs’ words, a manifestly “defective” pursuit, and it is consequently annoying or tiresome for those who must

100 Another issue that Coe’s proclamation of sovereignty over the UK and continent of Australia raises is the question of Coe’s authority to make this claim “on behalf of the aboriginal community and nation.” However, this issue is outside the central concerns of this thesis: my focus here is on White responses to assertions of Indigenous sovereignty, not on the politics of representation and sovereignty within Indigenous communities themselves.
endure it. Hence, Justice Gibbs rejects the possibility of Indigenous sovereignty outright when he states that “there is no Aboriginal nation, if by that expression is meant a people organized as a separate state or exercising any degree of sovereignty” (Coe v Commonwealth 1979: 131).

Coe’s proclamation of Indigenous sovereignty presents a second, and perhaps more serious, challenge to the “incontestability of the state” myth: it does this by disrupting the idea that the sovereignty of the Australian state is both legitimate and fixed. That is, the assertion of prior Indigenous sovereignty clearly challenges the idea that the initial establishment of British sovereignty over the continent of Australia was legitimate. The assertion of continuing Indigenous sovereignty – that is, Indigenous sovereignty that exists in the present – challenges the Australian state’s claim to exclusive sovereignty over the continent of Australia. It also suggests that White people might need to find an alternative configuration of sovereignty in Australia, which recognises the continuity of Indigenous sovereignty. Arguably, this is why the court quashed the idea that Indigenous sovereignty might exist at all. It may also explain why the court needed not only to employ points of law to dismiss the statement of claim but also to describe it as “absurd.” That is, the vehemence of the Court’s resistance to the possibility of recognising Indigenous sovereignty reveals an underlying uncertainty about the moral legitimacy of the Australian state’s claim to sovereignty, and it also illustrates the sense of panic that ensues when this moral uncertainty is exposed. As a result, the state’s claim to sovereign authority must be vigorously reinscribed.

In the Coe v. Commonwealth (1979) judgment, this vigorous reinscription of White sovereignty occurs in several ways, primarily through constructing as delinquent the source of the challenge – that is, Paul Coe himself. This is demonstrated by Justice Murphy’s description of Coe’s assertion of sovereignty as “irresponsible.” As Chapter Three argued, this is a key strategy of marginalisation employed by White people to discredit Indigenous peoples’ assertions of sovereignty. And, as I noted in Chapter Two, one of the central features of hegemonic discourses of sovereignty is the construction of a binary between state sovereignty and anarchy. Hegemonic discourses of sovereignty work to position state sovereignty as a “higher reality, a regulative ideal” (Ashley 1988: 230). Challenges to the state’s claim to legitimate
sovereign authority are therefore perceived to be, and represented as, its opposite: "external, dangerous, and anarchic" (Ashley 1988: 230). In this case, the challenge (or challenger) is explicitly portrayed as "irresponsible," connoting reprehensibility, recklessness, and carelessness. Thus, Coe's resistance to the Australian state's claim to sovereignty is also constructed by the Court as delinquent. The following passage from Gibbs' majority judgment provides another illustration of this:

[the question what rights [sic] the aboriginal people of this country have, or ought to have, in the lands of Australia is one which has become a matter of heated controversy. If there are serious legal questions to be decided as to the existence or nature of such rights, no doubt the sooner they are decided the better, but the resolution of such questions by the courts will not be assisted by imprecise, emotional or intemperate claims ... the claimants will be best served if their claims are put before the court dispassionately, lucidly and in proper form (Coe v Commonwealth 1979: 131, my emphasis).

As Moreton-Robinson points out, when Indigenous people attempt to speak to White people about White race privilege – or, in this case, to employ one of the institutions of the Australian state to conduct such a conversation – "more often than not they are positioned as 'racist troublemakers' or 'unpatriotic and angry blacks'" (1998b: 40). Furthermore, she argues, "White people, by positioning us in this way, use their race privilege to dismiss the issues and questions being raised." Positioning Coe as "irresponsible" and describing his claims as "emotional" and "intemperate" is an example of the discursive practice to which Moreton-Robinson refers. This also demonstrates the power of Whiteness to centre (and re-centre) itself, through constructing Indigenous people such as Coe as its opposite – irresponsible, intemperate, vexatious – and through positioning itself as normal and universal while also remaining invisible. Montag argues that

[the secret of Whiteness ... is that it is empty, defined only negatively by what it is not, a rule or norm established only after the phenomena that it came to define as inadequate or abnormal. Accordingly, in its most historically effective forms, whiteness does not speak its own name (Montag 1997: 291-292).

It is important to note that there are instances in the Coe v. Commonwealth (1979) judgment where the other judges dissent from some of Justice Gibbs' majority judgment: for example, Justice Murphy disagrees with Justice Gibbs that the concept of terra nullius is beyond dispute. He suggests in fact that the Privy Council's determination in the 1889 Cooper v. Stuart case (on which Justice Gibbs relied as a
precedent) that the continent of Australia was *terra nullius* prior to the arrival of the British in the 1770s "may be regarded either as being made in ignorance or as a convenient falsehood to justify the taking of aborigines' land" (Coe v Commonwealth 1979: 138). Justice Jacobs also took the view that the *Cooper v. Stuart* precedent was open to challenge (Coe v. Commonwealth 1979: 137-138). This demonstrates that Whiteness is not monolithic and that, as Chapter Two discussed, hegemony is never complete. It also tells us, however, that instances where the hegemony of Whiteness is called into question, by *White people themselves*, are rare.

**The executive and legislature: The Hawke Government's response to the Barunga Statement**

Chapter Three noted that, around the same time that Paul Coe was making his case for the recognition of Indigenous sovereignty in the High Court, discussion of and debate about a treaty between Indigenous and non-Indigenous people in Australia was gaining prominence on the national political agenda. Although attention to the issue of treaty fluctuated, the idea would remain a more or less permanent fixture on the Australian political agenda for the next decade. Chapter Three discussed one contribution (or set of contributions) made to the treaty debates in the 1980s: Kevin Gilbert's Sovereign Aboriginal Treaty '88 campaign. This part of the chapter considers another Indigenous contribution: the Barunga Statement presented to then Prime Minister Hawke in 1988.

I argue here that, like the case of Coe in the High Court, the Barunga Statement can be read as an assertion of Indigenous sovereignty that engages directly with the institutions of the Australian state. I suggest that the response to the Barunga Statement from the Australian Prime Minister and government of the day, and from other parliamentarians, can be broadly said to constitute the response of the Australian legislature and executive. Examining this response is therefore important to the central themes of this thesis because, like the response of the judiciary to assertions of Indigenous sovereignty, the response of the executive and legislature demonstrates the way that the organs of the Australian state are geared toward protecting and privileging White sovereignty. This example also highlights the way that different organs of the state employ different strategies in this process — that is, that the
executive and legislature employ a different “clustering of discursive elements” 
(Frankenberg 1993: 16) from those employed by the judiciary in its role in maintaining 
and reinforcing hegemonic Whiteness.

**Build-up to the White Bicentenary**

On coming to federal office, the Hawke government committed itself to introducing 
national land rights legislation. It failed to deliver on this promise, however, when 
Hawke could not convince the State Premiers and other powerful interest groups to 
agree on a model. Brennan describes Labor’s reneging on its land rights promise as 
“the grossest breach of faith committed by any government towards Aboriginal people 
since white settlement. Never had so much been promised, with absolutely nothing 
being delivered, and with Aborigines themselves receiving the blame” (1994: 72).

It was in this context that debate around the issue of a treaty re-emerged in the later 
years of the 1980s. Brennan’s point is important for this discussion because I argue that 
Prime Minister Hawke’s initial response to the Barunga Statement in 1988 – he 
promised that his government would negotiate a treaty with Aboriginal people – can 
be read at least partly as an attempt to assuage guilt about the government’s national 
land rights failure in the year of the White Bicentenary celebrations. That is, Hawke’s 
response to Barunga was as much about restoring a sense of the national self as 
inherently “good” as it was about recognition of Indigenous peoples’ political rights.

While the Hawke government was assiduously ignoring the demands of the Treaty 
’88 campaigners in 1987, the Bicentenary year was fast approaching. With it grew the 
perceived need to effect some sort of resolution between Indigenous and non-
Indigenous peoples in Australia so that “everyone could enjoy 1988” (Brennan 1994: 
75). As Hawke said in launching Labor’s 1987 election campaign, “‘We have 
Australian achievements, splendid achievements, to celebrate,’” but, he went on, “‘we 
Australians have mistakes to rectify ... if Australia is to achieve its full promise of what 
it can be, and should be – simply the best and fairest nation on earth’” (cited in 
Brennan 1994: 73). Brennan notes that, following the government’s re-election for its

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101 Then Aboriginal Affairs Minister, Clyde Holding, had said in parliament that “dissatisfaction 
amongst the Land Councils had prevented the passage of any legislation” (Brennan 1994: 72; 
third term in July 1988, the issue of treaty was put firmly back on the national political agenda when Hawke raised the idea during an interview at the Central Australian Aboriginal Media Association (CAAMA) in Alice Springs on 2 September 1987 (Brennan 1994: 73-74). Hawke told his interviewer that

"I would like to see 1988 preceded by some sort of understanding – compact, if you like, I don’t want to get caught up in particular words, but a compact of understanding between the whole Australian community which recognises that 1988 is the celebration of 200 years of European settlement. And to recognise in that 200 years very many injustices have been suffered by the Aboriginal people ...
But that compact, or statement of understanding, should recognise that there is an obligation on the part of the whole Australian community to move further in the areas of education, health, employment, training so that there can be confidence in the Aboriginal community as we go into 1988, that the proper celebrations that there should be of the bicentenary in the sense that I have described it, is something [with] which they can identify” (cited in Brennan 1994: 74).

Although he was deliberately vague about what such a compact or statement of understanding should be called, Hawke did not rule out the possibility of calling it a treaty: “Whether it is called a treaty, I am open-minded about that. I don’t think we should be hung up on words – a treaty, a compact. The important thing is that there be a clear statement of understanding”” (cited in Brennan 1994: 74).

This passage from the interview with CAAMA is important for understanding Hawke’s response to the Barunga statement the following year for two reasons. First, Hawke’s commitment to negotiating a treaty was fundamentally tied to what might be described as a desire for a guilt-free Australian nationalism in 1988. Specifically, I argue that Hawke’s response to Barunga can be read as an attempt to reinstate a sense of the “good national self” amid the White Bicentenary celebrations in 1988. Second, Hawke’s “open-mindedness” about the word – treaty, compact, statement of understanding – would be a theme of his contributions to the treaty debate over the following 12 or so months. This returns us to another strategy in the discursive repertoire of hegemonic Whiteness – the strategy of paying “lip-service” to the idea of a treaty and of engaging in discussion and debate about the issue but, as I argue here, of doing so within a very limited set of parameters.
Barunga

In the first week of June 1988, the ALP held its national conference, where Hawke sought, and received, his party’s support for the government’s goal of reaching a “proper and lasting reconciliation [between Aboriginal and non-Aboriginal people] through a compact or treaty” (Brennan 1994: 82). As with his earlier utterances on the issue, Hawke took the opportunity to connect the need to resolve Aboriginal–non-Aboriginal relations with the nationalistic project of the Bicentenary: he told the party conference delegates that “there is no doubt that the bicentenary provides us with a golden opportunity to start serious work towards such an agreement” (cited in Brennan 1994: 82). Brennan writes that, “armed with the support of the national conference, the Prime Minister and his wife took off for an Aboriginal sports and culture festival to be held at Barunga in the Northern Territory” (1994: 82).

Once at the festival, the then leaders of the Northern and Central Land Councils, Galarrwuy Yunupingu and Wenten Rabuntja, presented Hawke with what became known thereafter as the Barunga statement:

We, the indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights:
- To self-determination and self-management ...
- To permanent control and enjoyment of our ancestral lands ...
- To compensation for the loss of use of our lands, there having been no extinction of original title.
- To protection of and control over our sacred sites ...
- To the return of the remains of our ancestors for burial in accordance with our traditions ...
- To respect for and promotion of our Aboriginal identity ...
- In accordance with the universal declaration of human rights, the international covenant on economic, social and cultural rights, the international covenant on civil and political rights, and the international convention on the elimination of all forms of racial discrimination, rights to life, liberty, security of person ... and other basic rights.

We call on the Commonwealth to pass laws providing:
- A national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander Affairs;
- A national system of land rights;
- A police and justice system which recognises our customary laws ...

... And we call on the Commonwealth Parliament to negotiate with us a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedoms (Barunga Statement 1988, my emphasis).
Hawke sat down with Yunupingu and Rabuntja, accepted the proposals contained in the Barunga statement, and agreed with them on a five-point plan for putting the proposals into action. He then told the assembled crowd “that there shall be a treaty negotiated between the Aboriginal people and the Government on behalf of all the people of Australia” (Hawke 1988b: 2). Hawke said that the next step should be for a small group of Aboriginal leaders to embark on a consultation process to decide what they would like to see in a treaty. He also expressed his wish to see an agreement concluded before the end of the life of that parliament (Hawke 1988b: 2). The process Hawke proposed – whereby a group of Indigenous people would first decide on what they would like the content of a treaty to be – could be said to be a recognition on Hawke’s part that any treaty would need to express Indigenous peoples’ views and aspirations. In making it clear that it was up to Indigenous people to take the next step in the treaty process, however, Hawke effectively placed the responsibility for the process’s success or failure, at least in the short term, on Indigenous people. The failure of the consultation process between Indigenous people to yield a model within Hawke’s timeframe was later suggested as one of the reasons that the treaty never got off the ground (Department of the Prime Minister and Cabinet 1991: 17). As Crawford argued at the time, it is “not enough merely to ask unspecified Aboriginal leaders to negotiate among themselves in order to present a proposal, when the assumptions underlying that proposal are not merely not shared, but have not even been articulated” (1988: 1178). As such, this example illustrates another strategy in the discursive repertoire of Whiteness – placing the onus of the work of “race relations” squarely on Indigenous people (thus positioning Whiteness as not raced) and then blaming them when their work does not succeed.

If nothing else, however, the Barunga statement, and Hawke’s initial response to it, succeeded in putting the issue of a treaty firmly back on the national political agenda. The subsequent responses of other White politicians and commentators also demonstrate various discursive strategies in the repertoire of Whiteness. John Howard, the then Leader of the Liberal Opposition, for example, issued a press release the following day saying that, if a treaty between Indigenous people and the Commonwealth was signed, the Liberal Party would “rip it up” as soon as they got into government (Brennan 1994: 83), labelling the concept of a treaty a “recipe for
separatism" (Howard 1988: 6-7). This is an example of White "separatist anxiety." Similarly, a predictable cacophony of conservatives lined up against the idea: mining company executive Hugh Morgan (1988b: 18), for example, warned that the implication of a treaty was an Aboriginal nation, and this would be the culmination of a long-running communist/left-wing conspiracy to undermine Australia's territorial integrity:

[a] separate sovereign state for the Aborigines, carved out of Australia, has been a settled and constant ambition for the communists, and Bolshevik left generally, in Australia for over 50 years. If the Prime Minister's promise of a treaty is fulfilled then the patient, unremitting work of 50 years will be within sight of completion (Morgan 1988b: 18).

To refute the case for a treaty, Morgan used the conservative ploy that will now be familiar to the reader: he constructed the issue of Indigenous sovereignty as the product of radical left-wing influence.

I wish to concentrate here, however, on both Hawke's original response to the Barunga statement, as well as on his replies to critics of the concept of treaty. In particular, I will focus on how these can be read in terms of discourses of White nationhood and sovereignty. I have suggested above that Hawke's desire to effect an "agreement" between Indigenous and non-Indigenous people in Australia was linked to the nationalist project of the White Bicentenary and was particularly important in reinstating a sense of the national White self as "good" following the Hawke government's failure on land rights. This desire to see the self as "good" – as illustrated by Hawke's initial promise that "there shall be a treaty negotiated" – also demonstrates a tendency of Labor governments, which I described in Chapter Three with reference to the Whitlam Labor government's relationship with the Aboriginal Tent Embassy. This is the tendency, or the strategy, of paying "lip-service" to an idea but failing to deliver on promises made. The adoption of the subject position of the "good" White self reinforces White power and privilege by facilitating the elision of the facts of White power and race privilege on which that subject position depends.

For the purposes of my argument, this debate has an additional significance: Hawke's response to conservative criticism such as that from Howard and Morgan –
that is, his defence of his commitment at Barunga – was also characterised by the hegemonic discourses of Whiteness and sovereignty (albeit in a much more circumscribed way). For example, Hawke made it clear that a treaty between Aboriginal people and the Commonwealth government would not be equivalent to recognising or creating a "nation within a nation," describing this idea as a "nonsense" (Hawke 1988a: 5). Rather, it would signify the incorporation of Indigenous people into the Australian nation – "[t]he treaty will be negotiated by people who share the one nation and the one future: it will be a treaty between Australians and for Australians" (Hawke 1988a: 5). Thus, like the responses of his conservative counterparts, Hawke's approach did not advocate the recognition of Indigenous sovereignty, at least not in any meaningful way. This is because his articulation of the form of document that the proposed treaty might take entailed resistance to the possibility of any change to existing legal and political structures. That is, it entailed resistance to any reconfiguration of sovereignty in Australia.

Indeed, only a few months after the Barunga festival, Hawke was pressed on the issue of the treaty in an interview on ABC radio. Perhaps to underscore the point above, he reminded the interviewer and his audience that, in September 1987, he had said that he was not "'hung up on the word treaty.'" Further, he said, "'compact, treaty, it's not the word that's important, it's the attitudes of the non-Aboriginal Australians and of the Aboriginal Australians'" (Department of the Prime Minister and Cabinet 1991: 15). The Barunga Statement still hangs on the walls of Australia's Parliament House. Despite this, and as happened with his government's commitment to legislate for Aboriginal land rights, history shows that a treaty between Indigenous people and the Commonwealth was never signed as a result of Hawke's commitment at Barunga.

Broadly speaking, Hawke's failure to deliver on his promise of negotiating a treaty with Indigenous peoples in Australia (which can be said to constitute the actions of the Executive of the Australian government) can be seen as a failure of the Australian legislature as well: in liberal democratic theory, one of the roles of the legislature is to hold the executive to account (Held 1996: 86). Moreover, the Barunga Statement's call for a treaty had been explicitly addressed to the Commonwealth Parliament. This
analysis might seem to be an abstraction of a series of complicated realpolitik events, but my point — which is about the maintenance of hegemonic Whiteness through strict adherence to traditional White Western conceptualisations of sovereignty and nationhood — still holds. That is, a realpolitik analysis may well have concluded that Hawke failed to deliver on his promise at Barunga because the political climate of the time meant that it was simply “too hard.” This only demonstrates the extent to which traditional White Western understandings of sovereignty and nationhood — understandings that the negotiation of a treaty would have necessarily entailed reconsidering — are deeply embedded in Australian political culture.

The genesis of “reconciliation”

It was around the same time that Hawke began insisting he was “not hung up” on the word “treaty” that the word “reconciliation” steadily began to gain prominence in government and public discourse about Indigenous–non-Indigenous relations. Soon after, “reconciliation” was substituted for words such as “compact” and “treaty,” and the concept of “reconciliation” was formally instituted into Australian political discourse in 1991 through the Council for Aboriginal Reconciliation Act (1991).

In this way, the Hawke government’s failure to deliver on its commitments to national land rights legislation and the negotiation of a treaty led to the adoption of the policy of reconciliation in Australia. As Chapter Three argued with reference to the Aboriginal Tent Embassy and “Reconciliation Place,” the discourse of reconciliation has often functioned to obscure issues of sovereignty and legitimacy and to marginalise Indigenous people who advocate the recognition of Indigenous sovereignty. Therefore, it could be argued that the policy of reconciliation represents the institutionalisation of the avoidance of issues such as sovereignty and legitimacy, which Hawke’s promise at Barunga might have raised, had he delivered on it. The policy of reconciliation, and the Aboriginal Provisional Government’s critique of it along these lines, is discussed in further detail in Chapter Five.

102 This point should not be taken as a criticism of Indigenous people who have taken up the concept of reconciliation. It should only be read as a criticism of the structures and context out of which the government policy of reconciliation emerged. By “government policy” I mean the state’s deployment of the idea of “reconciliation” in its management of Indigenous-White relations.
The judiciary: Coe v. Commonwealth and NSW (1993)

A few years after the treaty issue slipped off the national political agenda, and 15 years after her brother Paul petitioned the High Court of Australia, Isabel Coe brought a case which, like Paul’s, asserted Indigenous peoples’ originary sovereignty as the basis for contemporary exercise of rights to and control over land. This was Isabel Coe on behalf of the Wiradjuri Tribe v. The Commonwealth of Australia and State of New South Wales (1993) (hereafter Coe v. Commonwealth and NSW 1993). The difference between Coe v. Commonwealth (1979) and Isabel Coe’s case, however, was that a decade and a half had passed. In this time, issues of Indigenous rights had been an almost constant presence on the national political agenda – for example, discussion and debate about a treaty, land rights, and eventually “reconciliation,” as discussed above. In 1989, the Aboriginal and Torres Strait Islander Commission (ATSIC) – an Indigenous-run bureaucracy to replace the Department of Aboriginal Affairs (DAA) – was established to give effect to the policy of “self-determination.” And, in 1991, the Royal Commission on Aboriginal Deaths in Custody (RCIADIC) handed down a damming report, which listed the legacies of colonisation and dispossession as significant causes of the disproportionately high rate of Aboriginal deaths in custody. For this discussion of judicial responses to assertions of Indigenous sovereignty, the most significant event in the intervening period, however, was the High Court’s famous Mabo (1992) decision. This decision supposedly abandoned the doctrine of terra nullius as the founding premise of the Australian legal system and, as a result, ushered in a new era in race relations between Indigenous and non-Indigenous people in Australia. The following discussion of Coe v. Commonwealth and NSW (1993) demonstrates, however, that the High Court’s abandonment of terra nullius was only partial and that the concept of terra nullius – and the myth that it was applicable to the continent of Australia – in fact remains foundational to the sovereignty of the Australian state.

Coe v. Commonwealth and NSW (1993): The statement of claim

Unlike Paul Coe’s case, which was brought on behalf of the “aboriginal community and nation of Australia” (Coe v. Commonwealth 1979: 120), in Coe v. Commonwealth and

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NSW (1993), Isabel Coe's case was made only on behalf of the Wiradjuri people. Coe named both the Commonwealth – the "successor in title to the Colony of New South Wales, Victoria Regina, William IV, George IV and George III and as International Sovereign" – and the State of New South Wales – the "purported owner and occupier of Crown lands within the area of the Wiradjuri nation" – as defendants in her statement of claim (Coe v. Commonwealth and NSW 1993: para. 7).

Like Paul Coe's petition to the High Court 15 years earlier, Isabel Coe asserted that Indigenous sovereignty existed prior to the assertion of British sovereignty over Australia, that it continues to exist in the present, and that it provides a basis for the contemporary exercise of the Wiradjuri's rights to land. She asserted that, "since time immemorial," the Wiradjuri have been a "sovereign nation of people" (Coe v. Commonwealth and NSW 1993: para. 3, 8). Also, like Paul Coe's statement of claim, Isabel Coe's petition before the Court was framed to effectively give the Court a series of options. For example, she argued that, as an alternative to treating them as a sovereign nation, the High Court could recognise that the Wiradjuri are a domestic dependent nation. As a further alternative, Coe argued that the Wiradjuri are a "free and independent people entitled to the possession of those rights and interests (including rights and interests in land) which as such are valuable to them" (Coe v. Commonwealth and NSW 1993: para. 8).

Coe argued that the Wiradjuri have been wrongfully and unlawfully dispossessed of their lands by "unprovoked and unjustified aggression including murder, acts of genocide and other crimes against humanity" (Coe v. Commonwealth and NSW 1993: para. 9). She argued that, if the Court chose not to recognise the Wiradjuri's sovereign status and decided instead to see the Wiradjuri as subjects of "George III and his successors" since 1788, the actions by which the Wiradjuri were dispossessed

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103 In her statement of claim, Coe described the Wiradjuri as a "nation of persons who have continuously lived on and occupied that land now known as central New South Wales ... according to Wiradjuri laws, customs, traditions and practices, with their own language" (Coe v. Commonwealth and NSW 1993: para.3). Coe went on to describe in more detail the boundaries of Wiradjuri land, and she argued that, as a result of their continuous occupation of the land, the Wiradjuri nation have "continued to have rights to the said land ... notwithstanding any wrongful or unlawful extinguishment, forced dispossession, or forced abandonment" (Coe v. Commonwealth and NSW 1993: para. 3).
constituted a breach of fiduciary duty owed to the Wiradjuri by both the Commonwealth and the State of New South Wales (Coe v. Commonwealth and NSW 1993: para. 9). As another alternative, Coe argued that, when the Wiradjuri became British subjects, they maintained the right to possession and enjoyment of their lands and therefore continue to have native title to those lands (Coe v. Commonwealth and NSW 1993: para. 15). This aspect of Isabel Coe’s statement of claim is similar to the assertion of Indigenous peoples’ common law rights to land made by Paul Coe in Coe v. Commonwealth (1979: 123-124), but, in framing the assertion of common law rights to land in the language of “native title,” Isabel Coe was explicitly drawing on the precedent set by the High Court’s decision in the Mabo (1992) case.

Again like Paul Coe before her, Isabel Coe set out a range of bases (including breach of fiduciary duty and native title rights) for the recognition of Wiradjuri rights to land. It is possible to read these different aspects of Isabel Coe’s statement of claim as inconsistent or contradictory – indeed, Justice Gibbs had done something similar in Coe v. Commonwealth (1979: 127). But, as I argued with respect to Paul Coe’s case, when Isabel Coe gave the Court a range of choices for recognising Indigenous peoples’ sovereignty and their rights to land, she effectively gave it the opportunity to recognise Indigenous peoples’ originary sovereignty, but to do so in such a way that the sovereignty of the Australian state would not be threatened. As we will see, however, just as it had done a decade and a half earlier in Coe v. Commonwealth (1979), the Court did not take the opportunity to recognise Indigenous sovereignty in even a limited way.

"No support whatsoever" for Indigenous sovereignty

The High Court definitively rejected Isabel Coe’s assertions of Indigenous sovereignty, as emphatically as it had done in the case brought by her brother Paul 15 years before. Given the context in which Coe’s case was brought – that is, the alleged overturning of the concept of terra nullius the previous year – the Court’s judgment in Isabel Coe’s case raises several points that are significant for the purposes of this thesis.

First, with respect to terra nullius, Chief Justice Mason did acknowledge that, in Mabo (1992), the Court had "declined to accept the view of the Crown’s acquisition of
the Australian colonies" expressed in the 1889 Cooper v. Stuart case – that is, the idea of terra nullius, which had been used as a precedent in Coe v. Commonwealth (1979) (Coe v. Commonwealth and NSW 1993: para. 23). But, although the Court supposedly rejected the doctrine of terra nullius in Mabo (1992), Chief Justice Mason went on to say that Mabo (1992) did not change what the Court had to say in Coe v. Commonwealth (1979) with respect to the issue of sovereignty, which was that the assertion of even a derivative form of Indigenous sovereignty had "no support whatsoever":

Mabo (No.2) is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are "a domestic dependent nation" entitled to self-government and full rights (save the right to alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognized by the laws of the Commonwealth, the State of New South Wales and the common law. Mabo (No.2) denied that the Crown’s acquisition of sovereignty over Australia can be challenged in the municipal courts of this country (Coe v. Commonwealth and NSW 1993: para. 27).

Thus, although Mason’s judgment reflected the idea that the myth of terra nullius had been overturned in the Mabo (1992) decision, it reiterated the view put by Mason’s judicial colleagues in Paul Coe’s case 15 years before: the Australian state’s claim to sovereignty over the continent is unable to be challenged in the Australian judicial system. Subsequently, the only rights Indigenous peoples are able to “claim” are those “created or recognised by the laws of the Commonwealth.” As I argued with respect to the Court’s judgment in Paul Coe’s case, Chief Justice Mason’s ruling on the issue of sovereignty here demonstrates the institutionalisation of the “incontestability of the state” myth.

As the passage from the judgment quoted above suggests, Chief Justice Mason completely rejected both Coe’s assertion that the Wiradjuri (and therefore Indigenous people in Australia more generally) have, or have ever had, sovereignty. In doing so, he reasserted the act of state doctrine employed in both Coe v. Commonwealth (1979) and Mabo (1992), to make clear that the logical conclusion of Coe’s assertion of Indigenous sovereignty – that the Australian state’s claim to exclusive sovereignty over the continent of Australia might be open to challenge or question – is also not arguable in an Australian court. Following the precedent of Coe v. Commonwealth (1979), Chief
Justice Mason also dismissed the applicability of the concept of the domestic dependent nation to Indigenous people in Australia, and he similarly rejected the alternative suggestion that the Wiradjuri are a “free and independent people.” He stated that each of these ideas were “but [other] aspect[s] of the sovereignty claim, having no independent legal significance” (Coe v. Commonwealth 1993: para. 28). Therefore, rather than taking the opportunity to afford even a limited degree of recognition to the prior and continuing existence of Indigenous peoples’ sovereignty in Australia, such that it would be in co-existence with, but subordinate to, the sovereignty of the Australian state, Chief Justice Mason rejected outright Coe’s assertion of Indigenous sovereignty. In so doing, he dismissed the perceived challenge to the Australian state’s claim to the legitimate exercise of exclusive sovereignty over the continent of Australia.

Several examples in the Coe v. Commonwealth and NSW (1993) judgment demonstrate continuities with the White discursive practices that have been discussed earlier in this thesis. In particular, these examples demonstrate the way that the configuration of sovereignty within the Australian state is geared toward the protection of White interests. For example, Chief Justice Mason also rejected most of Coe’s arguments made in addition to the assertion of sovereignty, suggesting that they were imprecisely argued, lacked sufficient detail, and that their basis in Australian law was by no means evident. This is reminiscent of Justice Gibbs’ assertion in Coe v Commonwealth (1979: 131) that Paul Coe’s statement of claim was “imprecise” and “emotional” and that his case would be helped if his “claims” were put before the court “lucidly and in proper form.”

Chief Justice Mason similarly rejected both Coe’s allegation of breach of fiduciary duty, as well as her assertion of the Wiradjuri people’s right to native title, because both allegations were “inadequately argued.” He did suggest that the native title claim could be a tenable one if it was made in more detailed terms, since Coe’s statement of claim made the assertion of native title only generally. However, the Chief Justice was at pains to point out that Coe’s statement of claim then before the Court appeared to be based on the mistaken belief that it was for the defendants – the Commonwealth and
State of NSW – to prove that the Wiradjuri’s native title had been extinguished. That is, according to the precedent set by Mabo (1992), “if the plaintiff [Coe] asserts native title to land, then the plaintiff [Coe] must establish the conditions according to which native title subsists” in any subsequent native title case brought before the Court (Coe v. Commonwealth 1993: para. 51). In other words, Coe was wrong if she thought that it should be up to the Commonwealth and the state of NSW to prove that native title did not exist. This part of the judgment is configured in precisely the same way as the Native Title Act (1993), and both reveal how the organisation of sovereignty within the Australian state is geared toward the protection of White interests. That is, the Crown’s acquisition of sovereignty over Australia means that it is assumed to have underlying title to the entire continent, unless proven otherwise. This is notwithstanding the fact that the Crown’s acquisition of sovereignty was justified by the notion of terra nullius, which the High Court had allegedly dispelled in Mabo (1992). These aspects of Mabo (1992) and the Native Title Act (1993) are discussed in further detail in Chapter Five.

Although Chief Justice Mason commented at some length on these questions in his judgment, his actual ruling in Coe v. Commonwealth (1993) was to strike out Coe’s statement of claim on the grounds that it was brought for an “improper purpose,” specifically, to “contribute to a political settlement of claims made by the Aboriginal people of Australia or by the Wiradjuri who constitute part of that people” (Coe v. Commonwealth 1993: para.54). The counsel for the State of NSW had argued that

"[t]he inference that the proceedings have been brought for this ulterior and illegitimate purpose should be drawn from the fact that the core of the plaintiff’s case is the sovereignty claim, notwithstanding that this is an untenable claim (Coe v. Commonwealth 1993: para. 54, my emphasis)."

Chief Justice Mason agreed: the fact that the “sovereignty claim” was the central element of Coe’s case, and the fact that Coe’s assertions of sovereignty over and rights to land related to such a “large area” instead of being “manageable claims to defined parcels of land” (my emphasis), pointed to “the purpose of using the proceedings for political purposes” (Coe v. Commonwealth 1993: para.54). Chief Justice Mason also took into account an affidavit from a witness, which alleged that Isabel Coe’s brother Paul had made a series of statements indicating that the “principal purpose of the proceedings is to pursue the sovereignty claim in order to play a part in creating the
impression that the Aboriginal people have *rationally based legal claims* to much of New South Wales*" (Coe v. Commonwealth 1993: para. 55, my emphasis). Isabel Coe did not contest that Paul had made the statements. Accordingly, Chief Justice Mason struck out Coe's statement of claim on the grounds of "improper purpose."

What is significant about this aspect of Chief Justice Mason's ruling is that an Indigenous "sovereignty claim" can so easily be construed as having an "improper purpose": this is an example of the White discursive strategy of constructing assertions of Indigenous sovereignty as delinquent. The way that an Indigenous person's assertion of her nation's sovereignty is so readily perceived to be an ambit political claim, rather than a serious legal question, also demonstrates the pervasiveness of hegemonic understandings of sovereignty. This is not withstanding the fact that Coe's assertion of sovereignty may have been deliberately "ambit": her knowledge that the Court would read her assertion of sovereignty in this way does not make it any less legitimate. The connotations of underhandedness and clandestine behaviour implied in the Court's description of Coe's motives as "ulterior" therefore demonstrate the discursive strategy of constructing as delinquent Indigenous people who make demands for the recognition of their sovereignty.

Furthermore, the way that Chief Justice Mason so readily agreed with the counsel for NSW that the "sovereignty claim" was untenable demonstrates the way that Indigenous sovereignty sits outside the normative framework of hegemonic conceptualisations of sovereignty. That is, the idea of state sovereignty is normalised, such that Indigenous sovereignty is automatically constructed as "untenable." Again, this rejection of any assertion of non-White sovereignty demonstrates the way that state institutions are weighted in favour of privileging Whiteness and institutionalising White race privilege. Although Chief Justice Mason was considerably more circumspect in the language he used to dismiss Isabel Coe's case than Justice Gibbs had been 15 years earlier, the effect of his ruling — that is, the denial of Indigenous sovereignty — was precisely the same. This further illustrates the discursive repertoire of Whiteness — that is, the range of discursive strategies and tools that White people have at our disposal, which can be drawn upon at different times and/or by different
people, all of which contribute to the project of maintaining and reinforcing hegemonic Whiteness.

**Terra nullius and Whiteness in the Coe cases**

The preceding discussion of *Coe v. Commonwealth and NSW* (1993), and the discussion of *Coe v. Commonwealth* (1979) in the first part of the chapter, illustrate two fundamental points. The first is the absolute centrality of the concept of *terra nullius* to the Australian legal system and to the Australian state’s construction of its own legitimacy – this is shown most forcibly in Chief Justice Mason’s judgment in *Coe v. Commonwealth and NSW* (1993). Although *Mabo* (1992) partially discarded the applicability of *terra nullius* in relation to property rights, it firmly entrenched it with respect to sovereignty. Reynolds explains that

> For 200 years Australian law was secured to the rock of *terra nullius*. One pinioned arm represented property, the other sovereignty. With great courage the High Court recognised native title in the Mabo judgement and released one arm from its shackles. The other remains as firmly secured as ever and seems destined to remain there for some time but in the long run the situation will prove unstable (Reynolds 1996a: 15).

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1 For example, it would appear that Justice Gibbs’ vehement rejection of the very possibility of Indigenous sovereignty in *Coe v. Commonwealth* (1979) was not just the product of the time in which he wrote the judgment. In an article on international treaties and Australian sovereignty published in the conservative right-wing journal *National Observer* (Gibbs 2001), the now retired Gibbs betrayed the same strict adherence to the idea of the “incontestable” state that he had expressed in the Coe judgment more than 20 years earlier. For example, Gibbs argued that Australian sovereignty has been “eroded” as a result of our being party to a range of international covenants and treaties. He suggested that the “self-determination” clause in the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights is “particularly mischievous” and potentially “loaded with dynamite” (Gibbs 2001: 14). And he “wonders at how any government in Australia ... could have been so unwise as to accede to a treaty in these terms,” given the apparent threat that it poses to Australian sovereignty. Further, he says that

> [It] has been argued on behalf of Australia that the provision does not normally entail the right of secession. The use of the word “normally” seems to have been cautiously incautious. It was further argued that the provision does not authorise action to impair the territorial integrity or the political unity of sovereign and independent States. Aboriginal activists have put forward a contrary argument which is not without support in the words of the treaties. Their argument is for sovereignty, and the call that Australia should enter into a treaty with the Aboriginal people is a step in this direction. Some would limit the demand to one for internal self-government but others more extreme would go further. We may hope that there is only a remote possibility that effect will be given to the right of self-determination in a way that will detract from our sovereignty (Gibbs 2001: 14, my emphasis).
As Reynolds points out, the settled colony doctrine only works if “there literally was no sovereignty – no recognisable political or legal organisation at all – before 1788” (1996a: 13-14); therefore, that proposition can only survive if “underpinned by nineteenth-century ideas about ‘primitive’ people” (1996a: 13-14). But the High Court was of the view in _Mabo_ (1992) that any questioning of the settled colony doctrine would seriously “fracture” the skeletal principles upon which the Australian legal system is based. Justice Brennan wrote that, although the legal system can be “modified to bring it into conformity with contemporary notions of justice and human rights … it cannot be destroyed” (_Mabo_ 1992). According to Reynolds, this means that, in the view of the High Court, recognition of Indigenous sovereignty would “lead to unacceptable trauma” (Reynolds 1996a: 15). As I discuss below, this idea of “trauma” neatly encapsulates the “state of panic in the self-confidence of the established identities” (Connolly 1995: xv-xvi), which ensues (or would ensue) when existing definitions and constructions of identity (and in this case, sovereignty) on which hegemonic identities depend are challenged or disrupted. As such, _Coe v. Commonwealth_ (1993) demonstrates the dependence of the Australian legal system on the idea that, before White people arrived here, the continent over which it has jurisdiction was _terra nullius_ with respect to the issue of sovereignty.

This leads onto the second point, which is that the Coe cases reveal the way that sovereignty is currently configured in the institutions of the Australian state so as to effectively make Whiteness inviolable. This point is most obviously demonstrated by the act of state doctrine employed by the Court in both cases: as discussed above, the act of state doctrine is the idea that a challenge to the legitimacy of the Crown’s acquisition of sovereignty over the continent of Australia is not justiciable in a municipal (domestic) court whose jurisdiction is derived from the sovereignty that is being challenged, irrespective of the legitimacy (or otherwise) of the manner in which the Crown’s sovereignty was acquired. The act of state doctrine is therefore fundamentally geared toward self-preservation: put simply, its logic is that, once established (regardless of how), the Crown’s sovereignty cannot be challenged. The importance of _terra nullius_ to this configuration of sovereignty is that _terra nullius_ was central to the initial establishment or acquisition of the Crown’s sovereignty over the
continent of Australia. The concept of *terra nullius* is based on the inherent superiority of Whiteness. Therefore, sovereignty is configured in Australia such that the foundational premises of the Australian state’s claims to it – based as they are on *terra nullius* and, therefore, on the inherent superiority of Whiteness – effectively cannot be challenged. Thus, dominant conceptualisations of sovereignty essentially work to make hegemonic Whiteness essentially inviolable, as seen here in the operation of one of the central organs of the Australian state.

**Conclusions**

In discussing the ways that the institutions of the Australian state have responded to various demands for the recognition of Indigenous peoples’ sovereignty, this chapter has demonstrated how the state works as a specific sphere in which Whiteness is institutionalised and White race privilege thereby maintained. It has also shown the continuities across the discursive repertoire of Whiteness: that is, the way White people and institutions employ different discursive tools and strategies in the maintenance of White power and privilege, at different times, and in different situations. This is demonstrated by the similarities in the various responses to assertions of Indigenous sovereignty that have been discussed in this chapter. It is also seen in the likenesses between the examples in this chapter and the responses that were analysed in Chapter Three. This indicates the importance of the “ethos of pluralisation” discussed in Chapter Two – that is, the need to challenge the existing order of things by dismantling “operational standards of identity, nature, reason, territory, sovereignty, and justice … [which] both camouflage injuries that might otherwise be ventilated and foreclose admirable possibilities that might otherwise be pursued” (Connolly 1995: xii-xiii). This is the task of critiquing, interrogating, and challenging hegemonic Whiteness.

Reflecting on White Australia’s incapacity to come to terms with issues of Indigenous sovereignty in the context of the White Bicentenary celebrations, Tasmanian Aboriginal activist Michael Mansell wrote that it raises the question “of what might have been had the approach to the bicentennial been different” (Mansell 1988a: 1206). Michael Mansell’s contribution to Indigenous sovereignty activism is discussed at length in the following chapter. First, however, Mansell’s wistfulness in 1988 for “what might have been” raises the question of how the outcomes of the
assertions of Indigenous sovereignty discussed in this chapter could have been fundamentally different if an "ethics of engagement" had been employed.

If White people started to see ourselves as having an obligation to engage with issues of Indigenous sovereignty (rather automatically dismissing as vexatious nuisances people who argue for its recognition), the landscape of the Australian public sphere would suddenly shift dramatically. The idea of a conversation between the competing claimants to originary sovereignty might be possible, as opposed to the current situation, in which one group of voices has to struggle continually just to be heard. For example, if the justices of the High Court saw it as their obligation to recognise Indigenous peoples' originary sovereignty, the outcomes of the Coe cases might have led to the return of land to Indigenous communities. Those cases might also have led to the recognition of the legitimacy of Indigenous structures of law and governance and of Indigenous peoples' inherent right to govern themselves according to those structures of law and governance. Similarly, Prime Minister Hawke's 1988 commitment to negotiating a treaty, for example, could have led to a meaningful dialogue about how the question of the legitimacy of non-Indigenous peoples' occupation of the continent could be resolved. It could also have led to a discussion about how Australia's structures of law and governance need reconfiguring in order to undo their present privileging and protection of White race power and privilege. This, of course, is a formidable task, but I argue that its gravity and importance cannot be underestimated. Garth Nettheim puts it this way:

[It will take a major act of creative statesmanship for Australian governments to sit down with representatives of the indigenous peoples in an attempt to negotiate a redenifition of the political and legal basis of the relationship. But without such an attempt the relationship will continue to cause grave difficulties for the Aboriginal and Torres Strait Islander peoples and, indeed, to Australian society as a whole (1991: 36).

In demonstrating the way that hegemonic Whiteness works to prevent this dialogue from taking place, however, this chapter has further demonstrated that it is first of all necessary to critique and interrogate hegemonic Whiteness, in order to dismantle it and remove its power. The enormous extent of this task, but also its fundamental importance, is demonstrated in the following chapter's discussion of White responses
to the assertions of Indigenous sovereignty made by the Aboriginal Provisional Government (APG).