By Spencer Zifcak

One question that relates to the upcoming referendum on 'The Voice', and which has recently come to prominence, relates to the question of sovereignty. Who or what is 'sovereign' as the term is applied to the governance of Australia? Is there any such thing as Indigenous sovereignty? Might it be said that in Australia sovereignty is or could be shared? Might First Nations people be sacrificing some part of their sovereignty if a Voice to parliament is endorsed at the referendum? What does 'black sovereignty' actually mean and is there any chance that it may come into being? In this article, I address some of these questions, however briefly. It will become apparent that none of the questions affords an easy answer.

Constitutional Sovereignty

What is sovereignty as it applies to the Australian polity? Speaking legally, sovereignty implies a power to make overarching law. Sovereignty may vest in a person, in a people, or in a political system. In each case, a person, people or system will have supreme power to enact a nation's laws. In democratic countries, the supreme law will usually be set down and embodied in a Constitution.

In Australia, it is generally accepted that sovereign power is exercised by the Commonwealth parliament in conjunction with the executive government and the federal judiciary. The Constitution is structured upon and establishes the separation of powers. The formative relevance of the people

to the Constitution resides in the fact that the Constitution was approved by a majority of the people voting in each of the colonies that became the original States of the Commonwealth.

The Constitution brought into existence a system of representative government in which the elected representatives in parliament exercise sovereign power on behalf of the Australian people. Hence, parliamentary sovereignty. The legislative, executive and judicial branches of government together constitute a sovereign governmental system that is regarded as emanating from the will of the people.

The former Chief Justice of the High Court summarised the position as follows:

> The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives (in parliament).

Indigenous Sovereignty

There is an assumption in our system of representative government that the people will exercise their popular sovereignty collectively and equally. In this respect, Indigenous people are in no different position to any other Australian people. The parliamentary franchise extends to all Australians. Every Australian, whether Indigenous or non-Indigenous, has the right to vote in Commonwealth and State elections. Having the right to vote, however, is not what Indigenous people are talking about when conceiving of Indigenous sovereignty. The idea travels far more widely than that.

There is much to be learnt from the Indigenous aphorism sovereignty 'never ceded, never will be.' The most elegant and

persuasive definition of Indigenous sovereignty is contained in the Uluru Statement of the Heart. It states that:

> …Sovereignty is a spiritual notion: The ancestral tie between the land and 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom , remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished and co-exists with the sovereignty of the Crown."

It will immediately be apparent that this notion of sovereignty is radically different from the Commonwealth's institutionally and hierarchically founded conception.

In the case of *Mabo*, the High Court understood and accepted that, prior to colonisation, Australia's Indigenous peoples possessed their own, sophisticated systems of economy, societal arrangements, culture and governance. These were largely swept away by colonisation, but not entirely. Indigenous peoples have held tightly to their ownership of and links to their land and waters. This assertion of spiritual connection has never wavered. Indigenous people claim, persuasively, that in these spheres they continue to exercise sovereign rights, in particular to land and proximate sea.

Following from the decision in *Mabo,* the Commonwealth government and State governments have each acknowledged the existence of native title to land. This has been in recognition of Indigenous people's spiritual connection to land, and the fact of their continuing relationship to the land. Aboriginal communities that have been able to demonstrate such a special, continuing relationship have assumed ownership of large parcels of land throughout Australia.

The conferral of native title land, however, has come with one decisive caveat. Land will not be transferred to its original

owners where the Crown has granted an interest in the land that is wholly or partly inconsistent with a continuing right to enjoy native title. In that case, native title is extinguished to the extent of the inconsistency. So, for example, native title may be extinguished by prior grants of freehold or leasehold.

Importantly, however, the High Court determined that native title to land survived the Crown's acquisition of sovereignty at the time of colonisation. It has existed, the Court affirmed from that time until the present. So, where nothing has happened that is inconsistent with native title, that title continues to this day although still subject to extinguishment at the hands of the Crown. In other words, barring extinguishment, sovereignty with respect to native title land is possessed by its Indigenous owners.

Shared Sovereignty?

It follows from developments in relation to native title law, that there is a measure of shared sovereignty with respect to land in Australia. But it is heavily constrained.

The Indigenous claim of shared sovereignty is usually based on the following considerations. Aboriginals as the original peoples of the land of Australia were wrongly dispossessed of their sovereignty over it by the British colonisers. Aboriginal people's human rights have been grievously abused and denied ever since colonisation. As clans or tribes they claim perpetually the right to self-determination in accordance with international law. Their legitimacy in this respect rests upon the fact that they have done nothing wrong.

The Australian wars were commenced by the other side. The colonial takeover was not achieved by consent but rather by force. Australians now exercise the power, but possess no legitimacy. The pre-existing rights and entitlements of Indigenous peoples should be recognised and, to the greatest extent permissible legally, be returned to them.

Irene Watson has summarised the position succinctly.

> "We were sovereign peoples, and we practised our sovereignty differently from European nation states. Our obligations were not to some hierarchical god, represented by a monarch. Our obligations were to law and we were responsible for the maintenance of country for the benefit of future carers of law and country.

All this raises the question of whether and to what extent the sovereignty of the Crown and Indigenous sovereignty may now be shared. The answer provided in a series of High Court cases in the early 2000s appears to be this. Shared sovereignty can only be taken so far. Indigenous sovereignty exists only in so far as it is not directly inconsistent with the sovereignty of the Crown. A series of cases in the High Court with respect to broad claims of Indigenous sovereignty extending well beyond land and sea have made this position clear.

In the case of *Coe,* for example, the Indigenous claimants made the following claims. The Wuradjuri people are a sovereign nation of people. As such they are entitled to self-government and full rights over their traditional lands. The Wuradjuri 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.

It was apparent that such a broad claim as to sovereignty if accepted, would cut right across the constitutional and legal sovereignty afforded to the Crown since Australian Federation and established within the framework of the Australian Constitution. The claim had no prospect of success.

A succession of cases that followed elaborated further on the relationship between Indigenous sovereignty and that of the Crown. The cases afforded Indigenous peoples little room to move. The High Court rejected the proposition that some dual system of law could be created. Indigenous law, it determined,

would always be subject to any relevant Commonwealth or State law. And for any pre-existing Indigenous legal rights to be recognised and enforceable a foundation must consequently be found within the Australian legal system. The High Court in *Yorta Yorta* (2002) put the matter bluntly:

> What the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and …that is not permissible.

Voice, Truth and Treaty

A series of conclusions with respect to Indigenous sovereignty follow from this discussion. The nation's sovereignty will remain unaffected if the referendum for the Voice is successful. The Voice itself would be created pursuant to Commonwealth law and the Commonwealth Constitution. It will not arise independently from Indigenous law. No dual system of law will be created, among other things because resolutions and recommendations from the Voice will be advisory rather than enforceable. That being said, the Voice, having constitutional standing, will be immensely persuasive.

The suggestion that the Voice, if endorsed at referendum, may in some way or other compromise Indigenous sovereignty appears not to have any sound political or legal foundation. One may readily appreciate that some Indigenous peoples and communities will harbour profound reservations about assuming any role within a colonial constitution. The long history of Indigenous oppression and dispossession in Australia inevitably raises the suspicion, if not fear, of any such constitutional collaboration. At the same time, however, because what is now proposed has constitutional standing, it offers a unique opportunity for Indigenous peoples to assume a more equal and influential place in national legal and political life.

In contrast, the preceding discussion, offers no succour to any fledgling black sovereignty movement. It appears as if one aim of this movement is to promote the rise of some form of sovereign, independent and self-determining Indigenous entity related to, but separate from, Australia's present, sovereign constitutional and legal system. As the relevant High Court decisions have made clear, no such arrangement would or will be constitutionally, let alone politically, permissible.

As the Indigenous representatives who drafted the Uluru Statement of the Heart made clear, the Voice is designed to be a first, constructive step towards the achievement of better and stronger legal and political influence for Indigenous peoples within Australia's polity. But it is only a first step. The movement towards a compatible form of sovereignty for Indigenous peoples within the nation does not end with a Voice to the Parliament. Its logical end is with a treaty.

A treaty would acknowledge Aboriginal peoples prior ownership and stewardship of Australia's lands and waters. It would proclaim the injustices of the Australian wars. It would recognise the people's traditional laws and customs. It would make reference to Indigenous repression and dispossession from initial colonisation to the present.

Its object would be as far as possible to make reparations in the present from the harms inflicted in the past. It would form the basis for collaborative action by Indigenous and European peoples together for the achievement of genuine equality of opportunity. It would place a commitment to the fundamental dignity of Australia's Indigenous peoples at the heart of every relevant governmental policy and program. It is in this way that a special, valuable and compatible Australian form of Indigenous sovereignty may in time be achieved.