Literature Review and Annotated Bibliography
(In response to Indigenous People and the Constitution)

The First Nations Regional Dialogues
Torres Strait

Introduction:

- **Acknowledge the work of GOD Almighty in the Torres Strait region with his people the Torres Strait Islanders and Aboriginal people of as custodians of this area.**

This paper has been prepared for the purpose of discussions of the "First National Regional Dialogues held on Thursday Island 05th of May 2017 to 07th of May 2017. This paper will provide discussions in 3 parts on recommendations and options previously put forward by:

1. The Law Council of Australia between October 2010 and January 2011.
2. Recommendations put forward by the Torres Strait Islanders "A New Deal" is a report on Greater Attorney for Torres Strait Islanders 1997 and;
3. The Torres Strait Treaty discussion paper provides reporting on the "Way Forward" for Torres Strait Islanders.

Torres Strait Islanders have always been keenly aware of their unique position within the wider Australian community. They are a special and separate race of people. Their cultures have developed from ancient traditions and beliefs which varied from island to island. In more recent times there has been a sharing of old traditions across all the communities of the strait and a development of new ways of expressing themselves as Torres Strait Islanders according to Ailan Kastom. Their Christian and spiritual values are very important part of modern Ailan Kastom.

It is not surprising that this strong identification based upon their unique culture is what makes Torres Strait Islanders as separate Indigenous inhabitants of this region within wider Australia. The Torres Strait Islanders are now calling for ways of giving political expression to their unique experience in contemporary Australian society. The Torres Strait Islanders have been calling for greater autonomy, greater control over their lands and the events which affect their everyday lives for many years. Change has been incremental with aspects of control being granted through various pieces of Queensland and Commonwealth legislation over the past thirty years or so. The pace of change has not pleased all Torres Strait Islanders.

Background

The Constitution is Australian Government "Rule Book". The Constitution distributes power between the Commonwealth and the States and Territories and sets out the roles of the federal Parliament and the executive (the government of the day). It empowers federal courts and establishes the High Court of Australia as the ultimate decision maker on questions about the meaning of the Constitution. It is essentially a structural plan for a federal system of government.

The first of these vital issues was the fact that Australia's federal system did not serve the people of the Torres Strait well. While the distinct levels of Commonwealth, State and Local governments currently providing satisfactory means of delivering services and allowing democratic representation to most Australians, this has not been so for Torres Strait Islanders. The result for a small, contained and geographically isolated population has inefficiency of basic services at all levels of government and duplication of service delivery and a dilution of real autonomy.

This discussion paper is based upon the literature review of recommendation made to the Commonwealth and State government and the annotated bibliography on articles written by the past Torres Strait Leaders who advocated tirelessly for equality and social justice for all Torres Strait Islanders since 1937. Now I come to the first of this discussion paper

PART 1

Law Council of Australia
Constitutional Recognition of Indigenous Australians

The Law Council of Australia

Between October 2010 and January 2011, the Law Council of Australia consulted with its various constituent bodies, as well as other groups and individuals with particular interest and expertise in matters of the rights of Aboriginal and Torres Strait Islander peoples, and Constitutional reform.

As a result of those consultations, the Law Council has elaborated a Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples. It states that the Constitution must be based on recognition of their distinct rights as Indigenous peoples, and proceed on a basis of consultation through their own representative institutions in order to obtain their free, prior and informed consent to any proposal for Constitutional reform.

Section 25

The Section 25 of the Constitution provided (and continues to provide) and I quote

"If by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted."

In response to Section 25 of the Constitution, the Law Council strongly supports the removal of those remaining sections of the Constitution which discriminate on the ground of race. These include, relevantly, section 25 which anticipates the disqualification of persons of a particular race from voting. During the course of the Law Council's consultations, there was overwhelming if not unanimous support for the repeal of section 25.

The preamble to the *Commonwealth of Australia Constitution Act 1901*, an Act of the Parliament to the United Kingdom at Westminster, provides and I quote:

"Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established".

In response to the Preamble to the Commonwealth of Australia Act 1901, the Law Council has supported the insertion in the Constitution of a Preamble containing paragraphs recognising Aboriginal and Torres Strait Islander peoples as the first peoples of Australia with distinct identities and histories, as well as their prior occupation and ownership, continuing dispossession, and particular status in contemporary Australia. The Law Council considers that any Preambular text will necessarily be the subject of careful consultation and negotiation with Aboriginal and Torres Strait communities and organisations.

Section 51

The Australian Constitution itself contains no Preamble. Further, the "people" referred to in the Preamble to the Imperial Act did not include Aborigines and Torres Strait Islanders. In 1901, the only two references to Indigenous people in the body of the Australian Constitution were couched in language of exclusion and I quote:

(a) *Federal Parliament was denied power to make laws with respect to people of "the aboriginal race in any State": section 51(xxvi)); and (c) section 127 provided: "In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted."*

Both the Convention debates when Quick and Garran in their 1901 Commentaries on the Constitution make clear that the so-called race power in s 51(xxvi), in its original form, was a racist and discriminatory provision**.** In many countries, Indigenous peoples have re-established new Constitutional relationships within the limits of existing nation-States. These developments suggest that there are many ways to recognise distinct Indigenous identities in Constitutional documents, and to renew relationships between Indigenous and non-Indigenous peoples on a basis of equality and consent.

Constitutional Commission

In 1988, the Constitutional Commission recommended substantive Constitutional reform to the race power in section 51(xxvi) of the Constitution to retain the spirit, and make explicit the meaning of the alteration made by the 1967 referendum which Justice Brennan has described as and I quote"

"an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial".

The proposal to replace section 51(xxvi) with a provision empowering the Commonwealth Parliament to make laws with respect to Aborigines and Torres Strait Islanders has been supported by the Hon Robert French who, writing extra-crucially, has commented that and I quote:

"Such laws are based not on race but on the special place of those peoples in the history of the nation".

In March 1995, following the 1992 decision of the High Court in *Mabo v The Commonwealth (No 2)* comprehensive "social justice package" reports were provided to the Prime Minister by, amongst others, the Aboriginal and Torres Strait Islander Commission (ATSIC), the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner. Each of these reports raised the need for substantive Constitutional reform.

On 8 November 2010, Prime Minister Gillard said in connection with the announcement of an expert panel to consult on the best possible option for a Constitutional amendment to be put to a referendum as follows and in which I quote:

"*The first peoples of our nation have a unique and special place in our nation. We have a once-in-50- year opportunity for our country*".

The Kalkaringi Statement, adopted on 20 August 1998 by the Combined Aboriginal Nations of Central Australia, provided and I quote:

"*I9b) That a Northern Territory Constitution must contain a commitment to negotiate with Aboriginal peoples a framework agreement, setting out processes for the mutual recognition of our governance structures, the sharing of power and the development of fiscal autonomies."*

The 1967 Amendment to Section 51(xxvi)

In conjunction with the recommendation for the omission of section 51(xxvi), the Constitutional Commission recommended the insertion of a new paragraph (xxvi) which would give the Federal Parliament express power to make laws with respect to those groups of people who are, or are descended from, the indigenous inhabitants of different parts of Australia. The recommendation was made because and I quote:

a) The nation as a whole has a responsibility for Aborigines and Torres Strait Islanders; and
b) The new power would avoid some of the uncertainty arising from, and concern about, the wording of the existing power.

Conclusion

Within the broader context of future constitutional reform, the Commonwealth Parliament enacts legislation for a referendum which seeks to:

1. Prepare a new preamble to the Constitution which recognises the status of the first Australians;

2. Remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race" and;

3. Amend Section 51 (xxvi) and review section 51 (xxix) and I quote"

"The Commonwealth Parliament might be able, under its external affairs power, s 51 (xxix), to alter the boundary of such a territory, since the limitation on alteration of borders contained in s 123 applies only to States. Alternatively, a new State comprising the Torres Strait area might be formed pursuant to s 124 of the Constitution by separation of territory from Queensland, with the consent of the Queensland Parliament".

Jeremy Webber, "Multiculturalism and the Australian Constitution" (2001) 24 *University of New South Wales Law Journal* 882, 889-890.

Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians A Submission to the Commonwealth Government 1995;* November 1996 Bathurst People's Convention; the December 2000 Final Report of the Council for Aboriginal Reconciliation.

Going Forward: Social Justice for the First Australians: A Submission to the Commonwealth Government 1995; November 1996 Bathurst People's Convention; the December 2000 Final Report of the Council for Aboriginal Reconciliation.

The Hon Justice Robert French, "The Race Power: A Constitutional Chimera", chapter 8 in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003, Cambridge University Press) 180, 208.

17 Section 51(xxvi) provided Federal Parliament with power to make laws with respect to *"The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws"*.

18 On the background to s 127, see G Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 *Federal Law Review* 17, especially at 25-30.

19 For discussion, see George Williams, "Race and the Australian Constitution: From Federation to Reconciliation" (2000)

38 *Osgoode Hall Law Journal* 43 at 649-650

32 ATSIC, *Recognition, Rights and Reform: Report to Government on Native Title Social Justice Measures*, Commonwealth of Australia 1995.

32 ATSIC, *Recognition, Rights and Reform: Report to Government on Native Title Social Justice Measures*, Commonwealth of Australia 1995.

PART 2

TORRES STRAIT ISLANDERS
"A NEW DEAL"

A REPORT ON GREATER AUTONOMY FOR TORRES STRAIT ISLANDERS
House of Representatives Standing Committee on Aboriginal & Torres Strait Islander Affairs
August 1997, Canberra

Chapter 4 – a possible form of greater autonomy for the Torres Strait region - This chapter outlines a proposal for a Torres Strait Regional Assembly to be a joint Commonwealth-State regional organisation. It would carry out the existing functions of the TSRA, the ICC now Torres Strait Regional Counsel and the Torres Shire Council. It would also have an enhanced role in consulting with and advising Commonwealth and State government agencies operating in the region.

Establishing such a body would require consultation between the Commonwealth and Queensland. There would need to be complementary Commonwealth and Queensland legislation and the assembly would be responsible to both Commonwealth and Queensland ministers.

Recommendation 1
The Committee recommends that the Commonwealth Government negotiate the establishment of a joint statutory agency (the 'Torres Strait Regional Assembly') with the Queensland Government to represent all residents of the Torres Strait area and to replace the Island Coordinating Council (TSIRC), the Torres Strait Regional Authority and the Torres Shire Council. [p 52]

Recommendation 3
The Committee recommends that the statutory functions of the proposed Torres Strait Regional Assembly be to

- formulate policy and implement programs for the benefit of all people living in the Torres Strait area;
- accept grants, gifts and bequests made to it;
- act as trustee of money and other property vested in it on trust and accept loans of money from both the Commonwealth and Queensland Governments, or other approved sources;
- expend monies in accordance with the terms and conditions on which the money is received;
- develop policy proposals to meet national, state and regional needs of people living in the Torres Strait area;
- advise the responsible Commonwealth and Queensland Ministers on matters relating to the Torres Strait area, including the administration of legislation and the coordination of the activities of all government bodies that affect people living in the Torres Strait area;
- undertake activities on behalf of one or more island councils for such purposes as are requested of it by the council or councils concerned;
- have power to delegate to and contract with Island Councils;
- establish and operate such businesses as the Regional Assembly thinks fit for the benefit of the people of the region; and
- have and discharge the functions of local government within the region, except in areas covered by the Community Services (Torres Strait) Act 1984 (Qld) and the Community Services (Aborigines) Act 1984 (Qld). The final description and detail of these functions is to be negotiated by the Commonwealth and Queensland Governments and the people of the Torres Strait area. [p. 57]

Recommendation 4
The Committee recommends that the Commonwealth Government negotiate with the Queensland Government to abolish the Torres Shire Council on the basis that the Council's existing functions be transferred to the proposed Torres Strait Regional Assembly. [p. 61]

Recommendation 7
The Committee recommends that the proposed Torres Strait Regional Assembly sponsor a Cultural Council consisting of Torres Strait Islanders from the Torres Strait and the mainland. The Cultural Council should meet annually and advise the Regional Assembly on how to promote and maintain the Ailan Kastom of Torres Strait Islanders. The costs associated with the involvement in the Cultural Council of Torres Strait Islanders living on the mainland should be borne by the Torres Strait Islander Advisory Board. [p. 64]

Recommendation 13
The Committee recommends that the Torres Strait Regional Assembly develop generic guidelines for negotiation with people of the Torres Strait region that can be used by Commonwealth and State agencies which are developing policies that particularly affect the region. Until the Regional Assembly is established, the above task should be conducted by the Torres Strait Regional Authority, in conjunction with the Island Coordinating Council (TSIRC and TSC) [p.78]

Recommendation 16
The Minister for Aboriginal and Torres Strait Islander Affairs should seek the agreement of appropriate Queensland Ministers, that Queensland agency which delivers services to the Torres Strait Region develop charters committing the agencies concerned to involving the residents of the Torres Strait in the planning, administration and delivery of those services to the region. [p. 86]

Chapter 7 – the way ahead - The Committee concludes its report with a look at the processes necessary to encourage the greater autonomy which is the subject of the report. The key to success in delivering benefits to Torres Strait Islanders is consultation and negotiation.

Consultation with Torres Strait Islanders

Greater autonomy is a process as well as an outcome. Torres Strait Islanders, in the Torres Strait region or on the mainland, must be consulted about the forms which a greater degree of autonomy might take. The conduct of the Committee's inquiry has been part of that consultation.

The need for further consultation means that, within the Torres Strait region, neither the Commonwealth nor Queensland Governments should legislate to establish new structures of government (including those recommended in this report) without allowing sufficient time for all those affected to comment on the proposals. The process of consultation should be facilitated by establishment by the Commonwealth of a working party consisting of Torres Strait Islanders, other residents of the region and Commonwealth, State and local government officials. Accordingly, the Committee makes the following recommendation.

Recommendation 24 and I quote:

The Committee recommends that the Commonwealth Government facilitate a process of consultation with relevant State Ministers, Torres Strait Islanders and all other residents of the Torres Strait region to ensure their support before any legislation is introduced into the Commonwealth Parliament to amend the structures of government or administration in the Torres Strait region.

The Committee recognises that the Queensland Government will wish to consult with the people of the Torres Strait on these proposals to ensure that state legislation complements Commonwealth legislation and has the support of all involved.

The submission of the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson, identified broad-ranging examples of possible Constitutional change to illustrate the potential range that could be considered and I quote:

3) Provide a legal and/or moral framework for public policy towards Indigenous peoples, perhaps through a preamble to an Indigenous peoples section of the Constitution, with Indigenous peoples and governments to negotiate the detailed contents of the section 51 (xxvi)

4) Guarantee legal protection for treaties, land claims settlements or other agreements between Indigenous peoples and governments;

5) Specify, certain rights of Indigenous peoples;

6) Alter the system of political representation to better reflect the diversity of community and the makeup of the Australian population (for example, through multiple seats in one electorate);

7) Create Indigenous Parliaments for Torres Strait Islanders and Aborigines through which we can decide matters, govern areas or advise the national parliament (as in Norway);

8) Provide for customary law courts and dispute resolution;

9) Establish responsibility of different levels of government, including Indigenous governing bodies for services or other matters pertaining to Indigenous peoples after a full review of the adequacy and relevance of current spending;

10) Establish or recognise Indigenous self-government in principle or in specific geographic areas (like Torres Strait or the Tiwi islands or the Pitjantjatjara lands), or for certain categories of subjects (such as sacred sites);

11) Establish Torres Strait Island and Aboriginal grants commissions to fund Indigenous self-government;

12) Establish ecologically sustainable development planning commissions to develop integrated self-government, economic and environmental plans and structures for lands and seas under Indigenous management;

13) Establish national Indigenous land rights and sea rights or processes to define such rights nationally;

14) Commit governments to constitutional conferences or other processes with Indigenous people to discuss specified subjects like land and marine rights, self-government, funding and delivery of services (as did s 37 of Canada's *Constitution Act*, further formal political accords); or

15) Add one or more Indigenous treaty or statement to the Constitution as an appendix or schedule**,** together with provisions for interpretation and application.

Conclusion

Recommendations 1 and I quote:

"The Committee recommends that the Commonwealth Government negotiate the establishment of a joint statutory agency (the 'Torres Strait Regional Assembly') with the Queensland Government to represent all residents of the Torres Strait area and to replace the Island Coordinating Council, the Torres Strait Regional Authority and the Torres Shire Council."

Recommendation 4 and I quote:

"The Committee recommends that the Commonwealth Government negotiate with the Queensland Government to abolish the Torres Shire Council on the basis that the Council's existing functions be transferred to the proposed Torres Strait Regional Assembly."

Recommendation 7 and I quote:

"The Committee recommends that the proposed Torres Strait Regional Assembly sponsor a Cultural Council consisting of Torres Strait Islanders from the Torres Strait and the mainland. The Cultural Council should meet annually and advise the Regional Assembly on how to promote and maintain the Ailan Kastom of Torres Strait Islanders. The costs associated with the involvement in the Cultural Council of Torres Strait Islanders living on the mainland should be borne by the Torres Strait Islander Advisory Board."

Recommendation 16 and I quote;

"The Minister for Aboriginal and Torres Strait Islander Affairs should seek the agreement of appropriate Queensland Ministers, that Queensland agencies which deliver services to the Torres Strait Region develop charters committing the agencies concerned to involving the residents of the Torres Strait in the planning, administration and delivery of those services to the region."

Recommendation 24 and I quote:
"*The Committee recommends that the Commonwealth Government facilitate a process of consultation with relevant State Ministers, Torres Strait Islanders and all other residents of the Torres Strait region to ensure their support before any legislation is introduced into the Commonwealth Parliament to amend the structures of government or administration in the Torres Strait region*." and;

Submission my Mick Dodson

The submission of the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson, identified broad-ranging examples of possible Constitutional change to illustrate the potential range that could be considered are:

3) Provide a legal and/or moral framework for public policy towards Indigenous peoples, perhaps through a preamble to an Indigenous peoples section of the Constitution, with Indigenous peoples and governments to negotiate the detailed contents of the section 51 (xxvi).

4) Guarantee legal protection for treaties, land claims settlements or other agreements between Indigenous peoples and governments;

5) Specify, certain rights of Indigenous peoples;

7) Create Indigenous Parliaments for Torres Strait Islanders and Aborigines through which we can decide matters, govern areas or advise the national parliament (as in Norway);

10) Establish or recognise Indigenous self-government in principle or in specific geographic areas (like Torres Strait or the Tiwi islands or the Pitjantjatjara lands), or for certain categories of subjects (such as sacred sites);

14) Commit governments to constitutional conferences or other processes with Indigenous people to discuss specified subjects like land and marine rights, self-government, funding and delivery of services (as did s 37 of Canada's Constitution Act, further formal political accords); or

15) Add one or more Indigenous treaty or statement to the Constitution as an appendix or schedule, together with provisions for interpretation and application.

TORRES STRAIT ISLANDERS, a New Deal, a *Report on Greater Autonomy for Torres Strait Islanders, House of Representatives Standing Committee on Aboriginal & Torres Strait Islander Affairs August 1997 Canberra*

Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians A Submission to the Commonwealth Government 1995;* November 1996 Bathurst People's Convention; the December 2000 Final Report of the Council for Aboriginal Reconciliation.

PART 3
The Torres Strait Treaty

Introduction

Although the determination of issues of sovereignty over certain islands in the Torres Strait and the establishment of maritime boundaries in the Torres Strait area are not questions which aroused much popular interest during most of this century, they were of considerable importance at the end of the last century, and they re-emerged as potentially troublesome problems as Papua-New Guinea moved towards the achievement of independence on 16th September 1975. Those problems were partly international in character, involving the Commonwealth of Australia and Papua-New Guinea. They were also partly constitutional disputes between the Commonwealth and the State of Queensland, which claimed that the islands and their territorial waters were part of the territory of Queensland, and opposed any solution which would entail the cession of territory to Papua-New Guinea or the limitation of the traditional rights of the Torres Strait Islanders.

Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters, 18 December 1978.

- DESIRING to set down their agreed position as to their respective sovereignty over certain islands, to establish maritime boundaries and to provide for certain other related matters, in the area between the two countries including the area known as Torres Strait;

- RECOGNIZING the importance of protecting the traditional way of life and livelihood of Australians who are Torres Strait Islanders and of Papua New Guineans who live in the coastal area of Papua New Guinea in and adjacent to the Torres Strait;

- RECOGNIZING ALSO the importance of protecting the marine environment and ensuring freedom of navigation and overflight for each other's vessels and aircraft in the Torres Strait area;

- DESIRING ALSO to cooperate with one another in that area in the conservation, management and sharing of fisheries resources and in regulating the exploration and exploitation of seabed mineral resources;

- AS good neighbours and in a spirit of cooperation, friendship and goodwill

Sovereignty over the Torres Strait Islands

The first substantive article in the Torres Strait Treaty (Article 2) sets out the agreed position of Australia and Papua-New Guinea on the issue of sovereignty over islands in the Torres Strait area. It constitutes recognition by the two countries of rights which had been established progressively in the nineteenth century.

After Papua-New Guinea became self-governing in December 1973, the determination of claims to sovereignty and of maritime boundaries in the area between Australia and Papua-New Guinea began to loom as a major issue between the two countries. As one writer observed in 1973, it was *'difficult to look south from Papua and not see the present Queensland border as a cartographic absurdity if not a growing affront to a country on the verge of independence'.'* It was realised by many in Australia, and in particular by the Commonwealth Government, that some settlement had to be made which would recognise the interest of Papua-New Guinea in the Torres Strait area.

The Proposals

Section 123 is of particular relevance to the situation in the Torres Strait. It provides that the Commonwealth Parliament may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, alter the limits of the State upon such terms and conditions as may be agreed on, and may with the like consent make provision respecting the effect and operation of any alteration of territory in relation to any State affected.

Thus, provided that the Queensland Parliament, the majority of Queensland electors voting on the question in a referendum and the Commonwealth Parliament all approved, territory in the Torres Strait over which Australia has sovereignty might be vacated. The way would then be open for the sovereign state of Papua-New Guinea unilaterally to take control of the islands vacated by Australia.

A second proposal was to create a new Australian State or Territory of the Torres Strait area. Under s 11 1 of the Commonwealth Constitution, it only requires the Parliament of a State to act to surrender any part of the State to the Commonwealth. If Queensland surrendered such territory, it would become a Commonwealth territory subject to the exclusive jurisdiction of the Commonwealth under s 122 of the Constitution. The Commonwealth Parliament might be able, under its external affairs power, s 51 (xxix), to alter the boundary of such a territory, since the limitation on alteration of borders contained in s 123 applies only to States. Alternatively, a new State comprising the Torres Strait area might be formed pursuant to s 124 of the Constitution by separation of territory from Queensland, with the consent of the Queensland Parliament.

Though this would incidentally affect the boundaries of the present State of Queensland, it is open to question whether it would be a boundary alteration under s 123, so as to require action by the Commonwealth Parliament and approval of a majority of Queensland *electors*.

A third proposal was that any issues between Australia and Papua-New Guinea should be settled by facilitating the submission of such disputes to the International Court of Justice. On the 17th March 1975 the Australian Government withdrew its reservations to the Optional Clause of the Statute of the International Court of Justice made in its declaration of 6th February 1954, except the reservation of disputes in regard to which the parties had agreed or should agree to have recourse to some other method of peaceful settlement.'

Among the reservations withdrawn were those as to disputes with the government of any other member of the British Commonwealth, disputes arising out of or concerning jurisdiction or rights claimed or exercised by Australia in regard to the Australian continental shelf and the resources of its seabed and subsoil, and disputes in respect of 'Australian waters' as defined in the Australian Fisheries Acts. While the Prime Minister of Australia said that this new declaration was made to indicate the Government's support for the International Court, it is clear that the Government had in mind the possibility of the border issue being decided by the Court in the event of failure to reach consensus with the Government of Queensland and the Government of Papua-New Guinea.

Conclusion

All of these proposals would have involved complex issues of constitutional and international law and would almost certainly not have resulted in a situation which was acceptable to the two countries or, within Australia, to the State of Queensland. They involved either a transfer of some islands to Papua-New Guinea, and the consequential definition of maritime boundaries between that country and Australia, or the retention of Australian sovereignty and control over the whole area.

The former solution was unacceptable to the Torres Strait Islanders, who insisted on the preservation of their right to freedom of movement and to carry on their traditional activities over the whole area, while the latter was unacceptable to Papua-New Guinea. It was only through a careful process of negotiation that an equitable and satisfactory answer to the various claims could be found.

It was fortunate that, as Papua-New Guinea moved towards independence; both countries were willing to engage in such negotiations and to consult the State and Provincial leaders of their countries and the Chairmen and Councillors representing the peoples of the Torres Strait area.

The Premier of Queensland, Mr J Bjelke-Petersen, had emphasised the desire of the Torres Strait Islanders to remain Australian citizens and to preserve their traditional fishing area. A motion of the Queensland Legislative Assembly adopted a resolution on 3rd April, 1974, to that effect and also that the area should be designated an International Marine Park'. By a letter dated 26th June, 1974, the then Prime Minister, Mr E G Whitlam, wrote to the Queensland Premier pointing out there was much common ground between them concerning the issue, in particular that the status of the Islanders remain unchanged as Australian citizens and that there should be a special regime for the unique Torres Strait area.

The Torres Strait Treaty, K. W. Ryan QC, Garrick Professor of Law, University of Queensland and M. W. D. white Barrister-at-Law.*

Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters, 18 December 1978 (P.1)