The Royal Commission into Aboriginal Land Rights in the Northern Territory, 1973-74.

A Discussion Between Sir Edward Woodward,
Dr. Nicolas Peterson and Professor Max Charlesworth.

Sir Edward Woodward is a Justice of the Federal Court and Dr. Nicolas Peterson is a member of the Department of Anthropology at the Australian National University in Canberra.

Sir Edward Woodward appeared in the Gove or Nabalco Case as Senior Counsel for the Aboriginal group at Yirrkala, and subsequently in 1973 he was invited by Mr. Whitlam, who was then Prime Minister, to head up a Royal Commission into Aboriginal Land Rights in the Northern Territory. It was that Commission which paved the way for the Northern Territory Land Rights Legislation which was enacted in 1976. During the Royal Commission Sir Edward had as his advisor Dr. Nicolas Peterson who has worked as an anthropologist among Aboriginal peoples in the north of Australia.

In this discussion with Sir Edward Woodward and Dr. Peterson we are mainly concerned to situate the Royal Commission in its historical context, and also to speculate to some extent about the whole Land Rights issue.

Professor Charlesworth — Sir Edward, your own interest in Land Rights began with the Gove or Nabalco Case. Could I ask you how you became involved in that case and what you see as its main significance?

Sir Edward Woodward — I suppose it was like most briefs that come to a barrister; it came out of the blue and it was certainly in a field that I'd had no occasion to study beforehand. I believe actually that I got the brief because of the fact that I had previously lectured to the wife of the solicitor who was acting for the Methodist Church in those proceedings. Perhaps she regarded it as something of a quid pro quo since I'd given her the prize for the best student in my first year of lecturing!

Professor Charlesworth — I suppose the case must have seemed tempting to you because it raised quite novel legal points didn't it?

Sir Edward Woodward — Yes, they were far more novel than I'd realised when I undertook it. When we first looked at it - and I should say that a junior counsel, John Little, had already done quite a lot of work on the case when I was brought in - for a second opinion if you like - we believed that an argument might be found by concentrating on the old legislation about Aboriginal reserves and trying to establish that the abrogation of reserves was contrary to law. But the more work we did, the more we realised firstly that that argument wouldn't wash, and secondly that there was a strong argument based on the Common Law, the Common Law of England, which had also been applied in American and other

colonial courts, relating to communal native land title. And the more research we did, the more we realised that there were some very helpful early decisions, particularly one in the United States and one or two in New Zealand, though unfortunately the early authorities tended to be whittled away later by perhaps more persuasive or more authoritative decisions. Also legislation was introduced in most places so that it was not very easy to find Common Law decisions or to find any chain of them. We really had to rely upon a few cases in particular and passing references in some other cases.

Professor Charlesworth — In the Gove case you were inviting the judge, Mr. Justice Blackburn, in effect to make new law, weren't you? You were asking him to make a fairly radical extension of the Common Law?

Sir Edward Woodward — That was the result of the fact that we were unable to establish any strong chain of authority. We had to rely on these few early statements of principle and ask him to make something of a jump into the twentieth century by, yes I think you would say, making new law.

Professor Charlesworth — Did you feel at that time the dilemma that has haunted the whole Land Rights issue ever since it began with the Gove case: 'How does one translate ideas of Aboriginal land ownership into the categories, into the terms of the British Common Law?"

Sir Edward Woodward — I think that came later as we began to talk to our Aboriginal clients and to anthropologists and started to get some feel for

the Aboriginal approach to land holding. It then very quickly became apparent that there were some major differences between what might be called Aboriginal Law and the European concepts of ownership. Just to take one simple example, there was no concept of boundaries in Aboriginal thinking, since they didn't need to have precise definition between one group's land and another group's land in the same way that European citizens find it necessary to draw precise borders.

Professor Charlesworth — And land for the Aborigines wasn't something you could buy and sell in the sense in which Europeans think of land?

Sir Edward Woodward — That was another major difference. In the belief of the Aborigine he acquired land on birth, indeed had an interest in land even before birth, as I understand the theory, and there was nothing that he could do about his relationship to land. It resulted from the circumstances of his birth and his parentage and he maintained that contact until death, and indeed after death, and there was no way that he could give it up, leave it, sell it or in any other way dispose of it. It wasn't that he personally owned a piece of land, rather this was something which he shared with the other members of his particular clan or descent group.

Professor Charlesworth — You spoke just now of the introduction of the anthropologists into the Court room (some people would say they've been there ever since!) and they've been fairly crucial in the Land Rights Movement. The two anthropologists in the Gove case were Professor Stanner and Professor Berndt, and they were able to

put forward this view of how Aborigines saw their land.

Dr. Peterson — I think the anthropologists' understanding of Aborigines' relationships to land has changed substantially under the impact of the land rights legislation. One of the questions I would like to ask Sir Edward is, 'How crucial to the legal argument was the demonstration of a link to the land since time immemorial?'

Professor Charlesworth — This was the idea that came out of Stanner's and Berndt's testimony?

Dr. Peterson — Yes, this raises the issue as to whether Aborigines' relationships to land are fluid and changeable, and the connection between how Aboriginal people think and talk about land and what they actually do in practice with their land.

Sir Edward Woodward — I think it's an important aspect of native title as it was understood by the Common Law that it was something that was not capable of being changed, that it did go back to the time 'beyond which the memoryof man runneth not'. That of course was one of the big difficulties that we had from an evidentiary point of view - establishing that fact. The only way we could do it was to try to get appropriate evidence, particularly from older Aborigines, about what they had been told by earlier generations, and then rely upon anthropological evidence to indicate that what they said would have applied for even a longer period; because of course there are no written records of

Aboriginal ownership in the same way that one can turn up long records perhaps of a custom or of a title to land in a European system.

Professor Charlesworth — What aspects of the Aboriginal evidence do you feel had most impact on Mr. Justice Blackburn?

Sir Edward Woodward — Well, I think one would have to say the consistency of the evidence and the fact that it wasn't contradicted, that there was no suggestion from Aborigines of any doubt about any particular piece of land. They were always able to say that 'that land', when a particular area was referred to, 'is Gumatj land' or 'is Riratjingu land', even in a case where it might have seemed strange that it was so because it may have been a small enclave in the middle of a much larger area belonging to a different clan. And yet whoever you asked, whether it was members of the clan that owned the surrounding land, members of the clan who were supposed to own the enclave or members of other clans who had no particular interest in that area, they would all say, without doubt and without contradicting each other, just who it belonged to. That consistency, as it ran through a series of witnesses, was I think impressive.

Professor Charlesworth — What was the attitude of the mining company to this? Did they attempt to contest it in any way, or were they simply trying to apply the standard Common Law to the case?

Sir Edward Woodward — The mining company really didn't play a very large part in the Gove case. They were content very largely to sit back and leave the main argument to the Commonwealth, which of course was

represented at a very high level. Commonwealth counsel did an extremely thorough job of historical research going right back through a lot of early Australian records and British records and all the international authorities that were relevant. There really wasn't a great deal left for the mining company to do. Very largely they adopted and made use in their arguments of the material that was provided by the Commonwealth.

Dr. Peterson — One other feature of the Gove Case was the use of Aboriginal witnesses. I suppose one of the features of Land Rights cases since that time has been the difficulty that Aborigines face when they're placed in an adversarial situation in Court and subject to the evidentiary rules that an Australian Court of course must carry on with.

Sir Edward Woodward — Yes, well this was a major problem for us in presenting the case for the Aborigines. It was extremely difficult to bring witnesses' minds to a particular issue such as what they had been told by their parents, or grandparents or other elders, about a particular piece of land, without referring in some detail to the land in question. And the risk of course is that you seem to be suggesting the answer by giving the detail necessary to bring their minds to such a comparatively abstruse piece of evidence, because they were being asked to cast their minds back virtually to their childhood, to about the time of their initiation, and to explain what they were then told about the limits of their land. As I say, to do that without asking leading questions was extremely difficult.

Professor Charlesworth — Could we say something about Mr. Justice Blackburn's judgment? Even though the verdict came down against you and your clients there were many positive aspects to the judgment.

Sir Edward Woodward — Certainly there was one very important aspect to it which was that he found that the Aboriginal relationship to land did involve an identifiable code of law. That was the positive finding and it really provided the basis, I think, for the pressure that then arose for appropriate legislation. The negative finding was that the nature of that Aboriginal relationship to land was not a proprietorial relationship such as we are accustomed to in British Common Law or in other European codes. The finding, though, that there was an identifiable legal system which delineated packages of land, however imprecisely, was I think a vital one, and indeed it was one of the reasons why I advised against any appeal. I felt firstly that it was most unlikely that the High Court, as it was then constituted, would go any further than Mr. Justice Blackburn had been prepared to go. We'd received from him an extremely sympathetic and careful hearing and I just couldn't see a Court of Appeal upsetting his decision on that main issue about the nature of Aboriginal relationship to land. What I was afraid of was that we might lose what we had already gained and that the High Court might not be prepared to find, as Mr. Justice Blackburn had done, that there was an identifiable code of Aboriginal land law.

Dr. Peterson — One of the things the case did also was to publicise Aboriginal spiritual links to the land in a way that was known to

anthropologists but not to the public at large I think. What kind of impact did the display of sacred objects to the Court have at that time? It's been an important feature of many of the land claims, subsequently taking the Land Commissioner to see sacred ceremonies and sacred objects. Do you think that had substantial impact at that time?

Sir Edward Woodward — I can't really speak for Mr. Justice Blackburn. My impression was that he was impressed by the solemnity of the production of the ranga, the particular sacred objects in the form of walking sticks which were, if you like, the title deeds for the land that we were particularly concerned with. They were produced to him in his chambers in the absence of any females and with appropriate use of the singing sticks and invocations, I suppose you would say, of the spirits of the early ancestors. In a way it was a little incongruous to do that in a judge's chambers, producing the sacred objects from their brown paper wrappings and so on. It would have been much more impressive had it been able to be carried out on the land in question, but there were practical difficulties about that. I'm sure that Mr. Justice Blackburn made all the necessary mental adjustments and my impression was that he did find it impressive.

Professor Charlesworth — Did you visit the land in question at all? Did the Court sit at Yirrkala?

Sir Edward Woodward — No. The hearings were all either in Darwin or in Canberra. The final argument, which involved the production of a lot of records and reference to many law reports, was held as a matter

of convenience in Canberra. The evidence was almost all taken in Darwin, and to the best of my recollection there were no on-the-spot inspections. To some extent my recollection is confused because of all the inspections that we later held as part of the Royal Commission, and all the conferences that I held with my clients on the land, but I don't recall any formal inspections by the Court.

Professor Charlesworth — One gets the impression, reading Mr. Justice Blackburn's judgment, that he was very sympathetic to your cause but he felt himself constrained by Common Law precedents and couldn't bring himself to go the one step that was necessary.

Sir Edward Woodward — I think that's a very fair statement of what I took to be his attitude. He was certainly immensely interested in the case and has told me since that he regards it as by far the most interesting case he's ever had anything to do with.

Professor Charlesworth — I wonder if we could move on now to the setting up of the Commission. The negative judgment in the Gove Case aroused a good deal of popular feeling, but there had also been a larger shift in popular sentiment. The old assimilationist policy had lost a lot of public support, and the McMahon Government had tacitly given that policy away, so there was a good deal of popular sympathy for the Aboriginal cause. The Whitlam Government then came in and I think almost the first act of the Prime Minister, Mr. Whitlam, was to set up the Royal Commission.

Sir Edward Woodward — Well, I do recall that he rang me on his first day in office indicating that he was intending to set up a Royal Commission and asking if I'd be free to conduct it. I can't now with certainty recall whether that was the Sunday, the day after his election, or the first day that he and Lance Barnard were sworn to all the ministerial positions. My recollection is that it was actually on the Sunday after the election, as early as that. It was obviously one of the things that was uppermost in his mind.

Professor Charlesworth — And did you have a say in setting the terms of reference?

Sir Edward Woodward — My recollection is that I was consulted about the terms of reference which had been drawn by others and that I did make some, probably fairly minor, suggestions which were accepted. But I suspect that the terms of reference were initiated by Mr. Barrie Dexter and Dr. Coombs.

Professor Charlesworth — Mr. Dexter was then permanent head of the department?

Sir Edward Woodward — Well it wasn't even a department at that stage; I think it was called an Office, or something like that.

Professor Charlesworth — The Office for Aboriginal Affairs.

Sir Edward Woodward — Yes, the Office consisted really of three - Dexter as a full time member and Dr. Coombs and Professor Stanner as part time

members, and they had a very small staff. I'm confident that most of the initiatives for the Royal Commission came from those three men, and of course it was enthusiastically backed by Gough Whitlam himself.

Professor Charlesworth — Can we talk now about the conduct of the Commission, how you got it afloat?

Sir Edward Woodward — Perhaps there's one point I should make at the outset. Although it's not of great importance, it did affect the way in which I carried out the Commission. I had just been Counsel assisting the Royal Commission into Oil Drilling on the Barrief Reef, that had been running until about six months earlier. That had been a very long, slow and expensive job and I was determined to demonstrate that it's possible to conduct a Royal Commission fairly expeditiously and comparatively cheaply. So, since this seemed an appropriate opportunity to do that, my thinking was partly conditioned by that circumstance. I believe in practise it worked out well. All I asked for was one research assistant, and that was Dr. Peterson, who was nominated presumably by the same trio of three people that I've been referring to. I was then prepared to conduct most of the Inquiry on an informal basis. I had in mind at the outset that what I would do after an initial Inquiry was to publish something in the nature of a White Paper giving the courses that were open, and inviting comment. Then I would conclude with a fairly short formal hearing in which all the interested parties would have an opportunity to present cases. That was the way in fact that it was carried out, and the whole exercise only took something like eighteen months, as I recall.

Dr. Peterson — In conducting the Commission you very quickly moved to recommend the establishment of Land Councils. Can you give us some of the background to your thinking about the need for Land Councils?

Sir Edward Woodward — I suppose there were two aspects to it. One was the immediate problem of finding a convenient way for Aboriginal views to be conveyed to the Commission. I was able to do that partly by moving about the countryside and talking to small groups of people, but naturally enough while they were able to express their aspirations they weren't able to help me with any suggestions as to how those things might be carried out. What I was looking for was some sort of a grouping of Aborigines who would then be able to brief lawyers and, if necessary, employ other professional assistants so that a positive case could be put before me which would broadly reflect their aspirations, but at the same time put them into a form which would be of assistance in making recommendations. I also had in mind that any body like this that was created might well have a major role to play in the years ahead in the carrying out of the recommendations that the Commission might come to.

Professor Charlesworth — So you saw them not just as a mechanism for your own purposes, helping you to gather evidence, but as having a continuing life afterwards?

Sir Edward Woodward — Yes, both aspects were important. The difficulty was to determine the appropriate size, because obviously nothing

larger than a representation of perhaps a few hundred people would be appropriate to traditional Aboriginal thinking. But that would be quite impractical in terms of having the necessary funds to be able to instruct senior counsel and so on. So there had to be some sort of a compromise, and after a great deal of thought and a good deal of discussion with Dr. Peterson and others, I arrived at the conclusion that initially at least there should only be the two Land Councils, one representing the Aborigines of Northern Australia, the 'Top End' part of the Northern Territory, and the other representing the Aborigines of Central Australia, the areas around Alice Springs. But I always envisaged that, with further experience, it might be necessary to break either or both of those up into some smaller groupings, although I've never thought that it would be possible to sustain more than perhaps four or five at the most.

Dr. Peterson — Did you foresee any difficulties in introducing an alien form of organisation into Aboriginal social organisation?

Sir Edward Woodward — Yes, I thought there were great difficulties. I suppose it's true to say that already in some places local councils were beginning to emerge, so that it wasn't entirely foreign to Aboriginal experience, but at the same time these new groups were being brought together for a much more significant purpose than had ever been the case in the past. I think the major difficulty was that the Aborigines who were most skilled at dealing with the white man's problems and with white men were quite often the younger men, people who'd had a European education, whereas the people in the communities who carried

real authority were of course much older men, men who would probably have grown up in days when there was little or no white contact of any sort and who were not so skilled at dealing with the white man and his problems. And the difficulty of trying to determine the types of people who could conveniently speak for a community with authority, and at the same time be able to make an effective contribution to a European-style debate, was very real. In the final analysis the solution had to be left to the local people, and I thought it best to leave it to them also to determine their own method of selection. The other problem of course was that you couldn't have large numbers coming from each area and yet single representatives might well not be able to speak with any authority at all for quite large numbers of the people whom they were allegedly representing.

Professor Charlesworth — Those two Councils, the Central Land Council and the Northern Land Council were established in 1973 just after the First Report?

Sir Edward Woodward — That's so.

Dr. Peterson — You list five aims, five reasons for granting Land Rights - compensation for people unjustly dispossessed, removal of legitimate grievances, as an economic basis for people who are poor, as an attempt to help preserve spiritual aspects of Aboriginal life, and hopefully to improve Australia's international standing. Is there any significance in that order, which is the order you list them in your report, and do you feel that some of those aims are more important than others?

Sir Edward Woodward — I think that's probably a question that I'd want to have on notice. Generally speaking, I don't think at the time that I was purporting to put them in any order of priority and I don't think I'd want to now. They're so interlocked that I believe they all have their importance. Perhaps some have a greater importance to one aspect of the report than others, and others may be more important for another aspect, but I think that they really need to be looked at as a whole and not in any particular sequence.

Professor Charlesworth — Ten years later they still read very radically to me. They would still, I think, send shivers of horror down some backs in Australia: 'the doing of simple justice to a people who have been deprived of their land without their consent'; 'the promotion of social harmony and stability within the wider Australian community by removing the legitimate causes of complaint of an important minority group within that community'; 'the provision of landholdings as a first essential for people who are economically depressed'; 'the preservation where possible of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs'; and finally 'the maintenance, perhaps improvement of Australia's standing among the nations of the world by demonstrably fair treatment of an ethnic minority'. These aims must have sounded quite radical in 1973/74.

Sir Edward Woodward — Yes, I suppose they did, but I think that what was radical was the quite sudden decision that Land Rights should be granted and

that of course was a decision that was taken by Gough Whitlam and his government, no doubt on the advice of people such as Dr. Coombs and Professor Stanner and Barrie Dexter. I think that, given that epoch-making decision, identifying the reasons for that decision flowed rather naturally, and I don't have any reason now to resile from the particular motives that I was attributing, I suppose, to the people who had been responsible for the decision.

Dr. Peterson One of the shifts we've seen over those twelve years has been away from an almost single-minded focus on the spiritual aspects of the relationship to the land to a much greater emphasis on the economic basis and economic significance of Land Rights for removing the legitimate grievances of Aboriginal people. And, in respect of the economic significance of land, your recommendation that Aboriginal people should have the right to veto mining is absolutely crucial. Could you tell us something about your thinking on that recommendation?

Sir Edward Woodward It flowed very largely from my experience in the Gove Case where it was brought home to me that Aboriginal people had lived comfortably with the white settlers in their area for many decades, that they'd seen farmers come and go, they'd seen cattlemen come and some of them go, they'd seen the armed services come during the war and go at the end of the war. I think they'd been able to live with all that because it hadn't seemed permanent, it hadn't seemed as though anything drastic was happening to their land. But when a mining company appeared on the scene and was not content with simply putting down bore holes and test drills and the like

but was starting to bring in bulldozers, and when it became apparent that it was likely that there would be a white settlement established with several thousand inhabitants, then it was brought home to the Aborigines that they had lost something which until then they had really believed they couldn't lose. I'm talking about the Aborigines of that particular area. And it was that, I think, which prompted the very strong reaction which finally attracted the support of the Methodist Church and led to the Gove land rights case. The thing that perhaps impressed me most was the dramatic impact that the establishment of a white settlement in the immediate vicinity had on Aboriginal people. I think that was even more significant than the scars of the bulldozers; there was no doubt that the Aborigines foresaw at Gove that there would be immense damage done to their own people by reason of the white settlement, particularly because of the availability of alcohol. They fought very hard in a quite separate action against the granting of a liquor licence at Yirrkala. They lost, as I suppose realistically they had to lose - because it's hard to imagine a city or a town of four thousand people that doesn't have a licensed hotel - and of course all their worst fears in fact were realised. It was that thought, that mining brings with it white settlement on a large scale, that led me to the view that land rights without the right to prevent that happening would be pretty hollow.

Dr. Peterson How though does one justify Aboriginal people having mining royalties when other members of the Australian community don't have access to royalties?

Sir Edward Woodward — I think that you have to begin by accepting that the Aborigines really are a special case in Australia, that they're not just another ethnic minority as some would suggest, but that they do have a special claim on the generosity, if you like, of other Australians, and that they also have greater needs than any other ethnic minority that can be pointed to. That suggests that they need larger funds than are normally available to the average citizen to be spent in community development. Those two thoughts came together with the idea that, if mining companies were prepared to pay substantial sums by way of royalties to prospectors and others who'd happened to have discovered the mineral lode, there was no reason why substantial royalties ought not also to be paid to the people who were going to be disturbed by the occupation. It's not, in my view, based on any question of ownership of minerals by Aborigines, it was essentially seen as a recompense for what could only be major disruption.

Dr. Peterson — Although you recommend that Aboriginal people should not own the minerals, you do in fact use the word 'ownership' in the text of the report, even though, as I understand the law as a layman, lawyers on the whole tend to think of rights and interests rather than ownership as such. Were there some special reasons behind using the word 'ownership'?

Sir Edward Woodward — If we're talking now about the more general concept of freehold title, or Aboriginal title, that I spoke of in the report, I think firstly that I was concerned with the symbolic importance of Aborigines being given a title which was of a high order. Whereas leasehold title is something which is essentially derivative,

freehold title is the highest type of ownership that an individual or group other than the Crown can enjoy. Ownership generally is described as consisting of a bundle of rights. It seemed to me that it was important that this special form of ownership to be enjoyed by Aborigines should consist of most of the bundle which is normally associated with freehold title, but not all of it. In particular I thought that it should be confined to community ownership, so that it shouldn't be capable of being broken up into any form of individual possession, and secondly that it should not be capable of being sold or otherwise bargained away. Overseas experience had suggested to me that both of those limitations were very desirable, and so what I ultimately recommended was a form of ownership different from any other form which we'd previously known in Australia, but which went a long way towards equating the highest form of ownership that is understood in our legal system.

Professor Charlesworth — I suppose using the legal notion of the trust here was an important part of this.

Sir Edward Woodward — The trust was the only way that I could see of creating a link between European or British land-owning systems and the Aboriginal law on the subject. It's a very flexible concept introduced into British law centuries ago for a number of purposes where you wanted to get away from strict definition of rights and entitlements and employ something which was more flexible and capable of being adjusted with time. I thought that was very important here. The idea of having some people who would be the nominal trustees and who would be seen as appropriate, and then as far as possible

allowing Aboriginal law to determine the rights of groups and individuals within the broad system, just seemed to me to be the most effective way of establishing something which was both appropriate and workable.

Professor Charlesworth — I suppose this was an important part of making the whole thing acceptable to the wider community, in particular the white community, in that it would have been insupportable to most whites if they had the idea that land rights entailed giving individual Aborigines title to land so that they were able to sell it. Under your scheme it was the community who owned the land and they couldn't sell it.

Sir Edward Woodward — That's very true, but I would have to say that that was incidental to my reasoning on this point. I think that I didn't need to go beyond the fact that this was in the best interests of the Aboriginal people themselves and was entirely appropriate to Aboriginal thinking. But certainly the idea that any income, particularly large royalty payments, would be spent to benefit communities rather than individuals, would have been an important selling point were it not for the fact that it was a necessary requirement in any event.

Professor Charlesworth — I think there's still a good deal of misunderstanding about this. A number of whites mistakenly think that land rights does entail the giving of land to individual Aborigines and that they can sell it if they want to, and this arouses a lot of hostility. So some whites say, 'Why should Aborigines be able to get land just like that whereas I have to work for my block of land and pay it off, etc.'

Sir Edward Woodward — I wasn't conscious of there being misunderstanding about individuals being able to own land, although I suppose that anything is likely to become a subject for misconceptions. I think that the idea of individual Aborigines owing motor cars and otherwise being able to display some signs of wealth is probably a greater source of misunderstanding. My belief is that vehicles are purchased from time to time for community purposes; they are allocated to particular people and no doubt they are used for the private purposes of that person, who may have some status in the community, as well as on community ventures. That of course is not very different from the sort of thing that happens in the white community with some government vehicles and corporate vehicles and so on. I don't believe that I've yet heard of any Aboriginal person who has acquired great wealth under the existing system, but on the other hand I have to confess to being a little out of touch.

Dr. Peterson — Despite the emphasis on flexibility that runs throughout the report and the suggestion that there's a need to review the legislation from time to time (as is in fact going on now with Mr. Justice Toohey looking at the legislation), do you think that the claim procedure is out of line with that in the sense that it's rather more legalistic and conducted on much less flexible lines?

Sir Edward Woodward — I don't think so. This is one of the areas where it was important that the scheme be acceptable to the wider Australian community. I suppose another way of saying the same thing was

that it had to be politically viable, and my belief is that a system which required some fairly strict establishment of Aboriginal claims was necessary in order to get that wider acceptance. If the approach had been less formal and grants had been made more freely or on less strict evidence, then there would have been a much greater backlash against such grants than has been the case as I understand it.

Professor Charlesworth — I suppose as a Royal Commissioner you have to make up your mind right at the beginning whether you're going to write your report for posterity and let the politicians go hang, or whether you're going to write a report that has a fair chance of political acceptance. From what you've said so far, you set out to write a report that could gain acceptance at the political level and also be workable in Courts of Law.

Sir Edward Woodward — Yes, I believe that. I think that it's a waste of time for anyone conducting an inquiry of this sort simply to nail their colours to the mast, knowing that they're going to sink. It's far better to produce a result which goes as far as seems to be practicable in the real world - to produce a report that you believe has a real chance of acceptance.

Professor Charlesworth — Both you and Dr. Peterson went to Canada to look at their experience with Aboriginal groups there, the North American Indians and the Inuit or Eskimos. Reading the report I gather that you didn't find anything of positive help in the Canadian experience but that you were warned off certain solutions to the land rights problem. You learnt from the Canadian mistakes.

Sir Edward Woodward — That's very true. That was what the Canadians themselves said to me, those who were working in this area. They were concerned to talk about the mistakes that they had made over the decades with native peoples.

Professor Charlesworth — One of these was buying off native groups by financial compensation.

Sir Edward Woodward — That's right. There was a system in Canada (I forget the date now but my recollection is that it was towards the end of last century) when people were able to buy the right to vote and the right to drink and a small parcel of land, by formally renouncing their status as Indians. That status entitled them to the protection of the Central Government of Canada. Many of them did so and this created a very large group of people known as 'non-status Indians', because the decision once made was irrevocable and applied to all the descendants of such persons. Many of them were full-blooded and they had in fact sold their heritage for the right to drink and a small parcel of land, which often proved to be non-viable and which they quickly sold for, in some cases, as little as the price of a bottle of whisky. From then on they had no claim on the Central Government arising from their Indian status. Anything like that, or even what was in the 1970's the U.S. solution in Alaska of paying many millions of dollars to native peoples for a once-and-for-all settlement of all their claims, seemed to me to be inappropriate, because the money would be dissipated over time and the problem would still be there.

Professor Charlesworth — We've already spoken of the Land Councils. What about the idea of the Land Commissioner that you introduced in your report?

Sir Edward Woodward

Well it was obvious that the Royal Commission itself couldn't resolve individual cases, that there had been claims made which would have to be investigated and determined upon, and that they were simply not appropriate to be dealt with by the ordinary processes of law. They needed to be dealt with, as I've said, in some reasonably formal fashion, but in a much less formal fashion than is involved in the ordinary litigation before the Supreme Court of the Northern Territory. So it seemed to me appropriate that there should be a continuing role for a Land Commissioner who would listen to claims, consider conflicting interests, other Aboriginal interests perhaps, and particularly the interests of other people in the community, and then make appropriate recommendations.

Professor Charlesworth

After the Commission you then gave instructions for possible legislation following from your report. In effect you gave drafting instructions for that legislation.

Sir Edward Woodward

Most of the credit for those instructions should go to Sir Gerard Brennan, now one of the Judges of the High Court, who was then Counsel for the Northern Land Council. He and those assisting him went to a great deal of trouble to draw up and put before me some positive suggestions for legislation. That's not always welcomed by the parliamentary draftsmen. They prefer to be given principles which they can then put into legislative form. But it seemed to me in this case that the problems were so complex that the only way of making sure that as many of the difficulties and pitfalls as possible had been foreseen, was to actually set

about the task of drawing up sample legislation. Having done that, it was a convenient way really of putting forward a lot of very detailed recommendations.

Dr. Peterson — It's interesting how closely the legislation has stuck to that draft in the back of the Second Report. I think there'd be quite a lot of interest in knowing particularly about the definition section. Do you recall whether you had a role in altering the definitions that were suggested by Sir Gerard Brennan, or do you know whether you adopted those that were put forward in the Northern Land Council section?

Professor Charlesworth — You're referring to definitions like the definition of the 'traditional owner'?

Sir Edward Woodward — I have to say that I can't remember clearly. I'd need to go back and consult papers to answer that, but I certainly didn't slavishly accept anything that was put forward and I certainly did make a number of alterations. But, broadly speaking, my recollection is that the job that had been done was a first class job and I didn't have to do a great deal.

Professor Charlesworth — Your report, Sir Edward, was overtaken by political events in the guise of the sacking of the Whitlam Government. The legislation was finally enacted in 1976 by the new Fraser Government in an amended form, and I know Dr. Peterson thinks that the amendments weakened the original legislation. Dr. Peterson, I wonder if you could summarise your thoughts on that matter?

Dr. Peterson Well, one of the final recommendations in the Second Report was that the legislation should be based federally and should not be capable of being affected by the Northern Territory ordinances. And you, Sir Edward, put forward what I felt, and I think a number of other people felt, were some cogent arguments on this matter at that time. I wonder how you feel about that now in retrospect, whether those arguments for protecting Aboriginal people from their local status as a minority, and the influences particularly of pastoralists and others interested in the land, by having the Government making it more difficult for the legislation to be amended don't still hold? Do you think that the transferring of the right to the Northern Territory to make laws about the day-to-day workings of the land (not its basic principles but access to Aboriginal land, control of sacred sites, rights in waters offshore, etc.) was a weakening of the Act?

Sir Edward Woodward I'd really prefer not to get involved in inter-governmental arguments such as that, but I would make the comment that the situation has changed since the time of my report. You now have self-government in the Northern Territory, you do have something which is moving toward statehood, although that no doubt is still some years away. Whereas at that time I felt that it was inappropriate for a number of matters of that sort to be dealt with locally, it would be harder to maintain that view now I think. I'm speaking now very generally in a situation where you're dealing with a sovereign state, or the Northern Territory as presently governed. Beyond that it would be a matter of looking at the individual issues and asking whether they're more

appropriate to be dealt with locally or from Canberra. As I say, that's a field that I'd really prefer not to get into.

Professor Charlesworth — One of the other objections to the amendments was that the possibility of Aboriginal people claiming land on the basis of need, as well as by traditional right, is missing in the amended form. In your report you clearly spelled out two distinct ways of gaining access to land, either compensation for need or on the grounds of traditional rights.

Sir Edward Woodward — They are quite distinct, although related in some ways. I think there is a difference which needs to be recognised between on the one hand claims that really are made as of right to particular parcels of land by people who have had almost timeless connections with that land, and on the other hand claims for general compensation, based on the fact that land is important to all Aboriginal people. In some general sense of land compensation forming a basis for other steps by way of social welfare that can be taken, Aborigines have an entitlement to sympathetic consideration. The two kinds of claims are separate. I think it was not a bad thing that the question of the traditional rights was dealt with first, if it was thought necessary that one should go before the other, and I understand that a good deal has been done in an informal, non-legislative way to achieve the other results in the Northern Territory, and that there are moves even today to implement that approach in a more formalised fashion. It's perhaps appropriate to make the point here too, as I think I did in the Report, that I didn't see my report as being something

which would be implemented and finished with in just a few years. Certainly there were some areas where I hoped that things would be done fairly rapdily, but there were others in which I recognised that we were looking at evolutionary processes over decades and that the recommendations that I'd made would need to be reviewed from time to time. I don't think it's right that one generation should create problems for subsequent generations who then have to deal with them in a situation which may not be foreseeable at the time that the original recommendations are made.

Professor Charlesworth — The original legislation in the Northern Territory was intended to be an exemplar for similar legislation in other states, but ten years later the other Australian states, with the exception of South Australia, vis-à-vis the Pitjantjatjarra, haven't followed the example of the Northern Territory legislation. From what you've said though you're not discomfited by that; you're prepared to take a long view that the symbolic example of the Northern Territory legislation that followed from your report will eventually have an educative effect upon people and that the other states will eventually enact similar land rights legislation.

Sir Edward Woodward — Yes, I think that's a fair way of putting it. It was mooted at the time of the Commission that the terms of reference would be extended to cover Australia generally. I was opposed to that myself because as it was I could see that the job for the Northern Territory was going to take at least eighteen months. If it had been extended to cover even two or three other states, in order not only to do that job properly but to be seen to be doing it properly, it would have been necessary to conduct very

wide-spread interviews and inspections, and it would then have become a three or four-year task. It seemed to me to be much more important to treat the Northern Territory as something of a pilot study for others to draw upon as they found appropriate. But I was careful to say that the solutions that I'd proposed for the Northern Territory would not necessarily be appropriate in other places.

Professor Charlesworth — One final question Sir Edward. If you were now to embark upon the Royal Commission, would you approach it any differently with the benefit of hindsight, or do you think you got it just about right in 1973 and '74?

Sir Edward Woodward — Well that of course would be a very bold claim, but I did hedge my recommendations around with repetition about the need for flexibility and the need for review over time. I can only say that I'm not conscious of anything which I recommended at the time that I regret or that I would alter if I were doing the job again. But that's not to say that if people who have been closer to the problem than I have, such as Mr. Justice Toohey for example, were to propose changes, I would be resistant to that course. I think it's entirely appropriate that there should be constant reconsideration and, from time to time, variation of the land rights legislation.