Developing aboriginal rights

Garth Nettheim*

The pattern of development of the law relating to the rights of the indigenous people of Australia is here traced and critically reviewed by Professor Nettheim.

I STARTING POINTS

Two hundred and one years ago that small group of vessels which Australians speak of as The First Fleet arrived in Botany Bay with their cargo of convicts and keepers. Last year Australia celebrated the bicentenary of their arrival and the establishment of the first colony at Port Jackson. Aboriginal organizations organized their own counter-observances to celebrate survival. Why?

The first and obvious answer is that they were not asked - and did not agree - to the invasion and takeover of their country. Whatever may be said of the Treaty of Waitangi, there was no such Treaty at all in New South Wales. Despite clear government instructions requiring the consent of the natives, "if there be any", they were not consulted. It is, to say the least, artificial to assume their consent from the fact of their absence from the ceremonies at which flags were raised and proclamations read. It is even more artificial to assume the consent of Aboriginal people hundreds of miles away in distant parts of that large portion of the continent which was so easily added to His Majesty's realms.

The more distant peoples were not immediately affected by the arrival of the British. Some remained unaffected and even unaware until very recent times. And yet, according to Australian legal theory, their legal situation was totally transformed, by those events so long ago. Their rights deriving from 40,000 years of habitation were to be totally disregarded in the years that followed.

Ten years or so ago, the events of 1788 were dramatically parodied by a group of Aboriginals who landed on the beach near Dover from a small boat, planted the Aboriginal flag, and proclaimed Aboriginal sovereignty over the British Isles. They went further than Governor Arthur Phillip did and at least purported to treat with the locals by presenting beads and trinkets to a bemused bystander. (As it turned out, the bystander was an Australian tourist!). Otherwise the people of Britain managed to remain blissfully unaware of the changes in their legal status.

In Australia, those people in the immediate path of the new settlements were directly affected by physical displacement, and by loss of access to their resources

* Professor of Law; Chairman, Aboriginal Law Centre; Chairman, Human Rights Centre, University of New South Wales.

of food, water, and ultimately, culture. They were also immediately affected by disease, by alcohol and by gunfire. The authorities made initial attempts to confine the spread of settlement to prescribed areas, but the "pastoral invasion" of sheep and cattle soon spread beyond the limits and, over time, took up most of the fertile and well-watered parts of the land. In modern times even the infertile and less well-watered (or too well-watered) parts of the country are facing encroachment from different forms of enterprise, notably the mining industry but also other forms of activity such as tourism. The dispossession that began in 1788 continues to this day.

But one might also ask why, two hundred years after the first contact, so many Aboriginal people remain unreconciled to the irreversible fact of Australia as a substantially European, relatively modern nation-state deriving from the first settlement in 1788?

The answer, to a large extent, lies in the social and economic position of Aboriginal people within Australian society. A 1984 government publication *Aboriginal Social Indicators* confirmed that they constitute the most disadvantaged section of Australian society in terms of practically all indicia - health, housing, education, employment and so on. Aboriginal people have been almost totally marginalised in Australian society, and all the welfare programmes adopted by governments have failed to produce substantial change in that regard.

One reason for this failure - and another answer to my question about Aboriginal irreconciliation - lies to a large extent in the law.

There is no reason in principle why the acquisition by the British Crown of sovereignty to Australia should be inconsistent with the continued recognition of Aboriginal rights within Australia. But the view that has prevailed to date is that Aboriginal rights were completely terminated by the act of annexation. It would follow that any rights that Aboriginal people may have *as Aboriginals* are limited to those which governments choose to give.

II JUDICIAL DENIALS

Let me return to 1788 and all that. The Gove Peninsula in what is now the Northern Territory was about as far from Port Jackson as you could get in the lands which in that year suddenly became British. Certainly the Yirrkala clans were totally unaware of what was happening down south. In the years prior to World War II there was some missionary activity, and during the war there were some military establishments in the area. But their relationship to their land was not substantially threatened until the 1960s when the Commonwealth Government granted leases to mining companies to develop vast reserves of bauxite. The clans went to court insisting that the land was theirs. In the Gove land rights case[1] decided in 1971 they were told by Justice Blackburn of the Northern Territory

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1 *Milirrpum* v *Nabalco Pty Ltd* (1971) 17 FLR 141.

Supreme Court that the land was not theirs and, in effect, that it had not been theirs since 26 January 1788.

One of the bases for this decision was the notion under international law that Australia was terra nullius, literally "no man's land", and thus available for the taking by the first European power to "discover" it. Aboriginals find this concept quite insulting. In British colonial theory the notion becomes one that a colony that is "uninhabited" or "desert and uncultivated", is acquired by settlement, not by conquest. Aboriginal people argue, with some justification, that the historical record is more consistent with conquest than peaceful settlement.[2] Justice Blackburn felt bound by precedent in the Gove case to follow the settlement theory. Under this theory (labelled by the late Justice Murphy as "a convenient falsehood"[3]) all applicable English law came into operation in the colony from the date of settlement, as the invisible baggage of the first settlers.

But need the infusion of English law mean that Aboriginal law ceased to operate, either of its own right or in terms of English law? Justice Blackburn held that this was indeed the consequence so that the land in question did not belong to the Yirrkala clans. He relied in part on a very recent decision of the British Columbia Court of Appeals in a case brought by the Nishga Indians, but after his decision the Supreme Court of Canada held that aboriginal title *can* survive British acquisition of sovereignty.[4]

Justice Blackburn's decision was not taken on appeal, for various reasons, and still represents the only Australian judicial authority on the subject. However, it is worth mentioning that there is a current action, *Mabo* v *Commonwealth*, working its way towards the High Court of Australia in which Torres Strait Islander plaintiffs are attempting to overturn the Gove decision.[5]

So there has been a denial of the continuance of Aboriginal title to land. The continuance of an Aboriginal sovereignty was held to be unarguable in the High Court of Australia, the jurisdiction of which, of course, is predicated on the sovereignty of the present Australian nation.[6]

As to other aspects of Aboriginal law, after some judicial hesitation the courts decided that Aboriginals were fully subject to the introduced legal system. The leading case is *R* v *Murrell* decided in 1836 in the Full Court of the Supreme Court of New South Wales.[7] An Aboriginal charged with murder of another Aboriginal challenged the jurisdiction of the court to try the case. The argument presented by his counsel is summarised in the report as follows:

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2 And see Henry Reynolds, *The Other Side of The Frontier* (Penguin, 1982).
3 *Coe* v *Commonwealth*(1979) 24 ALR 118, 138.
4 *Calder* v *Attorney-General of British Columbia* [1973] SCR 313.
5 *Mabo* v *Queensland and the Commonwealth.*
6 Above n 3.
7 (1836) Legge 72.

> This country was not originally desert, or peopled from the mother country, having had a population far more numerous than those that have since arrived from the mother country. Neither can it be called a conquered country, as Great Britain was never at war with the natives, nor a ceded country either; it, in fact, comes within neither of these, but was a country having a population which had manners and customs of their own and we have come to reside among them, therefore in point of strictness and analogy to our law, we are bound to obey their laws, not they to obey ours.

The argument proceeded to advance a second point:

> The reason why subjects of Great Britain are bound by the laws of their own country is, that they are protected by them; the natives are not protected by those laws, they are not admitted as witnesses in Courts of Justice, they cannot claim any civil rights, they cannot obtain recovery of, or compensation for, those lands which have been torn from them, and which they have probably held for centuries. They are not therefore bound by laws which afford them no protection.

The argument failed to win acceptance in 1836. It failed again to win acceptance in the same court 140 years later.[8] And the generally accepted view has been that Aboriginal people are fully subject to Australian law.

That law, of course, today gives Aboriginals equal rights under the law, at least in theory; in practice, Aboriginal people continue to be grossly over-represented in all stages of the criminal justice process, and to be heavily over-represented among complainants under anti-discrimination legislation. Worse, the sheer numbers of deaths in police or prison custody has led to the establishment of a national Royal Commission of Aboriginal Deaths in Custody.

Similarly the courts have substantially denied any recognition of Aboriginal law as such. In 1986 the Australian Law Reform Commission published a major report recommending recognition of Aboriginal law in a number of specific situations.[9]

The point I am attempting to make in this necessarily brief survey is that the starting point in Australian law is that Aboriginal people *as such* have no legal rights. Given the theme of this session, "Developing Aboriginal Rights", Australia's indigenous peoples are starting from zero.

Aboriginal people number little more than 1% of the population. Their political clout, their bargaining strength, would seem to be negligible. Denial of any legal basis for their rights reduces their claims to moral claims on Australian society. Yet, since the mid-1960s Australians have been responsive to these claims, (though the tide of public opinion appears to have turned in the past few years).

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8 *R* v *Wedge* [1976] 1 NSWLR 581.

9 *The Recognition of Aboriginal Customary Laws* ALRC 31 (AGPS, Canberra, 1986).

Substantial rights have been given by governments, especially in terms of recognition of land rights under legislation of the past two decades. In 1966 no Aboriginal Australian owned land by virtue of being Aboriginal. By January 1986 some 643,079 sq kms, representing 8.37% of the Australian land mass, were held by Aboriginals in freehold.[10]

III ABORIGINAL CLAIMS

What are those claims? What are Aboriginals asking?

First and foremost they are asking for a restoration of land.

Secondly they seek a number of rights in relation to Aboriginal land - control of access, a degree of self-management, an effective voice in resource development. They also have land-related claims that may not be confined to Aboriginal land - claims for the protection of sacred and significant sites, claims to pursue traditional hunting, fishing and gathering activities.

Thirdly, a degree of self-determination is sought both in regard to Aboriginal land and in regard to Aboriginal affairs generally, and programmes for Aboriginals.

Fourthly, they seek assistance towards social and economic development and do so not solely on the basis of evident need but also on the basis of compensation for the dispossession and culturisation that has led them to their present position.

Fifthly, they claim recognition of their cultural identity as a people, and recognition of specific cultural needs in regard to land, sites, language, law and so on.[11]

IV GOVERNMENT POLICIES

Under the philosophy of assimilation none of these claims need be met. All that would be needed is a variety of welfare programmes plus a sprinkle of anti-discrimination measures to bring Aboriginal people *as individuals* to a position of approximate equality within an over-all multicultural, melting-pot society.

But assimilation has scarcely worked in Australia, even after 200 years, and is resisted by most Aboriginal peoples. Most governments have now conceded that the people have the right to retain a distinct Aboriginal identity, should they so choose, and that they should have the means to do so. Hence the move in recent

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10 "Aboriginal Land Tenure and Population", Department of Aboriginal Affairs, Canberra, January 1986.

11 G Nettheim, "Justice and Indigenous Minorities: A New Province for International and National Law" in A R Blackshield (ed) *Legal Change Essays in Honour of Julius Stone* (Butterworths, Sydney, 1983) 257.

times to recognize or grant land rights - a move which has varied markedly among the separate jurisdictions within Australia. At the federal level, however, there has been a fairly clear commitment to the special position of Aboriginal people. And it has been largely bipartisan.

In 1975 a Labour Government introduced path-breaking land rights legislation for the Northern Territory which a non-Labour Government saw through to enactment in 1976. In February 1975 the Senate adopted a resolution moved by Liberal Senator Bonner acknowledging prior Aboriginal ownership of Australia and urging the Government to introduce legislation to compensate for dispossession. In 1988 a Labour Government obtained House of Representatives' assent to a resolution acknowledging similar matters. Such an acknowledgment is contained in the preamble to the Aboriginal and Torres Strait Islander Commission Bill, designed to transfer a greater degree of 'self-management' to Aboriginal and Islander peoples.

Given the substantial (but incomplete) rejection of the policy of assimilation in Australia, where does the nation now stand in responding to Aboriginal claims? How, in relation to Australia, are Aboriginal rights being developed? A brief tour of the horizon may be of interest.

V CONSTITUTIONAL DEVELOPMENT

The major constitutional development was the 1967 referendum to amend the Constitution to confer on the Commonwealth Parliament specific power to make laws for Aboriginal people (section 51(26)). Some limited use has been made of the power to develop Aboriginal rights. In addition, other relevant powers are available to the Commonwealth, for example, the plenary power to pass laws for the territories (section 122) and the power to pass law with respect to "external affairs" (section 51(29)). By force of section 109 a valid Commonwealth law will prevail over an inconsistent State law.

Last year a Constitutional Commission presented its report to the Attorney-General with a considerable number of recommendations for amendment to the Constitution. Two Advisory Committees to the Commission had suggested particular amendments in respect of Aboriginal people. The Commission itself recommended less. It rejected a proposal to add a preamble to the Constitution recognizing prior Aboriginal ownership, etc. It rejected a proposal to add specific power to negotiate a treaty with Aboriginal Australia. It proposed a rewording of the race power (section 51(26)) which would confine its scope to Aborigines and Torres Strait Islanders. And it recommended extension to State and Territory governments of the obligation to pay "just terms" for acquisition of property, though it also rejected a recommended exemption that no such obligation would apply in respect of acquisition of property for Aboriginal people.[12]

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12 G Neate, "Aborigines and Torres Strait Islanders and the Australian Constitution", (April 1989) Vol 2 No 37 *Aboriginal Law Bulletin* 10-12.

Four proposals to amend the Constitution were put to the electors in a referendum last year and went down to such inglorious defeat that it seems unrealistic to look to new constitutional means for developing Aboriginal rights in Australia.

VI LEGISLATION

The restoration of land to Aboriginal people, noted earlier, rests on the basis of legislation. The major innovation in recent times was the Commonwealth Parliament's legislation for the Northern Territory, the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).[13]

At State level, a variation of the Northern Territory regime was negotiated with the South Australian Government to transfer ownership of 10% of the State's area to the Pitjantjatjara peoples (Pitjantjatjara Land Rights Act 1981 (SA)). A similar pattern was followed for another 50,000 square kilometre tract of land in the Maralinga Tjarutja Land Rights Act 1984 (SA). (The Maralinga peoples had been moved from these lands in the 1950s and 1960s for the convenience of British testing of nuclear weapons and rockets. The people are still awaiting action recommended by a Royal Commission for a clean-up of radio-active debris and for compensation).

New South Wales enacted an Aboriginal Land Rights Act 1983, which transferred existing small reserve areas to Aboriginal ownership, authorised a closely circumscribed scheme of land claims, and provided a financial package to allow further open-market purchases. But the vulnerability of legislative solutions was revealed when the newly-elected Greiner Government last year came to office pledged to abolish land rights. It proved to be not just a Bicentenial re-enactment; they meant business, but were effectively blocked in the initial moves by the Upper House and by the Supreme Court. A more moderate attempt to reduce Aboriginal self-determination has recently been unveiled.

Land rights developments in other states have been more modest, ranging from grudging (WA) to nothing (Tas).

In 1983 the Hawke Government came to office pledged to introducing national land rights legislation based on five fundamental principles:

(i) Aboriginal land to be held under inalienable title;
(ii) Protection of Aboriginal sites;
(iii) Aboriginal control in relation to mining on Aboriginal land;
(iv) Access to mining royalty equivalents;
(v) Compensation for lost land to be negotiated.

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13 See Graeme Neate, *Aboriginal Land Rights Law in the Northern Territory* Vol 1 (APCOL, Sydney, 1989).

This clear commitment became derailed during 1984 as a direct result of a concerted campaign by the mining industry to oppose Aboriginal control over mining activity on Aboriginal land, and the commitment was abandoned in 1985. The same mining industry campaign precipitated a more general swing of public opinion against Aboriginal aspirations. Aboriginal organizations over the past several years have been trying to prevent any further erosion and to defend the limited earlier gains.

Legislation has been of benefit to Aboriginal people in a number of areas apart from land rights, for example, protection of cultural heritage, anti-discrimination measures and so on.

But Aboriginal leaders are fully aware of the limits of legislation, its dependence on political support and its vulnerability when political support ebbs.

VII LITIGATION

Litigation has been used in defence of legislation, for example, in an extraordinary number of unsuccessful challenges by the Northern Territory Government to the land claims process.

Litigation has been used less often to establish Aboriginal aspirations at common law. Several decisions were mentioned earlier in the paper which rejected Aboriginal claims to sovereignty, to immunity for non-Aboriginal jurisdiction and to land rights. Two cases currently listed in the High Court might, if successful, produce a rethinking of some of the fundamental issues, for example, the terra nullius doctrine, Aboriginal title, etc. The risks of major litigation are, of course, enormous, as are the transaction costs. On the other hand, a clear High Court determination that Aboriginal rights *did* survive the acquisition of British sovereignty could greatly strengthen the bargaining position of Aboriginal people in negotiating issues of land title and so forth. It could also assist them greatly in negotiating a treaty.

VIII THE TREATY PROPOSAL

The idea of negotiating a latter-day treaty between Aboriginal Australia and the nation has surfaced in modern times.

Australia still stands out as the one major British dominion in which no treaties were signed. Batman's purported treaties in 1835 for the purchase of land near Melbourne represents no exception, as he entered the transactions in his own private capacity, and not as agent of the Crown, and they were subsequently disowned in 1836 both by Governor Bourke of New South Wales and the Colonial Secretary of Van Dieman's Land (Tasmania).

The colonial authorities in London in the 1830's were determined that the new colony of South Australia should be settled on more enlightened lines than had

been the case in the eastern colonies, and they attempted to ensure that the settlers respected the rights of the Aboriginal peoples and negotiated purchase of land. The policy was not successful.[14] Throughout Australia, Britain's acquisition of sovereignty, and the displacement of Aboriginal peoples and Torres Strait Islanders from their lands proceeded entirely without "the consent of the natives".

In Canada, dozens of treaties were made with particular Indian peoples from as far back as the 17th century. The same process has continued into modern times, though the term "treaty" is not now employed. Examples of recent "comprehensive land claim settlements" are the James Bay and Northern Quebec Agreement of 1975 and the Inuvialuit (Western Arctic) Agreements of 1984. Other agreements have been under negotiation. The range of matters dealt with in these modern agreements include: land rights; compensation; environmental protection; hunting, fishing, gathering and trapping rights; culture and language rights; social and economic development. The topics are similar to those mentioned for Australia in the Barunga Statement.

Although the term "treaty" is no longer used in Canada for such agreements, the Constitution accords to them precisely the same status as the earlier treaties. Section 35 recognizes and affirms "existing aboriginal and treaty rights of the aboriginal peoples of Canada", and the term 'treaty rights' is defined to include "rights that now exist by way of land claims agreements or may be so acquired".

IX THE MAKARRATA DISCUSSIONS: 1979-1983

The revival in modern times of proposals for an Australian treaty was articulated by the National Aboriginal Conference (NAC) in terms both of "Treaty" and of "the Aboriginal Nation". In April 1979 the NAC resolved:

> That we, as representatives of the Aboriginal Nation (NAC) request that a Treaty of Commitment be executed between the Aboriginal Nation and the Australian Government. The NAC request, as representatives of the Aboriginal people, that the Treaty should be negotiated by the National Aboriginal Conference ... .[15]

The National Aboriginal Conference was an elected body established in 1977, and funded by the Commonwealth Government as its principal source of advice on Aboriginal issues. It was a successor body to the National Aboriginal Consultative Committee established in 1973, and effectively went out of existence in its own turn in 1985 when the Government ceased funding.[16] The proposed successor to the NAC (and to the Aboriginal Development Commission and the

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14 Henry Reynolds *The Law of the Land* (Penguin, 1987) 99-147.

15 *Two Hundred Years Later* ..., Report by the Senate Standing Committee on Constitutional and Legal Affairs, AGPS, Canberra, 1983, p 14.

16 Peter Hanks "Aboriginal and government: the developing framework" ch 2 in P Hanks and B Keon-Cohen, (eds) *Aborigines and the Law* (George Allen & Unwin, Sydney, 1984) 37-49.

Department of Aboriginal Affairs itself) is the Aboriginal and Torres Strait Islander Commission (ATSIC), legislation for which is currently before the Commonwealth Parliament.

In September 1979 the Prime Minister, Mr Fraser, agreed to meet the NAC to discuss the treaty proposal. In November the NAC Executive met with Senator Chaney, Minister for Aboriginal Affairs - it proposed to use the term Makarrata for the proposed agreement, and it established a sub-committee to consult with Aboriginal people and Torres Strait Islanders throughout Australia on the terms to put to the Government. The sub-committee, after an journey around Australia, published in July 1980 an initial report setting forth proposals for terms of a Makarrata. Senator Baume, as Minister for Aboriginal Affairs, gave a cautious response.[16a] A fuller set of demands was presented to the Minister on 29 September and 1 October 1981.

In the meantime considerable thought was given to the political, legal and constitutional issues presented by the proposal for a treaty/Makarrata. One of the earliest contributions to the debate was the article by Melbourne lawyer Bryan Keon-Cohen.[17] Amongst the many matters which he canvassed, he regarded the crucial question as being the legal character of an agreed Makarrata. He identified several possibilities:

(1) Policy statement. This would have moral and political force only, it would not bind the parties in law and would be unlikely to satisfy Aboriginal demands.

(2) Private contract: This would be enforceable in the courts.

(3) Legislation: An agreement could be ratified by enactment as Commonwealth and/or State statutes.

(4) Constitutional Entrenchment: This would give the agreement additional protection at the cost of some loss of flexibility. But the political difficulty in obtaining support in a referendum could be formidable.

(5) Domestic treaty having status in international law: This would require prior recognition that Aboriginal people have at least some of the attributes of sovereignty.

These aspects were explored further at a seminar convened in May 1981 in Canberra by the Aboriginal Treaty Committee and the Aboriginal Law Research Unit (now the Aboriginal Law Centre) at the University of New South Wales. The seminar immediately followed the Canberra Conference of the World Council

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16a (Parliamentary Debates, Senate, 25 March 1981).

17 Bryan Keon-Cohen, "The Makarrata. A Treaty within Australia between Australians. Some legal issues", (1981) 57 : 9 Current Affairs Bulletin 4.

of Indigenous Peoples. One significant concept that emerged from the seminar was a model for constitutional entrenchment based on the existing section 105A, ie, a constitutional amendment to authorise the Commonwealth to make an agreement and to implement it without the need to have the detailed agreement itself approved by referendum.[18] (Section 105A of the Constitution was inserted in 1929, at a time of national financial crisis, to authorise the Commonwealth to make agreements with the status with respect to their public debts.)

On 24 September 1981 the Senate referred to its Standing Committee on Constitutional and Legal Affairs "An examination of the feasibility, whether by way of constitutional amendment or other legal means, of securing a compact or 'Makarrata' between the Commonwealth Government and Aboriginal Australians". The Standing Committee's report, entitled *Two Hundred Years Later* ... was published in 1983 and strongly endorsed the section 105A approach in the first of its recommendations:

> The Government should, in consultation with the Aboriginal people, give consideration, as the preferred method of legal implementation of a compact, to the insertion within the Constitution of a provision along the lines of s 105A, which would confer a broad power on the Commonwealth to enter into a compact with representatives of the Aboriginal people. Such a provision would contain a nonexclusive list of those matters which would form an important part of the terms of the compact, expressing in broad language the type of subjects to be dealt with.

Thus, by 1983 there had been substantial consideration of the legal status of a Makarrata. In addition, the NAC had held extensive consultations with communities throughout Australia and had presented the Commonwealth Government with a set of proposals for the content. Federal elections in March 1983 resulted in an ALP Government in Canberra, and ALP State governments also took office in Western Australia, Victoria and South Australia. The ALP had been more strongly supportive of Aboriginal claims in the past than the Liberal and National Parties.

Yet the momentum died. One reason was that Aboriginal opinon became increasingly divided on the question whether the Makarrata concept was worth pursuing. A number of Aboriginal organizations and individuals argued that it represented a diversion of attention and resources from the more important goal of achieving land rights on acceptable terms across the nation. Even the NAC itself became deeply involved in land rights issues. The critical land rights concern in the period 1983-1985 was the Hawke Government's electoral commitment to national land rights legislation and the perceived inadequacy of the Preferred National Land Rights Model unveiled by the Minister for Aboriginal Affairs, Mr Holding, in February 1984. Throughout the same period the NAC itself was under review. It

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18 Peter Bayne "The Makarrata: A Treaty with Black Australia" (1981) 6 Legal Service Bulletin 232.

effectively ceased to exist on 30 June 1985 when the Minister ceased funding. But well before this date the Makarrata momentum appeared to have died.[19]

X TREATY DISCUSSION: 1987-1989

The idea was brought back to life in September 1987 when Prime Minister Hawke made a suggestion that a "treaty or compact" would be worth consideration. This appears to have been an exercise in kite-flying. Some regarded it merely as an exercise to defuse Aboriginal protest during the Bicentennial. In December 1987 the Minister for Aboriginal Affairs, Mr Hand, tabled in the House of Representatives a statement "Foundations for the Future". It was mainly concerned to outline his concept for an Aboriginal and Torres Strait Islander Commission to take over the roles of the former NAC, the Aboriginal Development Commission, the Department of Aboriginal Affairs, and the Australian Institute of Aboriginal Studies. Mr Hand said that he proposed to visit Aboriginal and Islander communities to discuss the proposed body, but he added that he also proposed to discuss with them the idea of proceeding towards a "compact, agreement, treaty or Makarrata - the name is not significant". The document also set out the terms of a proposed preamble to the ATSIC legislation which, among other things, would acknowledge prior Aboriginal and Islander ownership of Australia and the fact of dispossession without conpensation. The treaty initiative was followed up in June 1988 with the Barunga statement and the Prime Minister's response.[20]

The Opposition parties have expressed their strong opposition to a treaty. The former Leader of the Opposition, the Hon John Howard, has said that such an agreement would be contrary to the concept of Australia as one nation and he has stated that a coalition government would "tear it up".[21]

Aboriginal reaction has been cautious. Spokesmen such as Paul Coe of NAILSS have been ready to point out that the existence of treaties in Canada and the United States has not had the effect of dividing those nations. There is also a broad desire to achieve a resolution of outstanding issues.

There is not yet a consensus on the appropriate mechanism within the Aboriginal communities for negotiation of a treaty. In the absence of any successor body to the NAC, several national organizations of land councils, health services and so on established an entity of their own called the National Coalition of Aboriginal Organizations. Whether the NCAO is the body to represent the Aboriginal and Islander "side" in the development of a treaty has had to be discussed in Aboriginal communities and organizations around the country and within the NCAO itself.

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19 Judith Wright "What's become of that treaty?" 1988 (1) Australia Aboriginal Studies 40.

20 See Appendix to this paper.

21 For various statements of position on the treaty proposal see Ken Baker (ed) *A Treaty with the Aborigines?* Policy Issues No 7, Institute of Public Affairs Ltd, December 1988.

The terms of the Prime Minister's statement leave the initiative entirely with the Aboriginal "side".

Members of the NCAO and others are approaching the treaty proposal with some caution. They have sufficient information about experience with treaties elsewhere to be aware that negotiating the substantive content of a treaty is only one of the matters that requires attention. Other matters require resolution, some of them before negotiation even commences. For example:

(1) *Process.* A process has to be devised for the selection of negotiators, by the Aboriginal groups, communities and organizations who will be perceived by them as being appropriately representative, for consultation with communities, for endorsement or rejection of proposals, etc.

(2) *Resources.* Resources have to be made available to support the process and to permit the employment of specialist advisers.

(3) *Monitoring.* There have been proposals that independent observers from outside Australia should monitor the negotiations.

(4) *Legal Status.* The legal status of a treaty needs to be settled.

(5) *Interpretation.* Principles need to be agreed to resolve any disputes about interpretation of the treaty.

(6) *Implementation.* There need to be clear commitments to ensure implementation of those terms of a treaty that require action.

(7) *Enforcement.* There needs to be provision for enforcement in the event of breach. Some on the Aboriginal side would wish to provide for some form of independent, third party enforcement, possibly through machinery for international arbitration.

XI THE INTERNATIONAL DIMENSION

The tendency has been to deny to indigenous peoples the status of nation, both in domestic law and in international law. Such peoples are, of course, entitled to the benefit of the body of human rights that international law has developed over the past 40 years. Human rights law is particularly useful as a basis for challenging impediments in national law or practice to the enjoyment of rights on the same basis as the dominant population. But human rights law is, for the most part, individualistic and assimilationist. It scarcely addresses the central claims of indigenous peoples of self-determination and land rights.[22]

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22 Garth Nettheim "Indigenous Rights, Human Rights and Australia" (1987) 61 ALJ 291-300.

This situation is changing. Since 1957 there has been an International Labour Organisation Convention No 107 "concerning the Protection of Integration of Indigenous and Other Tribual and Semi-Tribal Populations in Independent Countries". This instrument, too, was largely assimilationist, but it is undergoing a process of revision which was to be completed at the International Labour Conference in Geneva in June 1989.

At the same time, within the UN system, a Working Group of Indigenous Populations is developing a draft Universal Declaration of Indigenous Rights. A working paper tabled at the Working Group's 6th session in 1988 contained 28 substantive points covering, particularly, collective rights to physical existence and security, to cultural identity, to land rights and resources, to social and economic development, to political participation, and other such matters.[23]

Both these processes are likely soon to result in a body of international law on indigenous rights that will inevitably have an influence on the terms of an Australian treaty. In addition, one of the members of the Working Group, Miguel Alfonso Martinez, was assigned to prepare an outline for a study of treaties between nations and indigenous peoples. The outline was presented to the Working Group at its sixth session in August 1988 and endorsed.[24] The purpose of the study would be the protection and the promotion of the rights and liberties of indigenous populations "in order to secure solid, durable and equitable bases for the current and, in particular, future relationships between those populations and States".

Any progress towards an Australian treaty (or treaties) will, thus be proceeding not in a national vacuum but in the context of a rapidly developing set of international principles on the rights of indigenous peoples and an emerging international interest in the effectiveness and equity of such treaties. The proposals for an Australian treaty have been drawn to the attention of the Working Group and its parent bodies in Geneva. The international community will certainly have an interest in any failure to achieve such a treaty, any substantial defects in a treaty, or any action by government to "tear it up".

XII CONCLUSION

Developing Aboriginal rights is not easy anywhere where the Aboriginal peoples are in a minority. In Australia, in contrast to New Zealand, there has been

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23 A working paper by Ms Erica Irene A Daes contains a set of draft preambular paragraphs and principles for insertion into a universal declaration on indigenous rights E/CN4/Sub2/1988/25, 21 June 1988.

24 *Outline on the study on treaties, agreements and other constructive arrangements between states and indigenous populations* E/CN4/Sub2/1999/24/Add1 (24 August 1988).

a total denial of Aboriginal rights, and "Aboriginal affairs" has been perceived as an exercise in welfare rather than justice.[25]

There are a number of possible means by which aboriginal rights may be developed and I have sketched the current state of play in Australia on a number of them.

One of the most interesting developments in the past decade or so has been the extent to which Aboriginal peoples around the world have begun to work together and to learn from each other. Aboriginal leaders considering the treaty proposal in Australia have a fairly shrewd appreciation, for example, of the strengths and the pitfalls of the Treaty of Waitangi and the James Bay Agreement. In particular, Aboriginal peoples from around the world foregather each year in Geneva for the annual meeting of the Working Group on Indigenous Populations. Information is exchanged, links are established. Particularly when progress is slow at the domestic level, resort to the international arena can provide a boost. Last August a very strong Maori delegation turned up at the Working Group.

I end with an anouncement. It is not easy to newcomers to understand and to work the international political system. My University is to introduce, in January 1990, a 4-week Diplomacy Training Program designed specifically to provide indigenous peoples from the region, NGOs and others, with the knowledge and skills that may make them more effective operators on the international arena.

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25 Garth Nettheim "Justice or Handouts? Aboriginals, law and policy" in Kayleen M Hazlehurst (ed) *Ivory Scales. Black Australia and the Law* (NSW University Press, Sydney, 1987) 8.

APPENDIX
of The Barunga Statement

We, the indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights:

- To self-determination and self-management, including the freedom to pursue our own economic, social, religious and cultural development;
- To permanent control and enjoyment of our ancestral lands;
- To compensation for the loss of use of our lands, there having been no extinction of original title;
- To protection of and control of access to our sacred sites, sacred objects, artefacts, designs, knowledge and works of art;
- To the return of the remains of our ancestors for burial in accordance with our traditions;
- To respect for and promotion of our Aboriginal identity, including the cultural, linguistic, religious and historical aspects, and including the right to be educated in our own languages and in our own culture and history;
- In accordance with the universal declaration of human rights, the international covenant on economic, social and cultural rights, the international convention civil and political rights, and the international convention on the elimination of all forms of racial discrimination, rights to life, liberty, security of person, food, clothing, housing, medical care, education and employment opportunities, necessary social services and other basic rights.

We call on the Commonwealth to pass laws providing:

- A national elected Aboriginal and Islander organization to oversee Aboriginal and Islander affairs;
- A national system of land rights;
- A police and justice system which recognises our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interfere with our freedom of expression or association, or otherwise prevent our full enjoyment and exercise of universally recognised human rights and fundamental freedoms.

We call on the Australian Government to support Aborigines in the development of an international declaration of principle for indigenous rights, leading to an international covenant. And we call on the Commonwealth Parliament to negotiate with us a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedoms.

Statement by the Prime Minister

1 The Government affirms that it is committed to work for a negotiated Treaty with Aboriginal people.
2 The Government sees the next step as Aborigines deciding what they believe should be in the Treaty.
3 The Government will provide the necessary support for Aboriginal people to carry out their own consultations and negotiations: this could include the formation of a committee of seven senior Aborigines to oversee the process and to call an Australia-wide meeting or Convention.

4 When the Aborigines present their proposals the Government stands ready to negotiate about them.
5 The Government hopes that these negotiations can commence before the end of 1988 and will lead to an agreed Treaty in the life of this Parliament.