CHAPTER III

AN AGREEMENT IS SIGNED

The government's decision to go ahead immediately with the mining projects was highly controversial. Only Britain had so far proclaimed itself a customer for the product from the Ranger mine; its contract for uranium supply from the Rossing mine in South Africa was causing it embarrassment. Britain offered to take 8.5 per cent of the proposed 3000-tonne annual capacity when Ranger could supply it in 1985.

Meanwhile, negotiations with the Northern Land Council were proceeding, and proving difficult. The miners' massive campaign of propaganda for the projects was heavily criticized, not only by environmental groups but by scientists. As for the Aborigines who were, the newspapers proclaimed, to come into a 'bonanza', they had little or no help in understanding the implications of the negotiations into which they were entering. FCAATSI, which had no funding of its own, commenced in August 1977 an educational counter-campaign, focusing on the land rights

issue, with the help of members of the Labor Opposition, the vice-president of the ACTU, environmental groups, the Campaign against Racial Exploitation and others, and appealed on 1 September for funds for a national advertisement to publicize the case against mining.[1]

Though the Council for Aboriginal Affairs had been wound up, Dr Coombs' part-time consultancy still allowed him access to the government. On 13 September 1977 he wrote to the Minister for Aboriginal Affairs (then Mr Ian Viner), expressing concern for the Aborigines of the Alligator River region. He pointed out that although the Fox Report had recommended elaborate and comprehensive measures to monitor the environmental effects of the mining, it had made no such specific proposals for monitoring the social and economic impact on the Aborigines or for informing them of the likely effects on their lives. Knowing what had happened elsewhere with mining projects, he feared the disintegration of social control, the breaking up of many aspects of their present way of life, and the lack of preparation for the changes ahead. He suggested that an independent advisory team be set up to help Aborigines understand the issues before them and plan strategies for dealing with the effects.

The end of 1977 was approaching, and the government felt it needed a new mandate. Fraser called an election. Though the uranium debate was played down, the government circulated a reassuring informational pamphlet detailing a number of points in favour of uranium mining. Environmentalists and others issued a pamphlet in reply, listing seven points which they declared were false. The document was authenticated by the signatures of a number of well-known scientists including Sir Mark Oliphant, doyen of Australian physicists, and other members of the

1 'Land Rights: An Urgent Appeal', FCAATSI circular, Woden, 1 September 1977.

community. The claim that Aborigines would benefit was denied also.

However, the government's claim of riches from uranium, and its continued condemnation of Labor's economic management, won the day. The coalition government was returned. Viner remained the Minister for Aboriginal Affairs.

Pancontinental's draft environmental impact statement, which included an estimate of the effect of the project on Aboriginal communities, appeared early in 1978. While environmentalists condemned it, its effect on those who understood something of the Aboriginal plight was even more electric. In a letter to the Minister, the Prime Minister and the Minister charged with responsibility for the environment on 9 February 1978, Dr Coombs protested that the Pancontinental statement was

> a travesty, exhibiting profound ignorance of Aboriginal people, complete disregard for the recorded evidence of the effects of other large-scale mining projects and contemptuous indifference to the preferences of the Aboriginal people concerned, clearly expressed to the Fox Commission.

In this second appeal to the government, Coombs urged that the company be given no approval to mine until it had arranged, through the Northern Land Council, for a thorough baseline survey of the present condition of the Aborigines of the region, an educational programme of information on what the mining would be like, and a scheme of procedures to monitor the effects of mining on the communities. Any effective educational programme would involve translation into several local languages. Few officials were expert in any of these; even fewer had gained the trust and confidence of Aborigines. The survey and programme would certainly take much time and goodwill on the part of mining companies and of the government; with all pressing for a quick start to the project, Coombs'

advice was clearly unlikely to be welcome. In the event, the negotiations proceeded virtually without the benefit of any widespread educational programme at all, either to the 'traditional owners' or to the Aboriginal members of the Northern Land Council.

As the year went on, it was apparent that Aborigines were under heavy pressure to make an affirmative decision and to make it quickly. In August 1978 there were press reports that the negotiations were reaching a final stage. Coombs decided to make a further plea for time. In a letter dated 24 August he outlined once again to the Minister the age-old procedure, still important to these communities, by which consensus decisions were made. He warned that Aborigines who felt that the agreement had been made on their behalf but without their consultation or authority, or under duress, would feel no obligation to abide by it. He asked that any agreement concluded with the Northern Land Council, or made by the arbitrator who, it seemed, was now likely to be called in to make the decision, should be ineffective until that process of consultation with, and discussion by, the Aboriginal groups concerned had been carried out and the nature of their consensus determined.

Since the public was generally ignorant of Aboriginal methods of deliberation and decision, Coombs sent copies of this explanatory letter to the press.

The Minister and his Cabinet colleagues publicly retorted that all legal processes required by the terms of the Aboriginal Land Rights (NT) Act were being carried out, and accused Coombs of 'partisanship'.

Early in September 1978 — just a year after the all-clear on establishing the mining projects had been announced on the publication of the Fox Report — the Prime Minister stated that the Ranger project would now go ahead. This followed the initialling (not the signing) of a draft agreement by the Northern Land Council's lawyer, Mr Stephen Zorn, and the first assistant Commonwealth

Crown Solicitor. This did not validate the agreement, since under the terms of the Aboriginal Land Rights (NT) Act the consent (and the full understanding) of the 'traditional owners' had to be obtained by the Northern Land Council which would then sign on their behalf.

The draft agreement itself was, to quote a legal critic, 'long, complex, technical and confusing'. It had not been translated into the relevant Aboriginal languages; nor, the critic considered, was it likely that the concepts involved could in fact be satisfactorily translated.

> According to the *Land Rights Act*, Aboriginal owners are supposed to have 'understood' and as a group 'consented to' all this. If they have truly understood and consented, they cannot be very happy about the protection provided for their land.[2]

Certainly, at the beginning of September, the 'traditional owners' had not consented to their signatures being added to the agreement, though the pressures on the Northern Land Council and its chairman, Gularrwuy Yunupingu, were greater than ever. On 14 September a meeting of the Northern Territory Land Council with the Prime Minister, other Ministers, and the mining company representatives was held at Red Lillies Lagoon near Darwin.

> Subsequently the conduct of that meeting has been criticized in parliamentary debate (Senate Debates 17 October 1978, pp.1348–1364), numerous press articles, and in sworn Supreme Court affidavits by NLC members who attended the meeting.[3]

The meeting, however, ended in a resolution to ratify and execute the agreement.

On 20 September Coombs made a further and widely

2 'From Glass Beads to Gold Pens'. *Legal Service Bulletin*, December 1978, pp.225–8.

3 ibid., p.227.

publicized appeal to the Minister, in a letter again made public to the press. Once more, he urged delay 'to let the Aborigines have a few weeks of uninterrupted and unpressured talk among the communities concerned'. If even this concession was refused, he said, it could only be interpreted as

> a confession that this agreement has indeed been concluded under duress and that the Australian Government rates the immediate profits of mining companies more highly than the deeply felt anxieties for their ancient way of life of those Australian citizens whom we have over the last two hundred years continuously robbed of what was theirs by plain and sacred right.

In fact it was now reported that a number of the 'traditional owners' had taken out an injunction to prevent the Northern Land Council ratifying the agreement until proper consultation had been carried out with the communities in the terms of the Act. Two members of the Northern Land Council itself had been involved in taking this action. They alleged before the court that only 28 of the 42 members of the Northern Land Council had been present at Red Lillies Lagoon when the decision was made, and that essential background information and translations of the agreement had not been provided. Their request for more time for discussion, they said, had been refused, and there had been threats against the out-station movement among Northern Territory Aborigines.

As Coombs wrote in the 20 September letter:

> Already it is apparent that this course has precipitated dissension among the Aborigines concerned [and] has undermined the standing and authority of the Northern Land Council... If the Government persists in it there can be no doubt that subsequent development of mining in the Alligator River region will be marked by bitterness and hostility and that the impact on Aboriginal groups concerned will be permanently destructive.

After discussion, and promises to engage in further consultation, the Aborigines concerned were persuaded to withdraw their application for an injunction against the Northern Land Council.

On 11 October the Aboriginal community at Oenpelli held a meeting which passed a resolution stating that the Ranger proposals were not acceptable 'at this time'. This was a careful wording intended to guard against the possibility of either legislative or arbitrative measures being taken by the Commonwealth Government on the ground that an impasse had been reached. The resolution called for further consultation between the Northern Land Council and the people of Oenpelli and other interested communities.

The Northern Land Council called a meeting with the 'traditional owners' at Oenpelli. Since there was no expectation that this was to be a final 'negotiation', not all the traditional owners were present. In fact, there were some press reports that only 4 out of 40 were at Oenpelli during the four days from 1–3 November. The Aborigines had still not been provided with any translations of the agreement or explanation of its terms.

But the government staged a pre-emptive coup. The Northern Land Council's members were flown, on 1 November, not to the Oenpelli meeting, but to Bamyili. There they found the Minister for Aboriginal Affairs. The Oenpelli community was not notified of any change in the arrangements and continued to wait at Oenpelli.

After two days of meetings with the Minister, on 3 November, Mr Yunupingu, the executive of the Northern Land Council (who were for the most part non-Aboriginal officials with strong links to the Commonwealth Government Department of Aboriginal Affairs) and Mr Viner arrived by plane at Oenpelli. The 'traditional owners' were told that the Northern Land Council had recommended that the agreement be signed. This was a

reversal of the procedure laid down in the Land Rights Act, whereby the traditional owners themselves should have recommended the Northern Land Council to sign on their behalf.

In his press statement issued after this meeting, the Minister announced that the necessary signatures to the agreement had been obtained. It was reported later, however, that in fact none of the 'traditional owners' had signed the document (though the Northern Land Council had done so).[4] Though the reports of the meeting were generally confused and sometimes contradictory, it seemed that Aborigines at Oenpelli had been thoroughly bewildered by the proceedings and some had wandered away from the meeting, unable to understand what was happening.

'Signing of the agreement will be seen as a considerable triumph for Mr Viner, who had been faced with an increasingly restless Cabinet impatient to see the Ranger project under way', wrote the *Financial Review* correspondent.[5]

The reaction of Dr Coombs, who had continued to place hope in the sections of the Act which supposedly protected Aborigines from having hasty decisions forced on them, was one of deep distress. On 29 November he put some of this distress into words in a further letter (also made public) to the Minister:

> I have frequently, throughout my official life, disagreed with actions of the Government of the day, but never before, in the field of domestic policy, have I felt such shame at the way in which policy has been put into effect ... The signatures have, I believe, been obtained without the processes of clarification

4 Advertisement placed by Land Rights and Uranium Defence Trust Fund. *National Times*, 16–23 December 1978.

5 J. Hoare, 'Ranger deal well orchestrated'. *Financial Review*, 6 November 1978, whose account I have followed as well as that of the *Legal Service Bulletin* article.

> and discussion which were promised to obtain the lifting of the injunction previously imposed by the Supreme Court. Furthermore, the proceedings at Bamyili and at Oenpelli not merely failed to include representatives of communities vitally concerned but were such as to leave those Aborigines who did participate bewildered and unaware of the significance of what was happening. The Government has the signatures required by the Act, but it has not got an agreement.

By this time, the 'traditional owners' who had not been consulted were attempting to take further legal action. Coombs saw in this a possible field in which the government might make some amends for the circumstances in which the signatures had been obtained. His letter to Viner pointed out that

> at least eleven with traditional rights in the land concerned have requested solicitors to initiate proceedings in the Supreme Court . . . but the Aborigines lack financial resources and their solicitors have not been reimbursed for their costs in the action to secure the original injunction.

He urged that the government should announce that it would underwrite the costs of such a challenge in the Court. If the action by the Aborigines were successful, time would be gained in which the translation of the agreement into the languages concerned could be completed and in which, with help from their own chosen advisers, they could continue the process of discussion and consultation for which they had asked.

Coombs' letter was a final and forlorn hope. Already Ian Viner had been promoted from the Ministry of Aboriginal Affairs to a more senior portfolio. 'I have done my job', he modestly told the press.

By this time Coombs had not only given up hope that the situation of the Aborigines of the Uranium Province would be given redress by the Commonwealth Government, but had turned already to the idea that there could be value in

the idea of a document which would bind the Commonwealth to carry out its responsibilities to Aborigines generally. The first draft of a proposed agreement between the Commonwealth and Aborigines chosen by Aborigines themselves to carry out negotiations for a treaty was circulating among a group of Aboriginal sympathizers and past members of the Council for Aboriginal Affairs (see Appendix). Among these was Professor Charles Rowley, then heading the Aboriginal Land Fund Commission which was having great difficulty with the Queensland and Western Australia Governments over their refusal to transfer to Aboriginal owners leasehold properties purchased for them by the Commission during the years from 1975–78, and was now also unable to get appointments to see the Federal Minister.

All these factors, and the shame felt by people of conscience as the facts emerged over the government's method of obtaining the signatures to the Ranger agreement, underlay the attitudes of the group to whom Coombs had circulated the draft proposal. As he wrote, there seemed no alternative but to attempt to go back to 'first principles' in the attempt to find some way of binding future governments to recognize and respect the rights of the powerless Aboriginal minority and to act on their behalf.

This return to first principles entailed, at least at the beginning, some rethinking of the basis of the early occupation of the country itself, and of the question of the situation of Aborigines and the causes which underlay it.

The unique situation of Australia's original inhabitants, in that they had been held to own no land whatever in the country they had occupied so long, seemed to prompt examination of the history of British occupation of Australia to understand the reasons for so unmitigated a dispossession. Why, in fact, had no treaties been negotiated from the beginning?

In such international legal consensus as existed in the eighteenth century, colonies could be acquired by the colonizing powers either by conquest, or by 'discovery and settlement' where no inhabitants were held to have rights in the land — the principle of *terra nullius*. This principle appears to have been in Cook's mind when he claimed the eastern coast of the continent of Australia. But he was in fact disobeying his instructions in doing so, since they specified that

> You are, *with the consent of the natives*, to take possession of convenient situations in the country, in the name of the King of England; or, *if you find the country uninhabited*, take possession for His Majesty by setting up proper Marks and Inscriptions, as *first discovers and possessors.* [Emphasis added.][6]

Cook had not only had considerable contact with Aborigines, he had been plainly warned off their land several times by spear and stone throwing (though later friendly relations were established). Nowhere does his journal refer to any attempt to obtain consent to his 'taking possession' of convenient situations though his long sojourn at the Endeavour River when repairing the ship's damaged timbers might have provided opportunity for such an attempt.

When the question of setting up a convict colony arose in 1779, an idea that the settlement would meet with no resistance from the Aborigines seems to have arisen from Banks' evidence to the 1779 inquiry by the House of Commons on transportation. He recommended the site of Botany Bay for a convict colony, on the grounds that

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6 J. C. Beaglehole (ed.), *The Journals of Captain James Cook*, Vol. I London, Cambridge University Press, 1955; and see A. T. Yarwood and M. J. Knowling, *Race Relations in Australia* pp.29–33. Sydney, Methuen, 1982 (for relevant comment).

> during his Stay there in the year 1770 he saw very few and did not think there were above Fifty in all the neighbourhood, and had reason to believe the Country was very thinly peopled; those he saw were naked, treacherous and armed with Lances, but extremely cowardly, and constantly retired from our People when they made the least appearance [*sic*] of Resistance ...[7]

Cook, in his Journal, agreed:

> I do not believe them to be a warlike People, on the Contrary I think them a timorous and inoffensive race, no ways inclinable to Cruelty ... Neither are they very numerous ... They seem to have no fix'd habitation but move about from place to place like wild Beasts in search of food, and I believe depend wholy [*sic*] upon the success of the present day for their subsistance [*sic*] ...

He also took the view that

> We see this Country in the pure state of Nature. The Industry of man has had nothing to do with any part of it and yet we find all such things as Nature hath bestowed upon it in a flourishing state ...[8]

These views clearly underlay the decision in 1779 to occupy the country.

Yet even during the first years of settlement, they were contradicted by experience. Watkin Tench in his *Narrative* of 1789 remarked that 'the country is more populous than it was generally believed to be in Europe at the time of our sailing'. He also stated that 'on the north-west arm of Botany Bay stands a village, which contains more than a dozen houses, and perhaps five times that number of

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7 J. C. Beaglehole (ed.), *The* Endeavour *Journal of Joseph Banks 1768–1771*. Sydney, Angus & Robertson, 1962.

8 Beaglehole (ed.), *The Journals of Captain James Cook*.

people'; and that Governor Phillip had once fallen in with 'a party, which consisted of more than three hundred persons, two hundred and twelve of whom were men'. Tench nevertheless believed 'the interior parts of the continent . . . there is every reason to conclude from our researches, as well as from the manner of living practised by the natives, to be uninhabited'.[9] This judgment was evidently based on the observation that fishing and collecting shellfish were the main sources of food for the coastal people. Phillip himself estimated in 1788 that 'in Botany Bay, Port Jackson, Broken Bay and the intermediate coast they cannot be less than one thousand five hundred'.[10]

It was decidedly odd that Cook's and Banks' confident avowal that the natives were few and had no fixed dwellings was so early contradicted, yet that no move was made to revise the estimates. The lack of cultivation — one desideratum for the principle accepted by the British that the divine instruction to 'possess the earth' and 'subdue it' provided the chief basis for ownership — was probably influential. And certainly the European superiority in arms and technology weighed also in the lack of any attempt to re-evaluate the basis of the occupation.

There was in fact nothing in Cook's claim to possession on behalf of the King which precluded negotiation with the Aborigines if his and Banks' estimate of their numbers and habits of life were proved wrong. Certainly there was no reason for the British Government to accept without question the fact that Cook's claim was in any case based on disobedience to his instructions, and to confirm his error. If

9 L. F. Fitzhardinge (ed.), *Watkin Tench, Sydney's First Four Years*, being a reprint of the 'Expedition to Botany Bay' and 'A Complete Account of the Settlement at Port Jackson'. Sydney, Angus & Robertson, 1961, pp.35 and 52.

10 C. M. H. Clark, *Select Documents in Australian History 1788–1850* Sydney, Angus & Robertson, 1950, p.66.

the decision to occupy the land was based in the judgment that hunting-gathering people had no claim to land, that view was already contradicted by the recognition of existing rights in land under the Royal Proclamation of 1763 which established that purchases of North American Indian land could only be made by the Crown 'at a public meeting called for that purpose: that is, all land cessions were to be settled through treaties'.[11]

The case of the Australian Aborigines therefore presented a break with established precedent. By no means all North American tribes either cultivated the ground, even sporadically, or lived in 'fix'd dwellings'. But Cook had described the Aborigines as doing no more for their subsistence than did 'wild Beasts', and as such, apparently, they were thenceforth to be treated.

There was in fact considerable uncertainty among the governors themselves, and in the instructions given them, as to the status of the indigenes from 1788 onwards until 1837. The first governor, Phillip, set the pattern. To avenge the death by spearing of his huntsman McEntire in 1790, he sent out a large punitive party. His instructions to the officer in charge were that they should capture and bring in a large number of Aborigines (not necessarily those who had launched the spears), not for trial but for summary hanging; if the party was unable to capture the number, an equivalent number was to be shot out of hand. If, on the raising of the British flag in 1788, it were considered that Aborigines on the east coast automatically became British subjects, this kind of treatment would have been inexcusable, especially by a governor acting for the Crown.

11 N.K. Zlotkin, *Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference*. Kingston, Ontario, Institute of Intergovernmental Relations, Queen's University. Discussion Paper 15, 1983, p.10; also D. Barwick, *Making a Treaty: The North American Experience*, Pamphlet for the Aboriginal Treaty Committee with bibliographical references. Canberra, n.d. [1980].

This event, and Phillip's other actions in the matter of Aboriginal contact, W. E. H. Stanner considered to have influenced all relations between 'settlers' and Aborigines thereafter. 'Two realities', wrote Stanner, had emerged:

> a pattern of racial relations and a structure of racial equities. They were the products of a process — meeting, sporadic violence, a general struggle, and the imposition of terms by the stronger — which always appeared wherever settlement went.[12]

This incisive description of the pattern and sequence of contact makes use of one term which seems self-contradictory — if the word 'settlement' is taken to imply, as in legal terms it does, 'peaceful settlement'. The facts of the case as Stanner presents them, speak much more convincingly for a process of conquest, even if a piecemeal one. As for the 'imposition of terms', these were not committed to paper and were in fact less a matter of agreement between the parties than of forced submission.

After Phillip's departure, the status of Aborigines remained cloudy in the eyes of authority. Governor King, wanting a clear directive, asked Richard Atkins for his view. Atkins, Judge-Advocate of the colony (*faute de mieux*) gave no opinion on the status of Aborigines beyond the view that they did indeed come 'within the Pale of His Majesty's protection', but since they were ignorant of the law and of any charges that might be brought against them, they could not be brought before a criminal court and the only way of dealing with them was by pursuit and punishment. This did not touch on the question of what should be the penalty for those who dealt out that 'punishment' without authorization.[13]

But in effect, Atkins' view continued and authorized the

12 W. E. H. Stanner, *Aboriginal History*, 1(1), 1977, p.20.

13 *Historical Records of New South Wales* I,ii, Judge-Advocate Atkins to Governor King, 8 July 1805, pp.653–4.

general practice of the settlers. 'Punishment' was the response to those Aborigines found on land which the settlers claimed, or resisting their claims. This land was almost always the frontages of water, highly important for Aboriginal food supplies, from time immemorial occupied by them and holding many of their sacred spirit-sites and initiation grounds. It would never be possible for the pattern of European arrivals (often guided by Aborigines ignorant of their final intentions), then the taking up of such places, clashes and final expulsion, to be altered as long as there was competition for such land.

The British Government, though clearly understanding little of the problem, was anxious to avoid such clashes.

> I do strictly forbid any of His Majesty's Subjects . . . from using any act of Injustice or wanton Cruelty towards the Natives, on pain of being dealt with in the same manner as if such act of Injustice or wanton Cruelty should be committed against the Persons and Estates of any of His Majesty's subjects.

wrote the Secretary of State for Colonies to Governor King, and King in 1805 published a proclamation to that effect.[14] But it was already impossible to do more than make an occasional example of those who disobeyed the instruction. (And a certain ambiguity is noticeable in the wording of the dispatch, which did not say '*any other* of His Majesty's subjects'.)

The outbreak of smallpox in 1789, which has been estimated to have reduced the Aboriginal population near Sydney by 50 per cent[15], and the rapid increase in venereal and other diseases among Aborigines, kept the problem muted for a decade or more near the settlement of Sydney. But numbers both of 'settlers' and of livestock were growing and by the 1820s both the Hunter Valley and the Bathurst

14 *Historical Records of Australia* I, iii, p.592–3.
15 N. Butlin, *Our Original Aggression*, Sydney, George Allen & Unwin, 1983, p.20.

Plains provided areas of expansion for the colony.

In 1823–4 Aboriginal resistance to the occupation of the Bathurst Plains became a factor to be reckoned with, and in the Hunter Valley farmers and land grantees were complaining of attacks. The first Attorney-General, Saxe Bannister, arrived in 1824 and was, with Governor Brisbane, presented with the problem of dealing with the situation. Legally, if Aborigines were to be considered as British subjects, the outbreak could only be treated as insurrection, not as war. In 1825, on Bannister's recommendation, a state of martial law was declared on the Bathurst Plains, and soldiers and mounted police were sent there. Bannister wrote later that much bloodshed had taken place both before and during the martial-law period, but insisted that the method he had ordered, of mounted police driving the Aborigines to and fro until they surrendered, had not resulted in the shedding of blood by the soldiers themselves.[16]

The distance from the seat of authority in Sydney, however, made it impossible to control the actions of the newly arrived stockowners. Lord Bathurst, as Secretary of State for Colonies, issued fresh instructions to the new governor, Darling, in mid–1825, 'respecting the manner in which the Native Inhabitants are to be treated when making hostile incursions for the purpose of Plunder'. Where less vigorous measures failed, the Governor was 'to oppose force by force and . . . repel such Aggressions in the same manner, as if they proceeded from the subject of any accredited State'.[17]

This order gave practical *carte blanche* to the governor for military action against the Aborigines, and placed the colony in the position of a nation at war. In 1826 Darling

16 *Statements and Documents relating to Proceedings in New South Wales in 1824, 1825 and 1826.* Cape Town, (privately published) 1827, p.53.

17 *Historical Records of Australia.* XII, 14 July 1825, p.21.

acted on it by sending soldiers to the Upper Hunter Valley, where Europeans had been killed and houses burned, and there was military action as a result. Bannister, as Attorney-General, evidently considered that some of the actions against the Aborigines were illegal. As he wrote later:

> Military massacres have been probably more common — in New South Wales — than elsewhere: in 1826 Governor Darling ordered such massacres and in consequence one black native at least was shot at a stake in cold blood. The Attorney-General [Bannister himself of course] remonstrated against illegal orders of this kind and was told that the Secretary of State's instructions authorized them.[18]

This case, in which Lieutenant Nathaniel Lowe had ordered the execution of an Aborigine for murder, without trial, had been reported to Bannister by the missioner Lancelot Threlkeld. Lowe himself was not brought to trial, but was deported to Van Diemen's Land. The case formed one of various quarrels between the Attorney-General and Governor Darling, which resulted in Bannister being deprived of his post in 1826. Bannister warmly espoused the cause of Aborigines, who were by the time of his arrival, as Lancelot Threlkeld attested, regarded as 'only a species of the baboon, that might be shot down with impunity'.[19]

The concept of martial law is difficult to pin down, since it could be declared against aliens either within the country or outside it, and could also be declared in cases of insurrection by British subjects themselves (as it was, for instance, during the agricultural riots in England in the 1830s and 1840s). Bannister evidently considered it as a method of putting down the resistance without committing the government to actual warfare. Darling's acceptance of Lord Bathurst's view, which virtually stood King's proclamation of 1805 on

18 Saxe Bannister, *British Colonization and Coloured Tribes*. London, William Ball, 1838, pp.246 ff.

19 N. Gunson (ed.), *Australian Reminiscences and Papers of L. E. Threlkeld*. Canberra, AIAS, 1974, vol.1, pp.92, 95.

its head, marked yet another stage in the uncertainties of governors as to the real status of Aborigines.

Meanwhile, the invasion of the Liverpool Plains as well as of the Port Phillip area, beyond the 'limits of location', continued as wool prices rose in England and flocks and herds increased. By 1835 Bourke as governor had succeeded in convincing the British Government that the invasion could not be contained, and that it should be authorized by the issue of grazing licences to those who depastured their animals beyond the boundaries. Clashes between Aborigines and shepherds and stockowners had become a serious factor in colonial prosperity by the time that the House of Commons set up a committee of inquiry into Aborigines in British settlements during 1835.

Bannister was now back in England and still much at odds with Darling and the Sydney magistrates who had helped to engineer his downfall. He took the opportunity of giving evidence to the Committee, on the needs of the indigenous inhabitants not only of Australian colonies but of South Africa, where he had spent some months on his way home to England.[20]

Among his recommendations, he argued that treaties should immediately be entered into with Aborigines in the new British colonies then being established in Australia, before settlement proceeded further. Only legal recognition, he appears to have thought, would protect Aborigines from the lawlessness and oppression evident in New South Wales wherever settlement had proceeded without any agreement over the occupation of land. He also recommended that the authorities take steps to 'reduce the laws and the usages of Aboriginal tribes to language [*sic*], print them and direct our courts of justice to respect those laws in proper cases'; that Aborigines be included in juries, or at least engaged as

20 Report of the Select Committee of the House of Commons on Aborigines (British Settlements), British Parliamentary Papers, 1837, p.176.

assessors, in cases involving Aborigines; and that Aboriginal evidence, through interpreters, should be admitted in courts. Since, as he said, trials of Europeans for murder or injury to Aborigines were seldom if ever now held, he recommended 'an equal administration of justice', and respect for the rights of Aborigines to their own land.

This advice was ignored. However, in Western Australia, though there was no negotiation over or compensation for the taking of land, Governor Stirling had issued an explicit warning in 1829 that Aborigines were British subjects and that crimes committed against them would be treated accordingly.[21] The contradiction between these instructions and those issued by Lord Bathurst and by Governor Darling three years earlier in the case of Aborigines on the other side of the continent seems to be part and parcel of the confusion over the status of Aborigines which had first appeared in Governor Phillip's time.

The setting up of the mounted police in Western Australia in 1832 paralleled that of the Border Police and the Port Phillip Native Police Corps (later the Native Mounted Police) in eastern areas. It was, as Hasluck has pointed out, clearly regarded by the colonists as providing protection for them against Aboriginal attack, not vice versa.[22] The course of resistance and attack, and retaliation against resistance, followed much the same path as elsewhere, because the ruthlessness of pastoral expansion was comparable everywhere. The status of 'British subject' was in fact as little protection for Aborigines in the south, west and north of Australia as it had been in the eastern colonies, and was in practice scarcely so much as a hollow show of legality.

In 1838 the occupation of Port Essington was carried out

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21 Rowley, *The Destruction of Aboriginal Society*, p.64.
22 P. M. C. Hasluck, *Black Australians: A Survey of Native Policy in Western Australia 1829–1897*. Melbourne, Melbourne University Press, 2nd edn, 1976, p.69.

without any attempt to negotiate with Aborigines over the taking of land, though in this case it was not the need for pastoral land but simply the desire for a British base which occasioned the occupation. Bannister, who had pointed in evidence to the 1836 inquiry to the need for prior agreements, instancing this forthcoming enterprise as one where once again that procedure was not being envisaged, might have felt himself vindicated when in 1972 the Larrakia people of the Darwin area demanded treaties and spoke of the resistance their ancestors had made in the past.

It was invariably questions not of law but of the possession of property, in particular of land, which were the central issue in what Rowley has called 'the hard ethic of the pioneer' which ruled the way in which Aborigines were treated. European attitudes to land and ideas about exclusive possession remain today at the root of the problems between Europeans and Aborigines. And though there were differences between the various Australian colonies — both in the manner of their establishment and in the apparent intentions of the British Government towards the Aborigines — even in South Australia where 'in no colony in the first decades was there so sincere and determined an attempt by authority to ensure that justice and law were established', policy failed on this irreducible block.[23] Under the British dispensation — a relationship between Aborigines and new arrivals in which the major factor was conflict over possession of land, and in which British common law provided for no rights whatever for the first occupants — no redress would be available for the dispossessed.

At all events, the Report of the Select Committee on Aborigines (British Settlements) issued in 1837 went little further than to recommend the setting aside of some reserves into which Aborigines were to be removed for their

23 Rowley, *The Destruction of Aboriginal Society*, p.80.

protection, and the appointment of Protectors to carry out a protective and educative function. Nevertheless, the evidence given to the Committee on the treatment of Australian Aborigines caused the Committee particular concern. They firmly asserted that Aborigines were British subjects (as Lord Bathurst and the early governors of New South Wales had not done), and placed the duty of protectorship also on governors themselves. Thus Governor Gipps, Bourke's successor, was enjoined by Lord Glenelg

> to regard them as Aliens with whom a war can exist, and against whom H.M.'s troops may exercise belligerent right, is to deny them that protection to which they derive the highest possible Claim from the Sovereignty which has been assumed over the whole of their ancient Possessions.

This reference to the use of His Majesty's troops probably reflected the evidence of Saxe Bannister on Darling's actions, and certainly reversed Lord Bathurst's directions of 1824.

Lord Glenelg also made it clear that

> if the Rights of the Aborigines as British subjects be fully acknowledged,it will follow that, when any of them comes to his death by the hands of the Queen's officers, or of persons under their Command, an Inquest should be held to ascertain the cause which led to the Death of the deceased.[24]

This referred in particular to actions by an exploring party led by Major Mitchell, the colonial Surveyor-General, in 1836. The party had attacked a number of Aborigines, killing four and wounding seven or more. The Legislative

24 *Historical Records of Australia.* XIX, Despatch No.535, 26 July 1837, pp.48–9.

Council had held an inquiry and concluded that Mitchell acted with indiscretion and against orders, but did not go further than a reprimand. Nor, for that matter, was any further action taken in the matter on a public level.

This further claim that Aborigines were British subjects allowed the British Government to remain silent on the question of treaties and negotiation over land. The claim was to be echoed more than a hundred years later, when Prime Minister McMahon replied to the request by representatives of the Larrakia people for treaties to be negotiated.

To summarize, the status of 'British subject' meant for Aborigines that during the whole of the process of occupation and dispossession, which continued far into the twentieth century, no negotiations over land or rights, no process of agreement or of cession, ever acknowledged that Aborigines had in fact any rights over their land or the conditions of their lives. The legal fiction that the country was peacefully settled, and the annexation of all land to the Crown, were thought to ensure legal title to the land for the Crown and for its British occupants.

As Glenelg had written to Governor Bourke, in the year before the 1837 Report was issued, the British Government could not recognize in Aborigines 'any right to alienate to private adventurers the Land of the Colony'. This dispatch, approving Bourke's immediate action to invalidate the supposed negotiation of a treaty between Batman (for the Port Phillip Association) and the Aborigines of that area in June 1835, did not mention the fact that the British Government had not, in any case, recognized in them any right to occupy or possess that land, or any right to compensation for its loss.[25]

As an instance intended to prove the rule that Aborigines,

25 *Historical Records of Australia.* xviii, Despatch No.142, 13 April 1836, p.379.

as British subjects, were not to be murdered with impunity, the notorious Myall Creek case of 1838 stood alone. This was Gipps' first attempt to establish the principle (and his last). A party of eleven convict servants led by a free 'settler' (who was never brought to trial) had murdered twenty-eight Aboriginal men, women and children on a frontier station in Kamilaroi territory in New South Wales. The case was perfectly clear, the evidence irrefutable, but in the first trial of the eleven men the jury refused to convict. In a later trial, seven of those accused were convicted; but appointed magistrates of the Crown — who were themselves squatters — both conducted the defence and counselled the defendants. The trial and subsequent hangings shocked the colony so deeply that it remained the sole example of such trials during the nineteenth century. It was common knowledge that the incident was only one of a series of such massacres in frontier areas, where Aborigines were defending their land and causing serious stock losses to squatters and stockowners; and it was strongly rumoured that similar happenings continued, though under cover of concerted silence both by stockowners and their employees and servants.

The reporting of the Myall Creek case provided an insight into the way in which Aborigines were now regarded. On 7 November 1838 the *Sydney Herald*, the organ of the stockowners, squatters and magistrates of the colony, was outraged by the claim that Aborigines were British subjects, and declared that they had no more right to the land they lived on than did 'the Emu or the Kangaroo'. With such views prevailing among the most influential of the colony's citizens, the fate of Aborigines was to continue to be determined by the demands of 'settlement' and the spread of pastoral occupation. The protectorates set up in the southern areas collapsed against this opposition, and the reserves set aside for Aborigines (naturally without title) were abandoned. In 1847 the situation in New South Wales

was quite beyond hope of control, and Gipps' attempts to confine settlement and to protect the Aborigines had clearly failed on the realities of the situation.

The old grazing licence system set up under Governor Bourke, which provided no tenure for squatters beyond the 'boundaries of location', was superseded by an Order in Council passed in Britain, under which the squatters were given fourteen-year tenure of their huge 'runs' with the right of pre-emption by purchase of part of them at the end of the lease term.

Thereafter Lord Grey, in a dispatch to Governor Fitzroy, Gipps' successor, laid down the principle that the Crown leases were not intended to deprive Aborigines of the right of hunting and gathering except where land was fenced in for the purpose of cultivation.[26] In a further attempt to convert Aborigines to the agricultural economy, he directed that reserves already made for the Aborigines should be vested in trustees for the purpose of cultivation, either by Aborigines themselves or for 'their advantage', and that other 'small tracts of land' should be established for this where none yet existed. Since this dispatch also failed to take into account the realities of the situation, those Aborigines who had survived disease and frontier warfare in areas now given over to pastoralism were in fact wholly in the hands of the pastoralists, and their presence was tolerated only so long as they provided cheap labour on the stations and did not commit depredations on the livestock which had displaced kangaroos on the pastures and were eating out the food plants on which Aborigines had depended.

The Crown Land Commissioners were usually the sole representatives of government and their districts were vast. As such, they were legally protectors of the Aborigines, with the assistance of a small band of Border Police assigned to

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26 Colonial Office 2/2/54, no.24.

each.[27] But when Gipps' term ended in 1847 and the Order in Council prevailed, the Act under which the Border Police were established lapsed, and Land Commissioners had no law enforcement officers except a few constabulary. If, in fact, the Commissioners had taken seriously the task of protecting the Aborigines of their districts, they would in any case have had little chance of doing so, but they were seldom likely to step in against the interests of the pastoralists and few took that duty seriously. One exception was the Land Commissioner for the Gwydir District, whose report in 1848 spoke of 'murders of the most revolting description' being committed on Aborigines in his district, especially on women and children. But no repetition of the Myall Creek trial followed this report.

In 1850 Lord Grey expressed his conviction that the lack of progress in protecting and civilizing the natives apart from 'the inherent difficulties of the subject', was perhaps due to over-haste in the attempts of his predecessors and of the Colonial Office in their instructions to governors, and to lack of recognition of the need to 'improve the natives' gradually and slowly. He concluded that the means to be adopted now should be directed, not to their improvement as a distinct race, but to their amalgamation as soon as possible with the settlers.[28]

This new statement of British policy, of course, laid its main emphasis not on control of the actions of the colonists, but on the intractability and intransigence of the Aborigines. In its effect, it left the process in the pattern later described by Stanner as one of 'meeting, sporadic violence, a general struggle, and the imposition of terms by the stronger'. The 'settlers' themselves were to remain in charge of all contact, as before.

27 'The Commissioners of Crown Lands, beyond the Boundaries of Location, shall act as Protectors of Aborigines.' Gipps to Glenelg, 27 April 1938. *Historical Records of Australia*. I, xix, pp.397–8.

28 Colonial Office 202/58, No.163, Grey to Fitzroy, 5 November 1850.

The separation of Queensland from New South Wales in 1859 marked a further entrenchment of the Mounted Native Police as the instruments of the spread of pastoralism, and of the ruthlessness of the struggle for land. Queensland on separation had a virtually empty Treasury but vast expanses of land occupied by many Aborigines. Its income depended on the filling of those spaces with livestock as soon as possible. Its first Land Acts provided for land to be tendered for in blocks of 6480 hectares each, with no limit to the number of blocks to applicants provided that they were stocked within a year of the acceptance of the tender to within a quarter of their estimated capacity. Naturally the invasion proceeded with great haste. It met very strong Aboriginal resistance which in many instances repelled the first arrivals or inflicted considerable damage on livestock, shepherds and even squatters themselves. The Mounted Native Police, taken over from the New South Wales administration (in so far as it was paid by a levy on the squatters' stock tax), now not merely acted as protection to the newly established stations but patrolled and 'dispersed' in country not yet taken up, clearing the way for the next move forward. The question of those 'inquests' which, under the formalities laid down earlier by Lord Glenelg, had to be carried out on Aborigines who met their death at the hands of officials, had earlier been solved by the appointment of all Mounted Native Police officers as magistrates who could hold 'on-the-spot' inquiries into their own actions. Since neither Aborigines themselves, nor the Aboriginal troopers, could legally give evidence, being unable to take the oath, the system was highly efficient in clearing the way for occupation with the minimum of trouble to government and of public unease. (Nevertheless, it was sometimes pointed out that Mounted Native Police officers might in theory be liable to charges of murder.[29])

29 L. E. Skinner, 'Pastoral Frontiers of the Queensland Colony' in *Settlement of the Colony of Queensland*. Brisbane, John Oxley Library, 1978.

The question of the acceptability of Aboriginal evidence in courts of law, which Bannister had urged to the Select Committee inquiry, was settled in theory at least when the colonial governors were given authority to pass legislation making Aborigines legally capable witnesses. In South Australia, Governor Grey acted on this in 1842. In other colonies the time taken to do so varied. In Queensland, for instance, an Oaths Amendment Act was not passed until 1884. But the state of the law was always less significant than the attitudes of the dominant race; and as Rowley remarked in the case of South Australia, 'By this time however [1846] the settlers far out were acting as though there were no laws: the more relentless they were, the less evidence could there be'.[30] This remark applies equally to all the colonies. The apparently increased protection of the law when Aboriginal evidence was at last able to be accepted made little difference to the situation in which whites killed Aborigines with impunity, while Aborigines suffered the heaviest retaliation for any attack on whites.

The question, on the other hand, of Aboriginal law in its relation to British law in cases of Aboriginal offences *inter se* was legally decided in 1836. The question was basically whether Aborigines were or were not to be regarded as having their own system of law and whether punishments inflicted under that system were legally acceptable under the dominant system.

This had further implications for the question whether Australia was to be regarded, as was the legal convention, as a 'settled' colony — a question which was important to the legal situation not only of Aborigines but of land titles in Australia. A people whose law and government could be recognized as real and effective had rights to their practice, and could therefore only be regarded as 'conquered', that is, the *terra nullius* principle could not be applied. The

30 Rowley, *The Destruction of Aboriginal Society*, p.80.

Supreme Court of New South Wales in 1836 held that the 'Aborigines of New South Wales are amenable to British Law in the Courts of this Colony for offences against the Public peace committed on each other'.[31] This view was upheld in all later cases. It not only resulted in the view that no law but the British common law could rule the actions of Aborigines, but confirmed the legality of the occupation as 'peaceful settlement'. Further, it virtually ruled out Bannister's recommendation to the Select Committee that the laws and customs of the Aborigines should be ascertained, translated and printed and should be respected by courts 'in proper cases'. In fact, it was not until 1971 that a court found that Aborigines had in fact a system of law (in the Gove case), though even then it was rejected as unacceptable because of incompatibility with British law.

A Privy Council ruling in 1883 in a matter not concerned with Aborigines, laid down that the colony of New South Wales was not acquired by conquest but was 'peacefully annexed to the British dominions'.[32] The ruling corroborated the early Supreme Court view on the Aborigines' lack of law and government; and thus provided a retrospective vindication of a *fait accompli*. For under any other view, all British titles to land were at stake.

No further cases were brought to test this view until the Gove case in which the Yirrkala people claimed ownership of their clan land in 1969. Its failure was further challenged in 1978–79, in a case brought by an Aboriginal, *Coe* v. *Commonwealth of Australia and Another*. This case was running concurrently with the struggle between the Aboriginal 'landowners' of the Uranium Province and the Commonwealth Government over the Ranger mining application. Its dismissal in April 1979 was a factor in the

31 Dowling to Gipps, 1842, *Historical Records of Australia*. I, p.656; Stanley to Gipps, 2 July 1842, ibid. xxii, p.133.
32 *Cooper* v. *Stuart*, 14 App. Cas. 286.

demand, in that month, of the National Aboriginal Conference for a treaty between the Commonwealth and Aborigines.

The statement of claim filed by Coe in the High Court of Australia sought 'declarations and relief on behalf of the Aboriginal people of Australia in respect of the occupation, settlement and continuing dealing in the lands comprising the Australian continent by the defendant governments' (the other defendant being the United Kingdom, which did not appear). The plaintiff sought to assert the sovereignty as a nation of the Aboriginal people, and to invoke Section 116 of the Commonwealth Constitution (which forbids the property of any citizen being taken without compensation). It is worth remarking that if in fact all Aborigines became British subjects on the annexation of the various Australian colonies — a claim which underpinned the Report of the Select Committee on Aborigines (British Settlements) of 1837 — their property rights should in fact have been recognized from the beginning; but even in the case of movable property such as nets or weapons, no case was ever brought against a 'settler' in the matter of robbery from an Aborigine, though the contents of museums alone testify to the likelihood of a great deal of illegal acquisition. As to land, of course, the annexation of all the colony's land to the Crown precluded from the beginning a case on land rights between Aborigines and individual 'settlers'.

The Coe case failed, the argument (with two justices dissenting) once again upholding the view that the annexation of the country and subsequent acts were 'acts of state whose validity cannot be challenged', and rejecting the view that Aborigines were capable of exercising sovereignty. It was, said the prevailing opinion 'fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest'. But, with regard to the claims to land and rights in lands 'if there are serious legal questions to be

decided . . . the sooner they are decided the better'.[33]

With the failure of the Coe case, and with the call of the National Aboriginal Conference for a treaty between the Commonwealth and Aborigines, an immediate role became obvious for the small group of people to whom Dr Coombs' documents had been circulated. If the National Aboriginal Conference's demand were ever to be taken seriously by any Commonwealth government, a campaign of re-education and information would be urgently necessary in all Australian electorates. Such was the state of mind among many Australians on the rights and needs of Aborigines, that no such appeal would get far without such a campaign.

33 *Coe v. Commonwealth of Australia and Another, 24 October 1978.* Australian Law Reports 1979, 24, pp. 118–37.