CHAPTER IX

LEGAL JUDGMENTS AND POLITICAL CHANGES

Both domestically and internationally, the most important of the many developments of 1982 was the decision of the High Court in the case *Koowarta* v. *Bjelke-Petersen.* Its significance lay not just in the implications for the power of the Commonwealth as against the states, which was how most commentators saw it, but in its affirmation of the power of the principles of international law under the Declaration of Human Rights to reach into the domain of domestic legislation. In its effect, it corroborated the Commonwealth's power under the 1967 referendum, not merely to implement the Racial Discrimination Act 1975 but to introduce new legislation based in those principles. We wrote, in *Aboriginal Treaty News* (no. 5), that the

> significance of the judgment is that again the court has recognized that the Commonwealth is a sovereign State with sovereign powers and responsibilities. It cannot shelter behind the difficulties inherent in a Federal-state relationship to shirk its responsibilities and obligations. That too often is what the

> Commonwealth has done. The case strengthens the hand of those who wish to see the Commonwealth act more resolutely in its Aboriginal affairs responsibilities, and those who wish to see treaty legislation given more teeth ... The High Court's decision suggests that [the Commonwealth's powers] are far wider than the Commonwealth has hitherto admitted.

But as 1983 opened, with the Premier once again victorious and the Archer River station put forever beyond the reach of the Winychanam people as a national park, little seemed to have come of the affirmation implicit in the case.

For Aboriginal leaders therefore, the international scene still seemed to offer more hope than the domestic one. The questions raised in April 1981 at the World Council of Indigenous Peoples Assembly, and the Draft International Covenant on the Rights of Indigenous Peoples discussed there (see Appendix) now occupied the forefront of their minds.

All these issues seemed to need testing. While the Aboriginal Treaty Committee itself was preparing to give evidence to the Senate Standing Committee on Constitutional and Legal Affairs inquiry into the feasibility of securing a compact or Makarrata, it was clear to us that the very wording of the terms of the inquiry presupposed that the kind of sovereignty envisaged in the Position Paper, and by the Federation of Land Councils, could not be admitted to exist as far as the government was concerned.

Nevertheless, when Aboriginal organizations approached us for help in determining the issue as it might apply if a case were to be brought under international law, we decided that we could and should organize a legal workshop to provide proper discussion in the light of recent overseas, as well as local, legal views. For the constitutional 'external affairs' power (soon to be further verified in the Franklin Dam case, as discussed in the next chapter) might be applied in the negotiation of a treaty with Aborigines if it could be proved that international concern made the

question of the treatment of Aborigines a virtual 'external affair'; while if the Commonwealth were to sign the final version of the Draft Covenant discussed at the Third Assembly of the WCIP, this might contain means of asserting at least a former sovereignty on the part of Aborigines and Torres Strait Islanders.

But our financial position made it difficult to consider actually organizing and paying for such a conference ourselves. We were not likely to be able to raise much money from those interested in the treaty idea. Not only the Federation's decided repudiation of a treaty within the foreseeable future, but a recent paper by Ms Pat O'Shane, had discouraged donors. This paper, given at the Labor Lawyers' Conference in July 1982, by a woman whose qualifications were impressive as lawyer and public servant as well as an Aboriginal, was strongly opposed to a treaty, seeing the ideas both of sovereignty and of a treaty as foreign to Aboriginal life and ways of thought. Instead, she advocated a simple change in the Constitution, without the implication of a treaty.[1]

On the Aboriginal side, little or nothing appeared to have been done towards the Makarrata programme. It seemed that with the production of the document listing the 'twenty-seven points' (see Appendix) both interest and funding on the government side had lapsed. That document, with its demand for the allocation of 5 per cent of the GNP to Aboriginal affairs, had taken even sympathizers by surprise. It had been easy, therefore, to drop the Makarrata project from national attention, so far as it had ever reached it.

Clearly also, many Aborigines were now suspicious of the whole idea. Some tended to regard it as a government trap to divert attention from claims for land rights, health,

1 P. O'Shane, 'Comments on Makarrata', Labor Lawyers' Conference, Canberra, 3–4 July 1982, draft quoted.

housing and education and to absorb the energies of Aborigines. White politicians, they thought, might get some kudos from it; for Aborigines, it might mean nothing. But ever since the appearance of the Aboriginal delegation in Geneva at the time of Noonkanbah, and the publicity given both to the Aboriginal situation and to the Commonwealth's reluctance to act against the states, Aboriginal leaders had known there were cards to be played. The choice of Mr Reginald Birch, Kimberley NAC representative, as WCIP Executive Member for Australia–South Pacific had endorsed this. But as he himself wrote, the division apparent between the NAC representatives at the Assembly and the unofficial forum of Aborigines held concurrently with the Assembly itself had confronted the NAC with serious questions.

> It was perhaps asking too much to accept total leadership in the National Aboriginal Conference. Aboriginal yes, but having its roots still in the Federal Government system handicapped the voice of freedom. Many chose the free forum of individual opinion, much more like the Aboriginal traditional system of communicating than the white man's way. Some say the National Aboriginal Conference accepted this new role within the World Council of Indigenous Peoples too soon, although I think not. Because there has to be a time when we must declare ourselves and accept our responsibilities together ...[2]

But the Makarrata issue was now a divisive one among Aborigines, since the NAC's acceptance of the Commonwealth Government's view that no 'treaty' could be concluded (though a 'compact' might) with Aborigines and that no 'Aboriginal nation' existed went against the refusal of the newly formed unofficial Federation of Aboriginal Land Councils to concede either point. The recent shifts in international law generated by the

2 *NAC Newsletter*, September 1983, p.10.

instruments of the United Nations under the Universal Declaration of Human Rights, and the new activism of indigenous peoples in North America and Canada, and elsewhere, seemed more than ever to need and justify a legal re-examination and discussion of where the changes might be leading. It was necessary to examine the possibilities of the situation for Aborigines and indeed for Torres Strait Islanders as well as others, and the implications of this new fluidity in international norms.

The NAC itself had pointed to the dangers of accepting the government's conditions. 'It appears', an article in an *NAC Bulletin* warned,

> that the Government believes it will be able to negotiate an agreement with the NAC in which the Aboriginal people give up their claim to being a separate nation, a sovereign race of people. In return the Government will allow Aboriginal people to administer the funds it makes available for Aboriginal affairs through something like the Development Commission.[3]

This bulletin was issued immediately after the return of the successful delegation from its appearance before the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, and after the seven-point list of demands then made by the NAC had been communicated to the government.

That seven-point list of 1980, in retrospect began to appear as a first turning point for the government's attitude towards the treaty proposal. Its first point, the demand that the government should initial an agreement to negotiate a treaty known as a Makarrata with the Aboriginal people '*based on recognition of the prior ownership of Australia* by the Aboriginal people' (my emphasis), appeared to go no further than had the unanimously passed Bonner motion in the Senate of five years before. But in the interval, the

3 *NAC Bulletin* 2, 25 September 1980.

implications of such an admission had evidently become clear to the government. For 'prior ownership' implied a change in ownership, for which, under both British law and the Australian Constitution, compensation was due. And compensation for the loss of a continent was not something that the Commonwealth Government could contemplate without nervous spasms. Nor could, or would, the states do so. No admission of either sovereignty or ownership could be made without commitment to compensation, if not to reparations.

It was not to be wondered at that Aborigines, who were learning so much from their new overseas presence and communications, were not willing to commit themselves to negotiations with a government which was clearly not taking their claims seriously, and would not even provide their only officially recognized body with funds and help to base their negotiations on expert advice.

Thus the Koowarta case, though for the Winychanam it led to no result as far as their land rights were concerned, should have signalled change in Commonwealth thinking and action. Yet during the rest of 1982, no further steps were taken in the direction of land rights for Aborigines in the states as far as the actions of the Commonwealth were concerned. Nor did the Federal Queensland Aboriginal and Torres Strait Islanders (Self-management) Bill prepared by Senator Susan Ryan, move off the table of the House of Representatives after its passage in the Senate.

The reasons behind the lack of action were seldom publicized. But as we wrote in *Aboriginal Treaty News* (no. 6):

> The great underlying issue of the Commonwealth Games and the Queensland Government's refusal to grant secure tenure of the reserves lay in the question of bauxite.
>
> The reserves in Cape York and around the Gulf, where many Aborigines and Islanders live, are the subject of intense interest from mining companies for the bauxite they have now been

proved to hold. Aurukun Associates (in which Shell has a two-thirds interest and Pechiney one-third) have been granted a lease over huge areas at Aurukun, overlapping the former Aboriginal reserve, transferred to shire status by the Queensland Government against weak Federal opposition some years ago. Alcan has another large lease nearby. Comalco of course holds the big Weipa lease now being worked. World fall in demand has made aluminium unprofitable; when it picks up this and other areas are intended to be worked. Says a *Financial Review* article, 'The entire Cape York Peninsula could be vital to Australia's future as a major world aluminium producer'.

Another factor in turning the State Government's eyes towards the northern reserves is tourism. Palm Island, Bamaga and Yarrabah are all attractive prey for tourist developers; and the Premier has already called tenders for a tourist development on Sweers Island in the Gulf of Carpentaria, part of the land claim of the Mornington Islanders. Islands in the Torres Strait, hitherto thought by Islanders to be theirs from immemorial time, but now understood by them to be in fact Queensland possessions, are also in the sights of developers.

The article in the *Financial Review* (1 October 1982) went on to point out that 'The last thing the State Government wants is Northern-Territory style land rights legislation where Aborigines have both a say over mining activities and a healthy share of royalties'.

Since the co-ordinated demands of Torres Strait Islanders and of the Aboriginal reserve council chairmen (with one exception) now were for freehold, inalienable tenure of the reserves and self-management, and many also wanted control over mining and other development on the reserves, the real motivation of the Premier's campaign against Aboriginal land rights — not merely in Queensland but anywhere else in Australia — and of his fanatical assertion that the land rights campaign was orchestrated by a Communist plot, became clear.

Further, the Commonwealth's own acquiescence in the 'deed of grant in trust' legislation, and Mr Fraser's refusal to

intervene, even with the result of the Koowarta case plainly in his favour if he did so, were also clearly attributable to the same facts. While Commonwealth and state governments shared a common interest in the advancement of the interests of mining, those of Aboriginal communities and Aboriginal futures, and even of international treaties on human rights, would not get far.

For all these reasons, as 1983 began, we on the Aboriginal Treaty Committee wondered with Aborigines and Torres Strait Islanders whether any treaty negotiations with the Commonwealth Government as it then was, or with Ministers and Prime Ministers from the coalition parties, would in fact be worth pursuing at all.

Yet the protests, the marches, and the whole bearing of the Aborigines and Torres Strait Islanders during the Commonwealth Games, had in fact won them something. Donations poured into the Brisbane organizations supporting Aborigines and into the Release Bail Fund organized by the Foundation for Aboriginal and Islander Research Action in Brisbane. The 440 arrests made during the marches (which were all non-violent) had perhaps done more to enrich the Queensland Treasury than to bring about justice or land rights, but once again there was a wave of sympathy for Aborigines among those who had watched them and listened to their voices in radio interviews and in television cover. It might, in some ways, have been a more spectacular version of the 1972 Tent Embassy protest. And it seemed once again, as in 1972, Aboriginal protest might provide an influence in a coming Federal election.

In fact, Mr Fraser (though certainly not on grounds connected with Aboriginal affairs) was to decide to go to the polls in March of 1983. The seventh issue of *Aboriginal Treaty News* summed up the situation of Aborigines as we then saw it:

> The Commonwealth Government has virtually abdicated its responsibility for Aboriginal rights and land rights ... The

> Prime Minister, Mr Fraser, condones and abets this betrayal of Aboriginal interests and Commonwealth responsibility.

We published, as a separate sheet, the platforms on Aboriginal affairs of the four main parties (Liberal, National, Labor and Democrats), with a summary of their answers to a question put by Dr Coombs: 'Would your Government be prepared to override a State or Northern Territory Government to ensure that land and human rights are provided for Aboriginal Australians?' In brief, the answers were: from Senator Chipp, leader of the Australian Democrats:

> Briefly yes. (a) I am a firm advocate of Aboriginal land rights, and (b) I am adamantly opposed to the package of amendments to the Land Rights law proposed by Mr Everingham and Mr Wilson.

From the Labor Party:

> If a State or Territory Government refuses to collaborate with the Commonwealth in giving effect to Aboriginal Land and Human Rights, a Labor Party Government will be prepared to exercise its constitutional power to override the State or Territory in these matters.
>
> The ALP proposes to take action on these lines in relation to land rights in Queensland promptly after taking office.

From the Liberal and National Parties, we got only a reply on their behalf made by the Minister for Aboriginal Affairs, Mr Ian Wilson, which, after the usual enumeration of the benefits provided for Aborigines by the Commonwealth Government (most of which originated with the Whitlam Government) opined that

> there is no occasion to intervene because nothing is being taken away from the Aboriginal people [in Queensland] . . . It should be remembered that although the 1967 referendum altered the

> Constitution to empower the Commonwealth Parliament to make laws with respect to Aboriginals in the States, this is a concurrent power. The States retain their powers with respect to land and mining and such vitally important matters for Aboriginals as housing, health, education and welfare. The success of such an approach has been shown in Queensland, but also in South Australia where the Pitjantjatjara people have been granted freehold title to an area of more than 100,000 square kilometres. You will be well aware of the situation in the Northern Territory where about 25 per cent of land is Aboriginal.

For some reason, no mention was made of the situation in Western Australia. As to the Northern Territory, as usual no mention was made of the fact that much of the 'Aboriginal land' was previously in any case Aboriginal reserve, and that only about 3 per cent of Aboriginal land in the Territory was actually productive pastoral land, or that the 'Everingham package' proposed to erode even the gains made in the 1976 land rights legislation, and to remove from Aborigines the chance of claiming land which under the Act was clearly open to claims.

We also published the official policy statements by the various parties on Aboriginal affairs. Dr Coombs wrote:

> The unwillingness of the Commonwealth Government to intervene to ensure the effectiveness of its own legislation and to protect the interests of its Aboriginal citizens leaves Aborigines at the mercy of a Government dedicated to the interests of mining and pastoral companies, many of them non-Australian. This unwillingness becomes positive hostility to Aboriginal rights in the attitude of the present Minister for Aboriginal Affairs, Ian Wilson. He has made it clear that he is exerting pressure on the [Land] Councils to acquiesce in the so-called 'package' of amendments.[4]

At the same time, a big land claim on the Nicholson River in

4 *Aboriginal Treaty News* 7, p. 2.

the Northern Territory, under the Aboriginal Land Rights (NT) Act 1976, was being held up by the Queensland Government. Most of the claimants of the land actually lived at Doomadgee, on the Queensland side of the border, where there were some facilities for the old people, women and children, while none had been provided in the Northern Territory area subject to the land claim. The eastern boundary of the claim was actually on the border, but the border line pegged in 1860 was faulty because of a surveying blunder and neither the NT nor the Queensland Government would agree to concede an adjustment of the line. Nor would Queensland allow the claim to be heard at Doomadgee, where many of the old people whose evidence had to be heard were living.

The Federal Government refused to intervene to settle the dispute. Stewart Harris wrote that such instances

> make it clear why Aboriginal people refuse to take seriously the possibility of any negotiations for a Treaty with the present Commonwealth Government ... with such a record, it could not be expected to accept a Treaty which would even protect existing land rights legislation, let alone pass new legislation and then enshrine the whole in a permanent document which would be unassailable. Hence the current Aboriginal scepticism about a Treaty, which the Aboriginal Treaty Committee completely shares.

But, as he also pointed out:

> There is no security, no comfort, no final victory for Aboriginal people in Acts of Parliament. These are no more than positions won, which have to be constantly defended as attempts are made to retake them; their defence is a waste of Aboriginal energy, which should be able to go forward and win new positions, without worrying about security in the rear.
>
> Without a Treaty or, as Dr Coombs has written, a similar instrument, Acts of Parliament do not offer sufficient strength to the Aboriginal position, whether on land rights, compensation, the protection of sacred sites or any other issue

> . . . so the need for a Treaty remains very strong, although the time for negotiating one is certainly not yet.[5]

This, then, was our own position during the lead-up to the election of March 1983.

We established an account with our bank, into which Aboriginal supporters could donate towards the Federal candidacies of Aborigines. Neville Bonner, Aboriginal Senator, had been dropped by his party from first to third position on the Queensland Liberal ticket, greatly reducing his chances of re-election, and was standing as an Independent. His party apparently thought that his support for Aboriginal causes, shown during the Commonwealth Games, was alienating Liberal voters. Certainly his campaign, which against the odds almost returned him to the Senate, did the Liberal Party in Queensland and elsewhere no good.

We included in this pre-election issue of the *News* a survey of the land rights and other rights situation in all the states.

In Western Australia, the Kimberley Land Council was appealing 'desperately' for funds for its expenses and projects, while 'since Noonkanbah, the Kimberley area has been further invaded by mining companies and our financial and staffing resources have been hard-pressed'.[6] With no land rights at all under the West Australian Government, the few Aboriginal leasehold properties purchased by the Aboriginal Development Commission on the Federal level and the Aboriginal Land Trust in Western Australia were seldom approved by the government and many applications by landless communities were delayed or blocked. The Aboriginal Treaty Support Group in Western Australia had prepared a draft Western Australia Land Rights Bill for debate, but the then Western Australia

5 *Aboriginal Treaty News* 7, p. 2.

6 *Kimberley Land Council Newsletter* 2, 2.

Government of the coalition parties was scarcely likely to view it with any favour.

In Tasmania, a Land Rights Bill had been prepared and was to have been tabled early in 1983, but the fall of the Tasmanian Labor Government over the issue of the Franklin Dam in 1982 had removed it from consideration. The new Liberal Government continued to take the stance that there were in fact no Aborigines in Tasmania and that therefore land and other rights were not a consideration. The fact that more than 3000 people of Aboriginal descent lived in that state was not acknowledged.

In Queensland, the passage of the legislation on 'deeds of grant in trust' had jeopardized the future of the Aboriginal reserves. It remained to be seen whether Commonwealth intervention might yet protect them from the intentions of miners and developers.

We of the Aboriginal Treaty Committee had been working for some time on capital, with a few further donations. During 1982 an appeal from Dr Coombs to our major individual supporters, with an account of the work we had done and what we proposed to do, had brought in a further generous flow of donations; we also had a valuable collection of manuscripts and books given by Australian writers, which we were holding until times were better for their sale. We had had to close down the Book Club project, which had made a small profit for us, when postage costs and conditions were altered in 1982. We had sold quite a large number of books and other publications of our own through our own fundraising subcommittee; and a kit of publications sent free to secondary schools throughout Australia had resulted in more sales of books as well as cards and state and Territory land rights information pamphlets. These pamphlets were completed early in 1983 when Mildred Kirk and the publications subcommittee produced information leaflets on the situation in Tasmania and Victoria. All these were sent to Aboriginal

organizations free, as they appeared, and sold at five cents (plus postage) to others. We felt legitimately proud of all our publications, including the issues of *Aboriginal Treaty News*, and of the oral interview tapes produced and edited by Peter Read. But rising costs, and a lull in interest in Aboriginal affairs after the Commonwealth Games were over, made it unlikely that we would be able to continue on our then basis much longer.

Nugget was still completing his work for the Central Land Council consultancy. Charles Rowley was to leave Australia on overseas holidays in April 1983. Stewart was working hard and found it difficult to take time out; our new editor for *Aboriginal Treaty News*, Chris Snow, was about to take a full-time job with the Aboriginal Development Commission which would involve much travel and working time; and it was difficult to find a replacement as editor. I, as secretary, was not likely to be able both to manage the secretarial work and write the book we decided should be part of our contribution, reviewing the Aboriginal situation and the years of the Committee's involvement. Appeals in Canberra for more help on the Committee's programmes had not met with success. We decided that the proposed seminar on international law in its relationship to Aborigines, and the book itself, would wind up as far as possible the projects we could undertake as a voluntary and unfunded organization.

The meeting we held in February 1983 envisaged that we might have to organize the seminar ourselves, a rather daunting and expensive prospect since we wanted to bring at least one Canadian lawyer with expertise in international law relating to indigenous peoples. This ruled out a seminar in August, when the United Nations' summer round of meetings on human rights was to be held and lawyers with those interests were likely to be away from their bases. In the event, Nugget's approach to the Australian National University's programme on Public Affairs allowed us to

avoid this commitment and the seminar was organized by the Australian National University. This freed our remaining funds except for a notional sum to be used to ensure that Aborigines and others with important contributions could attend the seminar. A subcommittee — Nugget, our legal adviser, Peter Bayne, and another young lawyer, Philippa Weekes, and Mrs Joan Crawcour, was to represent us in the planning of the seminar.

Moreover, during 1983, with Labor Governments installed federally and in all but two of the states, and many promises made on land rights and other matters, it was not likely that a voluntary lobby group — however much it might be needed — would attract much more financial support from private donors who believed that the problems of Aborigines were now to be solved on a higher level. Our remaining funds — about $30,000 in February — would be best used in maintaining the office, winding up our programmes and producing *Treaty News* issues, distributing the remaining copies of the various publications, and in issuing to our supporters an accounting, financial and otherwise, of what we had achieved and what we now saw as the prospects for relations between the Commonwealth and Aborigines.

In this, the deliberations of the Senate Standing Committee on Constitutional and Legal Affairs on 'the feasibility of a compact or Makarrata between the Commonwealth and Aboriginal people' would be important. Its report was to be issued during 1983, and, with the seminar on Aborigines and International Law, it seemed that this year would in a way complete the preliminary work towards acceptance of the idea of a treaty and allow us to feel that the confidence of our donors and supporters had been justified. Though obviously there would be a continuing and in fact increasing need for a lobby among non-Aboriginal Australians, as the idea moved towards reality, we did not feel we could supply it as the Aboriginal

Treaty Committee was then constituted.

In June 1982 the Committee had presented its evidence to the Senate Standing Committee during its hearing in Canberra. Peter Bayne, as our legal adviser, presented two papers — his summary 'The Makarrata: the Legal Options', which we had published as a pamphlet, a longer version ('The Makarrata: a Treaty with Black Australia', *Legal Service Bulletin*, October 1981), and another separate submission to the Senate Committee itself, which we had agreed to support as part of our own submission. Nugget, as chairman, presented a separate submission on our behalf, but as he was in Central Australia at the time of the hearing, he gave evidence directly in a later hearing.

We also provided the Standing Committee with all the papers given at the various seminars and conferences held on the question of a treaty, and other publications both by our own members and others relating to the question. They were by that time an impressive collection.[7]

The evidence we gave as a body may be found in the official Hansard Report of the hearings on Tuesday, 22 June 1982. With that given by Dr Coombs, it is of course far too massive to be included in this book. But a few excerpts — some already quoted in the Standing Committee's final report — can be included here.[8]

Professor Rowley, as vice-chairman, began by correcting the Senate Standing Committee's apparent assumption that the Aboriginal Treaty Committee was the begetter of the idea of a treaty with Aborigines.

> There have been many occasions on which Aborigines have sought to make a deal with governments. These do not appear

7 A list of Papers presented at Seminars and Conferences, etc., as submitted to Senate Standing Committee on Constitutional and Legal Affairs, June 1982, is in the Appendix.

8 Senate Standing Committee on Constitutional and Legal Affairs, Official Hansard Report of Evidence, uncorrected proof, 22 June 1982, p. 545 ff. to p. 623.

very prominently in our history, because they were not considered by historians as important enough. Moreover, the idea of a treaty even today owes more to Aboriginal pressures and Aboriginal expressions of ideas to people in this Committee and to many others, than it does to the Committee itself.

And he explained the purpose of the Aboriginal Treaty Committee:

Of course, our main purpose has been to get the idea of a treaty discussed, and to try and persuade people that this is an important issue — one of the most important issues, I think ... facing the Australian community ... Our job is to convince the majority that justice requires consent to some major Aboriginal demands, and a treaty objective seems a sensible way of initiating a series of agreements between two continuing communities ... It cannot be argued in justice that the Aborigines have not been a separate community, because the norm in law and administration has been that they should be treated as a separate people. You have only to think of the mass of special legislation dealing with Aboriginal affairs ... probably greater in mass than the legislation dealing with external affairs...

A treaty has, or can have, the status and purpose of a declaration of rights, perhaps, and I would agree that a Bill of Rights might — included in the Constitution, which has universal application — benefit Aboriginal people as well as probably the rest of us. But the background of prejudice against Aborigines does justify a treaty as a special declaration about a particular continuing injustice, and it is all the more necessary because our Constitution has no general Bill of Rights provisions...

There can be no healing of the breach between the two communities without admission by the whites of the facts of the past, and admission and acceptance of an inherited responsibility in that the contempt has gone side by side with deprivation...

But then, whatever happens there has to be sometime some end to this situation of two communities, not necessarily always at loggerheads with one another, but in profound

disagreement about matters of property particularly. Either the weaker side will be obliterated or there has to be an agreed basis for peace and sharing of what Australia offers to all ... Any such agreement would meet our concept of a treaty...

A treaty ... should be seen as one stage, in the process now going on of discussing amendments to the Constitution ... and the treaty probably should eventually take the form of some amendment to the Constitution ... Administratively we are in an unco-ordinated mess in Aboriginal affairs, partly because of differences between Commonwealth and State, and this chaotic mess is just the reverse of what we need to get some sort of logical process of continuing negotiation between Aborigines and other Australians ... the need is not for something which is quite impossible, a treaty pulled out of the air which settles all these problems, but for administrative structures which will continue to negotiate.

Peter Bayne's legal submission on methods examined various possibilities first mooted at the initial legal seminar in April 1981 in Canberra. His paper examined the various options for achieving a Makarrata and concluded that an amendment to the Constitution gave the best hope of achievability.

It was suggested that an amendment along the lines of Section 105A of the Constitution might be sought. This would authorize the Commonwealth to:

i) make an agreement with the Aboriginal people;
ii) specify in general terms the topics that might be included in the agreement;
iii) enable the Parliament to make laws to validate any such agreement made before the new Section commenced (in order to allow negotiations for a Makarrata to proceed), and to carry out an agreement made under the new Section;
iv) provide that the agreement be binding on the Commonwealth (and the States?) irrespective of any other provision in the Constitution.

The simple but great virtue of such an amendment would be that it would give the agreement constitutional status and be a

> source of legislation without the agreement or the legislation themselves needing approval by a referendum under Section 128. It would only be necessary to submit to referendum the amendment to enable an agreement to be made.[9]

(Section 105A, inserted into the Constitution in 1929, permitted the Commonwealth to enter into agreements with the states with respect to their public debts, and further that the Commonwealth might make laws to carry out such agreements. Section 128 of the Constitution provides a means for its amendment. A Bill to amend the Constitution must be approved by a majority of all the electors voting in a referendum, and by a majority of electors in at least four of the six states.)

Mr Bayne considered that it was to be expected that Queensland and Western Australian Governments

> would vigorously oppose such an amendment, but it is reasonable to suppose that a majority of electors in all states would approve it. The practical political point is that an amendment which does not specify the content of the agreement is less likely to meet opposition.

Other witnesses with legal training also supported the idea of a Section 105A-type amendment, giving broad power to the Commonwealth to enter into an agreement, or as the Senate Standing Committee termed it, a compact.[10]

The evidence as to what body should be the negotiator of an agreement on the part of Aborigines was not decisive. In its first appearance before the Senate Standing Committee, the NAC contended that, as the elected body authorized to advise the Minister, it was also the body to take on the job of

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9 *A Makarrata: the Legal options.* Aboriginal Treaty Committee, 1981.

10 *Two Hundred Years Later* . . . Report by the Senate Standing Committee on Constitutional and Legal Affairs on the feasibility of a compact, or 'Makarrata', between the Commonwealth and Aboriginal people, pp. 115–16.

concluding the Makarrata. The Aboriginal Legal Service, in evidence given by Mr Paul Coe, regarded the NAC as only one among the combined Aboriginal Legal Service and other Aboriginal organizations; but Mr Coe believed that the NAC should be enabled to start the process of negotiation between these bodies and the Commonwealth Government.[11]

In May of 1983 the NAC again appeared before the Standing Committee, this time with a different view from that of 1982, and indeed different membership. Mr Rob Riley, West Australian elected member, spoke for the Makarrata subcommittee — which, it emerged, had not been funded to pursue either research or consultation in the August 1982 budget and was virtually non-existent. He took these new circumstances into consideration in his evidence.[12]

The lack of finance for the Makarrata proposal had damaged the NAC's credibility with Aborigines. The NAC now believed that its role was an intermediary, rather than initiatory one, seeking information and referring it to the Aboriginal community, and taking Aboriginal reactions and attitudes back to the government itself. He suggested that the Federation of Aboriginal Land Councils, could 'use the NAC ... to reinforce the argument that they are putting forward'; and if the NAC was not in a position to do that 'then the Conference is established for no reason at all'. The NAC's views on a timetable had also been modified. The Makarrata was now, in the NAC's view, a long-term goal, and the NAC itself a facilitator for the views of other organizations on land rights and other issues.

Again the need for adequate information and research was made clear, as was the fact that Aborigines' disquiet

11 *Two Hundred Years Later*..., p. 136.

12 Senate Standing Committee on Constitutional and Legal Affairs, 'Legal Feasibility of Makarrata', Official Hansard Report of Evidence; uncorrected proof, p. 1143.

over the whole proposal came from the lack of information and knowledge, while the long gap during which the Makarrata subcommittee had been unable to move at all for lack of finance had left the issue hanging.

> Proper, meaningful consultation with all Aboriginal and Torres Strait Islander people is essential to the successful development of the Makarrata. That consultation process will need to be long and will need to be carried out in a number of different ways to best suit the area and the occasion. But ... the Conference ... has never been in that position to research adequately and provide information, and then on top of that give that information back to the Aboriginal community. The very fact that we do not have the resources to translate information into language, which is something that is very basic, should be of concern.

But the fourteen months spent up to July 1982 in consultations and Makarrata seminars had, the NAC now realized, allowed for too little information and involvement and no follow-up sessions had been carried out.

They had now, with the new subcommittee, returned to the recommendations of the April 1981 Position Paper, with the series of steps through the calling of a convention of representatives from land councils and other Aboriginal organizations, the engagement of consultants on constitutional and legal advice, new research staff and a principal legal officer for the NAC negotiations, staff for interviewing and surveys and staff to co-ordinate community meetings.

However, the lack of funding had undercut their plans. It was no wonder that the NAC itself admitted despair and felt it had been allotted an impossible task. The document it had submitted for funding for the Makarrata project for 1982–83 provided for additional costs and a research allocation of $1,861,300.[13] This was meagre enough for

13 Evidence, p. 1151, uncorrected proof.

what was planned — and a comparison of the funding of around $10 million granted by the Canadian Government for the Mackenzie Valley Pipeline inquiry made it seem farcical. But one could imagine the outcry from the states and the media if any such allocation were made.

The question of sovereignty, which had been claimed by the Federation of Aboriginal Land Councils as a prerequisite for any negotiations, was one on which the NAC had had no advice. Though it was fundamental to the whole question, said Mr Riley, 'We have never been able to get legal opinion as to how we can pursue the idea of sovereignty and use it as a basis of the argument in relation to the treaty or Makarrata'.

It was suggested by the NAC research officer that a moral basis might be used. If Aborigines were agreed to have had sovereignty in 1770, negotiations could take place on that basis, assuming such rights as would then have existed.[14] He also provided a useful proposal that Makarrata would in fact be achieved at the time of the agreement itself. While it need not mean that all claims by Aborigines had been settled,

> it would mean a situation in which the principles have been established and recognized by the Government, probably through the Constitution, and that commitment is made towards meeting Aboriginal needs. At the point where that is recognized, and when Aboriginal people have accepted those things ... we can say that your occupancy of this country is legitimate and therefore, while claims continue, it is on an understanding of principles and commitment.[15]

We ourselves had not discussed the question of sovereignty in our submissions, for much the same reasons as confronted the NAC. With the new international moves,

14 Evidence, L. Malezer, uncorrected proof, p. 1130.
15 ibid. p. 1147.

too, on the subject of indigenous peoples' rights, it might be thought that changes such as the NAC and the Federation of Land Councils were thinking of might come about over the next decade or two, clarifying the question in ways not yet available for consideration. With the Draft Convention discussed at the third Assembly of the WCIP in 1981 still pending and being further elaborated, it seemed best for Aborigines to wait, meanwhile, perhaps, deciding to reserve the whole sovereignty question in any compact or agreement or whatever the term might be.

Important events, however, were to come: the forthcoming conference on Aborigines and International Law now set for November 1983, the Report of the Senate Select Committee on Constitutional and Legal Affairs, and overseas, the settlement and negotiations between the Canadian Government and the indigenous peoples of Canada.