CHAPTER X

NATIONAL AND INTERNATIONAL MOVES

The High Court case, *Koowarta* v. *Bjelke-Petersen*, had confirmed the Commonwealth's powers over the states — which were not really in doubt. But in May 1983, the newly elected Labor Government took further action under its international obligations by passing the World Heritage Properties Conservation Act. This case sought an injunction against the building of the Franklin Dam by the Tasmanian Government, and was designed to test the Commonwealth's powers once more, under the World Heritage Convention.

One of the main arguments used to support the Commonwealth's case centred on the area's recently discovered caves. Fraser or Kutikina, and Deena Reena had been proved to contain artefacts and relics of the most southward ice age occupation not only by Aborigines of Australia, but anywhere in the world. Though conservation groups had long fought for the area's preservation for its 'wilderness' status, this discovery made a second and

equally important argument against its flooding. The Tasmanian Dams case relied not only on the World Heritage classification as an outstanding natural area, but on the Commonwealth's powers under Section 51 (xxvi) to make laws 'for people of any race for whom it is deemed necessary to make special laws'.

Ironically, the people concerned were Tasmanian Aborigines, who were not held by the Tasmanian Government to exist at all, in spite of the fact that the same government accepted Federal funding on their behalf. And in fact that government instructed its counsel to argue that there were no such people. The arrival of several of their representatives on the scene to demonstrate their own existence made headlines and convinced the hitherto ignorant of the fact.

The Tasmanian Aborigines were acknowledged by the Court to be indeed members of a 'race' to whom the section of the Constitution applied; the question was whether the law concerned was a 'special law' applying to them. The Tasmanian Government argued that since the cave sites were of sufficient universal value to be included as part of the 'cultural or natural heritage' under the Act, the law proposed by the Commonwealth to prevent the dam's construction was not a 'special' but a general law. Two of the Justices (Gibbs, C. J. and Wilson, J.) supported this view; the majority, however, rejected it.

> **Mason J. found that the cultural heritage of a people is so much a characteristic or property of the people to whom it belongs that it is inseparably connected with them... Brennan J. agreed and added that a law which does not discriminate on its face may nevertheless be valid if it has a particular significance to people of a race in its operation. Murphy J. found further that such a law may not only strengthen the common understandings that make Aboriginal people conscious of their identity but may promote tolerance of their**

> position among the general community. A law aimed at the preservation or uncovering of evidence about the history of the Aboriginal people was therefore a special law.[1]

The Dams case also verified once more the Commonwealth's power to make laws with respect to external affairs, the World Heritage Convention constituting such an 'external affair'. The Commonwealth's reluctance, during Fraser's Prime Ministership, to intervene against the states on behalf of Aborigines, on the ground that it might not have the power to do so — an argument few believed, was once again discredited. There could now be little doubt of that power.

As the editorial in the issue of *Aboriginal Law Bulletin* discussing the outcome of the case downrightly said:

> The Aboriginal people have cause to be angry at the way in which the Anglo-Australian legal system weaves its way around them with breathtaking hypocrisy and mind-boggling cynicism. On the one hand, federal and state constitutions together with the common law fail to recognize the existence of the country's original inhabitants, insisting that upon the arrival of the first British invaders the place was desert and uninhabited; on the other hand the High Court in the Tasmanian Dams Case asserted the power of the Commonwealth to make special laws for this nonexistent group. (p.3)

In the noisy rejoicing of conservationists over the result of the case, this particular implication of the High Court decision did not emerge clearly, though it had been a considerable factor in the decision itself, much augmenting the environmental issue. But it added greatly to the agitation and condemnation of the Court by the Premier of Queensland, whose first reaction was to denounce this

1 J. Terry, 'Damned Wilderness and Special Laws'. *Aboriginal Law Bulletin* 8, August 1983, p.2.

confirmation of the Commonwealth's power to override states' decisions in the matter of Aboriginal land and other rights.

The ALP's policy on Aboriginal Affairs had been announced just before the March 5 election by Senator Susan Ryan. Its programme for self-determination included the statement that the party would

> ensure that Aboriginal people in all States and Territories are granted land rights in line with the following principles:
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> - Land to be granted as inalienable freehold.
> - Mineral rights to remain vested in the Crown, however, Aboriginal people to have the right to refuse permission for mining on their land or to impose conditions under which mining may proceed. A refusal or conditions shall be set aside only by an Act of Parliament.
> - Royalties from mining on Aboriginal land to be paid into a Trust managed by and used for the benefit of Aboriginal people.

And the policy specifically referred to Queensland:

> Where there is a long history of hostility to land rights and discrimination against Aboriginal citizens (as in Queensland) then the Federal Government will be prepared to use its constitutional powers to achieve justice.

There were many other statements in the policy which the Queensland Government would have found offensive, but the 'land-rights' question was paramount. The Premier, and those industrial and other interests which were in opposition to the granting of land rights and of any form of control over mining, seemed unlikely to accept the majority decision of the Court without making every effort to evade or overturn it. The Premier's talk of constitutional reform and a referendum to reinstate the rights of state governments was an early warning.

The full implications of the High Court decision were still being considered when, on 13 September 1983, Senator Michael Tate, the new chairman of the Senate Standing Committee on Constitutional and Legal Affairs, tabled the Committee's report on its exercise of investigation into the feasibility 'whether by way of Constitutional amendment or other legal means, of securing a compact or "Makarrata" between the Commonwealth Government and Aboriginal Australians'.

Senator Tate felt it necessary to emphasize again that

> the Committee's terms of reference did not require it to come to a conclusion as to the desirability or usefulness of the Makarrata concept... Clearly such an agreement would only succeed if it were understood and supported throughout the whole Australian community.[2]

As far as the Aboriginal community was concerned, the Chairman said,

> there must be a comprehensive consultative process throughout Australia, an understanding and systematic consideration of the legal issues involved, and of the various legal options for implementation... clear accord as to the objectives which are sought to be procured by the agreement, the establishment of proper representational processes and of a timetable for legal implementation.

The crux of the question, for Aborigines, was still that point to which they had clung, and continued to cling — their assertion of sovereignty and their emphasis that they had never concluded any treaty or bargain over their land and remained the possessors of it. It was this point however, at which the Report refused concession:

2 Senate, Press Release, 13 September 1983.

> However regrettable and ill-founded the views which led to the application of the settled colony principle with its historical consequences for the Aboriginal people, the Committee has concluded that sovereignty does not now inhere in the Aboriginal people.[3]

The report itself went into considerable detail on the subject, referring to the lack of recognition of 'prior ownership of indigenes' in the case of Australian Aborigines as the result of 'cultural blindspots'

> under which it is assumed Captain Cook and the early administrators of the colonies laboured in their perception of the exercise of authority within tribes and clans and the nomadic lifestyle under which the Australian Aboriginal people lived.[4]

The Report continued:

> Some would say that sovereignty inhered in the Aboriginal people inhabiting Australia at the time of settlement by Europeans and that this sovereignty still subsists even though not recognized by the occupying power or its legal system. Certainly the question of sovereignty was one frequently raised by Aboriginal witnesses who appeared before us. (3.18)

The fact that Aborigines were now known to have been 'in sole and undisputed occupation of the continent for some forty thousand years before European discovery', and that they claimed to have been dispossessed 'without compensation or even judicial recognition of their prior habitation', was examined in the Report; and the relationship of Aborigines to the land, so far as it was understood, was contrasted with English legal principles of land tenure.

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3 Ibid.

4 *Two hundred years later*... 3.17. pp 36-37.

> For example, principles such as ownership and sale of land fundamental to English land law, are meaningless in the context of the traditional Aboriginal relationship with land... It is conceivable that, had the early administrators understood the Aborigines' relationship with their land as it is understood now, they may have come to the different conclusion that some form of sovereignty over the Australian continent did inhere in the Aboriginal people, and that therefore it would have been appropriate to negotiate with the Aboriginal people in relationship to their land ... (3.25)

The Report referred to the International Court of Justice's view on the Western Sahara Case, but quoted the Aboriginal Legal Service's evidence to the Committee to the effect that Aboriginal people would not find it possible to establish standing in the International Court:

> and even if they did, it is submitted that the rule of prescription in international law would operate whereby Australia had remained under the continuous and undisturbed sovereignty of Britain and her successors in title for so long a period that the position has become part of the established international order which could not be upset by a decision of the International Court. (3.27)

This evidence accepted a view which had been first put forward in 1979 in the first paper presented at a seminar on the question of a Treaty with Aborigines at the Australian National University. Though not to be quoted or attributed, this opinion was given by a member of the Department of Foreign Affairs.

But the Report continued:

> Nevertheless, in this context the Committee remains very much aware of the significance of the sovereignty issue to the proposal for a compact. Professor Nettheim advised the Committee that:
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> ... it is likely that the 1980s will see the emergence of some new human rights convention to provide a basis in

> international law for protecting the interests of indigenous minorities. There will be pressures on Australian Governments to ratify such a convention and to comply with its terms. (3.27)

And in spite of the Aboriginal Legal Service's submission, Aborigines themselves remained aware of this significance.

The Report's recommendations on the possible implementation of a 'compact' (a word which appeared to mean little) broadly followed our own and the paper put forward by Mr Bayne on our behalf, in considering that a constitutional amendment along the lines of Section 105A of the Constitution would provide the best mechanism to remove any possible doubt of the power of the Commonwealth to negotiate a 'compact'.[5] The provision to be inserted into the Constitution would

> confer a broad power on the Commonwealth to enter into a compact with representatives of the Aboriginal people. Such a provision would contain a non-exclusive list of those matters which would form an important part of the terms of the compact, expressing in broad language the types of subjects to be dealt with. (p. xii)

To this end, the Report recommended that the National Aboriginal Conference should

> take the opportunity offered it by the Government to seek re-establishment on an independent statutory basis and with an increase in membership, so as to allow for more effective representation of the Aboriginal people.

It further recommended that the increased funding granted to the NAC in the 1983–84 Budget should be 'maintained', and that the NAC

5 For list of recommendations see ibid. p. xii.

should be considered as the most suitable organization to co-ordinate Aboriginal opinion during the negotiation process and, once negotiations are completed, to conclude the compact on behalf of the Aboriginal people.

Further:

in order to ensure that the negotiation process towards a compact is conducted on a basis of understanding and acceptance of the concept by all Aboriginal communities, the Commonwealth should ensure that the widest range of Aboriginal community leadership is involved in that preliminary task.

This method of proceeding towards a possible agreement, even though only a few years before the very idea of an official report on the possibilities might have seemed radical, was not now likely to satisfy the demands of the situation. The National Aboriginal Conference, even though it maintained that nothing more than increased funding and membership was needed to make it fully representative, remained a controversial body with Aborigines themselves; they would not be likely to change their view that a government-evolved, government-funded body such as the NAC was unlikely to represent their interests when the gloves were off; and the Report refused to concede the 'sovereignty' question which was now so much of an issue for Aborigines and Torres Strait Islanders.

The Report conceded that

there is no doubt that at the time of the establishment of English law in Australia [the] Aboriginal relationship with the land was both underestimated and misunderstood, perhaps because it was beyond the comprehension of recognised English legal principles of land tenure. (3.25)

But the Report concluded that

as a legal proposition, sovereignty is not now vested in the Aboriginal people except insofar as they share in the common

> sovereignty of all peoples of the Commonwealth of Australia. In particular they are not a sovereign entity under our present law so that they can enter into a treaty with the Commonwealth. (3.46)

The concessions made in the Report went no further than to suggest that

> if it is recognized that sovereignty did inhere in the Aboriginal people in a way not comprehended by those who applied the *terra nullius* doctrine at the time of occupation and settlement, then certain consequences flow which are proper to be dealt with in a compact between the descendants of those Aboriginal peoples and other Australians. (3.46)

The Report in its effect did no more than to acknowledge that a 'compact' was possible, imply that it might be desirable, and recommend a method of achieving one. Its terms of reference allowed for little more.

For Aborigines, the Senate Select Committee's report and recommendations would perhaps be seen as a very small step towards recognition. It did not answer, or deal with, their contention that the lack of a treaty or of any form of concession to the occupying power over land means that they are — morally at least — still its possessors. Nor did it deal with their claim that for them Aboriginal law, not the common law, was primary, unchangeable and must be acknowledged in any form of treaty or compact. The Law Reform Commission which had for years been examining such questions and attempting to reconcile them was yet to report on the question of recognition of Aboriginal law.

At the end of October 1983, after the release of the Report in August, the secretariat of the National Aboriginal and Islander Legal Service (NAILS) met in Sydney. This body had been newly formed, and combined the various legal services of the states and the Northern Territory. The conference called on the Human Rights Commission to visit Australia and report on Australian administration of justice

to the Aboriginal community.

The NAILS Conference had many instances of significance to quote to any such UN delegation. The Alwyn Peter Case had struck such headlines as were seldom accorded to trials of Aborigines for manslaughter, and its remarkable outcome, in which the court condemned the administration of Queensland reserves and recommended immediate parole for Peter himself, cast much light on the situation of Aborigines in Queensland.[6] The tragic violence and disorientation endemic on the reserves, the hopelessness of landless, homeless and deprived people, were not to be found in Queensland alone; the Peter case was one of a much less publicized series of cases arising from the situation of Aborigines in Queensland and elsewhere.

The NAILS Conference 'expressed a total lack of confidence in the administration of the Federal Racial Discrimination Act and called for the enactment of an Aboriginal Bill of Rights'. Paul Coe quoted the figures for imprisonment of Aborigines once more: 'Aboriginal males made up more than 30 per cent of the prison population but only 1 per cent of the community. Females made up as much as 50 per cent of the prison population'. Coe maintained that the Federal Government was 'breaching Australia's obligation to stamp out racial discrimination by not creating effective enforcement measures' and reminded Australians that the Human Rights Commission had promised to respond to such requests.[7]

It was in the following month that the Australian National University conducted the two-day conference on Aborigines and International Law. We, as the final undertaking of the Aboriginal Treaty Committee, co-sponsored this conference, for which we had provided the original impetus. Our capital was rapidly running down,

6 *R. v. Peter*, 1982, transcripts and see also Wilson, *Black Death White Hands*.
7 'Aborigines want UN inquiry'. *Canberra Times*, 29 October 1983, p. 7.

but we allocated the bulk of it to provide airfares and accommodation for some of the Aboriginal and Torres Strait Islander representatives who could not otherwise have come to the Conference, and for lawyers working in the field of international law relating to enclave indigenous peoples.

This field was relatively new. Aborigines, however, had learned much from their experience on the turning-point visit by the unfunded NAC delegation to the Geneva Conference of the Human Rights Commission in 1980, and the thinking of younger Aboriginal leaders was — though few European Australians yet realized it — strongly influenced by developments to which that visit had introduced Aboriginal leaders.

The Human Rights Commission had until recent years taken little interest in the politically sensitive question of the plight of indigenous peoples trapped within a colonial situation. It had been largely concerned with the question of the decolonization of those countries, mainly in Africa and Asia, which were separate from their 'metropolitan' colonizers. Especially after World War II, the colonizing countries themselves, hard-hit by war, wished to get rid of their now expensive overseas colonies. Trust Territories such as New Guinea, taken over under international auspices by Australia after Germany's defeat in the World War I, were in any case scheduled for independence as soon as possible. The task of decolonization of overseas or 'blue-water' territories, however, had been largely completed by the end of the 1970s, and after the independence of Zimbabwe had been achieved, the UN was able to turn its attention to the increasing number of complaints by 'enclave' indigenous peoples of their treatment by the dominant societies under whose administration they had been left.

The UN had previously adopted the conventional theory that such peoples were destined, after a suitable period of

tutelage, to become assimilated by the dominant culture. The sole Convention which dealt with their status, the International Labour Organization's 1957 Convention 107, was framed in this 'assimilationist' era. It contained recommendations on land ownership, and some limited provisions regarding the recognition of indigenous and customary law, but laid on governments the responsibility 'for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries'. In recent decades, however, the realities of the situation — in which indigenous peoples in Canada, the Americas, Australia and New Zealand had obstinately remained unintegrated and were clearly gathering strength to resist the process of integration — had caused the International Labour Organization (ILO) to reconsider its position. In 1973, a conference held in Panama City reported to the UN that there should be adequate protection for the rights of indigenous peoples including the rights to own land, to the recognition of their own organizations, and for the use of their own languages in education, with the official language taught as a second language.[8]

Australia had not signed the Convention, for reasons connected with its stance on indigenous land rights and other rights. But the 1973 report more or less coincided with the setting up of the National Aboriginal Conference by the Australian Government, and with some steps taken in the Northern Territory towards the use of 'native languages' in education.

Since 1973, indigenous peoples such as the Alaskan and northern Canadian peoples, and the Aborigines of northern Australia, had been deeply and increasingly affected by the

8 D. Sanders, 'The Re-emergence of Indigenous Questions in International Law'. Draft of a paper submitted to the Working Group on Indigenous Peoples of the Human Rights Commission by the World Council of Indigenous Peoples, 10 April 1983, p. 25.

upsurge of mining and energy development in their previously little-touched lands. This ensured that the Human Rights Commission and its subgroups would also be increasingly involved in their problems. But for the most part, apathy, indifference and long-standing contempt on the part of their dominant administering societies had veiled the implications of this new international activity, and of the rising influence of indigenous activist movements on the Commission's thinking. Moreover, the balance of power in the UN, which had formerly ensured that the interests of countries such as Britain, the Soviet Bloc, the USA and Canada would prevail in its counsels, was altering. Newly independent countries, and their Third World sympathizers, were now gaining a preponderant voice in international forums.

In 1971 the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities instituted a study of the question of discrimination against 'indigenous minorities'. This was still continuing during 1983. But in 1981 the Sub-Commission had established a Working Group on Indigenous Populations. The clearly articulated demands of American and Canadian indigenous peoples for self-determination — in their own words, 'home rule and responsible government' — had become a powerful pressure. The setting up of the World Council of Indigenous Peoples — with its meeting in Canberra during April 1981, and the drafting of its proposed Covenant — provided, along with other organizations of indigenous peoples, a strong voice in this movement.

Those organizations which succeeded in gaining recognition by the Economic and Social Council of the UN, as representative of indigenous peoples — the WCIP itself, the International Indian Treaty Council, and the Indian Law Resource Centre of the USA — achieved non-governmental organization status in UN forums and limited rights of actual participation in UN conferences and

activities. (It was the WCIP's speaking rights which enabled the NAC's unofficial delegation, after Noonkanbah, to put its case before the world.) The NAC itself, as the only officially recognized and funded body representing Australian Aborigines, had non-governmental organization status. But its delegation to Geneva in 1980 had of course been unofficial and had certainly not been funded by the Federal Government. Even without official standing, however, such unofficial bodies and individuals may put in complaints and argue their cases before the Human Rights Commission.

The World Council of Churches' delegation's report on its visit to Australia had been widely distributed within UN membership, and in 1983 the Council reported that bodies such as the International Commission of Justice, Amnesty International and the Human Rights Commission itself had shown 'substantial interest' in it, and intended to 'take notice of the issues raised according to their own style and procedures'[9]. The World Council's statement, adopted in 1982, laid special emphasis on land rights especially in the case of the indigenous peoples of the Americas, Australia and New Zealand, as sufferers from 'a common history of colonial invasion and dispossession of their land'. The statement pointed, as factors in the situation of these peoples, to a 'growing concentration of economic power in capitalist society', and its effects in increasing 'co-operation among transnational corporations, financial institutions, and governments in affirming profit-making over people's rights to self-determination'.[10]

At the meeting of the Working Group on Indigenous Populations in Geneva in August 1983, Australian

9 UN Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Indigenous Populations, E.CN.4/Sub.2/AC.4/1983, especially pp. 5–6 and 23–4.

10 ibid. p. 6.

Aborigines were both officially and unofficially represented. The Federation of Aboriginal Land Councils, though unfunded and indeed unrecognized, made a submission through its representative, Marcia Langton. It argued that the Australian Government's reports to the Commission on Human Rights had been evasive and misleading over the treatment of Aborigines. In the Australian failure to sign ILO Convention 107 (which asserted indigenous land rights) and the optional protocols to the human rights conventions which Australia had ratified, the Federation argued that the influence of the states had been decisive.

The submission condemned the Australian Government's attitude to Aboriginal attempts to attain self-determination, and its refusal to support the Federation itself, as an Aboriginal organization. The government, said the Federation, was attempting to use the Federation's expertise and authority, especially on land claims, without according it recognition or funding, and was attempting to limit the speaking rights of indigenous representatives. The government was failing to intervene over the 'deed of grant' legislation in Queensland, in other states such as South Australia where the big Roxby Downs enterprise was elbowing aside the rights of Aborigines over land, and in the Kimberleys where the Ashton diamond venture had ejected Aborigines from their land. Also, in its reports to the Commission, the Australian Government continued to refer to Aborigines as a 'population', not a 'people', thus affirming the unity of the Australian population.[11]

The Working Group of 1983 decided on a five-year plan for the period 1984–88, to deal with the definition of 'indigenous peoples', their rights to land and other resources, to their own culture, traditions, language and

11 An edited text of the Federation's submission appears in *Aboriginal Treaty News* 9, October 1983, p.2.

way of life, to self-determination and other human rights. If the new Hawke Government were to fulfil its promises to Aborigines and Torres Strait Islanders before the deadline of 1988 and the bicentennial celebrations of that year, there would be much to be done. But the Federation's submission of 1983 did not indicate that this independent Aboriginal organization was satisfied with what was happening on the Federal level since the March elections which had brought Labor to power.

Indeed, however good the intentions of the new government might be, there was a heavy legacy of past and present injustices to be overcome. In the same month as the government had been elected, scathing criticisms had been made by a visiting Professor of Law at the University of Ottawa, Brad Morse.

In a paper delivered at the University of New South Wales that March, Morse pointed out sharply that Australia was alone in not recognizing Aboriginal rights, in common-law countries.

> I would suggest to you that the perception of aboriginal title and the broader category of aboriginal rights is very different indeed between Canada and Australia ... the Australian position as it now stands also does not reflect the law in New Zealand, Africa, the West Indies, or the USA. Further, I submit that Mr Justice Blackburn's interpretation of the prevailing law in these other jurisdictions can and should be challenged.[12]

Professor Morse asked perceptively, 'Will Australian courts and/or governments ever recognize the doctrine of aboriginal title? If it [*sic*] does, what will the impact be on Australian society and the legal system?'[13] He pointed to some, at least, of the possible impacts.

12 'Common roots but different evolutions: the development of Aboriginal Rights at Common Law in Australia, Canada and the USA'. Draft, 16 March 1983, p. 11.

13 ibid. p. 2.

> Accepting the existence of aboriginal title calls into question many myths about what Australia is today. It challenges the concept of a bicentennial based on the discovery of a new, vacant land in 1788. It challenges the fundamental assumptions upon which land ownership, the legal system and the law itself is based. It forces a reconsideration of Aboriginal stereotypes. Finally, it challenges the legitimacy of the Australian state and the wealth derived from land enjoyed by most Australians. It is not surprising, then, that courts and governments have shied away from addressing these issues in full.[14]

In another paper delivered in that month, Professor Morse was equally hard-hitting.

> I believe that the total denial of Aboriginal law as 'law' can only be explained on the basis of ignorance, racism, convenience and self-interest ... The assumptions of the judiciary were ... based on a total absence of information on Aboriginal law. They presumed the worst as it fitted the general image of Aborigines as sub-human. This was also the easiest approach as it permitted British domination to be complete while it facilitated the ruling policies of assimilation and extermination.[15]

It seemed likely, then, that the material to be presented at the November conference on Aborigines and International Law would raise spectres which even the Hawke Government would fear.

The situation in which it would be held was one of a new government already uneasy at the implications of its own promises on land rights, and under attack in UN forums on various counts. The context included a set of state and vested interests, gathering strength and feeding on innate racial prejudices and even on intra-Aboriginal rivalries; and a mining and pastoral industry determined to resist the

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14 *Ibid.* p. 15.

15 'Indigenous Peoples and the Law: Cross-cultural and Transnational Comparisons'. Draft of paper presented at a Faculty seminar at Monash University, 9 March 1983.

promised land rights legislation in general and its proposed veto powers on mining on Aboriginal land in particular. Against these interests stood the new upsurge of common cause among indigenous peoples worldwide, an international human-rights campaign in UN forums on their behalf with the possibility of developments of strong pressure on Australia; and an Australian legal and institutional situation whose resistance to change and challenge would certainly take long to overcome.