CHAPTER XII

WHERE DO WE GO FROM HERE?

It would seem appropriate in concluding this account of the campaign conducted by the Aboriginal Treaty Committee between November 1978 and December 1983 to review briefly the relationship between Aboriginal and European-Australians at the end of that campaign and the relevance of a possible treaty to the future of that relationship. Such a review may make possible some provisional judgments about the broad strategy appropriate for action directed to the achievement of a treaty.

The Committee members remain more than ever convinced that a treaty is the logical and indeed inevitable instrument to embody the rights and status of Aboriginal Australians within Australian society. This is primarily because only a treaty freely negotiated and accepted as an act of self-determination will satisfy Aboriginal demands for recognition as a people or group of peoples in their own right. Secondly, only a treaty binding on succeeding governments could give security to rights and privileges

gained by Aborigines and embodied in legislation or established practice. Furthermore only a treaty would give international standing to any agreements reached about such rights and be seen as an exercise of the self-determination required by the United Nations Charter and conventions and other instruments concluded in accordance with it as part of the United Nations programme for the decolonization of subject peoples.

However, this conviction is far from general among European-Australians nor indeed, for different reasons, among Aborigines. It is true however, that there has in recent years been a steady strengthening of the consciousness among Australians generally of the grave injustices done to Aborigines during the occupation of the continent since 1788 and a growing conviction that Aborigines must be accorded a just and respected place in Australian society. Evidence of this change exists in the near unanimous support for the referendum of 1967 which gave the Commonwealth Parliament constitutional power in relation to Aborigines; in the wide and socially diverse support given to the work of the Aboriginal Treaty Committee; in the involvement of all major Christian churches and denominations in campaigns for Aboriginal land rights and civil liberties, in the increasing number of leading newspapers and journals of opinion which give sympathetic attention to Aboriginal issues; and in the mounting flood of academic historical, legal and other research which lends authority to Aboriginal claims.

This change is, without doubt, significant and has been reflected in the policy statements of all the major political parties, although so far much less so in their legislative and executive actions.

Indeed it must be admitted that the change is not yet pervasive enough to establish the political will necessary to achieve a treaty. It remains true, as Professor Russel Barsh expressed it in his report on Indigenous Policy in Australia

and North America, that 'In the final analysis, nothing will change permanently for Aboriginal people in Australia until there is a change in European–Australians. Until then, there will only be changes in Governments and changes in Government policies.[1]

The failure to achieve the political will necessary to a treaty derives from a variety of causes. First, the issue does not seem to many to be one of urgency and they remain indifferent to it. This indifference reflects partly ignorance of the facts and partly an unwillingness to accept changes which to some degree imply an acknowledgment of social guilt and which may involve some sacrifice of existing privileges or opportunities. Such unwillingness is, of course, encouraged and stimulated by commercial interests who see any acknowledgment of Aboriginal rights or of Aboriginal power to control the activities of enterprises on Aboriginal land as a threat to their actual or potential profits. Thus mining and pastoral companies have been conducting an expensive campaign to prevent such acknowledgment — a campaign which appeals to racist prejudice and to the selfishness inherent in us all. Unfortunately most Australians grew up in a context of contemptuous indifference to Aboriginal people. It is no easy task for them to grow out of that attitude.

This weakness of political will and the existence of powerful and organized opposition underlies the tardiness of even sympathetic governments to pursue the idea of a treaty or even to make effective the proposals embodied in their policy statements. This was made clear by the Commonwealth Minister for Aboriginal Affairs, Clyde Holding, in reply to a question put to him at the Conference on International Law and Aborigines, which was reported in the following words: 'We would like to recognize all your

1 p.12 of draft.

rights but our white constituents won't let us'.[2]

It was, too, recognition of this weakness which led the Senate Committee on Legal and Constitutional Matters, in reporting on the feasibility of a treaty or 'Makarrata' between the Commonwealth and the Aboriginal people while, by implication, favouring some form of 'compact', to conclude:

> The attitudes of non-Aboriginal Australians towards Aboriginal and Torres Strait Island people and vice versa lie at the heart of the situation and until they can be properly oriented a compact no matter what its form and content will at best only create superficial improvement.[3]

The Committee accordingly recommended 'a continuing and extended education programme' in the non-Aboriginal community.

It would be unrealistic to expect a government to put its political survival at risk by recognizing immediately all Aboriginal rights. There are, however, powerful reasons why it should use its political, legislative and administrative powers to bring about those changes in European-Australians which would make it possible for it to give effect to the programmes which justice for Aborigines demands and which its policy statements advocate. Certainly a 'continuing and extended education programme' in the non-Aboriginal community would form a vital component in the exercise of its powers.

The experience of the Aboriginal Treaty Committee demonstrates that such a programme would be more effectively carried out by non-governmental agencies. University and CAE adult education units could provide material, as well as support for local voluntary organizations. A well endowed programme conducted by

2 ibid, p.13.

3 *Two Hundred Years Later*... p.162, 10.8.

such agencies could over a few years achieve significant results.

Aboriginal attitudes to the idea of a treaty have been varied but far from unanimous or enthusiastic. The prevailing tone has been one of suspicion. A treaty is a 'white' man's concept, little understood by Aborigines and lacking a base in Aboriginal experience. Even the attempt to find a parallel by the use of the term 'Makarrata' seems to have been mistaken. A thoughtful Aboriginal has pointed out that a Makarrata, among the communities from whose language the word was derived, referred not to the content of an agreement after the ending of a dispute but to a joint ceremony to celebrate the ending of conflict: it would therefore be more appropriately applied to a joint decision to negotiate a treaty than to the treaty itself.

The unfamiliarity of the concept combined with past experience of European-Australian proposals to establish instruments for 'consultation' with Aborigines strengthened the Aboriginal tendency to look with suspicion on the treaty proposal as possibly another trap for the unwary. This attitude was intensified as Aboriginal knowledge increased of treaties concluded with indigenous people in the international context. Indeed the Aboriginal Treaty Committee itself as one of its earliest acts had drawn Aboriginal attention to that experience in the USA, Canada and New Zealand. Aboriginal contact with the World Congress of Indigenous Peoples strengthened their doubts and helped produce a conviction that any treaty or other compact should be negotiated only in a context which took full account of such international experience and the developing strength of indigenous peoples in the international political context.

Furthermore, some Aboriginal leaders felt that however important a treaty might be in the long run, effort devoted to it was for the present a distraction from more immediate tasks — the achievement of land rights, civil liberties,

compensation and other urgent needs. Aboriginal political organizations, while growing in strength and experience, were too short of expertise and experienced leadership to dissipate effort by concentration on an issue which at best would take many years of work if the outcome was to be worth while.

Despite these reservations, the idea of a treaty continued to develop in Aboriginal consciousness but increasingly it was seen as a charter which finally would set a seal upon a series of agreements about particular issues negotiated over a period of time, protect them from repudiation and provide a mechanism by which those agreements would be subject to mutual review. It could also perhaps be the means by which the Aborigines' right to self-determination could be exercised in the light of the new relationships which the continuing negotiations had developed.

Apart from the weakness of European-Australian political will to a genuine reconciliation with Aborigines and the suspicions and doubts of Aborigines themselves, the search for common ground about the possible content of a treaty or indeed any form of compact has been inhibited by organizational weaknesses in both Aboriginal and European-Australian political institutions which obscure the location of responsibility for that search, and a lack of consensus between the parties on some basic issues of principle.

In the European-Australian context the basic weakness derives from uncertainty about the division of responsibility for Aboriginal Affairs between the Commonwealth and the states. Those who anticipated that the referendum of 1967 would have placed this responsibility clearly with the Commonwealth and that early legislative action under it would have led to the states vacating this legislative field and the Commonwealth accepting the related administrative and executive responsibilities, have been disappointed. In practice, until Clyde Holding introduced

the Sacred Sites protection legislation in June 1984, the only Commonwealth attempts to legislate on a national basis in the field were the anti-discrimination law and that relating to the control of Queensland reserves initiated by the Whitlam Government which were either not proclaimed or proved ineffective. In neither instance was the legislation of a kind which required the states to vacate the field and indeed they and the Sacred Sites legislation seemed to have been designed to avoid this outcome. They assumed the continuance of state legislation and institutions concerned with its administration and were apparently seen as providing a reserve and supplementary support for it.

The decision to avoid the states vacating the legislative field seems to have been deliberate and probably originally reflected the doubts expressed by some lawyers that, despite the referendum, Commonwealth powers were possibly inadequate, but also the desire to avoid accepting a heavy and difficult administrative burden and the prospect of prolonged and bitter dispute with at least some of the states. Recent decisions by the High Court have put an end to doubts about the effectiveness of Commonwealth powers[4] but the other concerns persist. It seems likely that for the present the Commonwealth will seek to limit its direct legislative action to measures which will be designed to set standards for state laws and policies and to provide supplements to them. It will be an interesting test of the practicability of this approach if it is applied in the proposed national Aboriginal land rights legislation foreshadowed in 1983 by Minister Holding.

Since many of the issues of primary concern to Aborigines are the constitutional responsibility of the states, including many aspects of health, education, law

4 For example, *Koowarta* v. *Bjelke-Petersen and Others* (1982), 39 ALR 417, and *Commonwealth* v. *Tasmania* (the Tasmanian Dams case) (1983), 45 ALR 737.

enforcement, social security and welfare, this uncertainty in the Commonwealth's willingness to exercise its constitutional powers is particularly important. In the past it has seemed logical that so far as special programmes are required in these fields to meet the needs of Aborigines they should be designed and administered by the state authority concerned with similar programmes for the rest of the community. This (with few exceptions) has continued to be the practice despite the referendum of 1967. In some instances the Commonwealth has sought to influence or prescribe policies for those state authorities but, in relation to Aborigines, with little success.

The most striking development in this field has been the increasing tendency of Aboriginal communities (sometimes with Commonwealth and occasionally with state financial support— to establish their own community-controlled organizations to design and carry out programmes for themselves. Thus there now exists a network of Aboriginal health, legal aid, and to a less comprehensive degree, child-care and welfare services controlled and administered by Aboriginal communities themselves. It is a network which daily becomes more comprehensive, more effective, more trusted by Aborigines and respected by the professional practitioners involved. Furthermore, officially recognized and unofficial Aboriginal land councils exercise considerable political power and in the Northern Territory and some states carry out executive functions which Parliamentary legislation confers upon them.

There can be no doubt about the value of this shift of responsibility. Experience of welfare programmes for indigenous and other disadvantaged people in many societies demonstrates that those designed and administered *for* such people, however scientifically and devotedly this has been done, have a disastrously bad record of performance. On the other hand programmes designed and carried out *by* those whom they are intended to benefit

perform much better and show a steady improvement with experience. The importance of Aboriginal community-controlled land councils is daily demonstrated in their presentation of claims for Aboriginal land and in the conduct of negotiations with governments and mining and other commercial enterprises.

It would be logical to act to strengthen and expand this shift of responsibility. This could readily be done if the Commonwealth were to give formal recognition to all Aboriginal land councils and to announce that any Aboriginal community wishing to establish its own health, legal aid, or welfare organization and willing to accept responsibility for the relevant programmes could negotiate an agreement with the Commonwealth (and with the state if it were willing) to enable it to do so. This agreement would need to provide that the community be financed on a basis adequate to enable it to provide services comparable with those available for the community generally by the state or Commonwealth authority at present responsible. Such an agreement has recently been concluded between the Pitjantjatjara Council and the Commonwealth and the South Australian Governments in respect of the Pitjantjatjara Health Service which will take over the administration of health services and programmes in the Pitjantjatjara region of South Australia.

The scope of this kind of devolution of responsibility to Aboriginal communities need not stop at health, legal aid and welfare. One field of social action of great concern to Aborigines is education where many, while desiring access to educational opportunity for their children, fear the 'assimilationist' emphasis of most state and private schools. In some areas Aborigines have acted to establish schools under the control of their communities and these schools are actively designing curricula and pedagogic methods adapted to Aboriginal needs and have for content drawn also on the wealth of Aboriginal culture. Other

communities are seeking formal recognition for their own traditional law and its mechanism of enforcement. Study by the Commonwealth Law Reform Commission suggests that a community justice mechanism based on Aboriginal traditional practice could be devised which would go far to satisfy this demand and at least reduce the incredible imprisonment ratio among Aborigines in our society.

An important component in any strategy leading to Aboriginal self-determination would therefore be a consciously developed programme to transfer responsibility, where Aboriginal communities request it, to local community-controlled organizations for health, education, child-care, welfare, legal aid and law enforcement. Aboriginal models for such organizations exist; they can be established and given authority within the framework of existing Australian law; they have a better record of performance than existing alternatives and they are based on a form of democracy more akin to Aboriginal tradition than 'representative government' and its bureaucracy. Above all the establishment of the organizations would be an Aboriginal initiative.

It is possible therefore to conceive the development and elaboration of these community-controlled institutions so that within a particular area they collectively would constitute something approximating to the 'new level of government within the Federation' being negotiated by the Canadian Government with the Indian peoples. Such a development would have the advantage that it could occur not only within Aboriginal land but also in areas where the Aboriginal population lives within a larger, predominantly European-Australian population. Indeed it was within such areas and for such Aboriginal populations (for example, in Redfern, an inner city suburb of Sydney, New South Wales) that some of the first such community-controlled services emerged.

By contrast with the success of Aboriginal development

of community-controlled organizations for the provision of services, attempts by Commonwealth and state governments to develop political institutions based upon European-Australian forms of 'representative government' have been markedly less successful. 'Representative' Aborigines, whether nominated by governments or initially elected by Aborigines, have quickly succumbed to the temptations offered by 'white' patronage or have been suspected of having been so. The more remote the context in which these representatives have been expected to function from the communities from which they have been drawn, the more real the risk of their being ineffective and the greater the risk of their being corrupted. These problems are well illustrated at the national level by the experience of the NACC and the NAC, both of which failed to satisfy Aboriginal hopes of an effective Aboriginal voice in Canberra and the state capitals and to provide Commonwealth and state governments with plausible evidence that Aborigines were being effectively consulted.

In part these failures reflect the fact that European-Australian politicians, officials and political planners continue to think within the framework of their own institutions and without awareness of and respect for Aboriginal social practices and in particular for its decision-making processes. As a result there has been Aboriginal resistance and hostility to government measures, even to those which on the face of it were designed to benefit Aborigines. In other instances where consultation and negotiations have been conducted in accordance with European-Australian procedures, it has emerged that Aborigines have not understood agreements apparently entered into on their behalf by 'representatives', have not felt themselves to have been adequately involved in the negotiations and consequently have not felt bound by or committed to them. Few of the relevant documents have been translated into even the major Aboriginal languages.

The aspects of Aboriginal society most frequently ignored are that Aboriginal society was, prior to occupation and to a significant degree still is, composed of separate and distinctive groups each with its common language, ritual and other cultural affiliations, accustomed to conducting its own affairs normally without reference to other groups. These groups from time to time may come together for common purposes and usually have recognized procedures for reaching agreement but these occasions were unusual and even within them the autonomy of the separate groups was respected. Decisions within the group, where they were not clearly provided for by established tradition or where they did not fall within the responsibility of certain individuals by virtue of that tradition, were and generally are still made by consensus, often after prolonged discussion within family, clan and other social contexts.

Where, under European-Australian influence, representative bodies have been established for the conduct of some community affairs, difficulties often have arisen where such bodies influenced by European-Australian practice do not follow this decision-making process. Members of the community have not then felt bound by the decisions the representatives purport to have made. Such difficulties are most frequent and less easy to resolve when the representative bodies are drawn from a number of separate communities: there is no tradition of 'representative government' in Aboriginal society. 'Agreements' arising from negotiations conducted by Aboriginal representatives with governments and their agencies or with mining or similar commercial enterprises are especially likely to encounter these difficulties since representatives chosen to conduct negotiations would have no authority to commit those whom they represent without reference back to them.

These considerations suggest that any Aboriginal decision-making organization to be effective must, at its

lowest level, consist of community meetings at which all can attend and express their views; decisions even at this level should not be made until time has been allowed for discussion in smaller groups and for the emergence of a consensus. Where representatives are to be chosen to take part in negotiations with representatives of other organizations they should act as delegates in accordance with instructions and be accountable continuously to their organizations or community and not simply at periodical elections. Reporting back and accountability by representatives to their communities are especially important where negotiations with government or commerical agencies are involved.

These conclusions should be taken into account in the planning of discussions relating to possible legislation, agreements and especially so in relation to longer term issues such as the content of a treaty. Furthermore, because of the great risk that Aborigines will lack knowledge necessary for decision in such issues there should always be provision for the review of the terms of any agreement or compact with appropriate independent monitoring.

It is important also that Aborigines should not feel that their role is purely one of 'reacting' to proposals coming from the non-Aboriginal participants. This frequently leaves Aborigines with the conviction that they do not have a real range of choice. It is for this reason that negotiations should commence with an exchange of proposals and that ample time should be provided for progressive revisions before agreements are concluded. Furthermore where any treaty or compact is proposed it should be clear that Aborigines should be able to decide whether and at what point they would exercise their right of self-determination.

The Commonwealth Government, the NAC and Aboriginal communities now (June 1985) have for their consideration proposals designed to overcome some of these deficiencies. A structure of Aboriginal representative

organizations has been proposed which establishes on a regional basis a series of Aboriginal assemblies conforming closely with Aboriginal traditional practice and to which Aboriginal communities and service organizations (for example, land councils and those for health, legal aid, and welfare) send delegates; which makes those assemblies responsible for the choice of the members of a national representative organization; which makes those members accountable to their respective assemblies; and establishes a national organization composed of such regionally chosen members and representatives of the various national federations of Aboriginal service organizations.

This structure, at the time of this review, still has to be considered by the government and Aborigines. While any such proposals can at best hope to provide progress towards the emergence of Aborigines' own political institutions, they are worthy of consideration for the achievement of that progress.

Until trial and error have made possible greater progress than has so far been achieved, it would probably be unwise for Aborigines to agree to exercise their rights of self-determination on any structure of political institutions at present conceivable within the framework of the Australian federation. It is, however, conceivable that certain groups of communities with a stronger tradition of separation even from Aborigines generally may provide an opportunity for experiment in intermediate forms of self-government. The Torres Strait Island communities are a case in point. Apart from their differences in ethnic origins they have a record of continuity in the conduct of their own domestic affairs which has been maintained down to the present during which time the influence of the government of Queensland has been marginal. These Torres Strait communities have a powerful sentiment of separateness which warrants special consideration. Their rights to this may shortly be tested in the High Court when in the Mabo Case the Murray

Islanders will question the validity of the Queensland Government's claim to sovereignty and title to their lands.

There does not seem any real constitutional difficulty, at least in respect of groups of communities geographically marginal or external to the Australian mainland, in their being offered a status as a Commonwealth territory or territories with a form of self-government, the extent of which could be the subject of negotiation and implemented by legislation in the Commonwealth Parliament. There is already a variety of such Commonwealth Territories with various degrees of autonomy.

It is indeed conceivable that, as Aborigines evolve governmental forms appropriate to their needs, in areas composed of Aboriginal-owned land (such as eastern Arnhem Land), it may be appropriate for such status as a Commonwealth territory to be included within the options about which Aboriginal self-determination might be exercised. The areas concerned could range from those appropriate to local governments (for example, Queensland reserves, Aurukun, Mornington Island) to larger regional territories like Arnhem Land or the Pitjantjatjara lands of central Australia.

The prospect of early fruitful negotiations towards a mutually acceptable treaty or compact between the Commonwealth and Aborigines faces a major obstacle in the differing attitudes of the parties towards some fundamental issues critical to the whole concept of such a compact as well as to its content. The most basic of these differences relates to the issue of sovereignty: an issue both difficult and emotionally charged. The attitude of the Commonwealth to the issue is clear. In its view sovereignty is a fact — it is the capacity to exercise effective power and it clearly lies with the governments of Australia and is exercised in accordance with the Constitution. It would concede that the history of Australian settlement and the condition of Aborigines require special action to achieve

justice for Aborigines but they would assert that it is action which must be taken by those governments as an exercise of their sovereignty.

In its most absolute form the position of Aborigines is equally clear. It cannot be questioned that prior to 1788 sovereignty was vested in the various Aboriginal groups living within the continent and was exercised effectively in accordance with Aboriginal tradition. At no time have Aborigines ceded or acquiesced in the abrogation of that sovereignty and they have continued to resist the exercise of power by the invaders. Morally and in international law, Aborigines argue that therefore sovereignty still is vested in Aborigines. Consequently the present position is unlawful and negotiations which do not start from that foundation are unacceptable.

To most European-Australians it seems simply unrealistic for Aborigines to assert this position. However, their insistence on doing so reflects the conviction that the strength of their case lies in its moral foundation and that the mounting pressure of international opinion and political action by indigenous people around the world will in due course compel recognition of it. They would approve Margaret Thatcher's dictum during the Falklands War that 'Sovereignty is ours, it has not been changed by invasion, and sovereignty must never be changed by invasion'.[5]

Some Aborigines would take a less absolute view, but even they fear that to concede ground on the sovereignty issue would weaken the influence of their moral case and could indeed be interpreted as an abandonment of their claim to rights which derive from prior occupancy over millennia. At the same time they would probably agree with an Aboriginal leader, Paul Coe, who at the Australian National University Conference in November 1984 said in

5 BBC interview, London, 19 May 1982.

effect that the sovereignty issue did not need to be resolved to enable the government and Aborigines to negotiate to divide power between them.

This result could probably be achieved if in setting up negotiations the parties stated their respective positions on sovereignty as 'reserved from negotiation' but agreed to proceed to seek agreement on other issues. Provided it was also agreed that at the appropriate time Aborigines would have the opportunity to exercise their right of self-determination in relation to the outcome of negotiations on those issues, it would be possible to proceed without either party having to concede the issue of principle in relation to sovereignty.

However, the prospect of success in such negotiations would depend very largely on the context in which they are conducted—the legal, social and political climate, domestic and international, at the time. It is hard to avoid the conclusion that in present circumstances, particularly in the Australian scene, there are barriers which stand in the way of achieving a voluntary agreement about the content of a treaty or compact which would provide a just constitutional-style basis for the rights and status of Aborigines in the life of Australia even if the sovereignty issue were reserved by both parties. At the same time there are factors working to reduce the importance of those barriers which could be made more effective by conscious effort.

One of the most serious barriers is in the currently accepted judicial opinions on the status in international law of the original occupation of the Australian continent.

Chapter XI reveals the gap which exists between justicial opinion in Australia and the view of the rights of Aborigines and other indigenous peoples as they are embodied in the Charter of the United Nations, the various international conventions which bear upon them and the recent advisory opinions of the international Court of Justice. The Coe case

and the Blackburn judgment enshrine the validity of the *terra nullius* doctrine, the view that the legality of the occupation of Australia must be judged by law as it was in 1788 and that even if it were illegal it has been validated by international acquiescence over a sufficient period of time. This judicial view is unlikely to be questioned domestically while the Australian Government continues to adhere and judges accept that Australians are 'one people'. Between them these attitudes close off avenues of hope for Aborigines.

Before it will be possible to use access to the Australian courts as a means to achieve self-determination for Aboriginal Australians, it will be necessary to undermine the effectiveness of these presently prevailing judicial opinions on these matters.

The Coe case indicated a willingness by some High Court judges to consider the nature of the occupation in the light of contemporary historical knowledge. Some legal comment has called the Blackburn judgment seriously in question—in particular its vital assertion that it was essential to Australian law that Australia had been settled by peaceful occupation, an assertion based upon a Privy Council case dealing with another issue which probably accepted an account of Aboriginal society and the occupation now known to be incorrect. That the Australian legal system, in so far as it affects Aboriginal rights, should be dependent on an ill-informed conclusion of the Privy Council is surely unacceptable.

Two courses of action seem possible. The first is an approach to the High Court on what would in effect be an attempt to overturn the basis of the Blackburn judgment. The opportunity to appeal in that case has been foregone and the advice of senior counsel that an appeal would not have been sustained was, at that time, probably sound. However, much has changed since then both in factual information about the occupation and in material relating

to international law, arising particularly from argument in and the advisory opinions given by the International Court of Justice in the Sahara and the Namibia cases.

What are the prospects for such a challenge? A claim to assert Aboriginal ownership in an area where Aboriginal or Islander effective occupation and control has not until recently been questioned may well bring this factual information and international judicial reasoning under the notice of the High Court. The Mabo case, in which a Torres Strait Island community questions the claim of the Crown (in the Queensland government) to title and sovereignty in the Murray Islands in the Torres Strait, may well provide such an opportunity.[6]

Some legal authorities believe that the ICJ decisions in the Sahara and Namibia cases, if applied to the Australian scene would transform the legal view of the occupation of Australia and greatly strengthen the claims of Aborigines to land and compensation. However, only nation states and the General Assembly of the United Nations have the right to seek an advisory opinion from the Court. It is perhaps unlikely that the Commonwealth government would seek such an opinion in view of its opposition to allowing appeals beyond the High Court. However, in view of the importance of this issue both for the division of constitutional authority between the Commonwealth and the states and for the Commonwealth's responsibility for international affairs, there may be a strong case for the government to seek such an advisory opinion from the ICJ. Alternatively but less satisfactorily, it might seek such an opinion from the High Court on legal aspects of this issue in general terms rather than as they may arise in relation to a particular case. If it were practicable the ICJ or the High Court might be asked to advise whether, in the light of information now available relating to the British occupation of this continent begun in

6 At the time of going to press, this case remained undetermined.

1788 and continuing thereafter, of recent advisory judgments of the ICJ and Commonwealth obligations under the United Nations Charter and related international instruments, it is necessary to acknowledge continuing property in land and other rights in the Aboriginal people; and whether the Commonwealth may validly conclude a treaty with the Aboriginal people of Australia.

A third serious obstacle to the development of an intellectual consensus between Aboriginal attitudes and those prevailing in Commonwealth government arises in relation to the independent right of Aborigines to have access to and to participate in the work of international political institutions.

It is important to Australia's international reputation that it should not appear hostile to the work of the United Nations and its agencies seeking to extend decolonization to those indigenous peoples who continue subject to the jurisdiction of the colonizing state. Indeed the present government could properly see the work of these agencies as a valuable source of support for its own policies in relation to Aborigines and in particular for its expressed desire to extend to them the right of self-determination. To these ends certain important changes in present attitudes and practice are required.

So far all Commonwealth governments have failed to acknowledge that Aborigines are a 'people' or a group of 'peoples' in their own right and continue to refer in official statements to the Australian population as 'one people'. This is simply to deny the facts of Aboriginal history, geography, languages and culture. It also inhibits Aboriginal capacity to plead their cause in international forums. It is true that the government has recognized the right of Aborigines through the NAC to participate in international debate through some of these United Nations agencies and has acquiesced in the presence there of representatives of other Aboriginal organizations—

particularly the Federation of Aboriginal Land Councils and NAILS[7]. To clarify its position the Commonwealth needs to acknowledge formally and internationally that Aboriginal Australians are a people recognizable as such in international law. It needs also to facilitate and help finance Aboriginal delegations to appropriate United Nations forums including not only those organizations which have in fact recently participated but others necessary to make them widely representative of existing Aboriginal organizations including the Federation of Aboriginal Women. It should also encourage the relevant United Nations Agencies to study the condition of Aboriginal people, their access to civil and political rights and to monitor their progress towards self-determination. The pressure these agencies could exercise in this role on Australian opinion would greatly strengthen the government's hand in giving effect to its policies and so enhance its international standing in relation to this sensitive issue—a standing which so far has been increasingly under question.

It is generally although not unanimously agreed that Aborigines are entitled to compensation for the land they lost as a result of the European occupation to the extent that it is not possible for it to be restored to them without injustice to the present holders. The governments see this compensation being provided primarily by budgetary allocations to programmes specially directed at Aborigines but supplemented by royalty and similar payment for the use of resources derived from Aboriginal land as for example by mining.

To Aborigines this process, apart from the inadequacy of its total against the losses it purports to compensate, is

7 National Aboriginal and Islander Legal Services — a federation of Aboriginal community-controlled legal aid services.

unsatisfactory. Firstly it is uncertain, being subject to changes in governments and government policy as well as the exigencies of economic and financial fluctuations. It denies also Aboriginal rights to establish their own priorities since funds are provided against particular programmes by government or bureaucratic decision.

Aborigines believe that compensation should be paid on the basis of a negotiated formula in part to communities perhaps on a per capita basis and in part to a central fund for allocation to Aboriginal-controlled programmes. In both instances they consider that decisions on the use of the funds should rest with Aboriginal communities and their organizations.

Opinions differ about the basis of any formula. Government and European-Australian views generally favour some assessment of needs — partly on the grounds that the degree to which Aboriginal welfare falls short of the prevailing social standards is a reasonable measure of their loss from the deprivation of land and partly because it would justify reductions and ultimate termination of the compensation payments in due course.

Dominant Aboriginal views emphasize that the formula should be based on the contribution which access to land and natural resources makes to the Gross National Product. Various percentages of that total have been suggested. An alternative approach, perhaps more logical, would be to base the compensation on a type of royalty charge against the use of land and other natural resources for productive purposes, assessed as a proportion of their capital value. This process would in effect acknowledge Aboriginal ownership of land and resources and provide a rental type payment for its productive use by non-Aborigines. Similar royalty type payments could be levied on the use of forests, minerals, access to fishing grounds and other natural resources. To Aborigines, either of these approaches seems preferable to the assessment based on needs. They

acknowlege a right and justify Aboriginal control over priorities in the use of the proceeds.

The issues of principle involved in these divergences between Aboriginal and European-Australian concepts about the relationship between them have been given little thought except for those which concern the return of land to Aboriginal ownership and control, although even there, serious divisions exist for instance in relation to title to forest lands, national parks, Crown lands held under lease; difficult and emotional issues which remain unresolved.

Before serious attention can be given to the formulation of any treaty or other compact it will be necessary for these divergences to be explored. That exploration must involve Aborigines as well as European-Australians and desirably should draw on international resources both to strengthen its effectiveness and to provide an independent source of balance. Procedurally something could perhaps be learned from some international commercial negotiations. Some of these discussions begin with an exchange of proposals or statements or position. Following the study of these statements by the parties, an agreed panel with independent members could be commissioned to prepare a draft joint statement of principles and proposals as a basis for negotiation between the parties under independent international chairmanship. A series of such studies devoted to the issues about which significant divergences at present exist could do much to increase mutual understanding and prepare the way for actual negotiation. It could, for instance, provide material for the educational programme which the Senate Committee has recommended.

A strategy directed at developing a context in which a treaty or compact could usefully be negotiated would therefore include action to enable Aborigines to develop and strengthen their own organizations for the management of their own affairs at the community level and through

their own community controlled service organizations; to set up, through academic and independent voluntary organizations, an educational programme designed to raise the level of European-Australian consciousness of the need for recognition of Aboriginal rights; to strengthen the legislative role of the Commonwealth Parliament in Aboriginal Affairs and to devolve the planning and administration of programmes concerned with them progressively on Aboriginal community-controlled organizations; to allow Aboriginal traditional processes of decision making to be effective in all matters where negotiations with them are required; to explore the possibility of local and/or regional limited self-government for appropriate regions of Aboriginal and Islander land and population, for example, Torres Strait, Pitjantjatjara lands; to set up procedures for the joint study (with international participation) of issues of principle on which Aboriginal and European-Australian attitudes diverge to explore the scope for consensus: these studies would include compensation for Aborigines for the loss of lands and Aboriginal participation in international political institutions; to seek, by Commonwealth government action, advisory judgment from the International Court of Justice on whether information now available and recent ICJ judgments require acknowledgment of continuing property in land and other rights in Aborigines and whether the Commonwealth may validly conclude a treaty with the Aboriginal people of Australia.

This strategy if vigorously pursued could by 1988 achieve conditions in which negotiation could be initiated for the conclusion of a treaty.