2 Native Title Recognised in Other British Territories

In New Zealand, Papua New Guinea, Canada and the United States of America settlements were made which recognised native title to land. They were harsh and they were broken, but they were negotiated, as between peoples who respected each other, and they provided a legal basis upon which the conquered peoples of New Zealand, Canada and the USA can continue to fight for their rights in the courts. In Australia, however, on 5 April this year, the High Court by a 3/2 majority found that the Aboriginal people had been *lawfully* dispossessed of their lands and the annexation of Australia could not be challenged. Mr Justice Gibbs said: 'It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest'. The action had been brought by Paul Coe, president of the Aboriginal Legal Service (NSW). (Three of his uncles were shot and killed by white Australians.)

Now what happened in New Zealand, Papua New Guinea, Canada and the USA? In New Zealand, at the Treaty of Waitangi on 6 February 1840, the Queen's representative, Captain Hobson RN, promised the Maori chiefs 'full, exclusive and undisturbed possession of their lands . . . so long as it is their wish and desire to retain the same'. (The principle of Maori ownership had been accepted even before 1840, when the privately owned New Zealand Company had bought land from Maoris.) But soon there were bitter disputes over land and open warfare into the 1860s. Land belonging to rebel tribes was confiscated and yet, because of the principle established in 1840, much of it was later paid for or returned. (In 1926 a royal commission found that compensation would have to be paid to the tribes whose lands had been confiscated.)

From the 1860s, Maoris were encouraged to sell their land privately and the result was European ownership of most of it. Today only about 4% of New Zealand is Maori land, but the Maori concept of group ownership is recognised and there is special provision for raising mortgages on this land. (Today, in a total New Zealand population of 3.2 million there are 270,000 Maoris.)

In 1884 what is now Papua was taken over by the British government and New Guinea by the Germans. The British authority, Commodore Erskine RN, promised then that 'your lands will be secured to you'. Land wanted for settlement or business purposes was bought by the administration and then leased to the colonists. The bulk of the land remained with the native people, because not much of it was wanted for plantations and because local labour was the prime need. Village life, settled and visible to the European eye, was encouraged. There was some local autonomy and village leaders were recognised. Communal ownership of land had always been recognised by the law on the basis of traditional forms of title. Indeed there were strenuous and successful attempts to find traditional owners by interviewing village people.

In Australia, however, as Professor Charles Rowley has pointed out ('The Villager and the Nomad', *New Guinea*, March/April 1967), 'the white settlers completely disappropriated the native people, with a legal system which in this

Opposite The beginning of the campaign to influence and mobilise opinion among Australians who are not Aboriginal or Torres Strait Islander.

case acknowledged no rights at all arising from prior occupation. The Aboriginals lost all the land, not a few of the best areas'.

In North America, it was the usual practice, started by Britain and continued by Canada and the United States, to make treaties with the Indian tribes who, in return for their acknowledged ownership rights, would retain parts of their territories as reservations in perpetuity for their own use and also receive compensation in money, gifts, services and perpetual annual payments. The practice was given royal sanction in 1763, when King George III issued a proclamation (which had the force of a statute in the colonies) saying in effect that the Indians were not to be dispossessed of their lands without their consent and then they were to be ceded only to the government. No private person was to buy directly any Indian land.

There was no such proclamation by the King on behalf of the Aboriginal tribes in Australia. Indeed, the House of Commons select committee on Aborigines (British Settlements) noted in 1837 the inconsistency with which Britain had acted in its various colonies. (Although the settlement of different parts of Australia was generally accompanied by vague instructions from the British government, not even the well-intentioned Captain Phillip adhered to them. In 1788, as Governor, he began by trying to get along with the local Aborigines near Sydney, but by 1790 he was sending out a punitive party to avenge the spearing and killing of his personal huntsman, a villainous man called M'Entire. The party was directed to kill ten men and bring back their heads. It carried axes and bags for the purpose, but failed on two occasions to capture anyone). The House of Commons select committee found that although general principles of equity had been laid down, in fact lands had been settled 'without any reference to the possessors and actual occupants'.

Acting on the royal proclamation, Canada made 15 treaties with the Indians between 1850 and 1923. The land reserved for each Indian tribe was divided up for each family, which received either 160 acres or 1 square mile, depending on its size. Meanwhile in British Columbia, which did not join Canada until 1871, Governor James Douglas made 14 treaties, which gave the government absolute title to the tribes' land, but acknowledged their original ownership by paying them compensation.

There are now about 300,000 Indians and 18,000 Inuit (Eskimo) people in Canada. Together, they comprise about 2% of the total population. They own today more than 6 million acres. In 1974 the Federal government set up an Office of Native Claims to negotiate new settlements. By 1976 six claims had been heard and settled, 15 had been rejected, 25 more were being considered. By 1977 almost $3 million a year was being given to Indian groups for research and negotiation of land claims.

Recently the historic Canadian respect for native land rights was confirmed quite remarkably when the government accepted the recommendation of Mr Justice Berger, of the Supreme Court of British Columbia, that work should not begin for at least ten years on the 2,000 mile natural gas pipeline through the North-West Territories between the Arctic Ocean and the United States. This decision will allow the land claims of 30,000 Indian, Metis (people of French

Canadian and Indian mixed descent) and Inuit (Eskimo) people to be heard before the pipeline issue is again considered. Berger's report, released on 9 May 1977, and the government's endorsement of it were firm rejections of the pressure from oil companies and from the US government. The inquiry, which started in 1974, followed the discovery of oil and gas in Prudhoe Bay, Alaska, in 1968, and of oil in the Mackenzie River delta in 1970.

Berger's report (and Ottawa's response to it) may be compared with the Australian Ranger Uranium report by Mr Justice Fox, which was released only eight days later, and Canberra's response to it. Mr Justice Fox had been asked to inquire into the proposal to develop uranium deposits in the Northern Territory and into the Aboriginal claim for land which included the uranium deposits. He accepted the Aboriginal claim but rejected Aboriginal opposition to the mining on their land. He wrote: 'There can be no compromise with the Aboriginal position; either it is treated as conclusive, or it is set aside . . . . In the end, we have formed the conclusion that their opposition should not be allowed to prevail'. He recommended that Ranger's development should start without delay. On 25 August 1977 the Prime Minister announced that this would happen. It has happened.

In Canada, for at least ten years, nothing will be allowed to happen to disturb the people of the Northwest Territories. Then, as confirmed owners of their land, they will be able to make influential decisions about its use. (Aboriginal landowners were not allowed to affect the decision to mine uranium. 'Their opposition should not be allowed to prevail' wrote Mr Justice Fox.) The Berger report is an historic document of international significance, which should be read in Australia. Berger wrote 'We are now at our last frontier . . . but it is a homeland too', for Indian, Metis and Inuit. In a letter to the responsible Minister written on 15 April 1977, Berger explained that these people wanted a settlement which would 'entrench their rights to the land and . . . lay the foundations of self-determination under the Constitution of Canada . . . Their claims must be seen as the means to establishing a social contract based on a clear understanding that they are distinct peoples in history . . . Special status for native people is an element of our constitutional tradition . . . The native people insist that the settlement of native claims should be a beginning rather than an end of the recognition of native rights and native aspirations'.

It would be dishonest, wrote Berger, to try to impose an immediate settlement. 'They will soon realise — just as the native people on the prairies realised a century ago as the settlers poured in — that the actual course of events on the ground will deny the promises that appear on paper. The advance of the industrial system would determine the course of events, no matter what Parliament, the courts, this Inquiry or anyone else may say.' The social consequences of the pipeline would be devastating. Judge Berger concluded: 'Native society is not static. The things the native people have said to this Inquiry should not be regarded as a lament for a lost way of life, but as a plea for an opportunity to shape their own future, out of their own past. They are not seeking to entrench the past, but to build on it'.

Berger's words would also speak for Aboriginal Australians.

In the United States, the American Indian Policy Review Commission submitted its final, historic report to Congress on 17 May 1977 (the same day the Fox Report was released in Australia). In its introduction the Commission firmly founded its recommendations on the premise that 'the government's relationship with the Indian people and their sovereign rights are of the highest legal standing, established through solemn treaties, and by layers of judicial and legislative actions . . . The relationship of the American Indian tribes to the United States is founded on principles of international law'.

In 1831 a significant decision of the Supreme Court upheld the Cherokees' reading of the Constitution and Chief Justice John Marshall declared that the tribes had shown themselves capable in law and fact of self-government within the borders guaranteed them by treaty, and that they should be acknowledged as 'domestic dependent nations', with full powers over their internal policy, subject to no States' jurisdiction.

(Again, the contrast with the Aboriginal status within Australia is striking. See page 25 for the High Court's decision in April this year.)

The American Indian Policy Review Commission declared: 'The fundamental concepts which must guide future policy determinations are:
1 That Indian tribes are sovereign political bodies, having the power to determine their own membership and power to enact laws and enforce them within the boundaries of their reservations, and
2 That the relationship which exists between the tribes and the United States is premised on a special trust that must govern the conduct of the stronger towards the weaker'.

At present 1 million Indians in the USA (population 216 million) own 53 million acres, and almost half live on reserves. (In 1972, Congress legislated to give another 40 million acres, and $1,000 million, to Indians and Eskimos in Alaska.) This Indian land produces about 2% of the country's coal, 4.4% of its oil and gas, 4.9% of its phosphate and 40% of its uranium. 'And yet', as the Commission reported, 'Indian people lack credit, remain poor, uneducated and unhealthy . . . The Indian of America ranks at the bottom of virtually every social statistical indicator. How is this disparity between potential wealth and actual poverty to be explained?'

The Commission pointed out that 'a very significant part of this natural abundance is not controlled by Indians at all'. (Often almost worthless contracts with miners were written for the Indians by the Federal Bureau of Indian Affairs.) Its conclusion was that there must be 'a viable economic base for the Indian communities . . . and policies must be adopted which will favor Indian control over leases of their own natural resources'. (The lesson for Australian Aboriginal policy is obvious.)

The Commission recommended that 'the long-term objective of Federal-Indian policy be the development of tribal governments into fully functional governments exercising the same powers and shouldering the same responsibilities as other local governments'. It went on to assert that 'tribes have an inherent right to form their own political organisations in the form which they desire'. There would be tribal courts and appellate courts, which would be

subsidiary to the Federal courts.

The Commission recommended that tribes develop comprehensive plans for economic development. Federal mining experts would compile mineral inventories of all tribal lands and they would be confidential to the tribes. 'Known international and national experts' in negotiating mineral agreements would be made available to advise tribes. Finally, the law would be amended 'to ensure tribal control of the development of Indian-owned natural resources including water, coal, oil, uranium, gravel and clay, and all other minerals'. The tribes would be allowed to determine for themselves the best way 'to control development and realise the maximum financial returns from the development of their natural resources'.

This United States Indian policy, so much more encouraging than Australian Aboriginal policy, is based on the proposition that what Indians can do for themselves in their own ways with their own resources enhances not only themselves, as unique, free men and women, but also the total society of which they are also citizens. The proposition is derived from the first dealings with Indians, when treaties were negotiated.

The Commission explained that the United States inherited the practice of the European powers in 'treating Indian tribes as sovereign political communities, or nations'. (As the power and spirit of the tribes were destroyed by brutal treatment, so the Indians became more dependent upon the 'trust' element in their treaties. This threw a responsibility upon the Federal Government, which it often ignored but is now being forced to honour.)

The United States continued to negotiate treaties with the Indians until 1871, when Congress decided to legislate unilaterally rather than negotiate in Indian affairs. The decision, taken without reference to the Indians themselves, reflected the decline in tribal power, for the Indians had lost their erstwhile French, English and Spanish allies. By 1850, in any case, the treaties were becoming a device to erode the independence of tribal governments.

Federal Indian agents, often corrupt, were subverting the authority of tribal chiefs. They 'negotiated' so-called removal treaties, to make the eastern tribes leave their homelands and settle beyond the Mississippi. In 1887 Congress passed the General Allotment Act, which effectively reduced Indian reserves from 140 million acres to 50 million by 1930, individual Indian families being given title to blocks of land. What was left was taken away from the tribe. It was an attempt to force Indians to assimilate.

As the Commission pointed out, 'The damage was not confined to a shrinking land base, however. Indian social organisation, belief systems, and moral vigor were all related to land, to a universe defined by myth and ritual'. By the 1920s the Federal government's failure as a trustee had become notorious and in 1934, responding at last, Congress passed the Indian Reorganization Act, which aimed to restore the tribal land base and tribal self-government. But the legislation fell far short of the need. Already more than 100,000 Indians were landless.

Meanwhile many Indians, who had joined the armed forces or gone into industry, were applying their confidence to build new inter-tribal structures and

organisations. Indian culture began to revive and Indian numbers increased.

This movement coincided with a general feeling in Congress and in the Federal government that the whole issue was becoming too complex. Several superficial surveys recommended that there should be a drive towards integration and that Federal responsibility for Indian affairs should be reduced and then terminated. The Eisenhower administration accepted this new doctrine of disengagement, and by the mid-1960s Indian leaders began to demonstrate against the betrayal of the Federal trust which was explicit in the treaties. The Bureau of Indian Affairs in Washington was occupied and Wounded Knee in South Dakota was taken over, at a cost of two Indian lives.

Presidents Johnson and Nixon responded to the Indian anger and the growing Indian self-confidence with policies designed 'to strengthen the Indian's sense of autonomy'. Colleges and universities offered courses of 'education for Indian purposes' and Indians began to assert themselves professionally. In 1975 Congress passed the Indian Self-Determination and Education Assistance Act.

This brief account of US Indian policy shows how it has changed several times. It could still change, because Congress may legislate as it likes and Federal governments have varying priorities and concerns. But the constant factor has always been the treaty relationship, which the Supreme Court consistently upholds. The Commission reported that as late as 1975 the Supreme Court found that 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territories'. The Commission also quoted with approval the classic definition of tribal sovereignty by Felix Cohen, the leading authority on Federal Indian law, who laid down three principles:

'1 The Indian tribe possesses all the powers of any sovereign state.

2 Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government.

3 These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government'.

The Supreme Court has also obliged the Federal government to honour its trust to the tribes, who have recourse to the courts if the trust responsibility is not honoured, especially with regard to land. Between 1946, when a special Indian Claims Commission was set up, and 1973, there were more than 600 claims for compensation, and awards totalled $431 million. (The ICC is not empowered to restore land.) The treaties are regarded as superior to all State laws and have the same dignity as any Federal Statute. No Supreme Court in the last 50 years has failed to uphold an Indian treaty.

The Indian Policy Review Commission concluded its passage on treaties by emphasising 'their symbolic and moral significance to the Indian people'. They are seen as 'the word of the nation'. It is precisely this kind of permanent

protection, lying beyond the reach of constantly changing executive and legislative policy, which Aboriginal Australians have always been denied. A Treaty would give them this permanent protection. It would be 'the word of the nation'.

The Senate Select Committee on Indian affairs has already studied the recommendations of the Commission and Congress is to legislate next year.

Today in the United States many Indian tribes are going beyond the Indian Claims Council and asking the courts to declare that some huge Indian land sales made to individuals or States were not valid because they were never supervised by the Federal Government and ratified by Congress, as required by the Indian Non-Intercourse Act of 1790 — which recognised the Federal 'trust' responsibility. No case has yet been settled, either in or out of court, but already the hearings have led the Federal government to endorse some of the claims as valid. For example, in 1972 two tribes, the Passamaquoddys and the Penobscotts, demanded from the State of Maine 12.5 million acres and $25 billion in back rents and damages. The Federal government publicly acknowledged that the tribes had valid claims to between five and eight million acres, plus damages. In 1977 a mediating judge, appointed by President Carter, made the tribes an offer ($25 million and 100,000 acres) which they rejected with anger. In February 1978 they seemed more likely to accept a second offer from the Federal government (fulfilling its role as trustee for all Indians), namely $25 million, plus $1.7 million a year for 15 years, and 300,000 acres.

Other claims have been filed against Massachusetts, Rhode Island, Connecticut, New York and South Carolina, and very often the Federal government is either prosecuting them or supporting them in court. Some claims are much smaller than the one against Maine. For example, the Oneidas have claimed 100,000 acres of New York State, where some still live.

Tribes west of the Mississippi are generally going to court to regain control of the resources on their lands — timber, water and minerals. In some cases they want business agreements re-negotiated. Several of these cases have already been successful.

It is important to emphasise here that the Aboriginal Treaty Committee is not suggesting for Australia an unending series of court cases for land and compensation, arising as a result of a Treaty. As Mr Justice Woodward, who visited the United States in 1973, wrote in his 1974 Report on Aboriginal Land Rights, 'the problems of today are remarkably similar in North America and Australia, although the history of recognition of land rights has been so very different. Paradoxically, Australia now has an enviable opportunity to give belated recognition to such rights, uninhibited by a history of treaties and statutes by which, in North America, many rights were formally surrendered or compulsarily acquired in return for various forms of compensation. In many cases the compensation proved to be illusory or inadequate; often it was soon dissipated. But it has proved very difficult to go back over old ground or reopen old agreements'. (In the last five years it has not been so difficult.)

This page is not shown as it contains photographs of Indigenous Australians