Chapter 3

AGREEMENT IN THE FORM OF AN INTERNATIONAL TREATY AND THE ISSUE OF SOVEREIGNTY

3.1 In April 1979, the National Aboriginal Conference (NAC) passed a resolution requesting that a 'Treaty of Commitment be executed between the Aboriginal Nation and the Australian Government'.[1] By this request, the NAC sought formal recognition of, and redress for, the deprivations suffered by the Aboriginal people since European colonisation and settlement of the continent in 1788. At about the same time the Aboriginal Treaty Committee, comprising white Australians and chaired by Dr H.C. Coombs, was formed with the object of sponsoring the concept of a treaty among Australia's non-Aboriginal community. This Chapter examines the legal feasibility of implementing such a 'treaty of commitment' in the form of an international law treaty.

The meaning and functions of treaties in modern law

3.2 The expression 'treaty' has been used in international law as a generic term to cover many different forms of international agreement, often referred to by a variety of names.[2] Before 1969, the law governing treaties consisted of the customary rules of international law. To a large extent, these rules were codified and reformulated in the Vienna Convention on the Law of Treaties, concluded in 1969, to which Australia is a party. As a contemporary code on international law treaties, this Convention defines a treaty as an agreement whereby two or more States establish, or seek to establish, a relationship between themselves governed by international law.[3] In general terms, the object of a treaty is to impose binding obligations on the States who are parties to it.

3.3 In modern international law, for an agreement to constitute a treaty, it should satisfy the following four criteria:[4]

(a) The parties must have the capacity to conclude treaties under international law; that is, they must be sovereign entities possessing international personality;

(b) the parties must intend to act under international law and that any dispute arising under the treaty be arbitrated according to international legal principles and by international legal institutions;

(c) there must be a meeting of minds between the parties to the treaty; and

(d) the parties must have the intention to create legal obligations.

As a fifth criterion, though perhaps not a requirement, it is the usual practice for treaties to be in written form.

3.4 The Committee deals with the difficult issue of parties in Chapter 8 which discusses represenation. Assuming that the parties can be satisfactorily identified, it appears to the Committee that all of these criteria, with the exception of the first one, could be satisfied by the Commonwealth and the Aboriginal people. It is the need to satisfy the first requirement - that the parties must have the capacity as entities possessing international personality enabling them to conclude treaties under international law - which the Committee foresees as the major impediment to the conclusion of an international law treaty between the Aboriginal people and the Commonwealth of Australia.

3.5 In a submission to the Committee, Professor D.H.N. Johnson, professor of International Law at the University of Sydney, argued that a consequence of the Aboriginal people's lack of a recognised international personality would be the United Nations' inability to recognise and hence adjudicate upon an agreement between the Commonwealth and Aboriginal people.[5] He noted that the United Nations would be reluctant to register a proposed compact if the request for registration came from a body that is not recognised as a state.[6] Professor Johnson argued that even if a Commonwealth request for registration was granted, the registered status of the agreement, though it may have a 'certain political and psychological effect as appearing "to internationalise" relations between the Australian Government and Aboriginal people, would 'strictly be without legal effect'.[7]

3.6 In addition to the meaning which it had in international customary law, the term 'treaty' was used to describe international commercial agreements. During the 18th and 19th centuries, treaties were made by large trading companies, such as the Dutch East India and Hudson's Bay Companies, acting on their own behalf. These treaties were made with a variety of indigenous chiefs or princes and secured trading arrangements and privileges for the companies. Ultimately, the rights obtained by such companies were assumed by the country which had granted the company its charter. Rather than being considered as treaties in the international law sense, such 'treaties' have always been considered as commercial contracts.

3.7 The term 'treaty' has occasionally been used in domestic law in the context of an agreement between individuals, for example, for the sale or purchase of property. Taking advantage of the full range of meanings of the word, the NAC in its submission suggested that

> the word 'treaty' may be used in a domestic sense (to describe an arrangement between Aborigines and the Commonwealth) providing of course there are words specifically used to identify this as a domestic treaty bound only by Australian domestic law and not international law.[8]

The Committee foresees difficulties with this approach. Once the term is used, it invariably attracts the meaning ascribed to it in international law as set out in the Vienna Convention of 1969. This is because in domestic law there are a wide variety of instruments to choose from such as contracts, settlements and acknowledgements, whereas the term treaty is today used almost exclusively to describe agreements concluded between States and governed by international law.[9]

3.8 Consideration of an Aboriginal claim to international personality, and a consequent capacity to conclude treaties under international law, requires first that the current legal view as to the sovereign status of the Aboriginal people be ascertained.

Definition of sovereignty

3.9 Definitions of the concept of sovereignty vary according to the context in which the word is placed and, as a consequence, it eludes precise definition. The concept has been variously defined as 'that power in a State to which none other is superior'[10] and 'the supreme authority in an independent political society.'[11] The concept thus signifies autonomy, independence and capacity for self-determination in all matters.

3.10 This broad definition has been gradually restricted in some respects by the obligations of living within the international community. For example, the ratification of a multitude of international treaties (covering such diverse

matters as human rights, employment standards, and freedom of association), has imposed restrictions of varying degrees on the independence of a signatory State's domestic legislative, executive and judicial action. For this reason it has been suggested that now, 'it is probably more accurate to say that the sovereignty of a State means the residuum of power which it possesses in the confines laid down by international law.'12

3.11 Within these confines, however, the notion of a single sovereign within a nation state remains the constant requirement. Although it is recognised that the degree of sovereignty enjoyed varies from State to State according to each State's power and influence in international affairs, it would appear from the many definitions and the functions of a sovereign government that there is no legal prospect for recognising competing sovereign claims within any one State.

3.12 Thus, as sovereignty is understood in contemporary international law, it refers to a singular and exclusive power in any one State. For example, the notion that one claim alone may prevail has been authoritatively determined by the House of Lords in The Arantzazu Mendi,13 a case which dealt with conflicting claims to sovereignty of the parties in the Spanish Civil War. It will be readily apparent that much of this case reflected the requirements of international dealings between European nation states and their extended entities following colonisation of other parts of the world. It therefore emerges that sovereignty means an exclusive and indivisible power and capacity for self-government together with international recognition of that power.

The acquisition of sovereignty

3.13 Customary international law recognised certain traditional modes of acquiring territory. Depending on the mode of acquisition, the nation acquiring the territory could obtain

either an original and independent title or a derivative title in those instances where the validity of the soverignty of a pre-existing occupant of the territory needed to be recognised.[14]

3.14 Under the British Constitution, the Crown exercises all sovereign rights within its dominions. During the periods of British colonial expansion, the British Government took the view that sovereignty could be acquired over new-found territories in several ways. One mode of acquisition by the British Crown depended upon the terra nullius doctrine ('land belonging to no one' or 'a piece of territory not under the sovereignty of any state').[15]

3.15 Though strictly referring to uninhabited land, the terra nullius doctrine was extended by the British to cover the acquisition of any territory inhabited by peoples whose civilisation was thought to be less developed, and whose political organisation did not correspond to European norms. Such territories would then vest automatically in the first 'more civilised' power which chanced to occupy them, regardless of the wishes or resistance of the indigenous population.

3.16 On the other hand if the land was occupied by peoples possessing a cohesive and recognisable central political system, it was accepted that sovereignty was already vested in its inhabitants and could therefore only be obtained derivatively through conquest of, or agreement and negotiation with, those inhabitants. Such negotiation or conquest led to a cession or occupation of the territory and a legal transfer of sovereignty from the original inhabitants to the British Crown.

3.17 It was thus the practice of the British Government to recognise and uphold the prior ownership of indigenes in all those colonies in which European eyes perceived an organised political structure of authority and, even while acquiring

sovereignty in those territories by means of conquest or peaceful negotiation, to grant statutory recognition to the prior indigenous ownership for example this occurred to varying extents in Canada, the United States of America, New Zealand, new Guinea, the Solomon Islands, India and Africa.[16] In the case of Australia however, this did not occur because of the 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. These British policies of acquiring sovereignty either by occupation of uninhabited land or derivatively, with the consent of the inhabitants, are to be found in the instructions under which Captain Cook took possession of Australia in 1788:

> With the consent of the natives, to take possession of convenient situations in the country in the name of the King of Great Britain, or if the country [is] uninhabited take possession for his Majesty by setting up proper marks and inscriptions as first discoverers and possessors.[17]

The disputed question of sovereignty in Australia

3.18 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 recognised by the occupying power or its legal system. Certainly the question of sovereignty was one frequently raised by Aboriginal witnesses who appeared before us.[18]

3.19 Aboriginal attitudes to, and assertions of, sovereignty are still evolving.[19] The National Aboriginal Conference Makarrata Sub-committee advised the Committee that sovereignty is a matter of central concern to many Aboriginal communities in their quest for self-government.[20] As yet there has not been a

clear expression whether self-government is sought for individual Aboriginal communities or for an Aboriginal nation as a whole. However, the general claim to sovereignty by right of history is asserted by representatives of the Aboriginal people.[21]

3.20 Aboriginal assertions of sovereignty in Australia are a conclusion drawn from the historic fact that Aboriginal people were in sole and undisputed occupation of the continent of Australia for some forty thousand years before European discovery. Their claim is that rights of land usage throughout the continent belonged exclusively to them and that they have been dispossessed of the land and their sovereignty without either compensation or even judicial recognition of their prior habitation of the continent.

3.21 A significant justification for the British taking of Aboriginal land was that the Aboriginal people were not using it or cultivating it in a European sense. As a consequence, according to European concepts, they had forfeited any right of possession.[22]

3.22 The facts of the Aboriginal relationship to land are now better known. The relationship comprised an economic element (hunting and gathering) together with a more significant cultural and religious element. The significance of this latter element has only recently been better and more widely understood.

> No English words are good enough to give a sense of the links between an Aboriginal group and its homeland ... When we took what we called 'land' we took what to them meant hearth, home, the source and locus of life, and everlasting oneness of spirit.[23]

3.23 The significance of the religious aspect of the relationship between Aboriginal people and their land has been judicially recognised. Blackburn J in Milirrpum commented 'As I understand it, the fundamental truth about the Aboriginals' relationship to the land is that whatever else it is, it is a religious relationship.'[24]

3.24 In a more recent case, Ex Parte Meneling Station, in the High Court, Brennan J contrasted the European and Aboriginal relationships to land as follows:

> Owners of land under Anglo-Australian law are understood to be vested with a bundle of rights.[25]

By way of contrast, the only 'rights' which Aborigines have according to the tenets of their culture is a right to forage. The significant remaining feature of their relationship with the land is a spiritual one:

> The connection of the Aboriginal group with the land does not consist in the communal holding of rights with respect to the land, but in the group's spiritual affiliations to a site on the land and the group's spiritual responsibility for the site and for the land. Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights.[26]

3.25 It is apparent that the Aboriginal relationship with land is complex, and attempts to define it have perplexed anthropologists.[27] There is no doubt that at the time of the establishment of English law in Australia this 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. 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. When Captain Cook arrived and took possession of the continent under

English law, his actions when considered in an Aboriginal context could only be a purported taking of possession, since actual possession of land is a concept foreign to Aboriginal culture.

> Alienation of land was not only unthinkable, it was literally impossible. If blacks often did not react to the initial invasion of their country it was because they were not aware that it had taken place. They certainly did not believe that their land had suddenly ceased to belong to them and they to their land. The mere presence of Europeans, no matter how threatening, could not uproot certainties so deeply implanted in Aboriginal custom and consciousness.'[28]

Hence in Aboriginal cultural terms if they, who had enjoyed occupational and religious use of the land for approximately 40,000 years, could not alienate the land, still less could the newly-arrived Europeans. 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.

3.26 In arguing that there was already some system of sovereignty or rights in land in existence in Australia before 1788, and vested in the Aboriginal people, some judicial support has been sought from the Western Sahara Case.[29] In that case, the International Court of Justice was asked in 1975 to decide whether the Western Sahara at the time of its colonisation by Spain in 1884 was terra nullius. The Court found that at the appropriate time, the Western Sahara was inhabited by people organised in tribes and as a consequence, the Western Sahara was not terra nullius.

> The nomadic peoples of the Shinguitti country should ... be considered as having in the relevant period possessed rights, including some rights relating to the land through which they migrated.[30]

In a separate declaration one judge made an even more explicit statement of the migratory tribes' rights.

> I consider that the independent tribes travelling over the territory, or stopping in certain places, exercised a de facto authority which was sufficiently recognised for there to have been no terra nullius.[31]

3.27 It is argued on behalf of Aborigines that the case is authority for an Aboriginal assertion of sovereignty over the Australian continent since they too, as independent tribes travelling throughout the continent, exercised a de facto authority sufficient to refute a claim of terra nullius.[32] The Aboriginal Legal Service argued, however, that little if any benefit could be obtained by Aborigines from the Western Sahara Case since

> it would not be possible for Aboriginal people 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 has 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.'[33]

The Service also observed that if a court were to take the contrary stand on this issue, the basis of sovereignty of the majority of countries in the world could be overturned.[34] 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

> 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.[35]

3.28 Linked to their assertion of long and exclusive occupation of the continent as the basis of their sovereignty, Aborigines (as a further indicator of their sovereignty claim) can also point to a history of violent physical resistance to British colonial expansion which belies British claims that the colony was settled peacefully. As was noted in Chapter 2 (paras 2.2-2.9), frontier conflict between the Aboriginal people and the settlers was frequent and violent and extended throughout the continent.[33] Full-scale war was not possible, perhaps because of the nature of Aboriginal social organisation particularly because Aborigines lacked a unified, European-style political organisation. Another factor was the superiority of European weaponry and military tactics. Resistance therefore followed the pattern of guerilla tactics.[37] Aboriginal assertions of sovereignty have continued to the present day: they now take the form of legal proceedings and public protests such as street marches and demonstrations.

3.29 Despite this forceful opposition to British occupation, 'Australian historians have paid little attention to the Aboriginal groups' resistance to white settlement.'[38] Rather than treat the hostilities as war, the British government of the day, because it had declared sovereignty over the continent, regarded the opposition by Aborigines as either a criminal activity or open rebellion; it was never construed as an assertion of sovereignty in opposition to the British claim.[39]

3.30 It is true that the opposition to British assertions of sovereignty was not couched in the formalities required by contemporary international law, yet the physical resistance was evidence of a fundamental repudiation of British claims to sovereignty. Nevertheless, successive British governments and their Australian successors have judicially ignored this fact of opposition and resistance when considering the relative sovereign status of the Commonwealth and Aborigines. Australian courts have continually refused to find that the Aboriginal people held any sovereign or proprietary rights in the continent and have been consistent in asserting that the continent was settled peacefully and colonised without conquest.

3.31 The Commonwealth's claim to sovereignty in Australia derives from its position as successor to the title which the British Crown derived from Captain Cook's purported taking of possession of the 'whole Eastern Coast' of the continent in the name of the British Crown in 1770, and the gradual expansion of the settlement which followed. As has been seen the claim evolved from the assumption that the continent was terra nullius at the time of Cook's discoveries[40] and the principle that, since Australia was colonised by gradual and peaceful expansion, as a settled colony, no recognition was given to the pre-colonial land and social systems of the Australian Aborigines. The 'settlement' of a colony is used to distinguish the manner of its occupation from that of conquest. The legal consequence is that, whereas the inhabitants of a conquered colony retain their lands and their rights until these are specifically changed by their conqueror, the inhabitants of a settled colony are immediately subject to the laws of the colonising nation.[41] The colonising nation refuses to recognise that the original inhabitants have a recognisable system of law and disregards their relationship to their land.

3.32 This principle 'that the Australian Colonies became British possessions by settlement and not by conquest' has been described as 'fundamental' to the accepted legal view of the foundation of Australia.[42] The consequences of this principle for the Aboriginal people have been threefold. They were and are subject to the colonial and now State and Commonwealth courts; their status in law was defined by English common law; and their pre-colonial land ownership and social systems have not been recognised.[43] In 1889, judicial recognition was given to the principle that the Australian colonies were 'settled' rather than 'conquered'. In that year, the Privy Council in Cooper v Stuart stated its opinion that the colony of NSW was settled because at the time of its peaceful annexation it 'consisted of a tract of territory practically unoccupied'.[44] The Court also described New South Wales as belonging to that class of colonies 'without settled inhabitants or settled law', which was 'peacefully annexed to the British Dominions'.[45] The Privy Council sought support for this analysis from Sir William Blackstone's Commentaries on the Laws of England.[46]

3.33 Principles applied to the acquisition of colonial territory were also discussed in the case Milirrpum v. Nabalco Pty. Ltd and the Commonwealth of Australia.[47] This was the first case brought by Australian Aborigines seeking legal recognition of their customary land rights. The plaintiffs were unsuccessful in obtaining this recognition. The primary finding of the Court was that the plaintiffs were unable to prove their assertion that their predecessors in 1788 had the same links to the same areas of land as they were claiming 180 years later. In the case, Justice Blackburn provided a further judicial statement of Australia's status as a settled colony and concluded that therefore a doctrine of 'communal native title' (by which his Honour categorized the Aborigines' complex combination of individual and joint proprietary interests in land) to land 'does not form, and never has formed, part of the law of any part of Australia'.[48] Once again reliance was

placed on Blackstone's Commentaries and Justice Blackburn argued that Blackstone's words 'desert and uncultivated...have always been taken to include territory in which live uncivilised inhabitants in a primitive state of society'.[49]

3.34 His Honour cited American authority for his view that the attribution of a colony to a particular class is a matter of law 'which becomes settled and is not to be questioned upon a reconsideration of the historical facts',[50] and concluded that in his opinion 'there is no doubt that Australia came into the category of a settled or occupied colony'.[51]

3.35 The view expressed by Justice Blackburn is an example of the application of a principle of international law known as the inter-temporal law. According to this principle, an assessment of the legal validity of a claim to land title or sovereignty is to be appreciated in the light of the law prevailing at the time of the original claim and not in terms of the law in force at the time when a dispute regarding the original claim arises.[52]

3.36 Having regard to international legal principles prevailing at the time of the British acquisition of the Australian continent, there is no doubt that Britain did acquire sovereignty over Australia, a sovereignty which no other nation has ever challenged. Therefore, however repugnant that acquisition of sovereignty may appear to contemporary morality, it stands beyond challenge under the inter-temporal law.

3.37 Closely allied to the inter-temporal law in its effect of supporting the Commonwealth's claim to sovereignty over the Australian continent is the rule of prescription as it applies to territorial acquisition. A prescriptive title to sovereignty arises in circumstances where no clear title to sovereignty can be shown by way of occupation, conquest or cession, but the territory in question has remained under the continuous and

undisputed sovereignty of the claimant for so long that the position has became part of the established international order of nations. The conclusion to be drawn from the application of this rule to the Commonwealth's position, is that if there were any defect in Australia's title, the rule of prescription would apply to overturn the defect and to vest sovereign title in the Commonwealth Government.[53]

3.38 The settled colony principle was the subject of litigation in 1979. In that year, in the case of Coe v. The Commonwealth of Australia, the plaintiff, an Aboriginal, claimed to sue on behalf of the Aboriginal community and nation of Australia on the basis that Captain Cook had wrongfully proclaimed sovereignty over the territory of the east coast of Australia in 1770 and that Captain Phillip had wrongfully asserted possession and occupation of the eastern part of Australia for King George III in 1788.[54] The 'wrongs' arose from a failure to recognise the existing sovereignty of the Aboriginal people. In addition, it was claimed that Australia had been acquired by conquest.

3.39 The High Court dealt with the matter in a way which did not give rise to decisions on the sovereignty issues. Even though the sovereignty issues were not fully argued, two members of the Court took the view that the Aboriginal people had no legislative, executive or judicial organs by which sovereignty might be exercised and that the claim of a continuing sovereignty in the Aboriginal people could not be sustained because it was inconsistent with the accepted legal foundations of Australia.[55] Gibbs J also stated the principle that, as a fundamental basis to the legal system, sovereignty over Australia was gained by settlement and not by conquest.[56] Although not actually conceding sovereignty to the Aboriginal people, Murphy J did go further than other judges when he stated that the Aboriginal plaintiff was

> entitled to argue that the sovereignty acquired (over Australia) by the British Crown did not extinguish 'ownership rights' in the Aborigines and that they have certain proprietary rights (at least in some lands) and are entitled to declaration and enjoyment of their rights or compensation.[57]

3.40 Aborigines have asserted to the Committee their rejection of the settled colony principle; so too have other witnesses. Dr Coombs, in arguing that the general practice of the British occupation as presented in historical records of Australia was 'grossly in error' said that 'it is important to undermine the respectability of the view that this country was peacefully settled'.[58] Mr Peter Bayne, Member and Legal Adviser, Aboriginal Treaty Committee and lecturer in law, Canberra College of Advanced Edcuation, noted that the assertion of the settled colony principle is grossly offensive to the Aboriginal people: 'that it really proceeds on the assumption that they were not there, or, if they were, their institutions should not be recognised as being civilised'.[59]

3.41 The Commonwealth has conceded that it is prepared to acknowledge Aboriginal occupation of Australia before British settlement, though no mention was made of the relevance of this concession to the matter of sovereignty[60]. The Commonwealth has also restated its commitment to the principle of recognising the 'past dispossession and dispersal of the Aboriginal people, and the community's resulting obligation to the Aboriginal people'.[61] More recently still, the Commonwealth has given an indication that the settled colony principle itself may require reappraisal. The Minister for Aboriginal Affairs, the Hon. A.C. Holding MP, said at a recent seminar on Aboriginal customary law:

> We must not dwell on the past, but we have to be prepared to face up to the past and what has happened in order to apply effective solutions to the future. We have to face the fact that Australia as a country was

> conquered, not settled. If you take the view that Australia was settled, then you see it as a colony which was uninhabited and had no system of law. But in the Gove case, although the plaintiffs were unsuccessful in their main claim, Mr Justice Blackburn distinctively held that Aboriginal customary law was recognisably a system of law.[62]

Request and consent legislation

3.42 Before concluding its discussion in this area the Committee considers it appropriate to refer to evidence from Mrs Barbara Hocking, a Melbourne barrister. She submitted that the easiest way to provide a legal foundation for a Makarrata or compact between Aboriginal and non-Aboriginal Australians is to give legislative recognition to the fact that Aboriginal people were in possession of the continent of Australia in 1788, that the land belonged to them, and that they had rights in land throughout the continent. Mrs Hocking asserted that the method she proposed (and which is referred to in the following paragraphs) may be the only constitutional method available because, unless such a procedure were adopted, 'the Commonwealth Parliament/Government would be unable to make any Makarrata or compact that recognised Aboriginal ownership prior to 1901 and this ... would not form an adequate basis for the negotiation of a Makarrata or compact with the Aboriginal people.'[63].

3.43 Mrs Hocking argued that, following the 1967 referendum, the Australian Government is able to legislate pursuant to s.51(xxvi) of the Constitution, in conjunction with an existing inherent national power, to recognise traditional Aboriginal ownership in existence in 1967 and, following the usual principles of statutory interpretation, in 1901. It is not, however, able to recognise pre-existing ownership in 1788. This can be done only by the British Government as the successor in title to the then sovereign power. Therefore the Australian Government must request and consent to an Act of the United

Kingdom Parliament which recognises that in 1788 the Aboriginal people were possessors and owners of, and had land rights in, Australia. This procedure is available to former dominions under the Statute of Westminster 1931; examples of this procedure in the Australian context are the Cocos Islands Act 1955 (UK) and the Christmas Island Act 1958 (UK).

3.44 Mrs Hocking is of the opinion that the Australian Government is unable legally to recognise ownership belonging to the Aboriginal people in 1788 because it cannot legislate in relation to something that was in existence before it came into existence itself, but that this recognition is a pre-requisite to any Makarrata or compact with the Aboriginal people of Australia.

3.45 Without concerning itself with a necessarily technical discussion as to the validity of this proposal, the Committee must reject it as a solution to the problem. The Attorney-General has recently announced, following agreement by the Commonwealth and States at the 1982 Premiers' Conference, that the British Government has agreed to enact the necessary UK legislation to sever residual constitutional links between the Commonwealth of Australia and the UK. This involves the removal of all remaining categories of appeal from Australian courts to the Privy Council, the removal of any remaining capacity in the British Parliament to make laws binding in Australia, and the removal of certain remaining colonial fetters on the powers of State parliaments, and will signify Australia's complete independence from the UK. Once this process - which will be achieved by the enactment of request and consent legislation - has been completed, it would clearly not be possible for the enactment of the sort of legislation which Mrs Hocking has proposed.

Conclusion

3.46 It may be that a better and more honest appreciation of the facts relating to Aboriginal occupation at the time of settlement, and of the Eurocentric view taken by the occupying powers, could lead to the conclusion that sovereignty inhered in the Aboriginal peoples at that time. However, the Committee concludes that, as a legal proposition, sovereignty is not now vested in the Aboriginal peoples 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. Nevertheless, the Committee is of the view that if it is recognised 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.

Domestic treaties of other nations as a model for Australia

3.47 During its consideration of the feasibility of implementing a treaty which would be recognised at international law, the Committee's attention was drawn to the treaties concluded by colonising powers with indigenous peoples, such as those in New Zealand, United States of America, and Canada. Some witnesses have sought to draw analogies between the situations in such countries and that in Australia at the time of colonisation, suggesting that they provide useful precedents to support the need for a treaty in Australia. With this in mind, it will assist in a consideration of the issues if the position in New Zealand, the United States and Canada is briefly examined.

New Zealand

3.48 The Treaty of Waitangi of 1840 was concluded between the British Government and the Maoris of the North Island of New Zealand. The Treaty protected Maori rights and formed the basis for British annexation of New Zealand. The Treaty's three articles provided for the Maori signatories' acceptance of the British Crown's sovereignty in their lands and the Crown's protection of Maori possessions, with the Crown having the exclusive right to purchase Maori land. In return, as the third article of the Treaty, the Maori signatories were granted the full rights of British subjects. Following the Treaty, Britain annexed all of New Zealand: the North Island on the basis of the Treaty and the South Island by right of discovery.

3.49 Despite many requests, the Treaty has never been ratified, although it has been given domestic legislative recognition. In 1975 the Treaty of Waitangi Act was passed to provide for the 'observance and confirmation, of the principles of the Treaty of Waitangi by establishing a tribunal to make recommendations on claims relating to the practical application of the Treaty ...', in effect providing statutory acknowledgement of the principles of the Treaty.[64]

3.50 It has been argued that the Treaty was not a true instrument of cession because international law did not recognise the Maori tribes as capable of exercising the sovereignty necessary to conclude such a treaty. It also appears that in the prevailing view of the domestic law of New Zealand, neither the status nor the land rights of the New Zealand Maoris were based, as a matter of law, upon the Treaty of Waitangi,[65] but rather on Anglo-New Zealand common law.

The United States of America

3.51 Relations between the United States Congress and the American Indians are explicitly provided for in Article I section 8 of the American Constitution which empowers the Congress

> 3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;[66]

3.52 Until 1871, the Government of the United States had entered into treaties with Indian tribes, but the status of these agreements was such that they never amounted to instruments governed by international law. This was because the tribes were considered to have no international legal status and were subject to the sovereign power of the United States Government which had acquired the land they occupied. The policy of the United States Government in making the treaties was to purchase the lands occupied by the Indians, and in the period from 1778 to 1842, 242 of such 'treaties' or purchases were made.[67]

3.53 In 1871, the Indian Appropriations Act was passed, providing that 'no Indian nation or tribe within the territory of the United States shall be acknowledged or recognised as an independent nation, tribe or power with whom the United States may contract by Treaty ...'[68] Henceforth, the legal status of the tribes was one of wards of the nation.

3.54 The status of these 'treaties', rather than being analogous to a modern international law treaty, is more appropriately compared with a contract for the sale of land (in some instances coupled with a right of continued permissive occupancy for the Indians). The treaties were regarded as a voluntary cession to the United States Government of the Indians' right to the lands which they occupied.[69] More

significantly, the treaties have always been regarded as domestic arrangements, exclusively within the jurisdiction of the domestic law of the United States.

3.55 The United States Supreme Court considered the matter of these treaties entered into by the United States Government and Indian Tribes in Cherokee Nation v. State of Georgia.[70] In that case, the complainants described themselves as 'the Cherokee nation of Indians, a foreign state, not owing allegiance to the United States, nor to any State of this Union, nor to any prince, potentate or state, other than their own.'[71] In rejecting this description, Chief Justice Marshall described the position of Indian tribes in relation to the United States in the following manner:

> Though the Indians are acknowledged to have an unquestionable and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations ... living in a state of pupillage. Their relationship to the United States resembles that of ward to guardian.[72]

3.56 In a submission to the Committee it was argued by Professor D.H.N. Johnson, Professor of Inter-national Law at the University of Sydney, that too much should not be read into the statements of the Court in the Cherokee case.[73] Use of the term 'domestic dependent nation' in reference to American Indians does not contemplate recognising them as an independent or foreign nation; it is used specifically to contrast the position of the Indians with that of a foreign nation. In using the term, Marshall C.J. expressly rejected the claim of the Cherokees that

> from time immemorial the Cherokee nation have composed a foreign and independent State, and in this character have been repeatedly recognised, and still stand recognised by the United States, in the various treaties subsisting between their nation and the United States.[74]

The treaties between the United States and the American Indians have also been the subject of international litigation during which their international status was rejected. In the Cayuga Indians' Claim, of 1926 the American-British Claims Commission considered the effect of treaties between the Indians, who had settled over the Canadian border, and the United States. It was affirmed by the Tribunal that an Indian tribe is not a subject of international law and is a legal unit only in so far as the law of the country in which it lives recognises it as such.[75]

3.57 The extent of the rights granted to the American Indian tribes under the treaties can only be characterised as domestic. It was submitted to the Committee by Professor Johnson that they afforded protection to the Indians against State governments and private interests, but that they have not been regarded as binding on the United States Government.[76]

3.58 A further significant factor defeating the drawing of a comparison between the American and Australian positions is that, unlike the American Constitution, the Australian Constitution (according to current interpretations) does not appear to provide for an assertion by Australian Aboriginal communities that they are 'domestic dependent nations' in the same manner in which American Indian reservation communities have been able to do.[77]

3.59 In 1763, King George III, by Royal Proclamation, guaranteed protection to the North American Indian (Canadian) peoples under the sovereignty of his crown.[78] The Proclamation acknowledged the Indians' interest in the land they inhabited and according to its terms, land was to be reserved for the Indians with rights of undisturbed possession. Private individuals were prevented from purchasing Indian land, with the Governor, in the Crown's name, having exclusive right of purchase.

3.60 The Proclamation is regarded by the present Canadian Government as the fountainhead of fair dealing with the natives.[79] In his discussion of the Proclamation, Professor Green writes of United States Chief Justice Marshall's opinion of the Proclamation in the following terms:

> It is clear that in Marshall's eyes the Proclamation was in no way an acknowledgement of existing rights, but an ideological cover for the predatory claims of the Crown and a sop to the Indians; it was the price that the Crown was prepared to pay, at least on paper, in order to buy their goodwill ...[80]

Treaties were concluded between Canadian Indians and the British Government after this proclamation as an implementation of the latter's policy of land purchase in advance of colonial expansion to prevent the warfare which had occurred in the United States.

3.61 In treaties concluded after 1867 the Indians agreed to 'cede' all rights to designated territories in return for annual payments, smaller areas reserved for their exclusive use, as well as special hunting and fishing rights over the land ceded to the Canadian Government. Sixty seven such treaties were made

between 1725 and 1919 embracing half of the Indians of Canada.[81] All of these treaties were formal written agreements to which both parties attached great significance at the time. The representatives of the colonial government sought peace to reduce the costs of their colonial expansion and the Indians, negotiating under duress, sought good faith and permanency in the agreements.

3.62 The Treaties made between the British Government and, subsequently, the Canadian Government and the Canadian Indians, have, like the American treaties, been regarded as agreements to be governed by domestic law. Professor L.C. Green, in discussing the status of the treaties, wrote:

> Those treaties are not treaties in the international sense of that term. Since they are only of legal significance in municipal law there is no doubt that the Canadian Parliament is able to terminate them with the concomitant consequence that the courts would be obliged to give effect to the legislation, denying even any moral obligation upon the Crown. But even without such legislation, the courts have been unwilling, despite the activities of individual judges, to give the treaties any legal validity, ignoring the idealistic language and long-term promises of the treaty-makers.[82]

3.63 Recently an English Court was concerned with a case involving the Royal Proclamation of 1763 and the status of the treaties made with Canadian Indians. The Indians were concerned that their rights under the treaties should be safeguarded with the repeal of the British North America Act 1867 and the repatriation of the Canadian constitution. The court concluded that, as the treaties were not between independent sovereign states, they would possibly be adjudicated upon by municipal courts. Had the obligations set out in the treaties been of an international character, the English courts would have had no

jurisdiction over the matter at all.[83] Section 35 of the new Canadian Constitution now provides that 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'.[84] Professor Johnson in evidence to the Committee stated 'It remains to be seen how the Canadian courts will apply this provision.'[85] The rights of Canadian Indians are now regarded as being in part derived from the old treaties and in part from Anglo-Canadian common law. Their rights are therefore all domestic, and they have no separate rights under international law.

Conclusion concerning domestic treaties

3.64 The Commonwealth Attorney-General's Department as a basis for its opinion that the Commonwealth lacks the power to enter into a 'treaty' with Australian Aborigines notes that the social organisation of Aboriginal tribes and other communities in Australia is different in significant respects from that of other indigenous communities (for example, Cherokee Indians in the United States).[86]

3.65 In the Department's opinion, there is scope for 'an Australian Aboriginal "community" to develop to the point where, if the United States' models are followed it might conceivably become appropriate to speak of an arrangement between that organised community and the Commonwealth as a "treaty"'.[87] The Department hastened to negate the use of the term, however, because of its international legal implications, and reiterated recent advice by the Attorney-General to the Prime Minister that any such arrangement would require the insertion of

> ...any provisions needed to make it clear that Aborigines were not being treated as if they were a community separate from the Australian community, and provisions to ensure that the arrangement was not conceived as being analogous to a treaty between separate nation States.[88]

Such a precaution was necessary to preclude all possibility of an Aboriginal self-determination claim. For the same reasons the Commonwealth should avoid against the use of the term 'Aboriginal Nation'.[89]

3.66 It can be seen that not a great deal is to be achieved in attempting to use these past treaties as precedents for a compact between Aborigines and the Commonwealth. They were concluded at a time when the term 'treaty' did not possess so fixed a meaning in international law as it does today. Thus these treaties have no status as instruments of international law. In addition the purpose and effect of the treaties must be considered. It is significant for the contemporary debate that they were, for the most part, treaties imposed by a powerful colonising nation on an indigenous population with no choice other than to agree to the terms. (Neither party in the current Makarrata negotiations would brook this form of agreement today). While the language of the treaties may indicate an intent and concern to safeguard indigenous rights, their principal purpose was to sanction the colonising powers' alienation of land from the indigenes. It can be seen from the Canadian, United States and New Zealand examples that, for the most part, what rights the indigenes now possess arose not out of the treaties, but out of the domestic law applying to everyone, colonist and indigene alike, within the territorial boundaries of the nation.

Endnotes

1. Evidence, p. 901.

2. For example, 'Convention, Protocol, Agreement, Arrangement, Process Verbal, Statute, Declaration, Modus Vivendi, Exchange of Notes (or of Letters), Final Act and General Act.' J.G. Starke, Q.C., An Introduction to International Law, London 1977, p. 462.

3. According to Article 2, paragraph 1(a) of this Convention, 'for the purposes of the present Convention, "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.' Evidence, p. 852.

4. 'An international person is an entity having the power of independent action on the international plane.' D.W. Greig, International Law, London, 1976, p. 92.

5. Evidence, p. 854.

6. Evidence, p. 854.

7. Evidence, p. 854.

8. Submission by the National Aboriginal Conference, Evidence, p. 627.

9. Starke, op. cit. p. 458.

10. Jowitts Dictionary of English Law, London, 1977, p. 1678.

11. P.G. Osborn, A Concise Law Dictionary, London 1964, p. 297.

12. Saunders, Words and Phrases Legally Defined, 2nd Ed, 1970 Vol. 5, p. 92.

13. The Arantzazu Mendi (1939) A.C. 256, per Lord Atkin, at pp. 263-265, cited in Evidence, p. 716 by B.A. Keon-Cohen.

14. See generally Greig, op cit., p. 157.

15. '79 ... The expression was a legal term of art employed in connection with "occupation" as one of the accepted legal methods of acquiring sovereignty over territory. "Occupation" being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid "occupation" that the territory should be terra nullius - a territory belonging to no one - at the time of the act alleged to constitute the "occupation" ... a

determination that Western Sahara was a terra nullius at the time of colonisation by Spain would be possible only if it were established that at that time the territory belonged to no one in the sense that it was then open to acquisition through the legal process of "occupation".

80 ... The state practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as terrae nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of terra nullius by original title but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a "terra nullius" in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of terrae nullius.

81 ... At the time of colonisation Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them.

... In colonising Western Sahara, Spain did not proceed on the basis that it was establishing its sovereignty over terrae nullius.' Western Sahara, ICJ Reports, 1975, 6 at p. 39. Evidence, pp. 970, 971.

See also Greig, op. cit. p. 161.

16. There is abundant authority for British recognition of prior native ownership of land. Some relevant cases on the point are as follows: Canada, St Cathrines Milling and Lumber Co. v. R (1888) L.R. 14 App Cas 46, Attorney-General for Quebec v. Attorney-General for Canada (1921) 1 A.C. 401; United States of America, Fletcher v. Peck (1810) 6 Cranch 87, Johnson v. McIntosh (1823) 8 Wheat. 543, Worcester v. Georgia (1832) 6 Pet. 515; New Zealand, Treaty of Waitangi, Hoani Teheuheu Tukino v. Aotea District Maori Land Board (1941) A.C. 308; New Guinea, The Administrator of Territory of Papua New Guinea v. Guba Doriga, Unreported, 12 Dec 1973, (1973-4) 2 ALR xxiii The Solomon Islands; Hana siki v. O.J. Symes (1951) Solomon Islands, unreported judgement of Charles J, cited in B. Hocking, Native Land Rights, unpublished master's thesis, Monash

University, Melbourne, 1970, Appendix 2; India, Vajesingji Joravarsingji v. The Secretary of State for India (1924) L.R. 51 I.A. 357; Africa, Amodo Tijani v. Secretary Southern Nigeria (1921) 2 A.C. 399.

17. Cited in research paper, Interim Analysis of a Survey of Aboriginal Demands, prepared by Michael Anderson for the NAC Makarrata Sub-committee.

18. Evidence, p. 652.

19. Evidence, p. 652.

20. Evidence, p. 652.

21. Evidence, pp. 626, 652. 'Since 1788 our nation has been invaded by ever-increasing numbers of Europeans who, with superior weapons, have attempted to deport our people and destroy our law and culture and seize without compensation, our land. We have never conceded defeat...The Aboriginal people have never surrendered to the European invasion and assert that sovereignty over all of Australia lies with them. The Settler state has never recognised the prior ownership of this land belonging to that of the Aboriginal nation. We demand that the colonial settlers who have seized the land recognise this sovereignty and on that basis negotiate their right to be there.' Evidence, p. 248.

22. 'They bestowed no labour upon the land and that - and that only - it is which gives a right of property to it.' Herald, Sydney, 1838, cited in First Report from the Select Committee of the Legislative Assembly upon Aborigines, Sydney, 13 August 1980, p. 33.

23. Professor W.E.H. Stanner, White Man Got No Dreaming, Canberra, 1979, p. 230.

24. Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth (1970) 17 FLR 141.

25. Ex Parte Meneling Station (1982) 57 ALJR 59, (1982) 44 ALR 63.

26. ibid.

27. R.M. & C.H. Berndt, The World of the First Australians, Sydney 1977, provides a good anthropological study of this subject.

28. H. Reynolds, The Other Side of the Frontier, Townsville, 1981, p. 53.

29. Evidence, pp. 970, 904.

30. Western Sahara Case, cited by Professor Johnson in Evidence, p. 861.

31. ibid.

32. P. Bayne, The Makarrata, Legal Service Bulletin, October 1981, p. 234. 'In pursuing the Makarrata (Treaty) we assert our basic rights as sovereign Aboriginal nations who are equal in political status with the Commonwealth of Australia in accordance with the principal espoused by the International Court of Justice in the Western Sahara Case that sovereignty has always resided in the Aboriginal people'. Evidence, p. 626.

33. Evidence, pp. 904-5.

34. Evidence, p. 905. This rule regards a prescriptive title to sovereignty as arising in circumstances where no clear title to sovereignty can be shown by way of occupation, conquest or cession, but the territory in question has remained under the continuous and undisputed sovereignty of the claimant for so long a period that the position has become part of the established international order of nations.

35. Evidence, p. 772.

36. See for example H. Reynolds, Aborigines and Settlers, Melbourne, 1972 and H. Reynolds, The Other Side of the Frontier, Townsville, 1981.

37. C.D. Rowley, The Destruction of Aboriginal Society, Canberra, 1970, Vol. I, p. 5.

38. ibid.

39. Official British attitudes did not however have unanimous support among contemporary opinion. For example, 'our brave and conscientious Britons whilst taking possession of their territory, have been most careful and anxious to make it universally known, that Australia is not a conquered country ... and ... have repeatedly commanded that it must never be forgotten "that our possession of this territory is based on a right of occupancy". "A Right of occupancy!" Amiable sophistry! Why not say readily at once, the right of power? We have seized upon the country, and shot down the inhabitants, until the survivors have found it expedient to submit to our rule. We have acted exactly as Julius Caesar did when he took possession of Britain. But Caesar was not so hypocritical as to pretend any moral right to possession ... We have a right to our Australian possessions; but it is the right of conquest, and we hold them with the grasp of power.' E.W. Landor, The Bushman, Or Life in a New Country, London, 1847, pp. 187-9, cited in H. Reynolds, Aborigines and Settlers, Melbourne, 1972, p. 102.

40. 'There was no land law or tenure existing in the Colony (of New South Wales) at the time of its annexation to the Crown; ... ' Cooper v. Stuart (1889) 14 App. Cas. 286 at 292.

41. 'Aboriginals within the boundaries of the Colony are subject to the laws of the Colony ...' R v. Jack Congo Murrell (1836) Legge 72.

42. Cox v. The Commonwealth (1979) 53 ALJR 403 per Gibbs J. at 408.

43. Evidence, p. 549, and see Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth of Australia (1970) 17 FLR 141.

44. Cooper v. Stuart (1889) 14 App. Cas. 286, 291.

45. (1889) 14 App. Cas. 291.

46. ibid, p. 291, see also W. Blackstone, Commentaries on the Laws of England, Oxford, 1766. It has been suggested that such an analysis is an 'unwarranted extension of Blackstone', Evidence, p. 549. Blackstone wrote of territory which can be acquired by occupation as being 'desert and uncultivated', or 'uninhabited'. (Cited in Evidence, p. 549.) However, he did not extend the category to include 'practically unoccupied' land. Indeed he firmly stated that the right of acquisition of lands by occupation existed 'provided he (i.e. the occupier) found them unoccupied by anyone else. ibid, Vol. II, p. 9.

47. (1970) 17 FLR 141.

48. (1970) 17 FLR 141 at 245.

49. (1970) 17 FLR 141 at 201.

50. (1970) 17 FLR 141 at 203.

51. (1970) 17 FLR 141 at 242.

52. Greig, op. cit., p. 183.

53. G.J.L. Coles, The International Significance of a Treaty, Identity, Vol. 4(2), January 1981, p.32.

54. (1979) 53 ALJR 403.

55. Gibbs J, with whom Aickin J agreed. (1979) 53 ALJR 403 at 408.

56. (1979) 53 ALJR 403 at 408.

57. (1979) 53 ALJR 403 at 412.

58. Evidence, p. 1114.

59. Evidence, p. 588.

60. Letter from Senator the Hon. P. Baume, Minister for Aboriginal Affairs to Mr W.F. Bird, National Chairman, National Aboriginal Conference, 3 March 1981. See also speech by Senator the Hon. P. Baume, Senate Hansard, Page 713, 25 March 1981.

61. Letter from Secretary, Attorney-General's Department to Secretary, Department of Aboriginal Affairs, 28 July 1980.

62. Hon A.C. Holding MP, Australian Law Reform Commission Australian Institute of Aboriginal Studies Workshop on the Aboriginal Customary Law Reference, Law School, University of New South Wales, Sydney, 7 May 1983, cited in Professor C. Tatz, Aborigines and the Age of Atonement, paper for the Third International Conference on Hunter-Gatherers, Bad Homburg, Federal Republic of Germany, 13-16 June 1983, p. 5, Submission No. 35.

63. Evidence, p. 974.

64. Treaty of Waitangi Act, 1975.

65. Coles, op. cit., p. 33.

66. 'In 1973, in a highly significant footnote to a case involving Indians, Justice Marshall speaking for the Court observed: "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognised that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."' H.W. Chase, C.R. Ducat, The Constitution, Princeton, 1978, p. 83.

67. Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth of Australia, (1970) 17 FLR 141 at 209.

68. Cited in L.C. Green, Canada's Indians: Federal Policy, International and Constitutional Law, Ottawa Law Review, Vol. 4(1) 1970, p. 101 at 107.

69. Marshall, C.J. (USA) cited in (1970) 17 FLR 141 at 215.

70. (1831) 5 Pet. 1.

71. Cited in (1970) 17 FLR 141 at 215.

72. ibid and G. Bennett, Aboriginal Rights in International Law, London, 1978, p. 5.

73. Evidence, p. 857.

74. ibid.

75. Bennett, op. cit., p. 5.

76. Evidence, p. 862.

77. Coe v. The Commonwealth (1979) 53 ALJR 403 cited by B. Keon-Cohen, Evidence, p. 725.

78. See L.C. Green, Human Rights & Canada's Indians, Israel Yearbook on Human Rights 1971 for relevant extracts of the Proclamation (at page 158) and for a thorough discussion of the history and legal interpretations of the relationship between Canadian Indians and the Canadian Government. See also L.C. Green, Canada's Indians: Federal Policy, op. cit. pp. 101-131.

79. In All Fairness, A Native Claims Policy, Ministry of Indian Affairs & Northern Development, Ottawa, 1981, p. 9.

80. Green, Israel Yearbook on Human Rights, op. cit., p. 175.

81. Brown & Macguire cited in D. Barwick, Making a Treaty, the North American Experience, paper prepared for the Aboriginal Treaty Committee, p. 6.

82. Cited in Evidence, p. 857.

83. Evidence p. 863, in re Indian Association of Alberta, decision of Woolf J., The Times, London, 10 December 1981.

84. Evidence p. 863 (this section has not yet been tested in the Canadian courts).

85. Evidence, p. 863.

86. Letter from Secretary, Attorney-General's Department to Secretary Department of Aboriginal Affairs, 28 July 1980.

87. ibid.

88. ibid.

89. ibid.