AUSTRALIA'S ATTEMPTS TO LEGITIMISE THE ILLEGAL INVASION OF THIS LAND

Australia's unlawful sovereignty claim cannot be legalised by any other recourse to law, except a Treaty under international law. The ways in which the 'Commonwealth Government' and legal opinion has attempted to legitimise its claim to sovereignty over this our land have been by trying to maintain the now untenable fictions of *terra nullius* , land belonging to no-one, 'peaceable settlement' and other ill-founded facades of legal sophistry, such as contained in this impressive list, all equally without foundation in fact:

1) annexation
2) 1967 imposition of 'citizenship' on us
3) prescription
4) intertemporal law
5) conquest
6) Act of State
7) cession - never attempted

1) **ANNEXATION** is only legal when a political entity is annexed without military action. In this land there were more military orders than in any other former British colony, with the exception of South Africa (49) Several examples of Martial Orders are:

IN TASMANIA:

Proclamation, 15 April 1828, by Colonel George Arthur, Lieutenant-Governor of the Island of Van Diemen's Land and its Dependencies :

> Now therefore I,.....do hereby notify, that for the purpose of effecting the separation required, a line of military posts will be forthwith stationed and established along the confines of the settled districts within which the Aborigines shall and may not, until further order made, penetrate, or in any manner or for any purpose, save as hereinafter specially permitted; and I do hereby strictly command and order all Aborigines immediately to retire and depart from, and for no reason, or on no pretence, save as hereinafter provided, to re-enter such settled districts, or any portions of land cultivated and occupied by any person whomsoever, under the authority of His Majesty's Government, on pain of forcible expulsion therefrom, and such consequences as may be necessarily attendant on it.
>
> And I do further authorise and command all other persons whomsoever His Majesty's civil subjects in the Colony, to obey the directions of the civil, and to aid and assist the military power... (50)

Proclamation by Colonel George Arthur, 1 November 1828: '...martial law is and shall continue to be in force against the several black or aboriginal Natives, within the several districts of this island...' (51)

Government Order No. 9: Colonial Secretary's Office, 9 September 1830: '4. The utmost disposable military force will be stationed in a few days at those points in the interior which are most exposed to attack, or in which the Natives are most likely to be encountered.' (52)

Proclamation by Colonel George Arthur, 1 October 1830:

> ...Martial Law was, and should continue to be in force against the said black or aboriginal Natives within the several districts of this island...because it is scarcely possible to distinguish the particular tribe or tribes by whom such outrages have been in any particular instance committed, to adopt immediately, for the purpose of effecting their capture if possible, an active and extended system of military operations against the Natives generally throughout the island, and every portion thereof, whether actually settled or not. (53)

IN NEW SOUTH WALES :

Government Order of 28 April 1805:

> ... the Governor has judged it necessary for the preservation of the lives and properties of the Out-Settlers and Stockmen, to dis-

> tribute Detachments from the New South Wales Corps among the Out-Settlements for their protection against those uncivilized Insurgents ... it is hereby required and ordered that no Natives be suffered to approach the Ground or Dwellings of any Settler... the Settlers are required to assist each other in repelling those visits; and if any Settler...harbours any Natives he will be prosecuted.' (54)

Governor Brisbane's proclamation of Martial Law of 14 August 1824:

> Now therefore by Virtue of the Authority in me vested by HIS MAJESTY'S Royal Commission, I do declare that in Order to restore Tranquility, MARTIAL LAW TO BE IN FORCE IN ALL THE COUNTRY WESTWARD OF MOUNT YORK:.. (55)

The fact of invasion by the British people and their army, the fact of usurpation of land and dispossession thereof by the means of massacre and terror are indisputable facts. The claim of 'peaceable settlement" and legal establishing of British sovereignty in this land are without foundation in fact. To the contrary, evidence is available both by oral testimony and historic records that 'settlement' was officially established by means of invasion, massacre, fraudulent appropriation and instilled terrorism, including genocidal practice. The prevalent attitude was:

> Extermination is then the word - wholesale massacres of men, women and children ... These terrible *razzias* occurring in the remote back settlements and pastures, are for the most part ignored by the local authorities - crown land commissioners, police magistrates, and others, or else considered a justifiable negrocide. (56)

A Catholic missionary, McNab, wrote to the Earl of Kimberley that, at a banquet given by the Queensland Governor in 1880, the policy of genocide was approved:

> ...the discourse turned on the treatment of the Aborigines and the conclusion arrived at (as I learned from a member of the Legislative Council; who was present on the occasion) was, that there is nothing for the Aborigines but extermination. (57)

In fact, the first Governor, Phillip, portrayed by whites as a benign Governor who sought friendly relations with us, had his own policy of breaking the Aboriginal resistance. His policy was described by his expedition leader, Tench:

> That against this tribe he was determined to strike a decisive blow, in order, at once to convince them of our superiority, and *to infuse an universal terror*... (58)

Governor Arthur adopted the same policy: 'Terror may have the effect which no proffered measures of conciliation have been capable of inducing.' (59)

On 31st October 1828, the minutes of the Executive Council in Tasmania concluded: 'To inspire them with terror ...will be found the only effectual means of security for the future.' (60)

The historian, Rusden, wrote in 1883: 'The rule was to inspire terror by slaughter....' (61)

Our aggressive and protracted resistance to invasion is also well documented in white history, as well as being embedded in Aboriginal memory and oral history

> The aggression of the Aborigines along the whole border of civilisation grew worse and worse daily; they involved the loss of life as well as loss of property ...AN ENTIRE LINE OF ACTIVE HOSTILITY CIRCUMSCRIBING THE TERRITORY ALONG ITS ENTIRE BOUNDARY. (62)

It is otherwise known as 'the line of blood.

Peaceful settlement cannot be claimed on grounds that our land was uninhabited, nor that our land was settled without violence. In fact, such was the 'universal terror' instilled in our people to quash the resistance that many of our people are still afraid to speak out for fear of retribution. In 1900 Meston reported in a survey of blacks in south-west Queensland, that was supposedly 'peacefully settled' for fifty years, not ever before: 'had I seen Aboriginal men living under such extraordinary terrorism.' (63) A white official reported on Cape York Blacks in 1890 that they were like: '... hunted wild beasts afraid to go to sleep in their own country ... having lived years in a state of absolute terrorism.' (64)

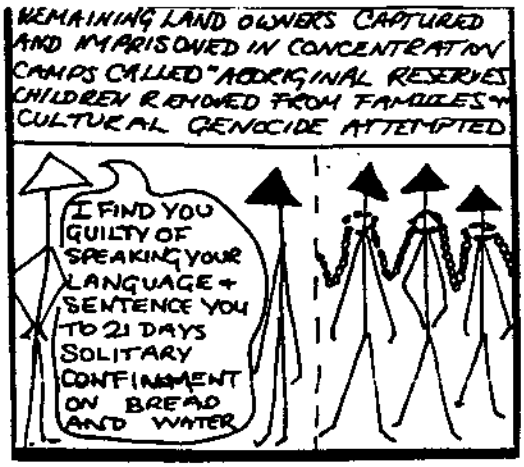
A policy of universal terrorism was supplemented by the policy of extermination and genocide. Along with 'universal terror', extermination and genocide was a denial that we were human beings, rather: 'as vermin, to be cleared off the face of the earth' (65)

Thus there was a total denial of, not only our land rights and our sovereign rights, but also our human rights. Many crimes against our humanity have been committed.

The British invasion claimed at least 600,000 Aboriginal lives (66). Live babies were buried in a line up to their necks in sand and their heads kicked off in a contest to see who could kick a head the furthest. Men had their testicles cut off and were left to run around screaming. (67) Women had their throats slashed, they ran until they collapsed and were then thrown, alive, onto a fire. (68) Live children were thrown onto fires. (69) 'Sport' was the shooting of blacks, men, women and children, on sight. (70) Starving blacks were invited to a feast, then shot as they came in for food. (71) Whole family groups were poisoned by strychnine in the flour or water. (72) Children were stolen. Many never saw their families again. Over 5000 children in living memory have been removed from their group. (73) Whole tribes/groups

have been forced to live in exile alongside incompatible tribes at close quarters. Punishments of 21 days solitary confinement were given to those speaking their own language. Women were kept imprisoned for prostitution. Men were tortured, (74) etc. etc..

The litany rolls on.



Even to the present day that terror, that disregard for our human lives, is entrenched in the social and bureaucratic structure of white Australia.

As recently as 28 July 1987, a report in the *Canberra Times*, entitled 'Aborigines Living Like Prisoners', Federal Court Judge, Justice Einfeld, President of the Human Rights Commission, had evidence that Aboriginals in the New south Wales border community of Toomelah, live in conditions as bad as World War Two concentration camps. The Judge exclaimed: 'It is beyond belief...I have been to Soweto in South Africa, to German concentration camps, but this is my own country.' (75)

The recent Black deaths in custody are a deliberate extension of that terror, today.

The dispossession by terror of our lands was unlawful by international legal standards contemporary with Captain Cook and has continued to be illegal to this day. E.de Vattel, in a standard work of international law, The Law of Nations, written in the mid 18th century, recognised indigenous peoples' rights to our lands on its true legal basis:

> ... whosoever agrees that robbery is a crime, and that we are not allowed to take forcible possession of our neighbour's property will acknowledge that, without any other proof, that no nation has a right to expel another people from the country they inhabit in order to settle in it herself.

In another section he observed that if a nation: ' ... takes up arms when it has not received any injury and when it has not been threatened it wages an unjust war.' (76)

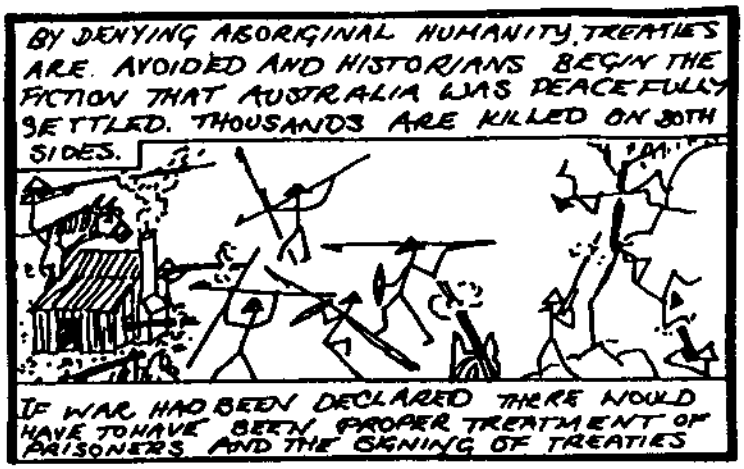
When a nation enters a country to usurp the land and does not declare war, but prefers to use methods of assassination against the civilian population, against babies, women, children and men armed only with hunting weapons, that invading nation commits, not war, but crimes against humanity.

Genocide.

Such acts bear no semblance of right or lawful purpose and from such acts no lawful position could arise. According to Vattel our resistance against an unjust attack was not only right but a sacred duty, for which we were massacred.

This continent has been acquired by assassination and invasion, not conquest, not peaceable settlement, not by any humane, just or legal manner. This land has not become the legitimate property of the invaders, the murderers by the mere passage of time or by a paper script marking the boundaries in English.

Even the High Court of Australia has never made a ruling as to how Australia was settled, therefore 'peaceful settlement' is not an established fact and cannot be given credence in Australian Law.



2) AUSTRALIAN CITIZENSHIP FOR ABORIGINALS

Australian citizenship, forced upon us as a result of the 1967 referendum, did not extinguish our sovereignty as has been claimed. (77) We never voted to be incorporated with non-Aboriginals. Australian citizenship was imposed upon us unilaterally.

In fact, Aboriginal People still do not have equality in the sense of 'Australian citizenship' as evidenced in the extremes of dispossession, poverty, homelessness, health, unemployment and standing before the courts and the awful fact that the majority of us live in oppressive circumstances in conditions far below those which are acceptable in most Third World countries and in far worse conditions than that which prevail for white prisoners and the mentally ill. For instance, Australian prisoners, wards of the State and the mentally ill have access to fresh reticulated water, adequate shelter, electricity, sanitary disposal, three meals a day and medical clinics in each community. Most of these services are denied Aboriginal People.

In many areas, approximately 7000 Aboriginal People have been coerced, by bullying and promise, to work for the dole (social security payments). Even with this forced labour, that is completely unacceptable to white dole recipients and unionists, adequate shelter, clean drinking water and medical facilities are still not available in these communities. We are still treated like refugees in our own country.

The principle of Plenary Power over Aboriginal people *assumes* authority to enact and enforce any kind of limitation on Aboriginals and their rights of property which it deems appropriate. The courts also assume this authority. Those 'realities' seem inconsistent with any Aboriginal claim to self-determination and sovereignty but if Australia imposes restrictions upon us in violation of international law, the restrictions do not change the rights which Aboriginal people are entitled to exercise under that international law (78), i.e. the right to pursue our sovereign position.

3) PRESCRIPTION:

> Prescription is acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.(79)

Prescription has been invoked, by the Commonwealth Ombudsman's legal advisor, as a justification of Britain's/Australia's claim to sovereignty. (80)

However, where there has been a continuous and unabated resistance to such an assertion of prescription and where superior force has been utilised to economically and politically deny avenues of redress to the original owners, prescription by such coercion cannot be accepted by international law as legalising the invaders' assertion of sovereignty by this means.

The International Court of Justice has taken the view that the emerging principle of self-determination supersedes States' historical claims to territorial integrity. (81) That is, a State can no longer claim it is immune from decolonisation if it encompasses enclave indigenous Peoples, who were unlawfully dispossessed:

'The fact that a people have long been displaced or oppressed does not convert a lawless act into a lawful one.' (82)

4) INTERTEMPORAL LAW

is that 'a judicial fact must be appreciated in the light of law contemporary with it.' (84)

Intertemporal law cannot be legally invoked here because the law extant at the time of invasion was that cession could only be made through treaty or formal purchase, neither of which occurred in this land. Nevertheless, intertemporal law was wrongly applied in Justice Blackburn's ruling in the Gove Land Rights Case (*Milirrpum v Nabalco Pty. Ltd*). Blackburn acknowledged the principle of 'communal native title'

'... at common law the rights ... of native communities to land within territory acquired by the Crown ... persisted, and must be respected by the Crown itself and by its colonising subjects, unless and until they are validly terminated. Such rights could be terminated only by the Crown and only by the consent of the native people or perhaps by explicit legislation. Until terminated, the rights of the native people to use and enjoy the land, in the manner to which their own law or custom entitled them to do, was a right of property."(85)

But he chose to ignore the international law extant at the time Cook claimed possession and Phillip established the colony, ie. indigenous lands were to be acquired by formal cession. Blackburn has tried to create a 'legal' foundation for Aboriginals' gradual eviction from our land, by working from the premise that this land was peaceably settled and Aboriginals immediately became British Subjects. Therefore Australia need not recognise 'communal native title', because 'communal native title' did not exist within England at the time of invasion of our land and there was no recognition of such a title in English Law.

In his deliberations, Blackburn totally disregarded the fact that Aboriginals had not been accorded rights or entitlements as 'British Subjects' accorded to them by the invaders. In fact, Aboriginals were deliberately slaughtered and *specifically* excluded from any such right as enjoyed by a British Subject. Aboriginals were not given standing in the courts; were not allowed to give evidence or swear oaths in witness against the whiteman; were specifically excluded from buying and holding title in land; were excluded from equal social welfare benefits and excluded from citizenship under the Australian Constitution.

It cannot be said with any legal validity that Aboriginals were accorded the rights of British Subjects or equal citizenship and status. In fact, such social and legal equality still has not been accorded to us, despite the fact that in 1967 distinct and separate apartheid laws, were removed by Referendum from the Australian Constitution.

His failure to recognise that Aboriginals had a highly complex legal structure, capable of negotiation and economic transaction in land sits peculiarly at odds with his statement: '... if ever I have seen a system of government ruled by law and not of men it is that which I have before me ...'

He failed to interpret the significance of the Batman Treaty and it would seem that he predicated his findings on the view of the Privy Council of 1881:

> There was no land law tenure existing in the colony at the time of its annexation to the Crown; and, in that condition of matters, the conclusion appears to their Lordships to be inevitable that, as soon as colonial land becomes the subject of settlement and commerce, all transactions in relation to it

were governed by English law, in so far as that law could be justly and conveniently applied to them. (86)

He did not realise, as he should have, that the question of land tenure and law related to a litigation between an Englishman and the Crown. He did not examine, as he should have, that sacrosanct principle contained therein, in that finding '... in so far as that law could be justly and conveniently applied to them....'

Most incredibly he failed to take legal cognisance of the fact that Aboriginals, from the Beginning, owned in possessory and proprietary right the land in accordance with the 'ancient laws of the kingdom' and that law remains in force until such time as it is terminated in the clearest and most unequivocable terms by clear negotiation. It is not necessary and has never been necessary, for such ancient laws to have a legal corollary in English jurisprudence. The whole of the Aboriginal case rests on the fact of prior occupation, possession and sovereign root-title.

His refutation of Aboriginal proprietary right by the dictatorial assertion (not in any way legal !) that Aboriginals did not own the land, the land *owned* the Aboriginals can be likened to that of a thief who , found in possession of a stolen car, asserts : 'no-one owns this car, the car owns me. This inanimate object exercises a *legal* proprietary right over me.!!' and the Judge finds in favour of the thief, awards a certificate of title to the car as legal proprietor !!

His assertion that 'communal native title' was not a legal concept in English Law fails as a juridical fact when examining the legal direction and principals in law, and used by Britain in external colonial application, such as the lawful recognition of indigenous rights in America, etc. etc., the Crown treaty with the Maoris, the Imperial Directives to recognise Aboriginal communal rights in land, i.e. Letters Patent to South Australia and Western Australia, etc..

By setting this precedent in Australia, Justice Blackburn opposed the mainstream view that indigenous title arises from the incontrovertible fact of occupation and possession; that indigenous rights remain until extinguished by formal ceding of root title.

He chose to ignore the Proclamation by King George III, on October 1763, (only 5 years before Captain Cook received his orders) which directed that indigenous lands be occupied only after public purchase and cession under the supervision of Crown officers, and ordered non-conforming settlers to be removed. (87)

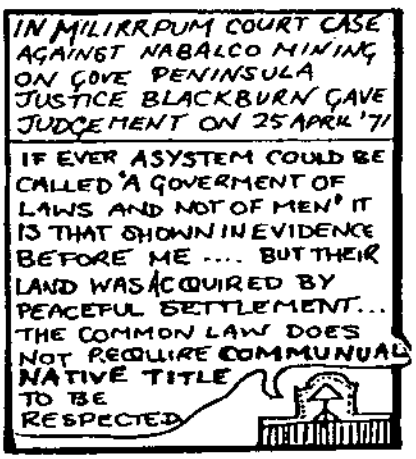
An Imperial Directive, such as that contained in the Proclamation of King George III over-rides, and is superior to, any other legal or constitutional doctrine then in place. In itself, such a Proclamation becomes a legally binding instrument in English law, with consequence and direction upon the Accredited Agents of the Crown and its servants.

Blackburn not only ignored the Admiralty Order, which bound Captain Cook as the Accredited Agent of the Crown, to recognise indigenous title: '... take possession with the consent of the natives ...', (88) but also the clear direction by Lord Morton to Cook:

> ... They are ... in the strictest sense of the word, the legal possessors of the several Regions they inhabit ... Conquest over such people can give no just title... (89)

Blackburn created a defect at law by claiming indigenous rights only existed if specifically created. His judgement has been criticised ever since by the legal fraternity both in Australia and overseas. (90)

One is left to conclude that he sided with the mining interest, Nabalco, who stated: 'To accede to the Aboriginal propositions would be to unsettle the property laws of the continent.' (91)

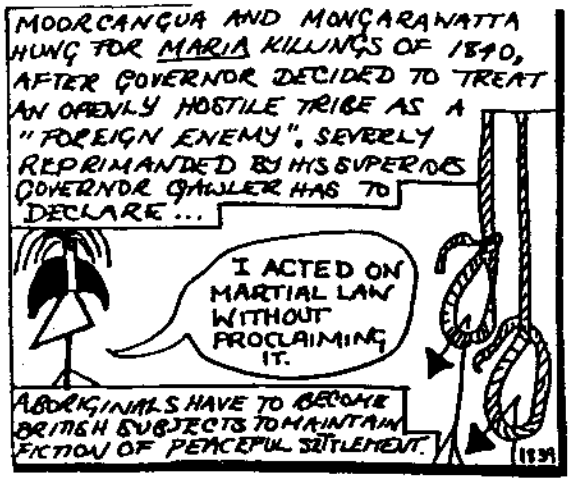


5) CONQUEST

The concept of *terra nullius* - land belonging to no-one - is fast becoming an abandoned method to justify the white invasion of our lands. Lawyers and politicians are desperately seeking another foundation to base a premise of interwoven fictions and acts to justify, in the courts, a continual denial of Aboriginal rights to land. The term of 'peaceable settlement' has also been abandoned in face of historic evidence to the contrary. The current device being propounded is the claim that Aboriginals have lost all entitlement to proprietary right through conquest.

Any comparison to the formal conquest of American Indians, at the end of the Indian Wars, when reservations were set aside for Indians separate from white settlement, is invalid in Australia because, no war was declared. In fact Britain was careful NOT to declare war otherwise Aboriginals would have to be accorded the recognition of certain rights. (92)

The Aboriginal reserves, in this land, were created as concentration camps to contain the rightful owners of this land in exile, and are where the majority of Aboriginal People are forced, through political, economic and medical circumstances, to live to this



day.

We have never surrendered our rights, nor entered into a Treaty, despite 200 years of terror, massacre and inhumanity levied against us.

For Australia to claim a *legal* base in land title, to try and establish a superior root title of sovereignty over these our lands has as much moral and legal foundation as be would an assassin's claim to the property of the victim.

6) ACT OF STATE

The Act of State principle has been suggested as that manner of legal enactment, which nullified Aboriginal rights and claims in territory. When a territory is acquired by a Sovereign State under the principle of 'Discovery', the Act and Proclamation for the first time is an Act of State. That Act of State still requires the appropriate principles be maintained throughout. In the case of 'Discovery', such Proclamation of a sovereign right served to stay any encroachment of right by any other international State upon the declared position of the 'discoverer'.

Such 'discovery' and proclamation, however, were not sufficient in themselves to abrogate the inherent rights in law and land of the indigenous possessor of those lands, and encumbered the 'Discoverer' State to then proceed to negotiate, by treaty or war, to assert a sovereign position. Upon the cessation of hostilities, it was still encumbent upon a State to negotiate the principles upon which the indigenous rights were to be recognised: the manner in which and extent of lands to be ceded and the sharing or exchange of powers to be negotiated in the most unequivocable terms.

The first 'Act of State', 'Discovery', and 'Possession' carried with it a principle of established law that was binding and irrevocable, which could not, of itself, create a superior title unto itself by misappropriation, fraud or massacre of the original possessors. An Act of State is implicit in the total integrity of the State so acting.

An Act of State must flow from a State that has a legal foundation in the first principle manner of acquisition, from which all Acts of State may flow.

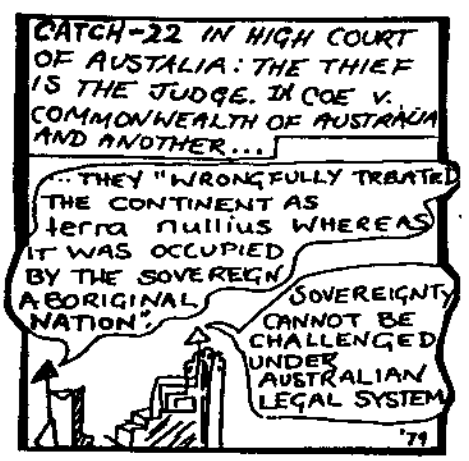
A sovereign State cannot legally claim territorial right of another country and, by subsequent Act or Acts, create a legal countenance to the initial fraud, i.e. 'Discovery' and *terra nullius*.

But in an original and first Act of State, such as that involving the proclamation of sovereignty over a foreign and occupied country, the State so acting is bound by legal consequence of Nations to act lawfully. If the principal first Act of State is an Act unlawfully executed to claim root title, that Act is illegal and cannot be given legal credence by any other Nation State. (93)

Some more recent Australian juridical interpretation of Act of State has been inclined to assume that an Act of State can, in effect, shield the usurping State from imputation of impropriety or municipal remedy to an overtly illegal premise in practice by that State. (94)

The so-called Act of State principle has also been used in Australian Law to shield the Crown from Aboriginal land claims arising after the date of annexation eg. in the *Gove Land Rights Case* (95). Act of State was also used to quash the Aboriginal sovereignty challenge in *Coe v. Commonwealth of Australia* (96), by claiming that the Act of State by Britain claiming sovereignty over this land could not be challenged in municipal courts, not even in the highest court of the land. The legal adviser to the Commonwealth Ombudsman submitted:

> The proclamation of sovereignty is an Act of State. The courts will not adjudicate on such a proclamation, even if it appears to be in violation of international law. (97)



Any examination of an Act of State, however, must bear the scrutiny of lawful conduct. Where an executive arm of State acts outside the perimeters of its legal charter (such as the colonial powers contravening the Imperial directives sacrosanct in State Letters Patent) (98) and where an Agent of the State ignores the binding orders of the Crown and thereby establishes that Act by fraudulent methods, that Act is not only questionable in law but becomes null and void.

In such a case, where fraudulent representation, terror and massacre have been employed as principal means whereby the State originates a root title in order to achieve status, the very foundation of the origin of that State has no *legal* powers to proclaim an 'Act of State'.

Previously Aboriginals had no recourse to municipal remedy at law, our case being considered a 'domestic issue', which effectively gagged us from seeking redress in the international arena. But the now poorly regarded 'Act of State' has fallen into disrepute, as archaic and untenable even in the country of origin. The international area of jurisprudence and internationally binding covenants over-ride domestic Acts of State. For example, a principle of international law is that a Nation State cannot excuse itself from applying an international law by claiming its internal laws limit its international responsibilities.

Article 43 of the Law of Treaties (99) means that when a State signs an international treaty any internal laws that conflict are over-ridden. Section 109 of the Australian Constitution enables internal laws to be over-ridden and made consistent with ratified international covenants. (100)

Australia ratified the International Covenant on Civil and Political Rights on 13 August 1980 (101) and thereby agreed, under international law, to protect indigenous rights to land (Article 1). (102)

Such ratification of international treaty not only enjoins a legal position upon the signatory States, but indeed over-rides municipal and State laws which do not conform to the principles of Charter, but also over-rides the Constitution of State.

In fact the Australian Government has reported to the United Nations that it considers that national Governments should not be able to hide behind their domestic political system in order to sidestep their international obligations. (103)

This position, taken in the knowledge of the original precise legal Admiralty Order, to Captain James Cook upon 'Discovery', and subsequently the Imperial Directives, as delivered by the various Colonial Secretaries and Governors to the colony, leaves no doubt as to our Aboriginal rights and entitlement to land, prior possession and sovereign status in domain.

Where an Act of State has been employed to declare 'peaceable settlement' and to suggest the imposing of a 'British subject' status upon Aboriginals, that 'status' of 'British subject' immediately then conferred such right to life and property as was commonly available to British subjects in England. A guarantee, in effect, that Aboriginal life and land right was sacrosanct at law. That such right was not accorded to Aboriginals goes but to prove the invalidity of the Crown to a Sovereign assertion legally over the land.

7) CESSION

There has never been any formal purchase of this land from any Aboriginals, nor negotiation and signing of a treaty with British or Australian 'Government'.