RECOGNITION OF OUR INHERENT SOVEREIGN AND INDIGENOUS RIGHTS WITHIN AUSTRALIA.

Cognisance of our inherent rights has been apparent *within* Australia and first acknowledged for protection by solemn laws then applied by nation States and in practice as a mandatory principle in English law elsewhere.

The lawful recognition of Aboriginal prior and possessory right was acknowledged in Australia, not only by the Crown, but also by the various sovereign representative agents of the Crown and its citizens. But these rights were subsequently refused to us on arbitrary grounds of omission, racism, political expediency and greed.

1. In 1807 Governor King prepared a confidential memo for his successor, Bligh. Under a section entitled 'Respecting Natives' he explained that he had never been willing to force Blacks to work because he had '...ever considered them the real proprietors of the soil'. (104)

2. On 15 April 1828, Governor Arthur proclaimed Martial Law in Tasmania but acknowledged the need for a treaty and the recognition of usufructuary rights.

> It is expedient, by a legislative enactment of a permanent nature, to regulate and restrict the intercourse between the white and the coloured inhabitants of this Colony, and to allot and assign certain specific tracts of land to the latter for their exclusive benefit and continued occupation.
>
> And whereas, with a view to the attainment of those ends, a negotiation with certain chiefs of aboriginal tribes has been planned.(105)
>
> Nothing herein contained shall prevent the Aborigines from travelling annually, (according to their custom). (106)

3. In 1835 colonial authorities in Sydney declared illegal Batman's attempt to buy land (which is now Melbourne) by treaty with Aboriginals. The Crown claimed that it alone had the pre-emptive right to root-title to land and to make land grants. Batman's company sought legal opinion from three of Britain's leading constitutional lawyers, one of whom was William Burge, who was *'in all matters of colonial law...one of the first authorities.'*

Burge referred to Marshall's authoritative recognition of 'communal native title'

> ...a principle adopted by Great Britain as well as by the other European states, in relation to their settlements of the continent of America, that the title which discovery conferred on Government by whose authority or by whose subjects the discovery was made, was that of the ultimate dominion in and sovereignty over the soil, even whilst it continued in the possession of the Aborigines. This principle was reconciled with humanity and justice towards the Aborigines,because the dominion was qualified by allowing them to retain, not only the rights of occupancy, but also a restricted power of alienating those parts of the territory which they occupied.(107)

4. The British House of Commons Select Committee on Aboriginal Tribes made its report in 1837, having realised that the Act of British Parliament initiating the establishment of South Australia in 1834 on 'waste and unoccupied land' ignored Aboriginal title and rights despite evidence that Aboriginals were known to inhabit the area

> It might be presumed that the native inhabitants of any land have an incontrovertible right to their own soil: a plain and sacred right, however which and, when there, have not only acted as if they were the undoubted lords of the soil, but have punished the natives as aggressors if they have evinced a disposition to live in their own country.

In a clear reference to the Aboriginals of Australia, the report states:

> If they have been found upon their own property, they have been treated as thieves and robbers. They are driven back into the interior as if they were dogs or kangaroos. (108)

Referring again to South Australia, the House of Commons Select Committee commented:

> A new colony is about to be established in South Australia and it deserves to be placed on record, that Parliament, as lately as August 1834, passed as Act disposing of the lands of this country without once adverting to the native population ...

The Commissioners acknowledged that it is:

> ...a melancholy fact, which admits of no dispute, and which cannot be too deeply deplored, that the native tribes of Australia

have hitherto been exposed to injustice and cruelty in their intercourse with Europeans.

... This then appears to be the moment for the nation to declare that...it will tolerate no scheme which implies violence or fraud in taking possession of such territory; that it will no longer subject itself to the guilt of conniving at oppression ...' (109)

5. Letters Patent issued to the South Australian Colonization Commission on 19 February, 1836, contained the proviso;

> ...provided always that nothing in these our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own persons or in the persons of their descendants of any Lands therein now actually occupied or enjoyed by such Natives. (110)

Two years after the founding of the Province, the Secretary of the South Australian Association observed in a report:

> No legal provision by way of purchase of land on (the natives) behalf or in any other mode has yet been made, nor do I think with proper care it is at all necessary. (111)

The observation made by the Secretary clearly shows it was the intention of the South Australian 'Government' to perpetrate a fraud and land theft in his advice for caution.

6. Sir George Grey, a member of the 1836-7 House of Commons Select Committee requested of the King of England: '... that measures be taken to secure to the natives of the several Colonies the due observance of justice, and protection of their rights.' (112)

7. Lord Glenelg, as Secretary of State for the colonies, wrote to the South Australian Colonizing Commission, aware that the claim of *terra nullius* - land belonging to no-one - was false.

> An object of very serious importance. This is more especially evident when it is remembered that the Act of Parliament presupposes the existence of a vacant territory and not only recognises the Dominion of the Crown, but the proprietary right to the soil of the Commissioners or of those who shall purchase lands from them, in any part of the Territory ... Yet if the utmost limits were assumed within which Parliament has sanctioned the erection of the colony it would extend very far into the interior of New Holland, and might embrace in its range numerous Tribes of People whose proprietary title to the soil we have not the slightest ground for disputing.' (113)

8. To satisfy the Colonial Office in Britain the South Australian Colonizing Commission agreed to protect our rights:

> Should the Protector of the Aborigines find that the Lands, or any portion of them ... are occupied or enjoyed by the Natives, then the lands which may be thus occupied or enjoyed shall not be declared open to public sale, unless the Natives shall surrender their right of occupation or enjoyment, by a voluntary Sale made to the Colonial Commissioner .... Should the Natives ocupying or enjoying lands ... not surrender their right to such land by a voluntary sale, then, in that case, it will be the duty of the Protector of the Aborigines to secure to the Natives the full and undisturbed occupation or enjoyment of their lands and to afford them legal redress against depredators and trespassers. (114)

A method of compensation was drafted to amend the South Australian Act:

> That it shall be lawful for the said Commissioners to assign or allot any Part of the Lands of the said Province to the Aboriginal Natives thereof free of any Price ... and also to make such Compensation to the said Aboriginal Natives as the said Commissioners shall deem it just in Compensation for their Interests in any Lands now occupied by them in the said Province; and any such Compensation shall and may be paid out of the Produce of Lands sold ... by the Commissioners in the said Province. (115)

9. In 1840 Governor Gawler and Land Commissioner Sturt defended Aboriginal Rights against the Settlers in South Australia, stating that Aboriginal root title prevailed over any rights or claims possessed by Europeans: ' ...as preliminary to those of the Aboriginal inhabitant...' whose ' ... natural indefeasible rights were vested in them as their birthright.'

It was acknowledged that we possessed: '... well understood and distinctly defined proprietary rights over the whole of the available lands in the Province.'

The South Australian colony was founded, on paper, on the principle that Aboriginals had:

> ... an absolute right of selection prior to all Europeans ... over the extensive districts over which, from time immemorial, these Aborigines have exercised distinct, defined and absolute rights of proprietary and hereditary possession. (116)

10. In the 1841 House of Commons Select Committee on South Australia passed the resolution:

> ...authorised to reserve and set apart within the said Province, for the use of the Aboriginal inhabitants thereof and lands which may be found necessary so to reserve and set apart for the occupation and subsistence of such Aboriginal Inhabitants.' (117)

11. Then the British Parliament, in 1842, passed the Australian Wastelands Act which specified that land be reserved: '... for the use and benefit of the aboriginal inhabitants of the Country.' (118)

12. Governor Gipps explained to the New South Wales Legislative Council in 1840 that: '... the uncivilised inhabitants of any country have but a qualified dominion over it, or a right of occupancy only...' (119)

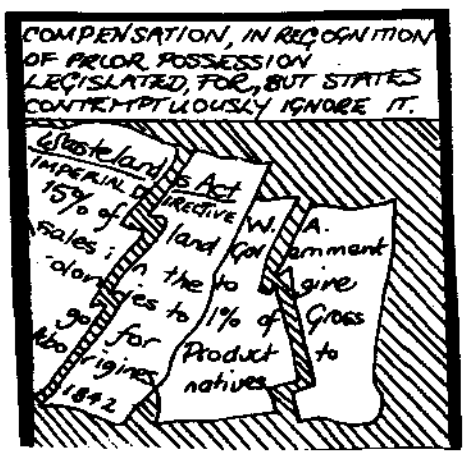
It is quite clear that Governor Gipps recognised not merely a communal title but actual *dominion* and those rights inherent with occupancy, which amount to a greater position than occupancy alone and usufructuary right.

13. In 1848, Secretary of State for the Colonies, Earl Grey, sent a dispatch to the Governor of New South Wales, giving official recognition of our minimum rights on the granting of pastoral leases:

> ... purpose give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such land as they may require within the large limits thus assigned to them but that *these leases are not intended to deprive the natives of their former rights to hunt over these districts, or to wander over them in search of subsistence in the manner to which they have been accustomed*, from the spontaneous produce of the soil, except over land actually cultivated or fenced in for that purpose. (120)

14. When Western Australia was set up by the Imperial Government a directive was that the: 'State Government should give one per cent of its gross revenue towards assisting natives ...

Needless to say: 'The Legislative Council of the day approved an alteration of that provision at the first opportunity....(121)



15. In 1901 the new constitution of Federation explicitly excluded Aboriginals because, under international law, new laws for indigenous people, original owners, could not be made until the existing 'ancient laws of the kingdom' were extinguished by cession or formal purchase. This was never done. (122)

16. In 1975 Senator Neville Bonner's Bill was unanimously passed by the Australian Senate:

> That the Senate accepts the fact that the indigenous people of Australia, now known as Aborigines and Torres Strait Islanders, *were in possession of the entire nation* prior to the 1788 First Fleet landing in Botany Bay, urges the Australian Government to *admit prior ownership* by the said indigenous people, and to introduce legislation to compensate the people now known as Aborigines and Torres Strait Islanders for dispossession of their land. (123)

17. In 1983 the Senate Standing Committee on the 'Makarrata' concluded:

> *It may be a better and more honest appreciation* of the facts relating to Aboriginal occupation at the time of settlement, and of the Eurocentric views taken by the occupying power, could lead to the conclusion that sovereignty inhered in the Aboriginals at that time...(124)

Then with no legal argument the Select Committee stated: 'In particular they are not a sovereign entity under our present law, so that they can enter into a treaty with the Commonwealth.' (125)

18. In 1984 Australian Minister for Aboriginal Affairs addressed United Nations Human Rights Commission's sub-commission's Working Group on Indigenous Populations in Geneva: 'The Australian Government *recognises the prior occupation and ownership* of Australia by Aboriginal and Torres Strait Islander People.' (126)

Despite quickly following up with a denial of present Aboriginal sovereignty the 'Commonwealth' has formally recognised our prior occupation and ownership in the international arena.

19. Having ratified the United Nations Conventions; a) International Covenant on Civil and Political Rights; b) International Convention on the Elimination of all forms of Racial Discrimination; and c) International Covenant on Economic, Social and Cultural Rights (127), Australia, as a treaty State to these Covenants, has to bring her internal laws into line with these Conventions. Section 109 of the constitution enables the law of the 'Commonwealth' to prevail over the laws of an internal state where there is an inconsistency.

A fundamental principle of the United Nations Conventions is:

> All peoples have the rights of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The peoples may, for their own ends freely dispose of their own natural wealth and resources. In no case may a people be deprived of its own means of subsistence.' (128)

In 1984, during the Third Session of the UN Working Group on Indigenous Populations in Geneva, the Minister of Aboriginal Affairs, Clyde Holding, committed the 'Federal Government' to legislate on the basis of the Five Principles of Land Rights. (129)

1) Aboriginal land to be held under inalienate freehold title,
2) Protection of Aboriginal sites,
3) Aboriginal control in relation to mining on Aboriginal land,
4) Access to mining royalty equivalents and
5) Compensation for lost land to be negotiated.

But on February 20 1984, the 'Government' abandoned the 'Five principles' and introduced the Preferred National Land Rights Model, which negated four of the five principles. It allowed:

- no mining rights
- no negotiation of mining royalties
- no compensation for lost land
- no protection of Aboriginal sites (130).

In August 1985 the Federal Government deceived the UN Working Group on Indigenous Populations by reporting that it was still committed to legislation for the 'Five Principles'.(131)

On March 3 1986 the Federal Labour Government announced it would NOT proceed to introduce any national land rights legislation (132) and consequently has broken faith with its ratification of the Human Rights Covenants.

It is only a matter of time and increased international awareness of our position before Australia will be forced to comply with international standards on Human Rights. Already the UN has received submissions on:

1) Genocide against our people (133)
2) Conditions of slavery of Aboriginals in Queensland and Western Australia (134)
3) Desecration of Sacred Sites (135)
4) That the 'Government' works against self-determination by controlling who Aboriginal organisations may employ (136)
5) That sovereignty was asserted on the discredited doctrine of *terra nullius* - land belonging to no-one. (137)
6) Despite the 'Government' asserting, to the UN, its commitment to the 'Five Principles' of Land Rights the 'Government' has abandoned these principles.(138)
7) That the 'Government' will not proceed to introduce any national land rights legislation. (139)

Despite the 'Federal Governments' claim in the United Nations to compliance with the principles International Bill of Human Rights, it has not brought forward any remedies, nor shown good faith in meeting the obligation of its international Human Rights Treaty responsibilities. In effect, it has shown such blatant disregard for International State Treaty obligations that Australia should be dismissed from the UN.

It is also a principle of international law that:

> Even if Australia offers Aboriginal people no municipal (internal) legal remedies for land confiscations pleading act-of-state, this cannot affect the rights and duties of other nations. At a minimum, other states need not recognise Australian Sovereignty over territory acquired, without native consent in violation of international law. At a maximum, other states may be obliged to aid Aboriginal people in asserting their territorial rights. (140)