3 The Legal Position in Australia . . . Aborigines Look Overseas

Australia now has an opportunity in one, comprehensive Treaty, to work out the frame of a just settlement for *all* Aboriginal Australians. It would provide land and compensation, land as soon as possible in all States and Territories (with an agreed time-table for each), and compensation in an agreed, defined way each year as a fixed proportion of some convenient representation of the national income. So the compensation would not be a matter of litigation, because there would be no doubt about its constant annual character. However the High Court would be the arbiter ensuring that no government reneged on its Treaty obligation and that no Parliament legislated against its interpretation of the Treaty.

It was the Indian experience in North America to become involved in the conflicts of rival European powers for their tribal lands. In these conditions, it was in the interests of the Europeans to win tribes as allies, by treaty, and this gave the tribes diplomatic power. Some of their military power came from European weapons which they were given by their allies.

In Australia, the Aborigines were always on their own against the one, single European invader, from Britain (see the *Handbook for Aboriginal and Islander History*, by the editorial board of Aboriginal History, PO Box 4, Canberra, 1979). They had no possible allies, no opportunity for diplomacy and treaty-making. But we now know that they did resist and fight well, within the limits set by their very small clan and tribal structures. This has never been decently recognised by those who took their land.

Nor has it been recognised in a proper way that Aboriginal Australians gave honourable and often fighting support to the Australian nation — in the first and second World Wars, in Korea, in the confrontation period against Indonesia and in Vietnam. In a real sense, it could and should be argued that they deserved the same status as the Indian allies of Britain in North America, a status which could now, with imagination, be recognised in a Treaty.

In 1942 Major Bill Stanner (now Professor Stanner) raised and commanded a special force of 600 men, in four squadrons, who operated in a vast area of northern Australia, watching for the Japanese to come. From the Kimberleys in Western Australia to Normanton in Queensland they worked closely with Aboriginal groups, upon whom their patrols depended. Meanwhile, elsewhere in the AIF Aborigines fought gallantly. Ted Loban for example had half his left arm shot off in Greece in 1941. Now he is a member for Thursday Island in the National Aboriginal Conference. Captain Reg Saunders served with distinction in Korea. Tony Assan, member of both the NAC and the North Queensland Land Council, and resident of Mt Isa, was seriously wounded in Malaysia in 1957 and later became a paratrooper in the *elite* Special Air Service Regiment.

However, when in 1970, Aborigines asked for one of their Reserves, Arnhem Land, to be respected, the Supreme Court of the Northern Territory

Opposite The poster which signalled the Aboriginal Australian part in the Second World Black and African Festival of Arts and Culture in Lagos, Nigeria, in January/February 1977. *The Canberra Times*

found that they did not own the land, and it followed that the bauxite mines at Gove could go ahead.

Back in 1963, without advising in advance, let alone consulting the Aborigines at Yirrkala, the government had granted a bauxite lease to Pechiney. Then in 1968 mining began by Nabalco on the Gove peninsula. Writs were issued in December that year against both Nabalco and the Commonwealth. The suit was brought by three men and seven clans. Two men, Mathaman and Mungurrawuy (the father of Galarrwuy Yunupingu, chairman of the Northern Land Council in Darwin), as head men of their clans, Rirratjingu and Gumatj, claimed to own the land which had been leased to the mining company. The third man, Daymbalipu, on behalf of the other nine clans, claimed that they had a proprietary interest in the same land, having been given permission by the first two clans to share the use and benefit of these lands.

The writs sought declarations that the plaintiffs were entitled to occupation and enjoyment of their lands free from interference, an injunction restraining Nabalco from interfering with the land, damages, and a declaration that the relevant minerals ordinance was void. The court convened in Darwin in March 1970 to hear the evidence of witnesses and moved to Canberra for the argument on the law. On 27 April 1971 Mr Justice Blackburn handed down his judgement, in 262 pages, Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth of Australia, 1971. (Milirrpum was one of the Rirratjingu plaintiffs.)

Ten Aboriginal leaders from eight different clans had given evidence and sacred relics had been produced as title deeds. But they lost their case. Mr Justice Blackburn said that the central question was whether the doctrine of communal native title existed at common law and applied in 1788. He found that it 'did not form, and never has formed part of the law of any part of Australia'. Briefly, he found that the relation between clan and land did not amount to proprietorship as that is understood in Australian law, that the clans had not sustained the burden of proof that they were linked with the same land in 1788 as in 1970, that no doctrine of common law ever required or now required a British government to recognise land rights under Aboriginal law which may have existed before the 1788 occupation, that Aboriginal land rights were never expressly recognised, and that if the clans had had any rights these rights would have been effectually terminated by the Mining Ordinance in 1968.

At one point in his judgement, Blackburn J. said that acquisitions of territory by the Crown fell into two classes, 'conquered or ceded territory, and settled or occupied territory'. Whether a colony came into one category or another was a

Photograph Captain Reg Saunders with his portrait by Pamela Thalben-Ball in the Australian War Memorial, October 1978. Born at Warrnambool, Victoria, in 1920, Saunders became the first Aboriginal to be commissioned. This was in the field in the Second World War. In 1950 he commanded a company of the Third Battalion, Royal Australian Regiment, in Korea. *A.W.M. Negative 195068*

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matter of law. He continued: 'In my opinion there is no doubt that Australia came into the category of a settled or occupied colony'.

No Aboriginal would accept this finding, certainly not the old man of Yirrkala who still had pellets in his body from the fighting days. The law, as they say, is often an ass.

Blackburn J. also found that the Letters Patent issued to the South Australian Colonisation Commission in 1836 never applied to the Northern Territory, which took over its administration in 1863. (The Letters Patent said that none of the instructions should be 'construed to affect the rights of any Aboriginal Natives of the said Province South Australia to the actual occupation in their own persons or in the persons of their descendants of any lands therein now actually occupied or enjoyed by such Natives'.) He found, too, that they did not provide a constitutional recognition of Aboriginal rights in land, even in South Australia. In any case the Letters Patent had been subsequently repealed and replaced.

All these findings were convenient for the descendants of those who had taken over the land. A typical reaction to the judgement came from Mrs Faith Bandler, former general secretary of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI), who said: 'We know this is absurd . . . Australia was conquered brutally'.

Professor Charles Rowley has reminded us that as late as 1948 Aboriginal suspects and witnesses were still being 'brought in', tied to the policeman's horse by neck-chains. The practice had been defended as humane and reasonable by a conference of the Commonwealth and States in 1937. What went on in earlier days has been well documented and was infinitely worse.

However, reverting to the Blackburn judgement, it was also found by the judge that the Aborigines at Yirrkala did have a system of law which they accepted as obligatory and that their system of law was cognisable as such in our courts.

This finding might seem to have offered some hope, had there been an appeal to the High Court. But there was no appeal. Counsel for Nabalco had said, and the Commonwealth had echoed: 'To accede to the Aboriginal propositions would be to unsettle the property law of the continent'. However, Woodward, QC, counsel for the Aborigines, had argued that his clients were not attacking the law of property. They were actually invoking its protection. Once, indeed, Blackburn J. had said 'Mr Woodward, you have put to me an argument of very great weight and interest. If it is accepted, a great deal of received doctrine has to be upset'. In the event, it was not upset. But Blackburn J. did recognise that 'the natives had established a subtle and elaborate system of social rules and customs which was highly adapted to the country in which the people lived and which provided a stable order of society remarkably free from the vagaries of personal whim or influence. The system was recognised as obligatory by a definable community of Aboriginals which made ritual and economic use of the areas claimed. Accordingly, the system established was recognisable as a system of law.

'However the relationship of the native clans to the land under that system

was not recognisable as a right of property . . .'

This strictly legal conclusion, which Blackburn J. (as man, not lawyer) must have found contrary to natural justice, led him to indicate in his judgement that the government should consider legislation on the matter, in other words political action.

Other lawyers of eminence questioned aspects of his judgement and even the judgement as a whole. For example, Mr Justice Rae Else-Mitchell of the NSW Supreme Court, who is president of the Royal Historical Society, said in 1975 'occupation and settlement at times was tantamount to hostile invasion with violence or threats of homicide'. Two other lawyers, Geoffrey Lester and Graham Parker, argued in the *Alberta Law Review* 1973 Vol. XI that if Australia was acquired by peaceful settlement or annexation, as held by Blackburn J., then Aborigines were British subjects protected by the common law, which meant that 'the expropriation of lands subject to customary tenure has been and still is contrary to the common law, unless the Crown can point to consent, compensation or some statutory authority'. Their argument introduced an important article by Professor Peter Cumming (of the law school at York University, Ontario) who recalled that the Report of the select committee of the House of Commons on Aborigines (British Settlements) 1837 had described the Aborigines as 'proprietors of the soil'. Professor Cumming concluded that 'Mr Justice Blackburn was wrong in his approach to the existence, operation and extent of communal native title'. Blackburn J. could have found 'that the spiritual nature of the system of tenure could be accorded a proprietary status by the doctrine of communal native title'.

John Little, junior counsel for the Aborigines at Yirrkala, has pointed out that the Letters Patent for South Australia had declared in 1836 that the Aborigines were British subjects. He drew attention to the words used by Blackburn in discussing the value of the Letters Patent as 'not intended to be more than the affirmation of a principle of benevolence, inserted in the Letters Patent, in order to bestow a suitable dignified status'. John Little commented: 'The obvious explanation of the proviso that settlement should not proceed in areas occupied or enjoyed by the Aboriginal people, unless those areas were purchased from them first, seems hardly to have occurred to the judge'.

However, Aborigines continued to try out the legal system. In September 1974 and again in February 1975 Paul Coe, for the Aboriginal Legal Service of NSW, brought unsuccessful actions in the ACT Supreme Court which were designed to get Aboriginal land ownership recognised in the Northern Territory's uranium country.

Then in April this year the Aboriginal people exhausted for themselves the possibilities of the law within Australia, when the High Court rejected their claim and Mr Justice Gibbs said: 'The contention that there is in Australia an Aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain'. However the High Court was divided 3/2, Mr Justice Murphy and Mr Justice Jacobs dissenting. Murphy J. said 'whether the territory is treated as having been acquired by conquest or peaceful settlement, the plaintiff' (Paul Coe, President of the Aboriginal Legal Service of NSW) 'is

entitled to argue that the sovereignty acquired 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 a declaration and enjoyment of their rights or compensation'.

It will be noticed that Murphy J. said merely that Coe was 'entitled to argue' this proposition, but the judge did not specifically endorse it.

As a consequence of these continual frustrations within Australia, culminating in the final High Court decision, Aboriginal Australians have been going overseas to enlist the political power of international opinion. For example, on November 2, 1976, Coe and another Aboriginal, Cecil Patten, landed at Dover, England, in a small boat which sank, but not before they had taken possession of the whole country, planted the Aboriginal flag and informed the British Prime Minister, James Callaghan, by letter that their invasion had been 'a replica of the purported British taking of Australian Aboriginal territory'. It was a political action meant to demonstrate the absurdity and injustice of the Australian legal concept that Australia was *terra nullius* (or land belonging to nobody) when the British came, and had been settled rather than conquered.

On August 18 last year Coe wrote to the UN Secretary-General, Kurt Waldheim, seeking an advisory opinion from the International Court of Justice on the Aboriginal claim to land, in the light of that court's finding in 1975 that the same sort of nomadic people of the West Sahara had not been deprived of their land by Spain's colonisation. In an advisory opinion the ICJ found that 'the nomadic peoples of the Shinguitti country should . . . be considered as having in the relevant period possessed rights, including some rights relating to the lands through which they migrated. These rights . . . constituted legal ties . . .'

This ICJ opinion was quoted at some length in support of Coe's case before the High Court. It was, however, rejected by the Australian judges and, again not surprisingly, the Aboriginal arguments were virtually unreported in the local press. Arguments based on the legal status of Indians in North America also went unreported. It is indeed remarkable how little the Aboriginal point of view is known and understood among Australians who are not Aboriginal.

However in the world beyond Australia's shores powerful people do know and understand what is happening here. For the first time, a group of Aborigines will soon be addressing the United Nations when they go to Geneva to appear before the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. They are sponsored by the influential Minority Rights Group in London and the International League of Human Rights in New York. (Gypsies have recently been recognised as a non-governmental group which may bring its problems to the UN. It will not, perhaps, be long before Aboriginal Australians achieve this status.)

Last year Mick Miller, chairman of the North Queensland Land Council, led a small delegation to Europe where they talked to officials of the International Commission of Jurists and the UN Commission on Human Rights (which will be considering a report on Aborigines in August next year). Miller's delegation spoke to the International Labor Organisation. On their return they declared

Photograph Mick Miller (right), chairman of the North Queensland Land Council, based in Cairns, Joyce Hall from Weipa and Jacob Wolmby in London during their European tour in 1978. They were supported by Australians of European descent, with placards attacking British mining groups. *North Queensland Land Council*

'the NQLC firmly believes our only hope of changing government policy is through international pressure'. Mick Miller also attended the 1977 meeting of the World Council of Indigenous People (WCIP) in Stockholm. The Council has already won status at the UN as a non-governmental organisation and its next meeting will be held in Australia in 1981. The chairman of the National Aboriginal Conference, Lyall Munro, and two other NAC members attended a WCIP executive meeting in Montreal in September this year.

In 1977 an Aboriginal group was in Lagos, Nigeria, for the second of the World's Black and African Festivals of Arts and Culture. Two Aboriginal delegations have been to Peking. Others have been to Moscow, New York,

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Israel and the Arab world. Galarrwuy Yunupingu, chairman of the Northern Land Council, has been in Papua New Guinea and the Solomon Islands, which became independent last year. Indeed, the truth is now more generally recognised, at last, that Aboriginal Australians are very much a part of the world and certainly a part of the Pacific and South-East Asia. It is incredible that so many other Australians still think of them as an internal, domestic 'problem'. These Australians never knew or they have forgotten that many Aborigines are partly descended from Indonesians, Malaysians, Filipinos, Chinese, Indians, Maoris, American negroes, and Pacific Islanders, as well as from Europeans.

As Gough Whitlam, Prime Minister 1972/75, said in his party's policy speech in December 1972, 'the Aborigines are our true link with our region . . . Australia's treatment of her Aboriginal people will be the thing upon which the rest of the world will judge Australia and Australians — not just now, but in the greater perspective of history . . . The Aborigines are a responsibility we cannot escape, cannot share, cannot shuffle off; the world will not let us forget that'.

The present government is also aware of the very great significance of Aboriginal Australians in the context of international relations, where they assume an importance out of proportion to their number (about 1% of the total population). As Andrew Peacock, Minister for Foreign Affairs, told the Commonwealth Parliament on 18 September this year, 'Unlike nearly all other developed countries, we live in a region of Third World countries . . . We are conspicuously different within our regional environment'. He was tabling the Report of the Committee on Australia's Relations with the Third World, which was chaired by Professor Owen Harries, head of policy planning in his Department. The Harries Committee emphasised in one of its recommendations 'the potential importance in the Third World context of the question of the treatment and conditions of Aboriginals'.

As this writer reported from Canberra to The Times (London) in a major article in July 1976, 'It will become increasingly difficult for Australian governments to have their international policies supported overseas if their Aboriginal citizens remain deprived'. Then on 29 May 1977, in an ABC Guest of Honour broadcast, the writer argued that Aboriginal Australians 'could help us all into the world around us or, in anger, they could divide us from it'.

Photographs Above: Northern Land Council lawyer, Geoff Eames, and anthropologists, Patrick McConvell and Arthur Palmer, consulting Aboriginal land claimants at Mudbura, Northern Territory. *Arthur Palmer, c/- NLC.*

Below: Members of the Northern Land Council and traditional owners of the Ranger uranium country discuss the final terms of the agreement. This meeting was held at Red Lily Lagoon, near the East Alligator River 12/14 September 1978. Jack Cotton, NLC talking to (left to right foreground) Joseph Giradbul, Jacob Nayingul, NLC field officer, Thomas Balmana, Toby Gangali (Mirrar clan) and Bill Najidji (Bunitj clan). *George Chaloupka, c/- NT Museums and Art Galleries*