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ABORIGINAL LAND RIGHTS

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For the Secretariat of IWGIA

Peter S. Aaby  Helge Kleivan  Stefano Varese
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Convention 107 of the International Labour Organisation, concerning the protection of indigenous and other tribal and semi-tribal populations in independent countries, states that

'...The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.' (Article 11)

In practice, such rights were not recognised in Australia until the passage of the Aboriginal Lands Trust Act of South Australia in 1966, and the Aboriginal Lands Act of 1970 in Victoria. Both these Acts provide for the recognition of Aboriginal title to only the small residual areas of 'Crown' land currently 'reserved' for the use of Aborigines in those two States. The respective State governments have interpreted these Acts, which directly affect only the small number of Aborigines resident on those 'reserves', as fulfilling the intentions of I.L.O. Convention 107.

The other State governments, and the Federal Government, have refused to recognise the principle of Aboriginal land right, and the Federal Government has gone as far as to oppose the Yirrkala Aborigines in the Northern Territory Supreme Court in their claim for recognition of their title to the land at Gove Peninsula in Arnhem Land, even though the land involved was part of an Aboriginal Reserve until excised for mining purposes.

Curiously, however, 'special royalties are paid for the benefit of (Aborigines) if mining or forestry work is done on reserves or on land excised from reserves' (1) in the Northern Territory, which would seem to be some sort of de facto recognition of an Aboriginal economic interest or right in reserve land.

The question of recognising an Aboriginal right to land, or compensation for land, not presently reserved for Aborigines, but which was alienated from them at some time in the past, has not received serious attention from any Australian government. Indeed most white Australians, even if they concede the Aboriginal right to ownership of existing reserves, would tend to the view that past injustices are best forgotten. Unfortunately perhaps, the past cannot be forgotten, for it determines the present, and may well determine the future.

A deep sense of injustice, resentment, and bitterness pervades much of the rapidly growing Aboriginal and part-Aboriginal population. The historic process of dispossession has been the prime agent of Aboriginal pauperisation. Loss of the land has disinherit the Aboriginal people economically and spiritually, so that spreading 'culture of poverty' amongst a growing coloured minority today threatens Australia with social and racial conflict.

The current situation calls for a reassessment of Australian history, particularly as it pertains to Aboriginal land rights. Hopefully, this may lead to a new willingness by white Australians to achieve racial justice in the present, and just compensation for past wrongs. Ideally this would lead, not only to the recognition of Aboriginal title to existing reserves, but also to restoration of Aboriginal ownership of other 'Crown' land, and to just compensation for land lost to the Aboriginal people.

In this chapter, we will look briefly at the history and significance of the land rights issue, so as to be able to put the current legal and political arguments into some sort of perspective.
Overseas Precedents

The right of subject people to their property, including traditionally occupied land, was first put forward by Francisco de Victoria, a Spanish professor of moral theology, in 1532, and again in 1542, by Bartholomew de las Casas, a Spanish priest who helped the Indian people of Mexico. Their views were incorporated into the Spanish 'Laws of the Indies' of June 11, 1594, which said,

'We command that the farms and lands which may be granted to Spaniards be so granted without prejudice to the Indians; and that such as may have been granted to their prejudice and injury be restored to whoever they of right shall belong.'(2)

In Canada, prior to the defeat of France in 1763, Britain, like France, had been inconsistent in its policy regarding Indian land rights. If anything, Indian land rights had been largely disregarded, but there was a growing awareness that the failure to render elementary justice was a potent cause of disorder and insecurity. The Crown had made numerous grants of land to settlers, usually leaving them to deal with the Indians as they would. This led to violent conflict with the Indians (as also happened in Australia with the Aborigines a century later), and the government was forced to act.

Thus, the Proclamation of the Crown, issued on October 7, 1763, declared that the Indians

'should not be molested or disturbed in the possession of such parts of dominions and territories as, not having been ceded to, or purchased by us, are reserved to them, or any of them, as their hunting grounds.'

It went on to prohibit royal governors and others in authority from making grants

'upon any lands whatever, which, not having been ceded to, or purchased by us, are reserved to the said Indians, or any of them.'

Further, persons who had actually taken up occupancy of land not ceded by the Indians were ordered, doubtless in vain, to remove themselves, and the Proclamation went on to make clear that land could only be purchased from the Indians by the Crown.

Thus were laid the foundations for the four great principles which were incorporated into Canada's treaty system: that the Indians possess occupancy rights to all land which they have not formally surrendered; that no land claimed by Indians may be granted to whites until formally surrendered; that the government assumes the responsibility of evicting all persons unlawfully occupying Indian lands; and that surrenders of Indian land may be made only to the Crown, and for a consideration.(3)

Indian treaties thus made in Canada are still in force, and their terms have been more or less carried out, although little was done until quite recently to set up schools and to assist the Indians to develop their land.

Following the American War of Independence, one of the first acts of the American Congress, before it had even adopted a Constitution, was to pass the Northwest Ordinance of 1787 which said concerning the Indians, that their 'lands and property shall never be taken from them without their consent'. To those familiar with TV Westerns, these may seem empty words; however, it is a fact that, by 1945, approximately 95 per cent of the public domain of the United States had been purchased from the Indians for a sum of about 800 million dollars.(4)
In 1946, the U.S. Congress set up the Indian Claims Commission to settle remaining claims by Indians against the U.S. arising 'from the taking by the U.S., whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant (tribe or group) without the payment for such lands of compensation agreed to by the claimant' and 'claims based upon fair and honourable dealings that are not recognised by any existing rule of law or equity.'(5)

In New Zealand, the Treaty of Waitangi, signed in 1840, established the rights of Maoris to 'the full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties ... so long as it is their wish to retain the same in their possession', but, at the same time, it established that 'all rights and powers of sovereignty ... were ceded to Her Majesty ... absolutely and without reservation' and that Her Majesty had 'exclusive right of Pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon.'

Thus it is, that the principles first enunciated in colonial Spain came to be adopted by Britain in her colonies, and became part of international law.

Two important principles are involved; firstly, that there is a fundamental difference between a change of sovereignty and a change of land ownership, and secondly, that the paramount title of the Crown to all the land in the kingdom is in fact less substantial than the right of use and occupancy of the subjects of the Crown.

The first point was well illustrated by the noted American authority on the legal rights of the Indians, Felix S. Cohen, when he wrote,'It may help us to appreciate the distinction between a sale of land and the transfer of governmental power if we note that after paying Napoleon 15 million dollars for the cession of political authority over the Louisiana Territory (the U.S.) proceeded to pay the Indian tribes of the ceded territory more than twenty times this sum for such lands in their possession as they were willing to sell. And while Napoleon, when he took his 15 million dollars, was thoroughly and completely relieved of all connections with the territory, the Indian tribes were wise enough to reserve from their cession sufficient land to bring them a current income that exceeds each year the amount of (the U.S.'s) payment to Napoleon.'(6)

On the second point Cohen comments, 'It is true that ... Indian possession was not considered a perfect title, and in the cases it is commonly said that legal title to such lands is in the United States, with a right of use and occupancy in the Indians. But these are subtleties of feudal legal theory which meant nothing to the Indians. Our courts have repeatedly said that the Indian right of occupancy and use is as sacred as the fee title, and it is certainly more substantial than the naked legal title which legal theory locates in the (U.S.) Federal Government.'(7)

The Australian Contrast

How, then, do these principles and precedents apply in Australia? The traditionally accepted legal views is that expressed by Baillman:-

'By the year 1788, the paramount title of the King to the
ownership of all land in the kingdom had become little more than a fiction so far as land in England was concerned. In that year, however, the fiction was transported into solid fact when Governor Phillip hoisted the British flag on the shore of New South Wales and took possession of the country in the name of the King. Although the small party of colonizers were probably quite unconscious of the fact, the royal overlordship of feudal doctrine had come out with the First Fleet.

'If any contemporary jurist had paused to concern himself about the prior title of the Aboriginal inhabitants of New South Wales, the concern must have been only momentary. Unlike the official attitude towards the Maoris of New Zealand some years later, when the British Government recognized native ownership of their own country, any rights possessed by the Aborigines were simply repudiated. Nor was there any suggestion of paying or compensating them for their territory beyond a few paltry hand-outs of blankets and the like. John Batman, an enterprising settler in Van Diemen's Land, who became impatient at official ineptitude with regard to the colonization of the Port Phillip District, actually purchased from the Aborigines a large tract of land in the vicinity of the present site of Melbourne. This early attempt at blackmarketing, however, was disallowed by the colonial government in an official proclamation which announced that any of His Majesty's subjects who claimed title to land by treaty or bargain with the natives would be regarded as trespassers on Crown land. The title to all "waste" land in the Colony was in the King as lord paramount, and could legally be disposed of only by His Majesty's Government.'(8)

Recognising the inconsistency between Australian policy in Papua-New Guinea as opposed to that towards the Aborigines in Australia, an official publication in 1960 stated of the position in the Territory of Papua and New Guinea:-

'Respect for native land ownership was laid down as a basic principle of Australian administration in Papua over 80 years ago. From the beginning in Papua, and in New Guinea since it was placed under mandate to Australia, following the First World War, successive Australian Governments have adhered strictly to that principle. Recognizing the fundamental importance of questions of land tenure to all aspects of policy in Papua and New Guinea, the Government has adopted as a long-term objective the introduction of secure, individual-registered titles for all native-owned land in the Territory. The Government's first step towards this objective was the setting up, in 1952, of a Native Lands Commission to try to establish a formal system of defining individual native ownerships of land in the Territory.'

It then went on to say:-

'At the time of first settlement in the Australian colonies all lands were deemed to be waste lands and the property of the Crown. In Papua and New Guinea, however, all land other than that previously alienated, was deemed to belong to the native people who occupied it.'(9)

What can account for this extraordinary piece of double-thinking? Certainly the fault does not lie in the British Admiralty, whose rarely cited secret instructions to Captain James Cook, dated the 30th day of July, 1768, included the following:-
... You are likewise to observe the Genius, Temper, Disposition and Number of the Natives, if there be any, and endeavour by all proper means to cultivate a Friendship and Alliance with them, making them presents of such Trifles as they may Value, inviting them to Traffic, and Shewing them every kind of Civility and Regard; taking Care however not to suffer yourself to be surprised by them, but to be always upon your guard against any Accident.

'You are also 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 you find the country uninhabited take Possession for His Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors.'(10)

Cook, and of course those who followed in 1788, were soon aware that Australia had native inhabitants, and indeed Cook fired several musket rounds at them as his landing party approached the shores of Botany Bay that day in April 1770.

On 22nd August 1770, Cook formally took possession of the eastern seaboard of Australia for King George III, the very same monarch who, seven years earlier, had proclaimed the rights of the Indians of Canada to the undisturbed possession of their lands.

It hardly seems fair to blame Cook personally for what followed: after all, the meaning attached to 'possession by the Crown' was not for him to interpret.

Many factors have been suggested as contributing to the disregard of the Aborigines. The highly derogatory descriptions brought back to Europe by the early Dutch explorers, and later by William Dampier, must have predisposed the British to regard the Aborigines as the lowest form of humanity. The lack of even a token practice of agriculture, such as was practised by the Indian woodsmen of the east coast of North America, may well, to European eyes, have signified a complete lack of attachment to the land, although this impression must soon have been dispelled by closer observation. There was certainly resistance by the Aborigines to the invaders, but perhaps the low population density, difference in armaments, and lack of leadership rendered this too ineffectual. Perhaps it was the lack of competition for the Aborigines' allegiance by competing colonial powers, as had worked to the Indians' advantage in North America, which rendered the Aborigines comparatively powerless. Or perhaps it was merely that Australia was so distant in space and time from the liberalising influences of metropolitan England that the higher principles of colonial theory never came to be enforced in a frontier situation ruled by 'practical' men. It could even be that the nature of the new colony, which was set up as a convict settlement rather than as a trading post of farming province, led to an initial failure to formulate a cohesive policy on the 'native question'.

Whatever the reasons, Governor King's proclamation of 30 June 1802, only fourteen years after the First Fleet, clearly failed to recognise the root cause of the growing conflict between natives and settlers. Having stated that both races would be regarded equally before the law, and that any aggression would be punished 'with the utmost severity', it continued

'at the same time that His Majesty forbids any act of Injustice or wanton Cruelty to the Natives, yet the Settler is not to suffer his property to be invaded, or his existence endangered by them; in preserving which he is to use effectual, but at the same time the most humane, means of resisting such attacks.'(11)
Already, it seems, the assumption was being made at the highest level of government that the natives had no rights to use and occupancy.

Reformist Views

Such a view did not go unchallenged. In 1837, the visiting English Quaker, James Backhouse, wrote to the Governor of New South Wales:—

'It is scarcely to be supposed that in the present day any persons of reflection will be found who will attempt to justify the measures adopted by the British in taking possession of the territory of this people, who had committed no offence against our Nation; but who, being without strength to repel invaders, had their lands usurped, without any attempt at purchase by treaty or any offer of reasonable compensation, and a class of people introduced into their country, amongst who were many ... who ... practised appalling cruelties upon this almost helpless race. And when any of the latter have retaliated, they have brought upon themselves the vengeance of British strength, by which beyond a doubt many of the unoffending have been destroyed, along with those who had ventured to return a small measure of these wrongs upon their white oppressors.'(12)

In similar vein, Backhouse wrote to the chairman of the British House of Commons' Select Committee on Aboriginal Tribes as follows:—

'The system of colonization that has been pursued by the British Government has been upon principles that cannot be too strongly reprobated and which want radical reformation. Aborigines have had wholesale robbery of territory committed upon them by the Government, and settlers have become the receivers of this stolen property, and have borne the curse of it in the wrath of the aborigines who, sooner or later, have become exasperated at being driven off their rightful possessions.'

Displaying a knowledge of the traditional Aboriginal attitude to the land which gives the lie to the frequently expressed view that such knowledge was not available until the twentieth century, Backhouse went on:—

'Though the mode of holding property differed among the aborigines of Van Diemen's Land from that used among English people, yet they had their property: each tribe was limited to its own hunting-ground; and into such hunting-grounds the island was divided; and it is said, the tenure on which the aborigines of New Holland hold their country is somewhat more specific than that formerly used by the now almost extinct race of aborigines of Van Diemen's Land.'(13)

The Select Committee, to which Backhouse addressed himself, issued its report in 1837.(14) Introducing its report, the Committee noted the inconsistency with which Britain had acted in its colonies:—

'The duty of introducing into our relations with uncivilized nations the righteous and profitable laws of justice is incontrovertible, and it has been repeatedly acknowledged in the abstract, but has, we fear, been rarely brought into practice; for, as a nation, we have not hesitated to invade many of the rights which they hold most dear.

'Thus, while Acts of Parliament have laid down the general principles of equity, other and conflicting Acts have been
framed, disposing of lands without any reference to the possessors and actual occupants, and without making any reserve of the proceeds of the property of the natives for their benefit.'

At this point, a footnote makes the following observation:-

'In the preamble of an Act passed August 1834, "empowering His Majesty to erect South Australia into a British Province, etc." it is stated that the part of Australia which lies as there described, together with the islands adjacent, "consists of waste and unoccupied lands, which are supposed to be fit for the purposes of colonization." In the account of the proposed colony which appears to be authorized by the Company who have purchased land under this Act, it is stated that "great numbers of natives have been seen along that part of the coast."'

The Select Committee continued:-

'Such omissions must surely be attributed to oversight; for it is not to be asserted that Great Britain has any disposition to sanction unfair dealing: nothing can be more plain, nothing can be more strong, than the language used by the Government of this country on the subject. We need only refer to the instructions of Charles II, addressed to the Council of Foreign Plantations in the year 1670.'

Quoting at some length from Charles II, the committee notes that he said, with respect to the Indians, that 'if any shall dare to offer any violence to them in their persons, goods or possessions, the said governors do severely punish the said injuries, agreeably to justice and right.'

'Nor', asserts the Committee, 'is modern authority wanting to the same effect', and it goes on to quote from the Address of the House of Commons to the King, passed unanimously July 1834:-

'His Majesty's faithful Commons in Parliament assembled, are deeply impressed with the duty of acting upon the principles of justice and humanity in the intercourse and relations of this country with the native inhabitants of its colonial settlements, of affording them protection in the enjoyment of their civil rights, and of imparting to them that degree of civilization, and that religion, with which Providence has blessed this nation, and humbly prays that His Majesty will take such measures, and give such directions to the governors and officers of His Majesty's colonies, settlements, and plantations, as shall secure to the natives the due observance of justice and the protection of their rights, promote the spread of civilization amongst them, and lead them to the peaceful and voluntary reception of the Christian religion.'

On the question of land rights, the Committee went on to say,

'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 seems not to have been understood. Europeans have entered their borders uninvited, 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.'
trarily declared to be 'waste and unoccupied'. Such a patently false proposition formed, and remains to this day, the foundation of the Crown's claim to ownership of the land on a basis more substantial than the 'paramount title' which Baillie describes as 'little more than fiction' so far as land in nineteenth century England was concerned.

Writing on behalf of Lord Glenelg, who was then Colonial Secretary, Sir George Grey dismissed Lushington's opinion as follows:

'Lord Glenelg is sensible of the great weight which is due to the deliberate judgement of Dr. Lushington on a question of this nature. As however the grounds, on which Dr. Lushington denies the title of the Crown to the Territory in question, are not explained; and as Lord Glenelg is not aware of any fact or principle which can be alleged in support of such a conclusion, which would not apply with equal force to all the Waste Lands in every other part of the Colony of New South Wales, His Lordship must decline to acquiesce in this doctrine, and cannot but believe that it was advanced by Dr. Lushington under a misapprehension of some of the most material parts of the case.'(20) (My emphasis added, A.B.P.)

Grey thus advanced no arguments against Lushington's opinion other than the obvious inconvenience of its wider application to areas already alienated from the Aborigines. Unfortunately for the Aborigines, however, Batman and Mercer, seeing that the Treaty could not in any case be sustained, did not pursue the legal argument any further. And so the matter rested - a legal question of vital importance to the Aborigines had been raised, and allowed to subside again, unresolved.

Whatever Governor Bourke's intentions, his repudiation of the Batman Treaty neither protected the Aborigines nor ensured the controlled and orderly spread of settlement. Indeed, the settlement founded by the Port Phillip Association was officially recognised on 9th September 1836.

Such processes of unauthorised settlement and later de facto recognition by the Government, in fact, became the dominant pattern of Australian land settlement in the era of the squatters. The squatter's occupancy of land to which he had no legal claim, and certainly less claim than the Aboriginal inhabitants, gradually turned into a right; so much so that, by 1839, the squatter could claim the protection of the law for himself, his 'run', and his boundaries.

Mr. Chief Justice Stephen summed the matter up as follows:

'A man passed into the interior and took possession of a tract of country, established his huts, sheep and shepherds in various directions, and the tract of country so occupied by himself and his establishment was said to be in his possession, and he could bring an action against any person who would intrude upon him. He was not bound to show his title.'(21)

The effect of this unauthorised invasion of so-called Crown land, apart from providing a large inheritance for many of the pillars of present-day white Australian society, was to undermine the theoretical paramount title of the Crown to which Baillie refers. As in England, this feudal concept was converted into little more than fiction in the more closely settled parts of Australia.

The new view, which gradually came to be upheld in Australian law, was that 'The territory of a country is in reality the property of its occupiers, which the nominees of the Crown administer advantageously.
only as they facilitate its settlement and culture.'(22) This, of course, was the view of the colonists, who did not pause to see how it reflected on the prior rights of the original occupants of the territory in question.

Throughout the intervening years, a few dedicated missionaries and government appointed 'protectors' worked to shelter the Aborigines from the worst forms of physical abuse and deprivation, and, in the classic phrase, 'to smooth the dying pillow.' Numbers declined drastically until the 1930s, when medical science, rations, and the resilience of the natives, led to a stabilisation of the pure Aboriginal population, and to the current rapid increase.

In many areas, Aborigines were encouraged, persuaded, or forced onto special Aboriginal settlements and reserves as closer settlement encroached on their traditional territory. As the white settlers' demand for land increased, the land reserved for Aborigines was whittled down. Naturally this process has gone furthest in south-eastern Australia, but it continues even today in the north and west at places such as Woomera, Weipa, Yirrkala, and Wingellina.

In Victoria, four of the six supervised Aboriginal stations and ten small reserves were revoked one by one. In the 1860s, 26,114 acres were set aside for Aborigines; now only some 4,000 acres at Lake Tyers and 548 acres at Framlingham remain.

The major government station, Coranderrk, was established in 1863, and by 1866, had been extended to 4,650 acres. The Aboriginal men were reported to be 'anxious to make the station self-supporting', and by 1870, the Aborigines had built neat houses of sawn timber, each family had its own garden and some 120 acres had been cleared and planted. In that year, the secretary of the Board for the Protection of the Aborigines advised the Board that

'The men are still anxious and uncertain respecting the tenure of their land. They feel they may be turned away at any time, and I hope the Central Board will make an effort to get a grant of the land now reserved for the use of the Aborigines. This, more than anything else, would give contentment and ensure the happiness of these people.'

The original temporary reservation was made permanent in 1884.

In 1886, the Government legislated to exclude 'halfcaste' Aborigines from care, rendering them ineligible to reside on Aboriginal reserves, and thus forcing most of the able-bodied men to leave Coranderrk. In 1893, the Crown Lands Reserve Act excised 2,400 acres from the permanent reserve for a village settlement. When the station was officially closed in 1924, all but a handful of aged Aboriginal residents were forcibly transferred to the Lake Tyers settlement in Gippsland. By 1927, another 78 acres had been alienated for a fauna reserve (which is now a well known tourist attraction), and 622 acres for other purposes. The last resident died in 1941, and the remaining land was revoked in 1948 by the Coranderrk Lands Bill. Today only the cemetery and a memorial plaque remain.(23)

The Aboriginal Interest

Anthropologists began to play a significant role in Aboriginal affairs early this century, and, in 1911, Sir Baldwin Spencer visited the Northern Territory under the auspices of the Federal Government to study the Aboriginal population and report. Thus it was that the following passage appeared in the Annual Report of the Acting Administrator of
the Northern Territory, for the year ending 30 June 1920.

'The greatest difficulty that confronts the Administration in dealing with the natives is the fact that they do not form themselves into settled communities, with individual possession as in New Guinea. ... The aboriginals of the Territory are divided into a large number of tribes, each of which speaks a distinct dialect and occupies a well defined tract of country, the boundaries of which are well known to the natives. ... The natives of Australia have never been recognised as having any legal title to their tribal lands. The whole of the lands of Australia were constituted Crown lands and under various Land Acts have been sold or leased by the various Governments to white settlers.

In the Northern Territory long leases of large areas have been granted to pastoralists extending uninterruptedly in the aggregate over hundreds of miles of country, and many native tribes have not a square foot of land that they can call their own, although they are still living on their tribal lands that have been theirs from time immemorial.

The Acting Administrator went on,

'I have given this problem of the Northern Territory the fullest and most anxious consideration, and I feel sure that the best solution of the question lies in the able and well considered recommendations of Sir Baldwin Spencer, who states, "There are two alternatives, either to allow them to wander about as outcasts, some of them doubtless working for the settlers but all of them practically dependent for their existence on promiscuous charity, or to establish a reserve for them under proper control. To be of any practical use, the reserve must be situated somewhere in their own district. To attempt to move them to some other part and place them amongst strange natives would be futile .... There is no other practicable policy but that of the establishment of large reserves, if the aborigines are to be preserved and if any serious effort is to be made for their betterment."'

The Report then lists the areas which Spencer recommended to be declared reserves, and the Acting Administrator states, 'I have endeavoured to carry out these proposals in their entirety.' He goes on to say,

'To insure that the natives are not dispossessed of their hereditary tribal hunting grounds and "made dependent for the existence on promiscuous charity" it should be laid down as the settled policy of Australia that in every district of the Territory an area must be reserved for the aboriginals which they will recognise as their own land, and on which they can live and hunt if they so desire. Each of these reserves should have permanent water and timber so that there is always available an adequate supply of their natural food - fish, animal life, yams, lily roots, seeds, etc.

After reference to the practice of cattle station owners of supplying beef to old men, women, and children who are not employed by, but live on the stations, the Acting Administrator added,

'The conditions of employment of native labour may possibly,
owing to legislature of the future, become so onerous that the station owner cannot continue the present patriarchal methods, and the lot of the aboriginals would then become pitiful if they were also deprived of lands set apart as aboriginal reserves.'

These last remarks take on a particular relevance since the introduction, in theory at least, of equal wages for Aborigines in the pastoral industry. Areas have not been excised from the huge pastoral leases, and Aborigines are being forced into over-crowded, highly institutionalised, and degrading settlements. This is one of the root causes of the current prolonged struggle by the Gurindji people to obtain recognition of their claim to 500 square miles of the 6,000 square mile Wave Hill Station, a property leased to the British Vestey group of companies which leases a total of nearly 17,000 square miles of the Northern Territory.(24)

Anthropologists have now documented, in detail, the traditional Aboriginal attachment to the land. Professor A. P. Elkin is important in this regard. In 1938, he wrote that 'the local group owns the hunting and food-gathering rights of its country; members of other groups may only enter it and hunt over it after certain preliminaries have been attended to and permission has been granted', a conclusion which supports the earlier observations of men such as Backhouse and other early missionaries and 'protectors'.

In the United States, evidence of anthropologists has played an important part in many of the claims brought before the Indian Claims Commission. In Australia, anthropological evidence has been presented recently in the case brought by the Yirrkala Aborigines before the Northern Territory Supreme Court over land on Gove Peninsula. Professor R. H. Berndt, who has a particular knowledge of the Gove area, wrote a long paper on the question of the Aborigines' relationship to the land and to sacred sites, with particular reference to the Gove dispute.

According to Berndt,

'In Aboriginal Australia generally, land was traditionally inalienable. ... Throughout most of Aboriginal Australia there were basically two kinds of small social group, each related to the land in a different way: one through descent, directly or otherwise, the other through occupancy and use. The first was an exogamous unit, such as a clan, associated with a site or combination of sites. ... This was a land-owning group: its focus was on these sites and the areas immediately adjacent to them. Their ownership was not a personal or individual affair, and territorial claims were not transferrable: the land was held in trust, collectively, in a time perspective which extended indefinitely back into the past and forward into the future. The other type of unit was what has usually been called a horde. ... This was a land-occupying and utilizing group, concerned predominantly with hunting and food-collecting.'

'These two kinds of unit reflected the two basic issues in social life - the religious and economic, viewed as interdependent. ... All Aborigines, male and female, were simultaneously members of both kinds of unit; but adult males had two distinct roles: in one, as land-owners, they were land-renewing or land-sustaining, in the sense of keeping
the basic "machinery" going; in the other, with their women-folk, they were land-exploiting. To appreciate the question of land tenure in Aboriginal Australia these two facets must be taken into account."(25)

The continuing historical process of dispossession has deprived the Aboriginal people, and their part-Aboriginal descendants, of both their cultural heritage and their economic independence. This is at the root of the present situation of Aboriginal poverty and alienation. The Aboriginal and part-Aboriginal people cannot be successfully integrated into an affluent twentieth century society unless they have some economic capital and bargaining power, and indeed a stake in the emerging multi-racial Australian community.

Characterizing the situation of part-Aboriginal people in country areas of New South Wales and South Australia in 1965 as typical of a 'Culture of poverty', Professor C. D. Rowley wrote,

'The Aboriginal social and economic situation has resulted from expropriation, from "white settler" prejudice towards a coloured indigenous people; from the destruction of the basis of social order which gave legitimacy to Aboriginal leadership and custom, without compensatory attraction to, or entry into, the encroaching society and economy; and from a high degree of institutionalization, often without security, over long periods.'(26)

Commenting on the significance of the Yirrkala (Gove) land case, Professor Berndt asserts,

'The Yirrkala case has implications for the whole of Aboriginal Australia, whether people of Aboriginal descent are living on or away from what they consider to be their own land; whether they have come out of the large reserves to the fringe settlements; whether they work on pastoral stations (ranches), and occupy huts built on land which is said to be part of that pastoral property; and so on. .....

Everywhere, throughout Australia, the only substantial asset the Aborigines possessed - the only commodity (besides their labour) required by the European intruder - was their land: and in every case, this has been arbitrarily taken over without any adequate compensation to the original owners.'

In January, 1969, the distinguished Australian economist and Chairman of the Commonwealth Government's own Council for Aboriginal Affairs, Dr. H. C. Coombs, spoke out about the situation on Gove Peninsula. Having commented on the 'human problem of frightening complexity' brought about by the mining development on the land of the Yirrkala people, and on the need to involve the people beneficially, so as to avoid 'the Aboriginal community deteriorating slowly into a depressed rabble of fringe-dwellers', Dr. Coombs continued,

'But haste is all to the mining venturer, and every day the facts of the intrusion are more apparent and the possibilities of benefit appear to the Yirrkala more and more remote.

'It is in this atmosphere that they have taken legal action against the Government and the company. In their eyes, this land is their property - occupied by them and their ancestors from the dreamtime of their ancestors, until recently undisturbed save for passing visitors and missionaries. What happened in 1788 on the shores of Sydney Cove is being re-
peated on Gove Peninsula - not a story in the history book, but a living event in own time.

'It is in a way touching that they should appeal to the law - to our law. There are those who are inclined to dismiss this action as trivial, of neither domestic nor international significance. I wonder. I am no lawyer - but I understand that our law is intended as an expression of natural justice and that its very basis is the recognition and protection of rights and obligations, established in a time (as the lawyers say) beyond which the memory of man runneth not. It will be interesting to see what attitude it makes to rights and obligations of even greater antiquity, but derived from the needs and disciplines of a different society.' (27)

A Plural Society

The position of the Federal Government, headed by Mr. Gorton, was stated by the then Minister for the Interior, the Hon. Peter Nixon, in the House of representatives on 3 September 1970, when he said,

'The Government believes that it is wholly wrong to encourage Aboriginals to think that because their ancestors have had a long association with a particular piece of land, Aboriginals of the present day have the right to demand ownership of it.'

The Minister went on to say that, in the Government's view the Aborigines 'should secure land ownership under the system that applied to the Australian community and not outside it.'

The implication is quite clear. In the Government's view traditional Aboriginal society and customs lie outside 'the system'.

As we have seen, the squatters obtained their rights outside the system of their day, but the system soon bent to accommodate them.

We have also seen that it is at least arguable on historical and legal grounds, that the system of British common law which Australia has inherited does have room within it for recognition of traditional native land tenure, as is exemplified in Canada and New Zealand, as well as in the United States. The feudal concept of the paramount title of the Crown, and how it is to be understood today, are here of basic importance. In both the United States and Canada, the Government holds title to Indian lands essentially as a trustee, however much this trust may have been and continues to be violated. As and when white paternalism is overcome, justice will require the handing over of actual control and ownership to the Indian people themselves.

Indeed, this was the primary intention behind the 'Indian Reorganization Act', passed by the United States Congress in 1934, the stated purpose of which was

'To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.'

On June 25, 1969, the Federal Government of Canada presented to the Canadian Parliament an official statement on Indian Policy which foreshadowed an 'Indian Lands Act' which would, at least in theory, grant full Indian control and ownership of reserve land. While this official statement on Indian Policy was rejected by the Indian people of Canada as inadequate, particularly in regard to communal ownership, it provides an interesting contrast with the official Australian situation. It reads, in part:—
'Under the existing system, title to reserve lands is held either by the Crown in right of Canada or the Crown in right of one of the provinces. Administrative control and legislative authority are, however, vested exclusively in the Government and the Parliament of Canada. It is a trust. As long as this trust exists, the Government, as a trustee, must supervise the business connected with the land.'

'The result of Crown ownership and the Indian Act has been to tie the Indian people to a land system that lacks flexibility and inhibits development. If an Indian band wishes to gain income by leasing its land, it has to do so through a cumbersome system involving the Government as trustee. It cannot mortgage reserve land to finance development on its own initiative. Indian people do not have control of their lands except as the Governments allows, and this is no longer acceptable to them. The Indians have made this clear at the consultation meetings. They now want real control, and this Government believes that they should have it. The Government recognizes that full and true equality calls for Indian control and ownership of reserve land.'

The statement goes on:-

'The Government is prepared to transfer to the Indian people the reserve lands, full control over them, and subject to the proposed Indian Lands Act, the right to determine who shares in ownership. The Government proposes to seek agreements with the banks and, where necessary, with the governments of the provinces. Discussions will be initiated with the Indian people and the provinces to this end.'

In Mr. Nixon's statement, which may be taken as representative of the established white Australian view, the Australian Minister went on to say that he had found that 'the land rights which were accorded to the Indian bands' in Canada 'had had the effect, in practice, of encouraging division between the Indian people and the wider Canadian community.'

In fact, as the Canadian statement implies, the real problem in Canada is not that the Indians' rights of use and occupancy were recognised, but rather that the Indians were unable to develop the land and obtain the necessary education, capital, and services, because of a too paternalistic and apathetic trusteeship role assumed by the Canadian Governments. As Canadians see it, the problem is not that Indian land rights have been recognised, but rather how to make those rights more effective in terms of Indian initiative and development. The question is not one of whether or not to recognise traditional Indian rights, but of how to embody these rights most effectively in modern Canadian society and law.

Commenting on the Canadian acceptance of more than one cultural and legal tradition within Canadian society, the Canadian Minister of Indian Affairs and Northern Development, the Hon. Jean Chrétien, said,

'We believe that a non-discriminatory society can accommodate different ways of holding and controlling land. Some people own land in their own names. Some hold land through corporations or partnerships. Some hold land in communal possession – such as the Hutterites. We believe that the Indian people can control their lands and ultimately own them without prejudicing their desire to have the lands remain Indian.'
The feeling Indian people have for their land is as strong as the French-Canadians' feeling for the French language. This feeling must be respected. The land must be protected. That is why we propose to have an Indian Lands Act which will continue and indeed enhance Indian control of their land by first transferring it to them in law and adding special safeguards.'

If this statement can be accepted at its face value, it reveals a crucial difference in approach vis-a-vis Australia. Canadians accept that Canada is a plural society. Thanks to the French presence, they can do no other and still survive as a nation. On the other hand, Australians persist in denying the rights, and the current validity of the cultural traditions, of the Aboriginal people. White Australians have not yet come to terms with the fact that Australia too, is a plural society.

Cook, and the settlers who followed him, found the Aboriginal people relatively few in number, and for the most part not a serious threat. For more than a century after that, white Australians were secure in the belief that the Aborigines were a dying race.

Only gradually, in the last few decades, has it slowly dawned on the non-Aboriginal population that the Aborigines are here to stay. Even more recent, is the idea that Aborigines may not want to become dark-skinned Europeans; so secure have we been in our belief in the self-evident material, moral, and cultural superiority of the Anglo-European way of life. It is only since 1965 that the official statement of the policy of Aboriginal 'assimilation' has used the words 'will choose' rather than 'will' in describing the policy's aim of ensuring that Aborigines conform to white standards.

Realities and Responsibilities

Today, approximately one quarter of the total population of the north-western half of Australia is of Aboriginal or Islander descent. Even allowing for immigration, the coloured population is increasing more rapidly than the white, and this despite one of the highest infant mortality rates in the world.

The vast majority of these black Australians live in extreme poverty, poorly housed and educated, in bad health and housing, and seriously underemployed.

Aborigines, like French-Canadians, may not wish to be 'assimilated' into a culturally 'homogeneous' Australian society. Nevertheless they do want, and are increasingly articulate in demanding, their share of the economic benefits of a technological age.

Whatever the merits or long-term realism of these cultural choices, (31) the demands for material progress and economic equality bring us to consider some sobering economic realities.

With an average annual increase in the Aboriginal and part-Aboriginal population over the next twenty years of around 7,000, a capital expenditure of around forty million dollars is needed to provide the necessary new jobs, houses, schools, hospitals, and so forth, every year. In addition, a similar annual expenditure is needed to overcome the poverty of the existing population of some 150,000 people of Aboriginal descent. Against this need, the present total annual expenditure of all Australian governments on Aboriginal affairs is about 30 million dollars. It would seem unlikely that the balance will be found from regular tax revenue in the near future.

Thus it is that the huge amount of capital available in the form of land, which rightly belongs to the Aboriginal people, together with
royalties and compensation from the development and exploitation of Aboriginal land, would seem to be the only realistic means to overall Aboriginal advancement.

This is not to say that recognition of Aboriginal land rights will be sufficient on its own, or that it will necessarily work miracles. However, it does seem clear that, without recognition of land rights, all the other positive measures which can and must be adopted will do little more than nibble at the edges of the problem. As in the American ghetto situation, conventional policies of assimilation cannot hope to even keep up with the growth in population. The problem of economic growth and social progress must be tackled where the people are and where they want to be, on their own land and in their own communities.

The present situation is remarkably unstable. There has been a revolution in communications and expectations which has forever ended the parochialism, and isolation of Aborigines in their reserves, settlements, missions, and fringe-dweller shanty towns. Today, black Australians are increasingly articulate and impatient for progress. Already there is an increasing migration from the lands of their disinheritance into the slums and ghettos of the cities on the south-eastern seaboard. If Aborigines are forced off the cattle stations and reserves of the North-west, this trickle will turn into a torrent, and racial problems will have come to the cities with a vengeance.(32)

In the north-west, an average of one in four of the population is coloured. They could be a healthy and productive source of new enterprise and skilled labour, well adapted and at home in the harsh environment. On the other hand, if they continue to be treated as obstacles to progress or as a cheap pool of unskilled labour, they could well become increasingly alienated and troublesome to white administrations and enterprises.

Big business, much of it international in character, has a peculiar responsibility in the north-west, since most enterprise and employment in the area is highly capital-intensive and economic interests exert a powerful influence on government policy in the area. Preferential training and employment of local labour is clearly desirable in the interest of long-term social stability in the area, as is the deliberate creation of local, labour-intensive feeder industries and Aboriginal-owned enterprises.

Unfortunately, without some sort of economic bargaining power such as land rights or royalties, it appears from the record that big industry is most unwilling to make even marginal concessions.(33)

If big business continues to oppose Aboriginal land rights in the north-west, as KABALCO has done at Gove, it may well be acting against its own long-term interests.

The president of the American Oil Company put this in its proper perspective when he asked,

'Does management, in the exercise of its responsibility to its stock-holders, have the right to invest time, effort, and money to help solve broad social problems? I don't lose much sleep over this one, nor should any other executive if he will really think through what it's all about.

'For while we are in business to make a profit, and profit motivation is a tremendous social force, we cannot abdicate our responsibility to help create and maintain a continuing society that will enable us to operate profitably.
We neglect our obligation to our stockholders if we take refuge in the cliche that our duty ends with today's production and sale of competitive commodities.

'No segment of society, and no individual in it, can afford to sit placidly by while a horribly costly and utterly inhumane condition ... goes from bad to worse.'(34)

Looking Ahead

The realities of politics and of competition for funds and resources have long led to Aboriginal affairs receiving low priority with Australian governments. If this situation is to be remedied, and growing racial conflict avoided, Aborigines must somehow gain a power to influence governments and events greater than their numbers and history would suggest possible.

Speaking of 'Aboriginal Power' at the opening of a national conference on Aboriginal and Islander advancement, Dr. Coombs suggested that,

'The greatest strength of the Aboriginal cause is that it stands squarely on the moral worth of its claims; it is in essence an appeal to standards of justice and humanity which all of us believe should underlie the structure of human society.'(35)

In the past, the moral worth of the Aboriginal cause has been proclaimed, usually from far off England, by the more idealistic sections of the white community. Australian legislatures, on the other hand, have been influenced more by the pragmatic materialism of the white settler and farming interests, and it is these which have prevailed. Whether white Australia has yet reached such a state of material security, social maturity, or civilisation that it can and will allow morality to prevail, remains to be seen. There are, in any event, other sources of Aboriginal power which offer at least some hope of progress.

Because of the peculiar distribution of the Australian population as regards colour, it appears that there are at least two, and possibly up to four, federal electorates where the Aboriginal vote could hold the balance of power as between the candidates of the major political parties. This is a situation which Aboriginal organisations and activists are bound to exploit, and ways and means of doing this are already being explored.

Appeals by people of Aboriginal descent for support and assistance from the United Nations and other bodies outside Australia are increasingly common, and becoming more sophisticated. These can be expected to exert some external pressure on Australian governments, although white Australians may well react against at least the cruder forms of external pressure in ways not helpful to the Aboriginal cause.

Probably the most fruitful form of external aid for the Aboriginal people will come in the form of encouragement, finance, and stimulus to Aboriginal leadership, organisation, and self-help. A big step in this direction was taken in 1970, when the World Council of Churches' Programme to Combat Racism made substantial grants to the two major Aboriginal advancement organisations in Australia, namely the 'Federal Council for the Advancement of Aborigines and Torres Strait Islanders', and the newly formed Aboriginal and Islander controlled 'National Tribal Council'.

As has already been implied, there is another potential source of Aboriginal power, namely the power to cause social and economic disrup-
tion, particularly in the North-West. In the immediately foreseeable future, it does not appear that Aborigines will deliberately seek to exploit this means of power, which in any case could well prove to be counter-productive. Nevertheless, frustration and idleness have already led to some mild examples, in some settlement situations, of the more or less pointless and spontaneous outbreaks of brawling and rioting which have been common in the American ghettos.

Taking a longer range view, it seems probable that unless considerable progress is made in the next few years, either through moral persuasion, external pressure, or the power of the ballot box, then the more radical tactic of deliberately fostering social and economic disruption may be adopted by some Aboriginal leaders.

The moral and practical arguments in favour of the recognition of Aboriginal land rights are overwhelming, but the task of winning a just and proper response from people and governments so late in Australia's history is a testing one. It involves a coming to terms with history, and a costly re-assessment of the role of the white man in Australia and the world. It also involves some powerful vested interests.

Hopefully, all that is necessary is to be able to expose the Australian public and governing elite to the full force of the case for land rights. Given, however, the current irresponsible attitude of the mining industry in particular towards this issue, and the fact that every major Australian newspaper and commercial television outlet is controlled by companies with mining investments, such a full exposure is problematical.

Whatever the courts decide on the legal issues, many important matters of principle and detail will remain to be resolved. How the courts, and Australia as a whole, responds to these issues, may well determine the future course of race relations in this country.

(Throughout this essay the words 'Aborigine' or 'Aboriginal' would, but for lack of space and awkwardness of expression, be accompanied by 'and Islander', since the people of the Torres Straits Islands, many descendants of whom reside on the mainland, suffer from many of the same injustices, including loss of land rights. Aborigines and Islanders work together, while maintaining their separate cultural traditions and identities, in both F.C.A.A.T.S.I. and W.T.C., and nothing in this essay is intended to detract from this unity in diversity. Cape Barren Islanders, who are partly descended from the obliterated Tasmanian Aborigines, also merit special mention.)

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