**Terra nullius**, Aboriginal sovereignty and land rights in Australia

The debate continues

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**ABSTRACT.** This paper presents an overview of recent developments in Australian Aboriginal land rights' claims and demands for indigenous self-determination. The period under review, from the mid-1980s to the present, has been one of continuous government on the part of the Australian Labor Party (ALP) at the federal level. While initially strongly committed to the idea of national land rights' legislation, the Commonwealth government has since backed away from this approach in favour of one allowing the states a greater degree of individual choice in this area. In contrast to the situation in Canada, the treaty idea, too, has recently been shelved in favour of the formation of a Council for Aboriginal Reconciliation. While all this has been happening at the administrative level the extraordinary legal concept of *terra nullius* has been coming under mounting pressure from many quarters. In June, 1992, the Australian High Court handed down a landmark decision in a long-running indigenous land rights' case (the *Mabo* case). While of enormous symbolic significance for the Aborigines, it is unlikely that this case will result in a flood of similar land rights' claims in the future.

In a recent paper on the subject of 'The New World Disorder', the distinguished Indonesian specialist Benedict Anderson (1991) urged his readers to beware of using such simplistic terms as 'fragmentation' and 'disintegration' when describing what appears to be happening politically in so many parts of the world today. His message is that the routine use of such words signifies a kind of anarchic, pathological condition where 'disorder' is deemed to be rapidly displacing 'order'. His central agenda is to highlight the relative recency of most so-called 'integrated states' and, indeed, to argue that in reality many of these are (or were) 'integrated' in only the most tenuous fashion. He seeks to persuade us, in short, to not forget our history. A similar message was spelled out forcefully in an earlier essay when Thornberry (1989) addressed the important issue of what happens to ethnic minorities when a state becomes independent under the banner of 'self-determination'. Given that the International Covenants on Human Rights routinely endorse such sentiments as 'All peoples have the right of self-determination', Thornberry (p. 868) poses...
the question: 'Are minorities justified in appropriating self-determination to state their claims and aspirations?'. Terms such as 'state', 'nation' and 'people' are often used interchangeably, yet it is quite clear that in many 'nations' there are groups of minority 'peoples' who enjoy few of the benefits flowing to the wider community.

In this context it is well to recall Goot and Rowse's (1991: 10) point that 'The assertion of indigenous rights [in Australia] has set unprecedented tests for hitherto unproblematic understandings of “nationhood”'. Also we need to constantly remind ourselves that what is now known as 'Australia' has only been in existence as a legal federation of states for less than a century and that for thousands of years prior to its first colonization by Europeans in the 18th century the same territory was home to several hundred different Aboriginal language groupings, perhaps totalling as many as 750,000 persons, successfully occupying and utilizing all parts of the island continent, together with Tasmania and other neighbouring islands, and traversing the entire region via an extensive and well-used network of trading routes. Despite Joseph Banks' 1770 assessment that Australia was 'thinly inhabited', compilations of recent research have resulted in the continuous upgrading of estimates of the size of the original Aboriginal population. Following earlier estimates of some 2000 Tasmanians, for example, it is now thought that there were probably in excess of 5000. Similarly, it is now believed that present-day New South Wales and Victoria probably had as many as 250,000 Aborigines, at least four times the assessment made in the 1930s (White and Mulvaney, 1987).

Aboriginal cultures were remarkably diverse and the experience with European contact equally varied. For example, European settlers first started moving into what is now known as the Northern Territory in the 1870s, so that there the local Aborigines' experience with western culture is very recent by comparison with the situation far away in mainland southeastern Australia and in Tasmania. In the face of much better research information on the numerous Aboriginal 'nations'—and more and more archaeological details are being added each year (Dodson, 1991)—the terra nullius concept increasingly takes on the appearance of a cruel and deliberate fiction. Indeed, in the course of an extended analysis of what can only be characterized as the outrageous and unprecedented legal and historical justification for the British appropriation of the whole of Australia, Reynolds (1987: 2) commented that over time 'The intellectual and moral gymnastics required to sustain that position have been quite extraordinary. However, as will become apparent in the ensuing discussion, there are some signs of hope for Australia's indigenous peoples. Recent times have seen the culmination of years of painstaking work in various academic disciplines coming together successfully to effect what some see as a profound change in the present lowly legal status of indigenous land claims in Australia. For example, in an important symbolic move, January, 1992, finally saw the 27,000 year-old remains of 'Mungo woman' being returned to her descendants in a moving ceremony at Lake Mungo in western New South Wales after their 'capture' by white archaeologists over 20 years earlier. Similarly, famous tourist sites such as Uluru (formerly Ayers Rock) have recently been returned to their traditional Aboriginal owners; and in Victoria it is now established government policy to replace Anglo-Celtic names with the original indigenous nomenclature for prominent mountains and other natural features in certain parts of the state (Birch, 1992). As well, in 1992, the Commonwealth Minister for Aboriginal Affairs, Mr. Tickner, blocked the construction of a proposed Aust.$20 million flood-control dam on the Todd River in Alice Springs on the grounds that Aboriginal sacred sites would be destroyed. This order was the first to be invoked using the powers of the 1984 Aboriginal and Torres Strait Islander Protection Act and it followed a bitter dispute between the Northern Territory and Commonwealth governments over the need for the dam.
In addition to the date of original Aboriginal occupancy being continually pushed back further and further in time (to 60,000, and quite possibly 140,000, years so far (Dodson, 1991)), ‘official’ Eurocentric histories are also now being extensively rewritten in many ways. In particular, in the same way that the ‘Columbus myth’ is being progressively debunked in North America (Murray, 1992), the historical record is finally being looked at much more closely and sympathetically from the Aboriginal perspective rather than almost exclusively from that of official British government records. In 1968, in his Boyer Lecture, the eminent anthropologist, W. E. H. Stanner, spoke of the ‘great Australian silence’—a direct reference to the almost total neglect of the Aborigines in Australian historical narrative up to that time. This situation is changing rapidly, with Aborigines themselves now being much more active in writing their own histories (see, for example, Miller, 1985). Nomadic lifestyles were indeed commonplace, but it is also apparent that Aborigines and Torres Strait Islanders often established permanent or semi-permanent settlements and occupied what were perceived to be strictly defined territories with named features. As well, it is now quite clear that in many parts of present day Australia the native inhabitants did not capitulate readily to the European invaders when carrying out their various acts of ‘total war’ (see Stevenson, 1992) but frequently carried out well-organized and lengthy guerilla warfare campaigns, in the course of which an estimated 20 to 30,000 blacks were eventually killed (see, for example, Reynolds, 1987; Milliss, 1992). The resistance to European settlement in Nyungar territory (Western Australia’s ‘Swan River Colony’), for example, was so strong and persistent in 1830 that serious consideration was given to the complete abandonment of the settlement. Similarly, armed reprisals against white invaders took place in Arnhem Land, in the Northern Territory, as recently as the 1920s and 1930s.

That the Aborigines were not totally annihilated is testimony to their own heroism and survival strategies and is also illustrative of Sider’s (1987) insight that, with respect to indigenous peoples, state power is by no means monolithic. Simultaneously—and contrary to simplistic melting-pot theories—it functions both to destroy native peoples and to encourage ethnic diversity. Given the weight of evidence now pointing to powerful and prolonged resistance on the part of Aborigines in many parts of Australia, the persistence of the fundamental legal doctrine that the Colony of New South Wales was ‘peacefully annexed’ by the British in the 18th century rather than being ‘conquered’ can be puzzling to lawyers and non-lawyers alike. Yet in the landmark case of Cooper v Stuart (1889) the Privy Council went to enormous lengths to emphasize

...the great difference between the case of a Colony acquired by conquest or cession...and that of a Colony [e.g. New South Wales] which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions.

It is the opinion of some jurists that once it has been legally settled that a colony belongs to one category or another—as in the Cooper v Stuart determination—then this becomes a binding authority and not one to be later reconsidered in the light of historical research. In 1823, for example, in the widely cited Johnson v McIntosh case in the United States, Chief Justice Marshall stated that

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained...it becomes the law of the land, and cannot be questioned (quoted in Bartlett, 1990: 456 emphasis added).
More recently, in a 1991 judgment, this conservative opinion was endorsed by Chief Justice McEachern in the Supreme Court of British Columbia's ruling in the case of Delgamuukw et al v. the Queen (Bartlett, 1991; Berg, 1992). Needless to add, these are controversial views which make a clear—and to many people, false—distinction between 'the law' and questions of historical injustice (i.e. politics) and also fail to take into account complex questions relating to varying degrees of 'conquest' and 'settlement' (Lumb, 1988). This point will be returned to later in the paper.

An earlier discussion (Mercer, 1987) emphasized the central significance of land to Australian Aborigines and outlined the evolution of Aboriginal land rights and claims in Australia up to the mid-1980s. Land, it was pointed out, has special spiritual significance to Aborigines who identify intimately with specific sites and regions. It follows that what is often referred to as their 'country' cannot be substituted, or traded, for other parcels of land, as in capitalist market transactions. Drawing on recent legal, political, historical and archaeological, as well as geographical, literature, the present paper extends the discussion to mid-1992 and also makes some comparisons with parallel recent developments in Canada, in particular. Canada provides a most interesting mirror in the sense that it has a sizeable indigenous population and is a federation with a similar settlement history and economic base. In some ways, too, it has recently moved far ahead of Australia in terms of genuinely attempting to right historical injustices to its First Nations. Cullen (1990: 190) has commented that while traditional native land rights is not a topic that is 'in the forefront of discourse' in Australian politics, it is nevertheless 'a most persistent issue'. It never really goes away and, as we shall see, from time to time occupies centre-stage in national political debate. Specifically, the present paper highlights the continuing debate in the Australian federal system as to whether the states or the national government should have primary responsibility for Aboriginal affairs and also discusses the important question of the growing significance for Australia of the evolution of international thinking on the rights of native peoples (Davies, 1987).

The international dimension

Traditionally, international law had no concern for matters that were deemed to be the sole responsibility of domestic jurisdictions, for example the treatment of nationals. This situation has now changed dramatically and in an interdependent world no country can now afford to ignore the expanded reach and force of international norms in this area. Later in the present paper, for example, attention is focused on an important recent Australian High Court case. In their research for this case the seven High Court justices drew on legal precedent from Africa, the United States, New Zealand and Canada. Increasingly, the attention of legal commentators, at least, is being focused on the common problems facing indigenous minorities in parts of the world as diverse as Scandinavia, Latin America and Oceania rather than on their differences—the unique cultural characteristics and historical experiences of such peoples. Torres (1991) argues that the colonial relationship has bequeathed indigenous populations all over the world with four major agenda issues: (i) the need for cultural protection of such things as sacred sites; (ii) the acknowledgment of land claim rights; (iii) the recognition of individual welfare rights; and (iv) political autonomy. The second of these concerns for indigenous peoples worldwide was highlighted by the United Nations' Martínez Cobo Report (1983) where (in para. 215) it was noted that 'the recognition and protection of land rights is the basis of all indigenous movements and claims today in the face of continuous encroachment on their land'.
For the past ten years the UN Working Group on Indigenous Populations has provided a much-needed forum for native populations to air their grievances. The five-member group—which is a committee of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities—is currently close to finalizing a Universal Declaration on Indigenous Rights, though there is still substantive disagreement on the issues of indigenous sovereignty and sub-soil resource exploitation. The drafting follows a visit to Australia of an overseas mission representing the group in 1988 which was strongly critical of Australia’s human rights’ record and recommended that

...the Aboriginal and Islander peoples be given self-government over their local and internal affairs...[with] powers sufficient for the protection of the group’s collective right to existence and for the preservation of their identities and with a secure financial base (Saes, 1988: 26).

Moreover, recent years have seen growing international interest in the link between ecological destruction—especially of tropical rainforests—and the dispossession of native peoples, as well as the setting up of an important international body to represent the Fourth World—the Unrepresented Nations and Peoples Organization (UNPO) in The Hague. Given that—unlike the situation in New Zealand, Canada and the United States—no treaty was ever negotiated between the European colonists and Australia’s original inhabitants, a key question is whether it is possible to discern any change in what Reynolds (1987: 4) refers to as ‘The inability of Australian law to retreat from historical injustice’. Of some relevance is the fact that since 1991, under the terms of the International Covenant on Civil Rights, it has been possible for Aborigines to bypass the Australian commonwealth or state governments and deal directly with the UN Human Rights Committee on sovereignty and related issues. Moreover, since the 4-3 majority judgment in the 1982 Koowarta case, it is clear that—if it so chooses—the Commonwealth government can use the powerful ‘external affairs’ power vested in it through the Constitution to force the subordinate states to comply with the provisions of international treaties signed by Australia. In the Koowarta test case the relevant treaty was the International Convention on the Elimination of All Forms of Racial Discrimination, which Australia signed in 1975, and the case involved testing the resolve of the Commonwealth government to overrule that of Queensland which, at the time, was refusing to transfer a leasehold property to Aborigines (McRae et al., 1991).

A reappraisal of the land rights issue is certainly timely, if for no other reason than that 1993 has been declared by the United Nations the International Year of Indigenous Populations. Contrary to official expectations in the 1930s when the Aboriginal population plummeted to around 30,000, Australia’s indigenous inhabitants have not died out. Indeed, their numbers have continued to grow and, increasingly, they are making their presence felt in many aspects of public life. However, this is not to deny what all the social indicators highlight so clearly, namely that, disproportionately, Aborigines and Torres Strait Islanders continue to be the most disadvantaged minority in Australian society, and this regardless of whether they are living in metropolitan or rural settings.

It is now 20 years since the Aboriginal ‘tent embassy’ first appeared in Canberra (more on this below), and to symbolically commemorate the event, in January, 1992, a group of 60 Aboriginal protesters occupied the old Parliament House in the nation’s capital. When four of the demonstrators were charged with trespassing, their lawyer applied for a temporary stay of proceedings both on the grounds that the court had no jurisdiction over ‘Aboriginal’ land and so that the case could be heard in the International Court of Justice in the Netherlands (The Age, Melbourne, 4 February, 1992). As well, the country’s
Bicentennial year is now over and Australians have been given ample opportunity to reflect on the reasons for the well-publicized Aboriginal boycott of the celebrations. The term 'Aborigine', too has been criticized, and even though it is still widely used in official discourse, many black Australians prefer the nomenclature 'Koori' (in Victoria and much of New South Wales) and 'Murri' (in Queensland).

Similarly, the last few years have seen an unprecedented surge of creative activity and popularity as far as the Aboriginal arts are concerned, a phenomenon that some commentators have suggested has been influential in recent years in terms of successfully persuading much of white Australia of the spiritual significance of land to Aborigines (Goot and Rowse, 1991). The arts explosion is all the more surprising given the still relatively small number of Aboriginals. The 1986 Census officially identified around 228,000 Aboriginals and Torres Strait Islanders, representing only 1.5 percent of the total Australian population. The outpouring of Aboriginal literature, too, has highlighted another problem. That is the fact that, in order to get their message across, black Australians have to write in standard English, an imported, alien language that is not theirs' and which, even by comparison with vernacular 'Aboriginal English', is often totally inadequate as a means of communicating 'the complexities of a totally different world view, a different moral universe' (O'Donohue, 1991: 20).

**Structural discrimination**

Notwithstanding some spectacular artistic achievements, at the same time there has been no diminution in the amount of evidence pointing to the continuation of structurally endemic discrimination against Aborigines in all aspects of life. In particular, the five-volume Royal Commission into Black Deaths in Custody, which reported in May, 1991, after three years of investigations at a cost of Aust.$30 million, highlighted continuing, serious problems in rural Aboriginal communities, many of which had their origin in dispossession from traditional native homelands. Revealing an imprisonment rate for Aborigines 29 times that of the rest of the community and a 24 percent increase in that rate over the last four years, the Commission eventually made 339 recommendations (Royal Commission into Aboriginal Deaths in Custody, 1991). A parallel National Inquiry into Racist Violence, undertaken by the Human Rights and Equal Opportunity Commission, also reported in 1991, came up with similar hard-hitting conclusions and made 64 recommendations.

In summary, in the 1990s we can identify what O'Donoghue (1991) has called 'two different versions of Aboriginal Australia'—one which celebrates achievement and Aboriginality and the other, perhaps more familiar, picture which portrays Aborigines as a serious 'social problem'. The central questions, then, are: has anything really changed; and which of these two versions will eventually dominate? As we shall see, notwithstanding considerable public sector investment in recent years in a host of laudable functional Aboriginal projects and programmes (water supply, housing, roads, education, land titles etc.), the much more fundamental issue of the precise relationship between Aborigines and the Australian polity and the way in which that relationship should be expressed is still largely unresolved (Brennan and Crawford, 1990). A number of analysts, including Bennett (1989) and Heatley (1991), have argued that there has been a substantial decline in Aboriginal power in Australian politics since the mid-1980s, though these and other writers have also made a convincing case for mainly looking at this issue from the regional (state) perspective rather than nationally.
The fact that the Australian economy is currently in deep recession—and indeed has been for some time—is certainly not irrelevant to the present discussion. Just as there is a strong contemporary backlash against immigration into Australia, so too is there mounting opposition in some circles to 'unnecessary' expenditure on such 'unworthy welfare recipients' as Aborigines. For example, a national poll of 1000 voters in March, 1992, found that 47 percent of those questioned agreed with the statement: 'Aborigines don't do anything to help themselves and expect to be looked after by the Government.' 35 percent took the compassionate view that Aborigines were deserving of special assistance, and 18 percent were undecided between the two positions (Saulwick Age Poll in The Age, Melbourne, 28 March, 1992). Aboriginal demands for land rights are often portrayed by their opponents as standing in the way of mining and other important projects that, potentially, could be earning Australia millions of dollars in much-needed foreign exchange. Indeed, the powerful minerals sector was outraged when, in 1991, the federal government recommended that local Jawoyn spiritual interests should be protected and a large new mining project should not be allowed to proceed at Coronation Hill adjacent to Kakadu National Park in the Northern Territory (Resource Assessment Commission, 1991). The nexus between Aboriginal and mining interests is of special interest to Australian geographers and is the subject of a recent edited text (Connell and Howitt, 1991). It needs to be said, however, that there are divergent views on the extent of the 'backlash' against progressive Aboriginal policies and legislation and that there is a real division in non-Aboriginal Australia between the 'assimilationists' on the one hand and the 'pluralists' on the other, who respect native land rights' claims (Goot and Rowse, 1991).

A particular focus here is the manner in which the central legitimating concept of terra nullius is now coming under mounting attack in Australia. The concept is inherently insulting to Aborigines in that it denies their presence at the time of the continent's 'discovery' by Europeans. Notwithstanding the economic difficulties, the period under review has been one of relative political stability at the national level, with a single political party—the Australian Labor Party (ALP)—being in office in Canberra under the same Prime Minister (Bob Hawke) without interruption for some eight years. This situation allows us the opportunity to chart policy evolution—and the associated actions—within one administration over several years untainted, as it were, by dramatic changes in political party leadership. As Beckett (1988) has so eloquently argued, the Aborigines have been a 'problem' for the modern Australian state ever since its inception. Yet paradoxically, as more and more public resources have been targeted to 'solve the problem' it has apparently become more problematic and changed its form. 'The implication of this', he notes (p. 4) 'is that the state is an integral part of the problem it is supposed to be solving.' First though, in order to contextualize the discussion, it is necessary to recapitulate and present a brief overview of some of the earlier developments sketched in more detail in the 1987 paper.

Earlier developments

In 1972 the then Liberal Prime Minister, Mr. William McMahon, publicly denounced the call for Aboriginal land rights. In so doing, the Prime Minister essentially was arguing that nothing had changed in the intervening century since the benchmark Privy Council determination in the 1889 case of Cooper v Stuart, namely that, to all intents and purposes, the colony of New South Wales was unoccupied at the time of its peaceful annexation by Britain in the 18th century. Moreover, such inhabitants as there were were not 'settled', nor did they have 'settled law'. In effect, then, with one stroke of the pen, this judgment
conveniently 'defined away' an entire race of people. It represented nothing less than an attempt to re-write history. In hindsight there is little doubt that, in many parts of Australia, the early policies were designed to exterminate the Aboriginal population. When this failed, dispossession, forced migration and assimilation were tried at various times, all unsuccessfully.

McMahon's denouncement came only five years after a national referendum had overwhelmingly voted in favour of an amendment to the Constitution finally allowing the states and the Commonwealth to enact special laws relating to Aborigines, granting them suffrage and enumerating them in national censuses. Such belated recognition of the very existence of the Aboriginal population served to highlight the enormous hypocrisy of the 1900 Commonwealth of Australia Constitution Act, the introduction to which states, 'Whereas the people of the colonies, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Commonwealth...'. The fact that the original Constitution expressly excluded Aboriginal concerns from the law-making activities of the Commonwealth was of no surprise to the constitutional lawyer, Sawer (1966-67: 18) for 'it was widely thought that the Aborigines were a dying race whose future was unimportant'. Clearly, the assumption was that when the six colonies combined to form a 'nation' that nation would be white, a view that was reinforced by the immediate deportation, upon federation, of kanakas, or indentured Pacific Island workers. In this light 1967 has to be seen as a momentous date in Australian political evolution. In historical terms colonialism meant that there had to be an institutionalization of the conquerors/conquered categories. Put another way, this translated into resolving the questions: who is deemed to be worthy of citizenship?; and who is to be allowed the privilege of political participation? (Beckett, 1988). In 1967 Aborigines in Australia were finally accorded that privilege.

As already noted, in angry response to McMahon's denunciation an Aboriginal 'Tent Embassy' was established on the lawns adjacent to Parliament House. It subsequently grew and remained there for six months until the settlement was eventually destroyed by police, long enough for Australians and the world to be made fully aware of Aboriginal grievances and of their demands for sovereignty and land rights. There have, however, been differing interpretations of what the tent embassy actually signified. Rowse (1991: 4), for example, asks:

Was the Embassy a renunciation of the rights and responsibilities of Australian citizenship, or a symptom of the political differences among Aboriginal people, or was it an expression of the complexity of Aboriginal feeling about their membership of Australian society?

In reality it was probably all of these things. Certainly, the initiators of the tent embassy idea were mainly drawn from the ranks of young, militant urban Aborigines pushing for recognition of 'separateness' and self-determination. But the situation is complicated by the existence of other groups, as well, including: those who wish for total or partial assimilation with white Australia, the alienated slum and reserve fringedwellers; and those living traditional lifestyles, relatively untouched by western culture (Gilbert, 1973).

1972, for the first time, also saw the establishment of a separate Commonwealth Government Department of Aboriginal Affairs. This represented a clear statement by the government of the day that Aboriginal issues are essentially a national concern rather than being something that should be the exclusive preserve of the state administrations. However, as Jennett (1990) has so ably argued, the Aboriginal Affairs' portfolio is one of the most problematical for any Minister on the grounds that it:
—is principally concerned with questions of redistribution and, by definition, such questions are profoundly ideological and conflict-ridden because of the winner/loser outcomes;

—focuses on people who argue strongly that they are not just another disadvantaged ‘interest group’ but, rather a dispossessed and alienated race who deserve special compensatory treatment. As well, many Aborigines argue that the government has no legitimacy in terms of managing their affairs, though a complicating factor is that they do not always speak with one voice and finally,

—is dealing with issues which have the potential to excite xenophobic fears and threaten the ‘unity of the Australian nation’ (p. 247).

In addition, while there is no doubt that it suited the Whitlam government to see Aboriginal issues primarily as a focus for the national government, there were—and still are—enormous problems in persuading Aborigines themselves to become interested and involved in ‘pan-Aboriginal’ political structures and conflicts rather than in strictly locally-based struggles. Inevitably this means that it is difficult to constitute a national body which speaks with any authority for all Aborigines and Torres Straight Islanders (Kowoser, 1991). In Aboriginal and Torres Strait Islander Commission (ATSIC) was indeed established in 1984, with a 60-regional council administrative structure. Yet the democratically elected ATSIC only controls about 60 percent of the total finances going in to Aboriginal programmes of various kinds and it has been criticized both for being a kind of ‘black parliament’ on the one hand and for acting as an imposed governmental mechanism to block Aboriginal claims for sovereignty on the other.

The retreat from national land rights legislation

When the Hawke/Australian Labor Party (ALP) government was elected to office in 1983 it did so on a platform that included a commitment to national Aboriginal land rights’ legislation. This commitment to what became known as the Preferred National Land Rights Model was effectively buried in March, 1986, when, in a public address, the Prime Minister argued that land rights’ legislation would be more appropriately handled by the states rather than by the Commonwealth on the grounds that ‘the public’ were now less ‘compassionate’ than they had been at the time of the 1967 referendum (Goot and Rowe, 1991). In hindsight, the period 1983-84 saw the country come perhaps closest to having successful nationwide legislation, yet at least part of the opposition in the ensuing years came from Aboriginal people who rejected the proposed land rights’ model. As well, apparently fearing a ‘states’ rights’ backlash, the first Minister for Aboriginal Affairs in the Hawke government—Clyde Holding—tended to favour a conciliatory policy of encouraging gradual changes in legislation on a state by state basis rather than attempting to impose uniform national legislation from above. In an important sense, what at least one newspaper (Canberra Times, 6 March, 1986) referred to as a ‘shameful backdown’ from the government’s prior commitment to national legislation represented a substantial policy shift away from recognizing Aborigines as a separate ‘people’—the pluralist view—and towards the idea that they were merely a disadvantaged interest group.

For a period, at least, the Hawke endeavours continued the hopes and aspirations of the earlier, Whitlam, Labor administration that had held office in Canberra for three years some ten years earlier. It was at this time, for example (in 1974), that the country’s only Aboriginal Senator—Neville Bonner—successfully moved a motion that the Upper House

...accepts the fact that the indigenous people of Australia, now known as Aborigines and Torres Strait Islanders, were in possession of this entire nation
As it happened, despite a unanimous vote on this motion, Whitlam’s dreams were only partly fulfilled, mainly in the form of his government’s significant reforms in the Northern Territory (specifically, the 1976 Aboriginal Land Rights (NT) Act), and through parallel legislative changes at the state level in South Australia and New South Wales, in particular. For various reasons the other four states successfully resisted commonwealth government pressure to introduce land rights’ legislation. In large measure this was because different political parties ruled in some of the states but also because of deeply entrenched racist attitudes and well-organized opposition on the part of mining and pastoral interests, especially in Queensland and Western Australia, two states with sizeable Aboriginal populations.

The state of Queensland is remarkable in that since the 1860s when it separated from New South Wales, successive administrations have steadfastly refused to accede to policy changes taking place in other states and the Commonwealth and recognize that the Aborigines had any special rights to, or relationship with, the land or that they were indeed deserving of compensatory privileges for acts of violent dispossession over a long period of time. The situation is even more extraordinary when it is recognized that Queensland has the largest complement of Aborigines and Torres Strait Islanders of any state (around 61,000 in 1989). In 1976, by using the finances of the Aboriginal Land Fund Commission, the Commonwealth government bought a cattle station at Archer River, in Queensland, on behalf of the Aurukun Aborigines. However, the Queensland government would not give its approval to the transfer of title and the federal government was unwilling to use the superior power vested in it under the 1955 Commonwealth Lands Acquisition Act (Action for Aboriginal Rights, 1988). 1975 also saw the enactment of the Commonwealth, Racial Discrimination Act, a statute which, potentially, gave Canberra enormous power over the states if it chose to use it. At this time, for example, the state of Queensland had in place two pieces of legislation—the Aborigines Act (1965) and the Torres Strait Act (1965), both of which were blatantly discriminatory and in breach of the 1975 federal legislation and the U.N. Declaration on Human Rights, to which Australia had long been a signatory (McRae et al., 1991).

The history of the Pitjantjatjara land claim throughout the 1970s clearly demonstrates the differences of approach between adjacent states. Pitjantjatjara country encompasses some half-a-million square kilometres of territory in Central Australia, centred on Uluru (Ayers Rock), and transected by the modern state boundaries of Western Australia, South Australia and the Northern Territory. Yet while the South Australian state government took a commendable lead in granting freehold title to over 100,000 sq. kms. of Aboriginal land in 1981 (around 10 percent of the state), and an additional 80,000 sq. kms. three years later under the terms of the Maralinga Tjarutja Land Rights Act, successive Western Australian governments of all political persuasions have always steadfastly refused to follow suit. Thus, the Pitjantjatjara people have succeeded in acquiring freehold title to only a portion of their lands in what appears on the maps as contemporary South Australia (it must also be remembered that much of the Maralinga lands are seriously contaminated as a result of the British atomic bomb tests there in the 1950s). Queensland, too, had always tended to adopt a similar, discriminatory approach to that of Western Australia. In 1981 the government of that state announced that it intended to abolish the Aborigines Act and the
Torres Strait Act and replace them with legislation which, at best, would have granted certain Aborigines 50-year leases over certain lands but under very restricted conditions. This proposal was seen as being seriously regressive by Aborigines and many liberal Australians and was the catalyst for the Murray Island case, to be discussed below.

The 1988 Parliamentary Resolution

Following the 1974 'Bonner' motion, mentioned above, in August, 1988—European Australia's bicentennial year—both the House of Representatives (the Lower House) and the Senate (the Upper House) of the Australian Parliament simultaneously—and unanimously—adopted the following historic motion. It is interesting to note that the precise wording was originally suggested by the heads of Australia's 14 main church groups some six months earlier and the debate took place in the presence of a visiting delegation from the US Congress (Australian Law Journal, 1988). Both Houses, then:

(a) acknowledged that
(1) Australia was occupied by Aborigines and Torres Strait Islanders who had settled for thousands of years before British settlement at Sydney Cove on 26 January 1788;
(2) Aborigines and Torres Strait Islanders suffered dispossession and dispersal upon acquisition of their traditional lands by the British Crown; and
(3) Aborigines and Torres Strait Islanders were denied full citizenship rights of the Commonwealth of Australia prior to the 1967 Referendum.

(b) affirmed
(1) the importance of Aboriginal and Torres Strait Islander culture and heritage; and
(2) the entitlement of Aborigines and Torres Strait Islanders to self-management and self-determination subject to the Constitution and the laws of the Commonwealth of Australia; and

(c) considered it desirable
that the Commonwealth further promote reconciliation with Aboriginal and Torres Strait Islander citizens providing recognition of their special place in the Commonwealth of Australia (Commonwealth Parliamentary Debates, House of Representatives, 23 August, 1988: 137; Senate, 23 August, 1988: 56).

Interestingly, the various statements carefully skirt around the thorny question of prior ownership, which had been mentioned in the 1974 resolution; and laudable as the total resolution is, there is no doubt that it represents little more than an agreed-upon, bipartisan position statement. It is certainly not binding in any legal sense and indeed paragraph (a) directly contradicts legal opinion as, for example, in the important 1971 Gove Land Rights case (Milirrpum v Nabalco Pty Ltd and the Commonwealth) and the 1979 High Court case of Coe v The Commonwealth of Australia and the Government of the United Kingdom and Ireland. In his judgment in the latter case, Gibbs C.J. commented: 'It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest.' However, it has to be said that even though the 1988 parliamentary resolution has no legal validity there is no doubt that it is seen to carry enormous symbolic political force and may well influence certain High Court decisions in the future. If nothing else it is a public admission of dispossession. Further, in view of the aforementioned division in Australian society between those favouring 'assimilation' and the 'pluralists', it is important to note that at the time of the debate on the resolution the Opposition unsuccessfully moved an amendment that the words 'in common with all other Australians' be added after 'self-determination' in (b) above.
The main task of the Australian High Court is to determine whether parliamentary laws and governmental programmes are constitutionally valid, but interestingly—in the context of Chief Justice Marshall's comment discussed earlier—it is not bound by its own judgments and can, in effect, reappraise and overturn earlier decisions if it feels that changing social and political circumstances warrant it. Such evolving interpretations of the Constitution can be either slow and incremental or, alternatively, as Solomon (1992: 19) explains, the court can bluntly declare that it believes its previous decisions were wrong, and the relevant part of the Constitution which was previously thought to mean "x" now means "y". He also adds, tellingly: 'The fact that court decisions may be influenced by policy considerations, and not determined by a mechanistic application of legal principles, is being faced.' The growing internationalization of native peoples' grievances and demands has already been mentioned, and this is not an unimportant consideration in High Court deliberations. Even in the early 1970s Justice Blackburn's judgment in the Gove Land Rights case was roundly criticized on several grounds by Canadian jurists and indeed has subsequently had its authority substantially undermined in the Canadian Supreme Court decisions in Calder et al v Attorney-General of British Columbia (1973) (a case concerning the Nishga tribe) and Guerin et al v The Queen (1985) (relating to the Musqueam of British Columbia) (see Cullen, 1990).

Twenty years on, the international context is even more significant. Australian Aborigines now regularly participate in international forums on native peoples' rights and have developed a strong global network with other indigenous groups. Moreover, in addition to those just mentioned, there have been a number of recent judicial decisions in New Zealand and Canada that have accepted the legitimacy of prior native title to land even in situations where treaties had not been negotiated (Ward, 1991). Perhaps most significantly, in 1990 the Inuit people successfully negotiated by far the largest native land claim in Canadian history when the Canadian government agreed in principle to the establishment of a self-governing homeland for some 17,500 Inuit covering 225,000 sq. kms. in the North-West Territories, together with 36,000 sq. kms. of subsurface rights and a Can.$1.4 billion compensation payment over 14 years (Aboriginal Law Bulletin, 1990). The creation of Nunavut, as the new territory is called, was sealed in an agreement signed by all parties in December, 1991, and the legislative structures are currently being put in place. No comparable, combined compensatory, land rights' and administrative arrangement of this kind and scale has ever been negotiated in Australia.

The treaty proposal

On several different occasions since 1979 the idea of a treaty between Aborigines and the Australian government has been openly discussed. Most recently, the issue was revived in June, 1988, when the National Coalition of Aboriginal Organizations presented the Prime Minister, Mr. Hawke, with what has become known as the Barunga Statement. This statement reinforced the traditional list of Aboriginal demands and also called upon the government to negotiate a treaty. The Prime Minister initially agreed to the request but since then the government has demonstrated considerable wariness about the treaty concept and the Coalition Opposition even less interest. Instead, a variety of other terms, including agreement, compact, 'Makaratta' and instrument of reconciliation have been routinely used (Hiatt, 1987). The most recent development has been the establishment of a 25-member Council for Aboriginal Reconciliation to examine procedural matters and possible options. Following extensive public consultation, the aim is to forge a new agreement between black and white Australians before January 1, 2001, the 100th anniversary of the Australian Constitution (Brennan, 1991).
As Lawrey (1990) has pointed out, there would certainly be considerable international interest in a treaty if one were to be successfully negotiated because it would be the first such agreement in modern times and the first treaty between a government and all indigenous people within its boundaries. Depending upon its specific wording and legal force, too, it would be far superior to existing land rights legislation which can of course be weakened and diluted by subsequent legislative amendment. However, it has to be said that—unlike the more progressive Canadian experience—the treaty idea does not have widespread, bipartisan support in Australia because there is much opposition to the recognition of the notion of a separate Aboriginal state. Indeed, as if to underscore this point, the Labor government's most recent (1992) policy package significantly was entitled the 'One Nation' policy statement.

Aboriginal land tenure

Table I details the situation with respect to Aboriginal and Torres Strait Islander land tenure as it stood in 1990. There has been little substantial change from this broad picture since then. The extraordinarily small percentage of Aboriginal freehold land in all states excepting South Australia and the Northern Territory stands out clearly. Needless to add, these two 'anomalies' are relatively easily explained in historical terms since in both cases there were extensive tracts of vacant Crown land that had neither been leased nor purchased by pastoral or mining interests because they were seen to have no economic value. The preference throughout most of Australia has been to allow Aborigines and Torres Strait Islanders limited leasehold conditions of tenure rather than freehold title. It could well be argued that for perhaps most rural Aborigines their daily lives are largely unaffected by subtle distinctions between 'leasehold', 'freehold' and 'reserve' land. Radical land rights' activists, on the other hand, contend that only freehold rights are truly empowering and therefore acceptable politically (Birch, 1992).

In May, 1991, under a new Labor government administration, Queensland did pass the Aboriginal Land Act. This statute does not guarantee Aboriginal land rights but it has established a useful framework for a claims process that now needs to be built upon. For example, all Deed of Grant in Trust Lands—the old, pre-existing reserves or 'DOGITs'—have been reclassified as potentially 'transferable lands', available for claim under certain specified circumstances. In general, though, following the Northern Territory model, claims are to be restricted to the mere 1 percent of the state (20,000 sq. kms.) currently designated as 'unused crown land' and—tellingly—the legislation was not opposed by the mining industry. A detailed discussion of the positive and negative aspects of that state's Aboriginal Land Act is contained in Brennan (1991). Given that the moderately reformist Labor government was re-elected in Queensland in September, 1992, it will be interesting to follow the fortunes of the legislation under an uninterrupted administration.

It is significant that even though the 1976 Aboriginal Land Rights Act was drafted by a Labor government, it was actually passed, with minor amendments, by the conservative, Liberal-Country Party government that was in office in December, 1976. That Commonwealth act remains by far the most important piece of land rights legislation in Australia and has resulted in Aborigines and Torres Strait Islanders gaining freehold title to some 464,000 sq. kms. of the Northern Territory (around 34 percent of the total area). However, the pastoral industry had already taken possession of most of the best land (over 50 percent of the Territory) prior to 1976 and this country has never been available to the estimated 6000 Aborigines dispossessed from these fertile areas. In addition, the federal
Table I. Land tenure—Aborigines and Torres Strait Islanders, 1990 (Source: Department of Aboriginal Affairs)

<table>
<thead>
<tr>
<th></th>
<th>ATSI population (1)</th>
<th>As % total population</th>
<th>Total land area (sq. km.)</th>
<th>ATSI freehold (sq. km.)</th>
<th>As % total land</th>
<th>ATSI leasehold (sq. km.)</th>
<th>As % total land</th>
<th>Reserve/mission (sq. km.)</th>
<th>As % total land</th>
</tr>
</thead>
<tbody>
<tr>
<td>Queensland</td>
<td>61 267</td>
<td>2.37</td>
<td>1 727 200</td>
<td>1 870</td>
<td>0.00</td>
<td>31 990</td>
<td>1.85</td>
<td>95</td>
<td>0.00</td>
</tr>
<tr>
<td>New South Wales and A.C.T.</td>
<td>60 229</td>
<td>1.07</td>
<td>804 000</td>
<td>507</td>
<td>0.06</td>
<td>842</td>
<td>0.10</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Western Australia</td>
<td>37 788</td>
<td>2.69</td>
<td>2 525 000</td>
<td>35</td>
<td>0.00</td>
<td>103 227</td>
<td>4.09</td>
<td>202 223</td>
<td>8.01</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>34 740</td>
<td>22.43</td>
<td>1 346 200</td>
<td>463 809</td>
<td>34.00</td>
<td>26 009</td>
<td>4.93</td>
<td>45</td>
<td>0.00</td>
</tr>
<tr>
<td>South Australia</td>
<td>14 292</td>
<td>1.06</td>
<td>984 000</td>
<td>183 649</td>
<td>18.66</td>
<td>508</td>
<td>0.05</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Victoria</td>
<td>12 610</td>
<td>0.31</td>
<td>227 600</td>
<td>32</td>
<td>0.01</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Tasmania</td>
<td>6 712</td>
<td>1.54</td>
<td>67 800</td>
<td>2</td>
<td>0.00</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Australia</td>
<td>227 638</td>
<td>1.46</td>
<td>7 681 800</td>
<td>649 904</td>
<td>8.30</td>
<td>162 576</td>
<td>2.12</td>
<td>202 363</td>
<td>2.63</td>
</tr>
</tbody>
</table>

(1) June, 1986 Census population. (2) Includes local council, pastoral and special purpose leases.
Labor government subsequently weakened the 1976 legislation considerably by amending it in favour of pastoral and mining interests, and the Northern Territory administration, too, has a long history of opposing land rights claims since it achieved independence in 1978. By 1987 the Territory government had challenged the legality of Aboriginal land claims on no less than 24 separate occasions, but had been successful only once (O'Leary and Sharp, 1991). Ironically the Northern Territory government sees tourism as the economic growth sector in the coming years and uses Aboriginal motifs almost exclusively in its advertisements promoting the Territory's natural and cultural attractions!

At the time of writing, some 40 claims are still outstanding in the Northern Territory and there is also a renewed assault by the minerals' industry on the Aboriginal right of veto over proposed developments on their land, an important feature of the 1976 legislation. As noted earlier, this follows industry disquiet at the Commonwealth government's refusal to allow mining to proceed at Coronation Hill in the Northern Territory in 1991. The data presented in Table 1 clearly show enormous variations in land rights 'outcomes' in different parts of Australia. One cannot help but speculate how different the picture might have been had the Hawke/Labor government persisted in its 1983 resolve to institute national land rights legislation. Almost ten years later, Aborigines in Western Australia and Queensland, in particular, are likely to take little comfort from what Rowse (1991: 12) has described as 'the Hawke government's expression of tentative satisfaction that each state either had created, or was moving towards establishing, its own legislative framework for Aboriginal land rights.'

**Terra nullius under attack**

The central concept of *terra nullius* is currently being besieged in Australia on several fronts. First, as already noted, it is being attacked for its historical inaccuracy. As the 1988 resolution emphasized, Australia was certainly not an 'empty land' at the time of first European settlement on the eastern seaboard. Indeed, certainly in the case of Tasmania, there was ample official recognition during the early years of settlement of the existence of a sizeable native population. In the days before advanced telecommunications it was certainly thought by many that there were only Aborigines in small, isolated pockets along the eastern seaboard. It was only later, as the settlement frontier moved inland and descriptions of earlier explorations along the north and west coasts by such people as Dampier became more widely known, that it became clear how wrong this assumption was. Indeed, belatedly in the 1830s the British Colonial Office actually recognized prior Aboriginal land rights in South Australia, unfortunately 'too late in the day to alter the assumptions and the practices in the colonies themselves' (Nettheim, 1991: 4). So, as in recent times in Canada, there is a current reappraisal of which parts of Australia the concept can or was intended to be applied to. Similarly, along with a range of sympathetic measures, in 1848 the Imperial Government instructed Governor Fitzroy to give legal recognition and grant special privileges to Aborigines guaranteeing them access to their land on colonial pastoral leases (Reynolds, 1987). Yet in amendments, enacted in 1978 and 1985, the Northern Territory government has considerably weakened such access rights.

Recently, scholars such as Reynolds (1987) and Nettheim (1991) have been rereading and publicizing the views contained in the classic texts on international law that first appeared in the 17th and 18th centuries and the debates on colonization and the responsibilities of colonizing nations that had taken place in the 16th century. Nettheim, for example, has reminded us of the contentious debate that took place in Spain in the 1550s between de Sepulveda and de las Casas over the rights of the Indian nations in
Central and South America that were being invaded by Spain and Portugal. The influential writings of such people as Grotius, Von Savigny, Wolff and de Vattel on colonization and the law of possession predated the ‘discovery’ of Australia. In *The Law of Nations* Wolff, in particular, explicitly argued that nomadic peoples could be said to have a form of common property right to the land and water they regularly used and that outsiders should not deprive them of that right. This view is interesting, given the 1848 instruction to Governor Fitzroy, just mentioned. de Vattel, too, despite being something of a staunch advocate of colonization, argued only for limited settlement and land acquisition by outsiders and not for the kind of blanket appropriation of entire continents, as happened in Australia. Reynolds has also rightly pointed out that in the 18th century much of Britain, too, was not actually farmed but this did not mean that the ‘wasteland’ was wide open to private claims. English law had by this time evolved over several centuries, had incorporated many varied cultural influences and was quite capable of accommodating different notions of tenure and use. Some, for example, have pointed out that one can discern close parallels between the oral legal traditions of the Irish and Scottish highland clans and Australian Aborigines.

Yet in the case of the latter, ‘the property law of centuries was suspended while they were dispossessed’ (Reynolds, 1987: 22). The early colonists, while recognizing that Aborigines existed—especially in Tasmania—clearly believed that they had the right to ignore or overrule native title.

The Mabo Case

On June 3, 1992, the Full High Court of Australia handed down its judgment in the case of *Mabo v Queensland and the Commonwealth* (*Australian Law Reports* 1992). In many ways this is comparable with the much earlier (1973) Canadian *Calder* case, mentioned earlier in the paper, where it was determined by that nation’s highest court that native title had not been extinguished in Canada. It is impossible to overstate the significance of the *Mabo* case and the historical importance of the 170-page document which spans over two centuries of diverse legal and scholarly sources in its concentrated analysis and includes the five separate judgments of the seven justices (two were combined presentations). As Keon-Cohen (1992: 22) commented ‘... this was the High Court’s first opportunity ... to confront the central question of the existence and nature of native title in Australian law’.

The case is now generally referred to as the *Mabo* case after the plaintiff, the late Eddie Koiki Mabo who died only a little over four months before the historic decision was finally handed down and there is no doubt that it will be widely cited in the English-speaking world for many years to come. Nettheim (1992: 9) has described it as quite simply ‘one of the most fundamental cases that the High Court of Australia has ever had to consider’ and (p. 14) speaks of the judgment as ‘a watershed in the law’. In total, the long drawn-out case was before the courts for ten years. Inevitably, much of the discussion took a fresh look at the terra nullius arguments in *Cooper v Stuart* (1889) and Justice Blackburn’s decision in the Supreme Court of the Northern Territory 1971 Gove land rights case in which he argued that in 1788 Australia was ‘desert and uncultivated’ and that upon settlement, there being no treaty, all the land immediately came under English law. Writing some two years prior to the handing down of the final decision, Cullen (1990: 190) warned, bluntly, that in the face of Australia’s ‘awful history’, the landmark case put pressure on the High Court to move ‘towards staging one more attempt at a legal atonement on the nation’s behalf’.

The case goes back to May, 1982 when Mabo, a Torres Strait Islander, living on one of a group of islands known as the Murray Islands, 50 kms. to the north of the Cape York Peninsula, sought a ruling from the High Court that the Murray Islanders had always had
native title to their land. This affirmation was required in order to stop the Queensland government from enacting legislation to deprive the island inhabitants of what they considered to be their long-established proprietary land and fishing rights. The islanders certainly considered that they had a powerful case because for generations their lifestyle had traditionally involved the construction and maintenance of gardens and they had developed dispute resolution processes for dealing with rival land claims (Hocking, 1987). Although an oral, rather than a written tradition, their lands were strictly demarcated and inherited through the males. It was irrefutable that they 'owned' the islands under customary law, even though European law seemed to be arguing that they did not. In Reynolds' words: 'It was not solely a matter of injustice but also a case in which legal theory was out of touch with reality' (1991: 12).

The Queensland government subsequently promptly moved to enact a piece of legislation in 1985 called the Queensland Coast Islands Declaratory Act. This argued that any rights to land held by Mabo and the other islanders effectively disappeared when the state of Queensland annexed the islands in 1879 and they became Crown Land. The annexation took place by force and involved the British navy. Then, in December, 1988—in an important and contentious determination—the Full Bench of the High Court voted by a majority of only one (the voting was 4-3) that in fact the Queensland legislation was invalid under the terms of the superior Commonwealth government's Racial Discrimination Act (1975).

Prior to the June 3 determination, the case for the Murray Islander land claim certainly appeared to be very strong and there was a strong expectation that the plaintiffs would succeed. As Wright (1991) explained, research had uncovered evidence that the Queensland authorities themselves in the past adjudicated over rival land claims and trespass disputes between islanders and also purchased land from them. She argued in advance (pp. 46-47) that the case does appear to have cleared the way ... for a final disposal of Cook's, and the British government's, original judgement that the inhabitants of Australia have no claim to be regarded as the owners of the land on the British arrival—the terra nullius view which has bedevilled all dealings with Aborigines and Islanders since our arrival.

In the final judgments the justices upheld the plaintiffs' claims by a 6/1 majority and, in effect, re-wrote both history and the common law relating to colonization and native title in Australia. What is perhaps surprising is the emotive tone of some of the language in the judgments. For example, on page 79 of their summary of the issues, Justices Deane and Gaudron write of an incident along the Hawkesbury River in New South Wales in 1804 in the following terms:

An early flash point with one clan of Aboriginals illustrates the first stages of the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginals and leave a national legacy of unutterable shame.

Aside from its enormous symbolic significance for the Murray Islanders, in particular, it is too early to predict with any degree of certainty what the consequences of the Mabo judgment will be for the Aborigines and Torres Strait Islanders in general. Certainly, there is little in the decision for the large number of urban Aborigines, and even for those living in rural areas the consensus on the part of many commentators is that the extraordinary amount of evidentiary material required for a successful claim of native title is, in itself,
likely to militate against a flood of similar cases coming forward in the future (Mansell, 1992). Gregory (1992: 161) doubtless speaks for many when he suggests that

... the great value of the Mabo decision will not be as a precedent for future litigation. Rather, it marks a paradigm shift in the underlying legal and moral assumptions of European colonisation, and should provide an impetus for political resolution, whether that be reconciliation, treaty or other outcome.

Nevertheless, the High Court will now move on to examine a related land claim issue focusing on the vast Kimberley region of Western Australia on the part of the Wunambul, Woroora and Ngarinyin Aboriginal peoples. A writ detailing claims for entitlement to thousands of square kilometres of tribal lands, as well as compensation for damage, was filed by 20 co-plaintiffs in July, 1991. The substance of this claim, too, is that there has been continual occupancy for a long period of time under a system of customary tribal law. In addition, the plaintiffs are arguing that the British Crown displayed considerable ambivalence even as late as the 1880s as to whether the Kimberley region was part of an administrative entity called 'Western Australia' and that it is not difficult to produce evidence that as a colony Australia was a hybrid category, showing features of both 'peaceful settlement' and 'conquest' (O'Grady, 1991).

Conclusion

When we survey the Australian political landscape over the last decade or so for signs of significant advancement for the Aboriginal population defined in terms of strong land rights legislation and moves towards self-determination, the picture is not especially bright. At best, one would have to say that, certainly by comparison with Canada, such advances as one can discern, have been faltering. The commonwealth government still tends to take the lead with new initiatives, but recent experience invariably has been that the government eventually retreats from bold new ideas such as national land rights legislation and the treaty concept and argues that Aboriginal issues basically are a state rather than federal concern. However, in contrast to this 'nervousness', the High Court has recently demonstrated that, under certain circumstances, it is willing to take a strong political stand in favour of Aboriginal interests.

By and large, the situation in Canada is much more positive for native peoples, both with respect to the private and the public sectors. There, the mining and forestry industries have often advocated land rights for Canada's First Nations on the grounds that this brings an important element of predictability into their long-term economic planning (Reynolds, 1992). This is in marked contrast to the common situation in Australia where mining and similar developments are frequently put 'on hold' for several years while oppositional groups forcefully argue their respective—and often ultimately irreconcilable—positions. Merlan (1991: 341–342) highlights the stresses on many Aboriginal communities when she points to

... the problems which arise from contradiction between direct governmental support for Aborigines as a traditional and socio-culturally distinctive 'type', and support from the private sector (thus also indirectly, from government) for them to become and to see themselves as modernizing facilitators of economic development.

She also emphasizes that the conflict between these two worlds—as in the case of the Coronation Hill mine and new land rights claims in the Northern Territory and the
Kimberley frequently manifests itself as a conflict over space. In such conflicts it is quite usual for opponents to either ridicule 'traditional' Aboriginal values pertaining to such issues as the identification of sacred sites or to emphasize disagreements within the Aboriginal community (Davis and Prescott, 1992). By contrast, as we have already mentioned, the tourist industry has been quick to capitalize on the promotion of 'traditional' Aboriginality.

The treaty concept and the Council for Aboriginal Reconciliation have both been discussed above. There is no governmental enthusiasm for the treaty idea at the present time. By contrast, in Canada, the new 1982 Constitution gave formal recognition to the rights of Aboriginal peoples and the country is well along the road to the granting of self-government, not only at the federal level but also in such provinces as Ontario, British Columbia and Saskatchewan.

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Aboriginal sovereignty and land rights in Australia


