

## I—INTERNATIONAL LAW IN GENERAL

### The settlement of Australia—the distinction between “settled” and “conquered” colonies—the situation in Australia

On 12 June 1986 the report of the Australian Law Reform Commission on Aboriginal Customary Law was tabled in the Senate (Sen Deb 1986, 12 June 1986, 3833). Following is an extract from the report (PP Nos 1986/136 and 137) which considers the settled colony debate:

64. *The Distinction Between Settled and Conquered Colonies.* A more usual—though not necessarily more fruitful—approach to the question of common law recognition of customary law is through a reassessment of the way in which the basic common law rules with respect to colonial acquisition were applied to Australia in 1788 and thereafter. It has been argued that such a reassessment would open the way to wider recognition of customary laws by the common law.<sup>25</sup> It is clear that these rules were the vehicle by which recognition of Aboriginal laws was denied. From the first days of settlement, the interaction of British administrative policies and legal principles relating to the colonies provided the foundation for asserting of English law at the expense of the customary laws and practices of Aboriginal groups.<sup>26</sup> The general principles for the introduction of English law into a ‘settled’ as distinct from a ‘conquered’ colony were laid down by Blackstone in 1765.<sup>27</sup> Justice Blackburn in *Milirrpum’s* case put the distinction thus:

There is a distinction between settled colonies, where the land, being desert and uncultivated, is claimed by right of occupancy, and conquered or ceded colonies. The words ‘desert and uncultivated’ are Blackstone’s own; they have always been taken to include territory in which live uncivilized inhabitants in a primitive state of society. The difference between the laws of the two kinds of colony is that in those of the former kind all the English laws which are applicable to the colony are immediately in force there upon its foundation. In those of the latter kind, the colony already having law of its own, that law remains in force until altered.<sup>28</sup>

As the Privy Council pointed out in passing in *Cooper v Stuart*, New South Wales had been regarded as ‘a tract of territory, practically unoccupied, without settled inhabitants or settled land, at the time when it was peacefully annexed to the British dominions’.<sup>29</sup> The classification of the British acquisition of Australia as acquisition by settlement might therefore seem to be established, although it is possible that the question may be reopened in the High Court. Two of the four justices in *Coe v Commonwealth*<sup>30</sup> thought the point arguable, though two did not. Chief Justice Gibbs held that:

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25. See para 66 for statements of this view. In practice, difficulties such as those encountered in *Milirrpum’s* case would be encountered, given the enormous changes in Aboriginal societies and traditions since settlement. See para 68. However it is desirable with the issue at the general level at which it is raised.

26. See para 39-41.

27. *Commentaries on the Laws of England* (1765) vol 1, 107.

28. (1971) 17 FLR 141,201.

29. (1889) 14 App Cas 286, 291.

30. (1979) 24 ALR 118.

It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest. It is hardly necessary to say that the question is not how the manner in which Australia became a British possession might appropriately be described. For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony acquired by conquest or cession, in which there was an established system of law of European type, and a colony acquired by settlement in a territory which, by European standards, had no civilized inhabitants or settled law. Australia has always been regarded as belonging to the latter class...<sup>31</sup>

On the other hand, Justice Jacobs pointed out that there was no Privy Council decision directly on the matter and that the plaintiffs should be entitled to argue the point.<sup>32</sup> Justice Murphy considered neither *Cooper v Stuart* nor *Milirrpum* to have settled the point:

Although the Privy Council referred in *Cooper v Stuart* to peaceful annexation, the aborigines did not give up their lands peacefully; they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide. The statement by the Privy Council may be regarded either as having been made in ignorance or as a convenient falsehood to justify the taking of aborigines' land.<sup>33</sup>

Discussion of Australia's status on colonisation has not been limited to judicial pronouncements. The Select Committee of the House of Commons on Aborigines stated in 1837:

The land has been taken from them without the assertion of any other title than that of superior force and by the commission under which the Australian colonies are governed, Her Majesty's Sovereignty over the whole of New South Wales is asserted without reserve.<sup>34</sup> Cooper Marks and Inscriptions' as first discoverers and possessers'.<sup>35</sup> According to Castles, each of the steps taken by Cook 'demonstrated that he was following those parts of his instructions which assumed that Australia was to be treated as uninhabited.'<sup>36</sup> Subsequent extensions of British rule were made:

on the assumption that the entire continent was to be acquired through settlement and not conquest. The last lingering doubts, if there were any, were firmly removed when the British authorities refused to give any form of legal recognition to John Batman's claim that he could acquire land rights by treating with Aboriginal tribes in the Port Phillip district.<sup>37</sup>

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31 id, 129, citing *Cooper v Stuart*. Aickin J agreed: id, 138.

32 id, 136.

33 id, 138. It is possible that the point may be dealt with by the High Court in *Mabo v Queensland and Commonwealth*, although the claim there does not depend on the 'conquered colony' argument. See para 61.

34 **Report** (1837) 82, 83.

35 Additional Instructions for Lt James Cook, appointed to command His Majesty's Bark Endeavour, 30 July 1768, in JM Bennett & AC Castles, *A Source Book of Australian Legal History*, Law Book Co, Sydney, 1979, 253-4.

36 Castles, 6.

37 id, 6.

65. *The Australian Courts Act 1828 (Imp) s 24*. Thus British law was applied in the colony from the first. But problems regarding its application led in 1828 to the passing of the Australian Courts Acts,<sup>38</sup> s 24 of which provided that:

...all laws and statutes in force within the Realm of England at the time of passing this Act...shall be applied in the administration of justice in the Courts of New South Wales and Van Dieman's Land respectively, so far as the same can be applied within the said colonies...

The decisive date was deliberately made the date of the passing of the Act, 25 July 1828, in order to gain the benefit of Peel's criminal law reforms introduced during the 1820s. Section 24, in effect, reaffirmed that New South Wales was a settled colony, but provided a later date of reception for reasons of convenience. British law, both common law and statute law, as at this date was thus declared to be the law of the two eastern colonies—New South Wales and Van Diemen's Land—but only so far as it 'could then be reasonably applied within the said colonies'. South Australia was not founded until 1836, and the relevant date of reception is 28 December 1836.<sup>39</sup> In Western Australia, the State was deemed to have been established on 1 June 1829 for the purposes of determining the application of Imperial Acts.<sup>40</sup> Except so far as it has been altered by Australian Parliaments or courts, or by Imperial Acts applying to Australia, British law as it existed at these dates is still the law applicable to all citizens, including Aborigines. By this means the Australian colonies directly inherited a vast body of English statute and common law.

66. *The Settled/Conquered Colony Debate*. Had Australia been treated as a 'conquered' colony, Aboriginal customary laws, to the extent that they had not been expressly abrogated, would presumably have been recognised, at least in their application to Aborigines.<sup>41</sup> The recognition of Aboriginal customary laws now, it has therefore been argued, depends at least in part on a reassessment of the initial classification of Australia for the purposes of the application of law. The Commission has received several submissions arguing that the 'settled' colony notion should be rejected in the strongest terms as an initial step in its inquiry. As one submission put it:

I suggest that the Commission should take the opportunity to reject in the strongest terms possible the notion that has hitherto prevented any recognition of customary law among the Australian aboriginal people, namely the doctrine that upon colonisation Australia fell into the category of a settled colony, a land either without previous inhabitants or whose inhabitants lacked any social organisation worth recognising...(T)his myopic view of aboriginal society (excusable as it might have been by the standards of the eighteenth and early nineteenth centuries) has been conclusively shown by anthropologists and historians to be quite wrong as a matter of

38 9 Geo IV c 83.

39 4 & 5 Wm IV c 95 s1; and see Acts Interpretation Act 1915 (SA) s 24.

40 Interpretation Act 1918 (WA) s 43.

41 This was the case, at least initially, in New Zealand. But the Maori experience suggests that such recognition would have been grudging and temporary, cf A Frame, 'Colonizing Attitudes towards Maori Custom' (1981) NZLJ 105; MR Litchfield, 'Confiscation of Maori Land' (1985) 15 Vict U Well L Rev 335.

fact...Yet the Australian courts persist to the present day in maintaining the fiction of the uninhabited colony, on the ground that it is a question of law which was authoritatively settled by the Privy Council in *Cooper v Stuart* (a reading of which indicates that the Privy Council hardly addressed its mind to the question). It is neither correct nor just to say that it is 'too late' to change now. To acknowledge the error and to admit that the country was inhabited by human beings whose customs could have been recognised (as they were recognised on the other side of the Torres Strait) does not involve the overthrow of the established Australian legal order. It does involve the concession that justice has been denied to the Aboriginal people through a fundamental misconception of fact from which legal consequences have followed. We should be mature enough to make that concession. If we do not, the Australian legal system will continue to rest on...a dubious basis of either fraud or a mistake of fact.<sup>42</sup>

The assumption, which underlay the proclamation of British sovereignty over Eastern and later Western Australia and the subsequent gradual occupation of the continent, that Australia was legally 'uninhabited' because it was 'desert and uncultivated'<sup>43</sup> was, it has been argued, wrong as a matter of fact. In the light of subsequent anthropological research, the assumption that Eastern Australia in 1788 had neither 'settled inhabitants' nor 'settled law' cannot be sustained. Whether Eastern Australia was 'desert and uncultivated' in Blackstone's sense may be another question. There is now considerable evidence of Aboriginal techniques of land management and conservation, including the deliberate use of fire,<sup>44</sup> but Aborigines were not in the European sense a pastoral or farming people, if that was what was required. But unease at the insensitive disregard for the facts of Aboriginal life, and at the way in which terms such as 'peaceful annexation' gloss over the reality of the relations between European settlers and Aboriginal groups,<sup>45</sup> has been a significant factor in recent suggestions that the question needs to be re-evaluated. There are other

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42 Justice JA Miles, *Submission 263* (29 April 1981) 2 3. To similar effect S Jones, *Submission 16G* (7 June 1977); P Gray & R Williams, *Submission 29* (15 June 1977) 1. The contrary view was expressed, for example, by Justice H Zelling, *Submission 369* (26 January 1983) 1, on the grounds that the settled colony rule was established practice for other colonies with indigenous inhabitants, and that it was in any event established, for South Australia at least, by statute (4 & 5 Wm IV c95), not merely by judicial decision. For differing views on the question of classification see GS Lester, *Inuit Territorial Rights in the Canadian Northwest Territories*, Tungavik Federation of Nunavut, Ottawa, 1984, esp 37-41, a summary statement of the arguments developed by the same writer in *The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument*. Ph D Thesis, York University, 2 vols, 1981; and MJ Detmold, *The Australian Commonwealth*, Law Book Co, Sydney, 1985, ch 4. See also GS Lester, *Submission 468* (19 February 1985).

43 Blackstone, vol 1, 108.

44 cf G Blainey, *Triumph of the Nomads*, rev edn, Sun books, Melbourne, 1983, 67-83, and see further para 883-7.

45 See eg the discussion of initial European contact in Cape York in R Logan Jack, *North West Australia*, Simpkin Marshall, Hamilton Kent and Co Ltd, London, 1921. See also para 23, 24.

factors also. For example, the classification of a country such as Australia was in 1788 as unoccupied territory (*terra nullius*) might well be incorrect if that classification had to be made by the standards of modern international law.<sup>46</sup> But it does not follow that the position under international law in the eighteenth and early nineteenth century was the same,<sup>47</sup> or that the international law category 'unoccupied territory' was synonymous with the 'settled colony' of the common law, or even that the acquisition of the Australian colonies is appropriately re-classified as one by 'conquest'. As Alfred Stephen, counsel in *Murrell's* case, recognised, the actual process was complex, perhaps *sui generis*.<sup>48</sup> Certainly the process of 'conquest' by attrition took much longer than the acquisition of the territory of Australia as a matter of international law.<sup>49</sup>

67. *Legal and Moral Issues.* To a considerable extent this reassessment or reevaluation of the processes of British acquisition of Australia is an aspect of the moral and political debate over past and present relations between Aboriginal and non-Aboriginal Australians. That debate is of great importance, quite apart from any specifically legal consequences it may have. As a matter of present Australian law it is clear that the Crown's acquisition of sovereignty over Australia was an act of state unchallengeable in the courts.<sup>50</sup> The classification of Australia as a 'settled' rather than a 'conquered' colony may also have been an act of state: at least, it may now be a classification settled by legislative or judicial decision. Whether all the consequences of that

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46 *Western Sahara Advisory Opinion* ICJ Rep 1975, 12; J Crawford, *The Creation of States in International Law*, Oxford, Clarendon Press, 1979, 181. However even this is not entirely clear. The International Court in the *Western Sahara* case emphasised that what was required was occupation by 'tribes or peoples having a social and political organisation' (para 80). The Western Saharan tribes, it held, 'were socially and politically organised...under chiefs competent to represent them' (para 80 & cf para 149). Whether Aboriginal groups could be said to have constituted nations (they were, of course, not a single nation), to have had sovereignty, or to have had a political organisation outside family organisation, has been the subject of considerable debate. See eg RL Sharp, 'People without Politics', in VF Ray (ed) *Systems of Political Control and Bureaucracy in Human Societies*, University of Washington Press, Seattle, 1958; P Sutton 'People with Politics: Management of Land and Personnel on Australia's Cape York Peninsula', in NW Williams and ES Hunn (eds) *Resource Managers: North American and Australian Hunter-Gatherers*. Westview Press, Colorado, 1982, 155. But it is doubtful whether they were organised under 'chiefs competent to represent them'. See para 37, 203. On the process of classification see further E Evatt, 'The Acquisition of Territory in Australia and New Zealand', in CH Alexandrowicz (ed) *Grotius Society Papers 1968*, The Hague, Nijhoff, 1970, 16; B Hocking, 'Aboriginal Land Rights: War and Theft' (1982) 20 (9) *Australian Law News* 22, Castles, 20-31.

47 Crawford, 177-80.

48 See J Hookey, 'Settlement and Sovereignty' in P Hanks and B Keon-Cohen (eds) *Aborigines and The Law*, George Allen and Unwin, Sydney, 1984, 16, 17. See also Logan Jack (1921), and cf para 39.

49 See para 29, 34, and cf J von Sturmer, *Submission 403* (March 1984) 10.

50 *Coe v Commonwealth* (1978) 18 ALR 592 (Mason J); (1979) 24 ALR 118 (Full Court).

classification are legally beyond dispute—that is, beyond the reach of judicial reassessment—is another question.<sup>51</sup> And it is another question again what the consequences would be of a reassessment now of the status of the acquisition of Australia, and of its classification as uninhabited and uncultivated. It is necessary to distinguish three separate issues. The first is the acquisition of sovereignty by the British Crown over Australia as a matter of international law (and the international consequences for the Aboriginal inhabitants). The second is the application of British law to Australia, and the consequences of that application for the continued existence and enforcement of Aboriginal customary laws and traditions. The third is the consequences of acknowledging now, as a result of an increased understanding of those laws and traditions, that the process of territorial acquisition and application of law involved a classification of Australia which reflected the insensitivity shown (and perhaps aggravated the injustices caused) to the Aboriginal peoples of Australia. A similar distinction was made by the Senate Standing Committee on Constitutional and Legal Affairs in its report on the feasibility of an 'Aboriginal treaty' or Makarrata:

It may be that a better and more honest appreciation of the facts relating to Aboriginal occupation at the time of settlement, and of the Eurocentric view taken by the occupying powers, could lead to the conclusion that sovereignty inhered in the Aboriginal peoples at that time. However, the Committee concludes that, as a legal proposition, sovereignty is not now vested in the Aboriginal peoples except insofar as they share in the common sovereignty of all peoples of the Commonwealth of Australia. In particular, they are not a sovereign entity under our present law so that they can enter into a treaty with the Commonwealth. Nevertheless, the Committee is of the view that if it is recognised that sovereignty did inhere in the Aboriginal people in a way not comprehended by those who applied the *terra nullius* doctrine at the time of occupation and settlement, then certain consequences flow which are proper to be dealt with in a compact between the descendants of those Aboriginal peoples and other Australians.<sup>52</sup>

68. *The Issue for the Commission.* The issue for the Commission in the present Reference is the extent to which Aboriginal customary laws and traditions should be recognised by the Australian legal system now, nearly two hundred years after permanent European entry into Australia. The reassessment now of Australia's status as a settled colony would not as such bring about appropriate forms of recognition. Whatever the position in 1788 or in 1837,<sup>53</sup> it is much too late

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51 GS Lester, *Submission 468* (19 February 1985) argued that the only secure basis for asserting Aboriginal rights at common law is to accept that Australia was settled and to controvert the decision in the *Nabalco* case that the consequence of settlement was to vest all land (and associated rights) in the Crown. As he points out, if Australia had been regarded as 'conquered', no Aboriginal rights would have been enforceable against the Crown without recognition by the Crown (which did not occur); even the application of Aboriginal customary laws as between Aborigines themselves would have been excluded because those laws would have been regarded as *malum in se*: *Calvin's case* (1608) 7 Co Rep 1a, 77 ER 377, and cf para 62.

52 *Two Hundred Years Later* (1983) para 3.46.

to suggest that justice to Aboriginal people today can be achieved through attempts to reconstruct or recreate the past. This is particularly the case with respect to the recognition of Aboriginal laws and traditions, which are now in many respects different from those the European settlers saw, but only dimly comprehended. The question is whether and how those laws and traditions, as they now exist, should be recognised. The acknowledgment of past injustice provides no particular answer to that question. What it may provide is a direction or a presumption, that where recognition is possible it should occur, as an aspect of the acknowledgment of past wrongs (and perhaps as a form of compensation to Aboriginal people thereby affected).<sup>54</sup> But such a presumption is hardly needed. The case for the forms of recognition of Aboriginal customary laws and traditions recommended in this Report is, in the Commission's view, a clear one. What underlies those proposals, and the Commission's general approach, is an acknowledgment of the present realities, and the present needs, of the Aboriginal people of Australia.

### **International law and Australian Aboriginals—proposals for a "Treaty of Commitment"**

On 29 November 1985 the Minister for Aboriginal Affairs, Mr Holding, provided the following written answer to a question on notice in the House of Representatives (HR Deb 1985, 4247):

Any Treaty of Commitment between Aboriginal and Islander peoples and the Western Australian community is a matter for Western Australia.

The Senate Standing Committee on Constitutional and Legal Affairs examined the feasibility of a compact or Makarratta between the Commonwealth Government and Aboriginal and Torres Strait Islander people. The Committee tabled its report entitled 'Two Hundred Years Later...' on 13 September 1983.

The Government's position on the Makarratta is outlined in its response to that Parliamentary Committee Report in *Hansard* of 31 May 1985 (page 2961).

The Government's response was tabled by the Leader of the Government in the Senate, Senator Button, and read as follows (Sen Deb 1985, 2961):

The Government considers that the concept of Makarratta must be seen in the context of the efforts required to promote community acceptance for the concept of national land rights legislation. The wider issues involved in a Makarratta would make it difficult at this stage to enlist the support necessary to achieve constitutional amendment as recommended by the Committee.

For detailed consideration of the "Treaty" proposal and the Senate Committee's Report, see (1987) 10 Aust YBIL 205.

On 18 December 1987 the Minister for Justice, Senator Tate, made a statement in Parliament on behalf of the Minister for Aboriginal Affairs, Mr Hand, on the Australian Government's proposals for legislation relating to Aboriginals and the establishment of an Aboriginal and Torres Strait Islander Commission (Sen Deb 1987, 3433-3441). Following are extracts from the statement:

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53 When the House of Commons Select Committee on Aborigines reported: see para 64.

54 But see para 109 for difficulties with 'compensation' in this context.

For more than 40 000 years Aboriginal and Islander people have considered themselves the custodians of this land.

Aboriginal and Islander people have maintained their pride, their dignity and their integrity despite the impact of European settlement just 200 years ago. The impact of this settlement is still being felt by Aboriginal and Islander people today.

It is only 20 years ago that the Australian people voted overwhelmingly in a Referendum to give the Commonwealth the power to make laws affecting the lives of these Aboriginal and Islander people.

In the light of this history, it is proposed by this Government to acknowledge that 'the Aboriginal and Torres Strait Islander peoples were the prior occupiers and original owners of this land'.

It is envisaged that such an acknowledgment would be included in the preamble to legislation introduced to achieve the aims outlined in this statement.

Whilst achievements have been made in recent years, there is a need to understand properly and to address seriously the vital issue of self-determination for Aboriginal and Islander people.

In the past there has been a misunderstanding of what Aboriginal and Islander people have meant when talking of self-determination. What has always existed is a willingness and desire by Aboriginal and Islander people to be involved in the decision-making process of government.

It is the right of Aboriginal and Islander people as citizens of this country to be involved in this process, as ultimately these decisions will affect their daily lives.

We must ensure that Aboriginal and Islander people are properly involved at all levels of the decision-making process in order that the right decisions are taken about their lives.

Aboriginal people need to decide for themselves what should be done not just take whatever governments think or say is best for them.

I believe this package of proposals addresses these needs. It is not simply a symbolic move but one of substance that provides a real foundation for the future.

Until all Australians recognise this need for self-determination, recognise the Aboriginal and Islanders' pride and dignity as a people and until Aboriginal and Islander people can take their rightful place as full and equal participants in the richness and diversity of this nation, our claims to being a civilised, mature and humane society sound hollow.

The Minister outlined proposals for the establishment of an Aboriginal and Torres Strait Islander Commission, and continued:

#### **PREAMBLE TO THE ACT**

The proposals I have outlined break new ground in terms of reflecting the progressive commitment by Government and all Australians to recognise the rights of Aboriginal and Islander people.

It is therefore fitting that the proposed legislation to establish the new Commission should contain a declaration in the form of a substantial Preamble of the Australian people's commitment to the recognition and protection of the rights of Aboriginal and Islander people and to measures to



overcome their disadvantage.

A proposed Preamble is attached to this statement (Attachment A).

I repeat: the Preamble is both significant and historic as it would officially recognise for the first time that Aboriginal and Torres Strait Islander people of Australia were 'the prior occupiers and original owners of this land'.

### **A COMPACT OR AGREEMENT**

There is a widely held belief that we cannot come to terms with our history unless we reach some form of compact, agreement, treaty or Makarrata—the name is not significant—between the Aboriginal and Islander and non-Aboriginal people.

It is a recognised fact that the settlers of Australia totally ignored the legitimate rights of Aboriginal and Islander people.

Indeed, as the proposed Preamble sets out, the indigenous people were 'dispossessed of their land by subsequent European occupation and have no recognised rights over it other than those granted by the Crown'.

Reaching an agreement is a difficult, and, for some, a contentious issue.

The Government makes no claim to special wisdom in this matter. Nor would it be appropriate to seek to impose a particular set of propositions on Aboriginal and non-Aboriginal people, for an imposed solution is unlikely to gain sufficient acceptance.

But, as the Prime Minister's recent comments have made clear, the issue must be addressed.

It is much too important a task to be rushed. No artificial deadlines will be set, no hasty drafting will be done. This time we must get it right.

The first step is to consult with the Aboriginal and Torres Strait Islander people.

We need to know what is thought of the concept, how Aboriginal and Islander people would see it being developed and what, from the perspective of Aboriginal and Islander people, might reasonably be included in an agreement.

Accordingly I shall initiate a series of discussions with Aboriginal and Islander people in the New Year to be organised on a regional basis that will, in effect, take the form of meetings of the Regional Councils I have already mentioned.

In these discussions the central issues will be: do you wish the concept of a compact to proceed and, if so, how should we proceed to develop it?

At the same time I would expect to receive comments on the proposals for the Aboriginal and Torres Strait Islander Commission, and obtain views on appropriate consultative arrangements to replace the former National Aboriginal Conference.

When the time is right, mechanisms will be set up for the further development of ideas put forward by Aboriginal and Islander and non-Aboriginal people.

When the discussions reach this point, I believe it would be appropriate to set up a group of people with high standing in the community and with the appropriate background and skills to undertake the vital and sensitive task of refining options put forward by the Australian community for consideration by the Government.