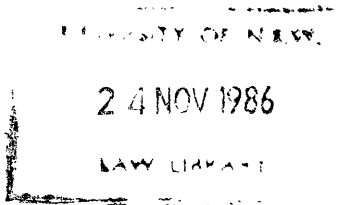


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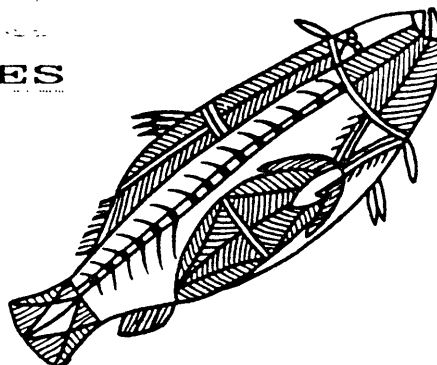


ABORIGINAL LAW NOTES

86/6

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Aboriginal Law Centre

The organization of the Aboriginal Law Centre is undergoing some changes. Garth Nettheim will be overseas from September - February, and the Advisory Committee has asked Richard Chisholm to be Chair during that period. In addition, funding from the Law Foundation of NSW has permitted the appointment of a Director during much of the same period. She is Laura Beacroft. She will serve 4 days a week keeping the organization ticking over, assisting Alastair Walton with the Aboriginal Law Bulletin, and researching for an upgraded set of teaching materials for a proposed Casebook on Aborigines and the Law.

THE ABORIGINAL LAW CENTRE

Faculty of Law, University of New South Wales, P.O. Box 1, Kensington, N.S.W., Australia, 2033. Telephone: 697-2256 or 697-2252.

Acting Chair :	Richard Chisholm
Acting Director:	Laura Beacroft
Editor:	Alastair Walton
Typing:	Bernadette Dattatreyan

Aboriginal Law Notes are distributed to members of the Centre's Network. Subscriptions \$5.00 per annum.

The Centre also publishes the Aboriginal Law Bulletin.

Registered by Australia Post - Publication No. NBP 5530.

Constitutional Commission

In the June issue of Aboriginal Law Notes, it was reported that the Constitutional Commission was calling for submissions from anyone interested in reforming the Australian Constitution.

The following Aboriginal organizations have made or are completing written/oral submissions to the Individual & Democratic Rights Committee:

Aboriginal Legal Rights Movement, Adelaide. (Contact Paul White)

National Aboriginal & Islander Legal Services Secretariat. (Contact Paul Coe)

NSW Aboriginal Land Council. (Contact Tony Simpson)

Aboriginal Law Centre. (Contact Laura Beacroft)

Although the Individual & Democratic Rights Committee has completed some of its oral hearings, written submissions are still being received. Please don't let the title 'Individual Rights' put you off sending in submissions on the need for recognition of Aboriginal peoples (collective) rights. Dr. Paolo Totaro reassured the many speakers who spoke on Aboriginal issues at the Sydney hearing that the committee did not view collective rights as outside their terms of reference. Dr. Paolo Totaro and Terence Purcell (Chair) were, disappointingly, the only members of the 8 person constitutional committee who personally attended the Sydney hearing.

The dates for the remaining oral hearings are as follows:

Alice Springs	7/11	Brisbane	2/12
Darwin	8/11	Rockhampton	3/12
Perth	15/11	Townsville	4/12
Canberra	22/11	Cairns	5/12
Albury	23/11		

The Distribution of Powers Committee is also of direct relevance to Aboriginal people. Appendix A is the section of the Issues paper which discusses the Races power in the Constitution, and a Makarrata. The written submissions to the Individual & Democratic Rights Committee listed above inevitably cover these Distribution of Powers issues too.

Written submissions for the Distribution of Powers Committee are also still being accepted.

The times for the remaining public hearings are as follows:

Sydney	14 November
Canberra	17-18 November

Details of venues can be obtained from the Constitutional Commission .
[Tel: (02) 298505]

Fulbright Award Application for 1987

The ALC, on behalf of the UNSW, prepared an application for a Fulbright Award to bring out a scholar from the US in 1987. The application specified that the successful grantee be a person with expertise in the development and protection of human rights, with an emphasis on rights of indigenous peoples and minority groups.

The Institutions which have so far expressed interest in supporting the application (with no financial obligations) are:

The Human Rights Commission; Commission for Community Relations; Australian Institute of Aboriginal Studies; Macquarie University Law Faculty; University of NSW School of Sociology; Dept. of Aboriginal Affairs.

If any other Institution is interested in benefiting from the visit, please ring Laura Beacroft for further information.

Resolutions passed at the Conference on Folk Law & Legal Pluralism, August 1986

Two resolutions passed at the Folk Law and Legal Pluralism Conference are attached as appendix B.

Also attached as appendix C is the reply from Clyde Holding, Minister for Aboriginal Affairs.

The ALC will ensure that the Conference resolution (regarding Article 12 of International Labour Organization (ILO) Convention 107) has been conveyed to the governing body of the ILO, as Mr. Holdings suggests.

Books, Reports, Newsletters Received

Human Rights Newsletter, "The Phillipines", LAWASIA, Vol. 1, No. 1, July 1986.

Survival International, News No. 13, 1986.

Sri Lanka Human Rights Bulletin, No. 5, July 1986.

Survival International - Urgent Action Bulletin/Mal/1/Jun/1986
Urgent Action Bulletin Update, UAB/Ban/lc/June/1986

"Aboriginal Self-Determination Off a Land Base", John Weinstein, Background Paper No. 8, Institute of Intergovernmental Relations, Queen's University, Ontario.

"Financing Aboriginal Self-Government in Canada", Marc Malone, Background Paper No. 9, Institute of Intergovernmental Relations, Queen's University, Ontario.

Aboriginal Statistics, 1985. Department of Aboriginal Affairs. AGPS, 1986.

Aboriginal Invention of Television: Central Australia 1982-86, Eric Michaels, Australian Institute of Aboriginal Studies, Canberra, 1986. R.R.P. \$8.50.

Northern Territory Aboriginal News, July 1986, Vol. 3, No. 1.

Aboriginal Newsletter, No. 148, March-June, 1986.

The Australian Environment Management Review Newsletter, Vol. 2, No. 7, April 1986.

The Recognition of Aboriginal Customary Laws, Vol. 1 & 2. Australian Law Reform Commission Report No. 31.

Tucar Newsletter, No. 11, July 1986

Post-Release Support for Aboriginal Prisoners: Designing An Action Research Project, Dr. Christian Alexander, Dec. 1985.

Children & Authority in the North West. Report of the South Australian Aboriginal Customary Law Committee.

North Australia Research Unit (NARU) News, No. 18, July 1986.

Campaign Against Racial Exploitation (CARE) Newsletter, No. 78, July 1986, No. 79, August/September 1986.

"...let us not forget the Aboriginal people...". Senator Michael Macklin.

Computers & Law Newsletter, No. 5, August 1986.

The Aboriginal Health Worker, Vol. 10, No. 2, June 1986.

Incentive Achievement and Community: An Analysis of Black Viewpoints on Issues Relating to Black Australian Education. Roberta B. Sykes. Sydney University Press, 1986.

Nordic Journal of International Law, Vol. 55, Fasc. 1-2, 1986.

KOORIER, Newsletter of the NSW Ministry of Aboriginal Affairs, June 1986.

Justice Programs for Aboriginal & Other Indigenous Communities - Kayleen M. Hazlehurst (ed.), Australian Institute of Criminology.

Correspondence

Correspondence with Garth Nettheim on developments in indigenous rights, and protection of indigenous rights in the US and Canada.

Correspondence with Kevin Gilbert on a constitution for Humanity International, a proposed international organization focusing, among other things, on a treaty between the Commonwealth of Australia and Aboriginal people.

Aboriginal affairs

(a) The 'Races' power

124. Before they were amended at the referendum held in 1967, the provisions of section 51(xxvi) of the Constitution (the "races power") empowered the Commonwealth Parliament to make laws with respect to:

"The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws"

As a result of the referendum those provisions were amended to remove the phrase, "other than the aboriginal race in any State". The purpose of the amendment was explained to the people who voted at the referendum as being that it would:

"make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Parliament considers it necessary".

(In this paper any reference to Aboriginal people is intended to be read as including a reference to Torres Strait Islanders.)

125. In the light of the judicial interpretation placed upon the races power it would seem that it may be used by the Parliament to pass laws for the advancement and benefit of people of the Aboriginal race including the protection of Aboriginal sacred sites and artifacts, the language and culture of Aboriginal communities and also the recognition and giving effect to the Aboriginal law to prohibit discrimination against people of the Aboriginal race by reason of race, at least if the law is confined to discrimination against people of that race. Possibly the power may also be available to support laws which discriminate *against* persons of the Aboriginal race especially having regard to the origins and history of the power before it was amended in 1967.

126. According to one approach to the power and the need to show that the law is a "special law", it is possible that the scope of the power will be confined to the enactment of measures which are designed to deal with matters which have a special connection with the people of the Aboriginal race (at least in its application to people of that race). In other words it will be necessary to show that the law deals with a special threat or a special need which peculiarly affects the people of that race. It has been suggested that this approach to the power could help to undermine quite considerably the extent to which the Parliament's opinion, as to the necessity of the law enacted as an exercise of the races power, is conclusive. The opinion of the Parliament as to the existence of the special need or the special threat would not suffice in order to show that the law was "special" in character.

127. While there is judicial support for this approach the position cannot be regarded as settled. If accepted in the future, however, it would mean that the power would not support the making of a law on any matter regardless of its context or subject matter merely because it was confined in its application to conduct or affairs involving people of the Aboriginal race.

128. A further aspect of the power which may give rise to practical difficulty concerns the meaning of the word "race" and whether for example it will be found to include persons of mixed race. While the issue has attracted some judicial attention, it also cannot be regarded as settled at the moment.

129. Another issue concerns the acquisition of land from State Governments and private owners for the purpose of transferring ownership in the land to groups of Aboriginal persons i.e. Aboriginal land rights. It is likely that any such acquisition would attract the constitutional obligation to compensate the original owners of the land acquired under section 51(xxxi) of the Constitution. A question arises whether that obligation should operate in cases where the owner of the acquired land is a State Government.

Summary of Issues

- Is the present power adequate to deal with matters affecting people of the Aboriginal race?
- Should the power be amended to make it clear that the Parliament can conclusively determine what "special" laws are needed in this area?
- Is there a need to clarify the availability of the power with regard to persons of mixed race?
- Should the Commonwealth be obliged to compensate State Governments in respect of land acquired for people of the Aboriginal race?

(b) Constitutionally entrenched 'Makarrata'

130. In recent times there have been suggestions put forward in favour of negotiating an agreement between representatives of the Aboriginal people and the Commonwealth Government which is sometimes called a "Makarrata". In 1983 the Senate Standing Committee on Constitutional and Legal Affairs reported on the feasibility, whether by way of a constitutional amendment or other legal means, of securing such a compact or agreement.

131. The Senate Committee recommended that the Federal Government should:

"in consultation with the Aboriginal people, give consideration, as the preferred method of legal implementation of a compact, to the insertion within the Constitution of a provision along the lines of section 105A which would confer a broad power on the Commonwealth to enter into a compact with representatives of the Aboriginal people. Such a provision would contain a non-exclusive list of those matters which would form an important part of the terms of the compact, expressing in broad language the types of subjects to be dealt with."

132. The kind of matters envisaged as being the subject of the Makarrata have included:

- the protection of Aboriginal identity, languages, law and culture;
- the recognition and restoration of rights to land;
- the conditions governing mining and exploitation of other natural resources on Aboriginal land;
- compensation to Aboriginal Australians for the loss of traditional lands and for damage to those lands and to their traditional way of life;
- the right of Aboriginal Australians to control their own affairs and to establish their own associations for this purpose;
- the provision of extensive welfare service such as Aboriginal medical services, legal aid, schools;
- the provision of reserved seats for Aboriginal people in the Commonwealth and Parliaments and local government bodies;
- compulsory employment of a fixed proportion of Aboriginal people in governmental bodies.

133. The Senate Committee considered the following legal solutions put forward as potential means of implementing any compact which may emerge from negotiations between Aboriginal and non-Aboriginal Australians:

- agreement with constitutional backing;
- agreement in the form of a treaty;
- agreement with legislative backing;
- simple agreement.

134. The principal advantages in favour of providing for the kind of agreement with constitutional backing recommended by the Senate Committee were:

- the symbolic value of the necessary referendum process to insert the provision in the Constitution (as a means of helping the non-Aboriginal community to recognise "the failings of the past 200 years" and also to acknowledge a "new commitment in relations between themselves and the descendants of the nation's original inhabitants");
- the flexibility to carry out legislative and executive action (which would be lacking in the other option for constitutional amendment, namely incorporating the full text of the compact as part of the Constitution); and
- the inability of subsequent Parliaments to amend or repeal the terms of the compact (thus giving it protection from what was described as "damage due to short-term political or social expediency").

135. Under the terms of the Senate Committee's preferred recommendation a constitutional amendment would not be required to amend the terms of the compact or agreement but at the same time such a document would, like the Financial Agreement between the Commonwealth and the States, enjoy overriding constitutional force and would be binding on both the Commonwealth and the States. Under the other option for constitutional amendment the terms of the compact or agreement would become a new section of the Constitution thus requiring an amendment of the Constitution whenever it was desired to amend any of the terms of the compact or agreement.

136. It is not within the terms of reference of the Advisory Committee on the Distribution of Powers to consider whether it is desirable for the Commonwealth Government to enter into a Makarrata with the representatives of the Aboriginal people. However the Advisory Committee is concerned with the question whether the Constitution should be amended to provide the framework within which such an agreement could operate if it is ever thought desirable for the agreement to be concluded in the future.

Summary of Issues

- Should the Constitution be amended to give constitutional backing to a Makarrata negotiated between the Commonwealth and representatives of the Aboriginal people?
- If so, what form of constitutional backing should be provided?
- Are there any practical or other difficulties in the way of providing any such constitutional backing?

The delegates gathered to attend the conference "Folk Law and Indigenous Rights: A Comparative Perspective" in Sydney on the 18th August 1986 resolve

- (i) to draw the attention of the Australian Government to the need to provide adequate funds to Aboriginal and Islander legal services to undertake litigation at all levels directed towards the vindication of indigenous land rights and other civil and political rights

and

- (ii) to demand that the Australian Government ensure that the recipients of such funding have the right to self determination in respect of the conduct of such litigation.

WHEREAS the International Labour Organization (ILO) is presently engaged in revising its convention No. 107 on Indigenous and Tribal Peoples

AND WHEREAS Article 12 of the current convention No. 107 only protects indigenous peoples from being dislocated from their lands subject to any exception contained in national legislation designed to promote national security, economic development or their health

AND WHEREAS many countries justify the theft of indigenous lands precisely on the grounds of economic development, national security or the health of indigenous peoples

THEREFORE, we as indigenous and non-indigenous peoples who are lawyers, anthropologists, political leaders, sociologists, political scientists, judges, social workers and students from Australia, Austria, Botswana, Brazil, Canada, Denmark, Finland, Malaysia, New Zealand, the Philippines, United Kingdom and the U.S.A. in attendance at a conference entitled "Folk Law and Indigenous Rights: A Comparative Perspective" in Sydney, Australia on August 18, 1986, call on the ILO to remove these very dangerous and damaging exceptions used by countries to oppress indigenous peoples AND to expand the process of redrafting the convention so as to ensure full involvement of all indigenous peoples and their political representatives throughout the world.



MINISTER FOR ABORIGINAL AFFAIRS
CANBERRA, A.C.T. 2600

Dear Professor Nettheim,

14 OCT 1986

Thank you for your letter of 26 August conveying two resolutions adopted at the Sydney Conference of the Commission on Folk Law and Legal Pluralism.

In 1986/87 the Department of Aboriginal Affairs will provide \$12.8 million to nineteen Aboriginal and Islander legal services to enable them to provide legal advice and representation to Aboriginals, for the conduct of community legal education projects and to further the interests of Aboriginals before the law. The objectives of the Department's law and justice programs are to ensure Aboriginals enjoy the rights accorded them under the law, to reduce their over-representation in the criminal justice system and secure respect for and, in appropriate circumstances the application of, Aboriginal customary law and related practices as part of the law of Australia.

A special allocation of \$70,000 to the Aboriginal Co-ordinating Council in Queensland will enable it to seek independent legal advice on Deeds of Grant In Trust being offered to Aboriginal communities. Aboriginal legal services offer advice and assistance on land and related matters.

The Commonwealth is also providing financial support to assist in the pursuit of test cases concerning matters of particular legal and public significance to Aboriginal Australians. In the area of indigenous rights, for example, assistance has been provided by the Attorney-General's Department to the plaintiffs in the case of *Mabo v Queensland and the Commonwealth*. In this case, as you are no doubt aware, the plaintiff is asserting native title to Murray Island in the Torres Strait. Assistance for test cases are considered by the Attorney-General's Department in the light of the merits of the particular case.

I note the concern expressed in your resolution about the revision of Article 12 of International Labour Organization (ILO) Convention 107. As you will know, a Meeting of Experts, including an Australian Government nominee, was held in Geneva from 1 to 10 September 1986 to consider the matter. The experts have reported to the governing body of the ILO and the report includes a recommendation that the revision exercise should be placed on that body's agenda as a matter of priority.

I am informed that in its report the Committee of Experts has provided a list of principles as points of reference for the revision exercise. The list includes specific reference to protection against full or partial expropriation of land, protection of people against removal from land, and procedures to compensate for land lost.

Because the ILO has carriage of the matters resolved by your Conference, I assume that you have also conveyed your resolution to that Organisation.

Yours sincerely,

(Clyde Holding)

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