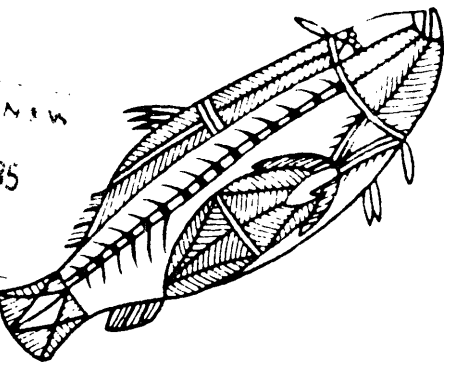

ABORIGINAL LAW NOTES

NO. 84/8

DECEMBER, 1984.

Being notes on matters of current interest, concerning Aboriginals and the Australian legal system, as reported to, or discussed at meetings of the Aboriginal Law Research Unit.

In the past the Aboriginal Law Research Unit has held more-or-less regular meetings at approximately 6-8 week intervals at which those who were able to attend talked over matters of current interest and heard from various guest speakers.

For the future, this practice will be discontinued. Instead, there will be occasional meetings or receptions for distinguished visitors, and occasional seminars or conferences on specific topics. Notice will be given through this newsletter and in other ways.

THE ABORIGINAL LAW RESEARCH UNIT is located in the Faculty of Law, University of New South Wales, P.O. Box 1, Kensington, N.S.W., 2033, Australia. Chairman : Garth Nettheim - Telephone (02) 697-2252.

The Unit also publishes the Aboriginal Law Bulletin four times a year.

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VICTORIAN GOVERNMENT ABORIGINAL AFFAIRS DISCUSSION PAPER

This paper was published in September 1984 and represents the recent thinking of the Victorian Government on Aboriginal Affairs in that State. It discusses several proposals under consideration including an Aboriginal Affairs Bill (differing in a number of particulars from the 1983 draft Aboriginal Land Claims Bill), the establishment of a Victorian Aboriginal Council, amendments to the Aboriginal Lands Act, 1970, and revision of the State's Aboriginal Heritage legislation. (Questions of compensation to Aboriginals for dispossession and dispersal have been under separate consideration by the Victorian Parliament's Social Development Committee.)

The proposed Aboriginal Affairs Bill provides for a land claims process, in respect of public lands, before an Aboriginal Land Claims Tribunal. The Victorian Aboriginal Council is to assist Aboriginal Claimants. Land may be claimed on the basis of needs, traditional rights, long association or compensation. The proposal contemplates that land claimed and granted will, for the most part, beinalienable, and Aboriginal owners will have some degree of control over mineral exploration and mining activity. Royalties and rents from mining will be divided 50:50 between the Aboriginal owners and the Victorian Aboriginal Council. The Council itself will have a limited role restricted to functions related to Aboriginal land rights.

Copies of the Discussion Paper may be obtained from the Victorian Government Bookshop, 41 St Andrews Place, East Melbourne, Vic., 3002, or Post Office Box 203, North Melbourne, Vic., 3051. Cost $3.80 plus postage $1.10.

THE ABORIGINAL LAND INQUIRY (WESTERN AUSTRALIA)

The report of Paul Seaman, QC, was released in September 1984. (His earlier Discussion Paper was published in January 1984.)

Mr. Seaman treats the history of Aboriginal dispossession and treatment since settlement as the starting point for his recommendations and devotes a complete chapter to a summary of that history. His terms of reference did not permit him to inquire into the general question of monetary compensation for dispossession, and this, he said, caused some dissatisfaction among the 10,000 or so of the State's 35,000 Aboriginal population who live in the South West - the region of longest contact and least potential for according land rights. Mr. Seaman's findings about Aboriginal relationships to land in W.A. are broadly similar to reports on such relationships in other parts of Australia.

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He reports that no Aboriginal group advanced claims to recover land which had become the private property of other people (some 8% of the State). He goes on to propose a land claim system which might in different ways, extend to other land, considered in five categories : (a) lands reserved for Aboriginals and Aboriginal reserves; (b) unallocated lands; (c) unused public lands; (d) national parks, forests and other conservation reserves; and (e) mission lands.

He deals in a separate chapter with land subject to pastoral leases, constituting about 38% of the land in the State. This is especially significant in the Kimberleys where Aboriginal people retain a traditional relationship with virtually all of the region. He recommends provision for excisions of village living areas, coupled with rights of access over pastoral land for traditional purposes and a general rearrangement of pastoral leaseholdings so as to facilitate the acquisition of some such areas by Aboriginals.

In chapter 6 Mr. Seaman recommends what he describes as modified title in regard to Aboriginal land, which is, in effect, inalienable freehold title. He discusses the application of general laws to such lands and the question of internal waters, and he concludes by recommending a permit system, backed by penalties, to govern access to Aboriginal land.

Chapter 7 proposes a granting system which places more stress on negotiation than does the Aboriginal Land Rights (Northern Territory) Act, 1976 (Cth) and less weight on adjudication - the proposed Tribunal would deal with any Aboriginal claim which cannot be disposed of by negotiation. Claims might be made on the basis of traditional associations with the land, long association with it, or need. The Aboriginal Land Tribunal would be composed of a Land Commissioner with judicial status. A claim would be lodged by an Aboriginal body corporate, and the Tribunal would call an early compulsory conference to resolve as many aspects of the claim as possible. There should be no cut-off date for claims; three land commissioners should be able to dispose of the bulk of claims in reasonable time. The Tribunal's ultimate adjudication would be a final decision, not merely a recommendation to government. The Tribunal should have no role in resolving Aboriginal disputes - these should be settled by regional Aboriginal organizations. Local incorporated Aboriginal organizations should generally be the land-holding bodies. Elected regional organizations would have resource functions, but would not, necessarily, be the "buffers between public authorities or resource developers and Aboriginal communities." A Statewide Secretariat would have very limited functions, mainly to receive funds from the State or other sources and to distribute them to regional Aboriginal organizations on a per capita basis.

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Chapter 8 deals with the vexed question of protecting sites or areas of Aboriginal significance. It proposes an additional system of protection, on an optional basis (for areas not on private land) "when non-Aboriginal people are given fair warning of the general location (zones) within which significant areas may be found". Otherwise more limited forms of protection remain available under the Aboriginal Heritage Act, 1972 (W.A.) and the Aboriginal and Torres Strait Island Heritage (Interim Protection) Act, 1984 (Cth.). Regional Aboriginal organizations would need to prepare details of the "zones" and the Tribunal would have certain adjudicatory functions.

Other matters dealt with in Mr. Seaman's careful report include environmental matters, and access to land and sea. But the most sensitive topic has proved to be that of resource development. Mr. Seaman recommends "systems of tenure and organization which place decision-making about mining issues firmly in the hands of the incorporated communities which own the land concerned".

The Seaman report is a mine of valuable information about the position in Western Australia, and contains a great deal of careful thought and analysis on how to accommodate Aboriginal aspirations with the interests of the wider community in that State. He has not hesitated to depart from the Northern Territory model, or other Australian models when appropriate, but the same issues are presented for resolution as elsewhere, even though the proposed solutions may not be identical. On a first reading, the report appears to represent a considerable addition to the Australian jurisprudence on Aboriginal land rights.

But prospects for implementation of the Report appear to be bleak. At the time it was tabled the Western Australian Government announced that it would not accept an Aboriginal "veto" on mining. Subsequently, after discussions between the State Premier and the Australian Prime Minister, in the run-up to the 1984 federal election, the Prime Minister undertook in October that his government would not attempt to override the State government decision on the matter. A recent newspaper report states that draft WA legislation departs substantially from the recommendations of the Seaman Report ("New land rights bill favors miners", The Australian, 10 December 1984, p. 1).

Copies of the Seaman Report may be obtained by writing to Aboriginal Affairs Planning Authority, 17 Emerald Terrace, West Perth, 6005. Purchase price of the current issue is $8.00 per copy, postage charges $5.20.

Supplement to Aboriginal Law Notes, 84/8, December 1984.

ALRU BRIEFING PAPER

December 1984.

The Western Arctic Claim (Canada). The Inuvialuit Final Agreement

This 1984 Agreement, in settlement of the Western Arctic Claim by Inuit people of Canada, is of interest for purposes of comparison with Australian development in issues of land rights, self-government, etc. Set out below are the Preamble and Sections 1, 3 and 4, followed by the table of contents (deleting various annexes) which indicates the range of other topics dealt with in the Agreement.

INUVIALUIT FINAL AGREEMENT

BETWEEN:

The Committee for Original Peoples' Entitlement (hereinafter referred to as "COPE"), representing the Inuvialuit of the Inuvialuit Settlement Region

AND:

The Government of Canada (hereinafter referred to as "Canada"), represented by the Minister of Indian Affairs and Northern Development.

WHEREAS the Inuvialuit claim an interest in certain lands in the Northwest Territories and the Yukon Territory based on traditional use and occupancy of those lands and seek a land rights settlement in respect thereof;

AND WHEREAS COPE and Canada have entered into negotiations directed towards a Final Agreement to provide rights, benefits and compensation in exchange for the interest of the Inuvialuit in the Northwest Territories and Yukon Territory, as contemplated by the Federal Government policy statement of August 8, 1973;

AND WHEREAS it is understood and agreed that this Agreement will be subject to legislative approval of the Parliament of Canada, under which legislation that interest will cease to exist;

AND WHEREAS the parties have earlier reached an agreement on the principles to be applied in reaching this Agreement, which principles are reflected in the Agreement in Principle signed on October 31, 1978;

AND WHEREAS the Governments of the Northwest Territories and Yukon Territory have been consulted and have participated in discussions concerning matters affecting them and over which they have jurisdiction;

AND WHEREAS COPE declares that it has been authorized by the Inuvialuit, after the approval process, to sign this Agreement;

AND WHEREAS Canada has authorized the Minister of Indian Affairs and Northern Development to sign this Agreement;

NOW, THEREFORE, COPE AND CANADA AGREE AS FOLLOWS:

PRINCIPLES

1. The basic goals expressed by the Inuvialuit and recognized by Canada in concluding this Agreement are:

(a) to preserve Inuvialuit cultural identity and values within a changing northern society;

(b) to enable Inuvialuit to be equal and meaningful participants in the northern and national economy and society; and

(c) to protect and preserve the Arctic wildlife, environment and biological productivity.

AGREEMENT AND LEGISLATIVE APPROVAL

3. (1) Canada shall recommend to Parliament that this Agreement be approved, given effect and declared valid by suitable legislation.

3. (2) For greater certainty, it is the intention of the parties that this Agreement be a land claims agreement within the meaning of subsection 35(3) of the *Constitution Act, 1982*.

3. (3) The Settlement Legislation approving, giving effect to and declaring valid this Agreement shall provide that, where there is inconsistency or conflict between either the Settlement Legislation or this Agreement and the provisions of any other federal, territorial, provincial or municipal law, or any by-law or regulation, the Settlement Legislation or this Agreement shall prevail to the extent of the inconsistency or conflict.

3. (4) Subject to the Settlement Legislation and in consideration of the rights and benefits in favour of the Inuvialuit set forth in this Agreement, the Inuvialuit cede, release, surrender and convey all their aboriginal claims, rights, title and interests, whatever they may be, in and to the Northwest Territories and Yukon Territory and adjacent offshore areas, not forming part of the Northwest Territories or Yukon Territory, within the sovereignty or jurisdiction of Canada.

3. (5) The Settlement Legislation approving, giving effect to and declaring valid this Agreement shall extinguish all aboriginal claims, rights, title and interests whatever they may be of all Inuvialuit in and to the Northwest Territories and Yukon Territory and adjacent offshore areas, not forming part of the Northwest Territories or Yukon Territory, within the sovereignty or jurisdiction of Canada.

3. (6) Nothing in this Agreement or in the Settlement Legislation shall remove from the Inuvialuit their identity as an aboriginal people of Canada nor prejudice their ability to participate in or benefit from any future constitutional rights for aboriginal people that may be applicable to them.

3. (7) The Settlement of the Inuvialuit land rights claim is without prejudice to:

(*a*) the aboriginal rights of any other native peoples based on traditional use and occupancy of lands, and

(*b*) their negotiation of a land claims settlement in respect thereof.

3. (8) Any rights and benefits extended in the Inuvialuit Settlement Region to other native peoples on the basis of traditional use and occupancy in accordance with the policy of Canada as stated in its Land Claims Settlement Policy of 1981 shall not prejudice the Inuvialuit with respect to any rights they receive under this Agreement and the Settlement Legislation.

3. (9) Nothing in this Agreement constitutes an admission by Canada or the Inuvialuit that any other native peoples have a demonstrated traditional use and occupancy within the Inuvialuit Settlement Region.

3. (10) The Inuvialuit may from time to time enter into agreements, such as that shown in Annex S, with organizations representing neighbouring native groups to resolve mutual or overlapping interests or to share rights, privileges and benefits. Such agreements may be amended from time to time with the consent of the signatories. For greater certainty, the agreement shown in Annex S is included for the purpose of information only and does not form part of this Agreement.

3. (11) The Settlement Legislation shall provide that Canada recognizes and gives, grants and provides to the Inuvialuit the rights, privileges and benefits specified in this Agreement in consideration of the cession, release, surrender and conveyance referred to in subsection (4).

3. (12) Subject to the provisions of this Agreement and the Settlement Legislation, the governments of the Northwest Territories and Yukon Territory will continue to have the jurisdiction they have had with respect to game management and may continue to pass legislation with respect to game management that is not inconsistent with this Agreement and the Settlement Legislation.

3. (13) The provisions of this Agreement may be amended with the consent of Canada and the Inuvialuit, as represented by the Inuvialuit Regional Corporation.

3. (14) As authority for the execution by the Inuvialuit of any amending agreement or instrument, Canada shall be entitled to rely on the certified extract of a resolution of the Board of Directors of the Inuvialuit Regional Corporation, supported by a shareholders' resolution certified to meet the requirements of subsection (15).

3. (15) A shareholders' resolution authorizing agreement by the Inuvialuit Regional Corporation to an amendment of this Agreement must be supported by a majority of its shareholders representing communities constituting at least fifty per cent of the Inuvialuit population resident in the Inuvialuit communities.

3. (16) Where any amendment of this Agreement requires legislation to achieve its effect, Canada agrees to take all reasonable steps to put in place suitable legislation forthwith.

3. (17) Where any amendment of this Agreement has application to the governments of the Northwest Territories and Yukon Territory, Canada shall consult with those governments before agreeing to any such amendment.

CITIZENS' RIGHTS AND PROGRAMS

4. (1) Nothing contained in this Agreement prejudices the rights of the Inuvialuit as Canadian citizens, and they shall continue to be entitled to all of the rights and benefits of other citizens under any legislation applicable to them from time to time.

4. (2) Existing and new programs and funding by governments, and the obligations generally of governments, shall continue to apply to the Inuvialuit on the

ame basis as to the other Inuit of Canada, subject to
e criteria established from time to time for the applica-
on of such programs.

4. (3) Canada agrees that where restructuring of the
ublic institutions of government is considered for the
estern Arctic Region, the Inuvialuit shall not be treated
ss favourably than any other native groups or native
eople with respect to the governmental powers and
uthority conferred on them

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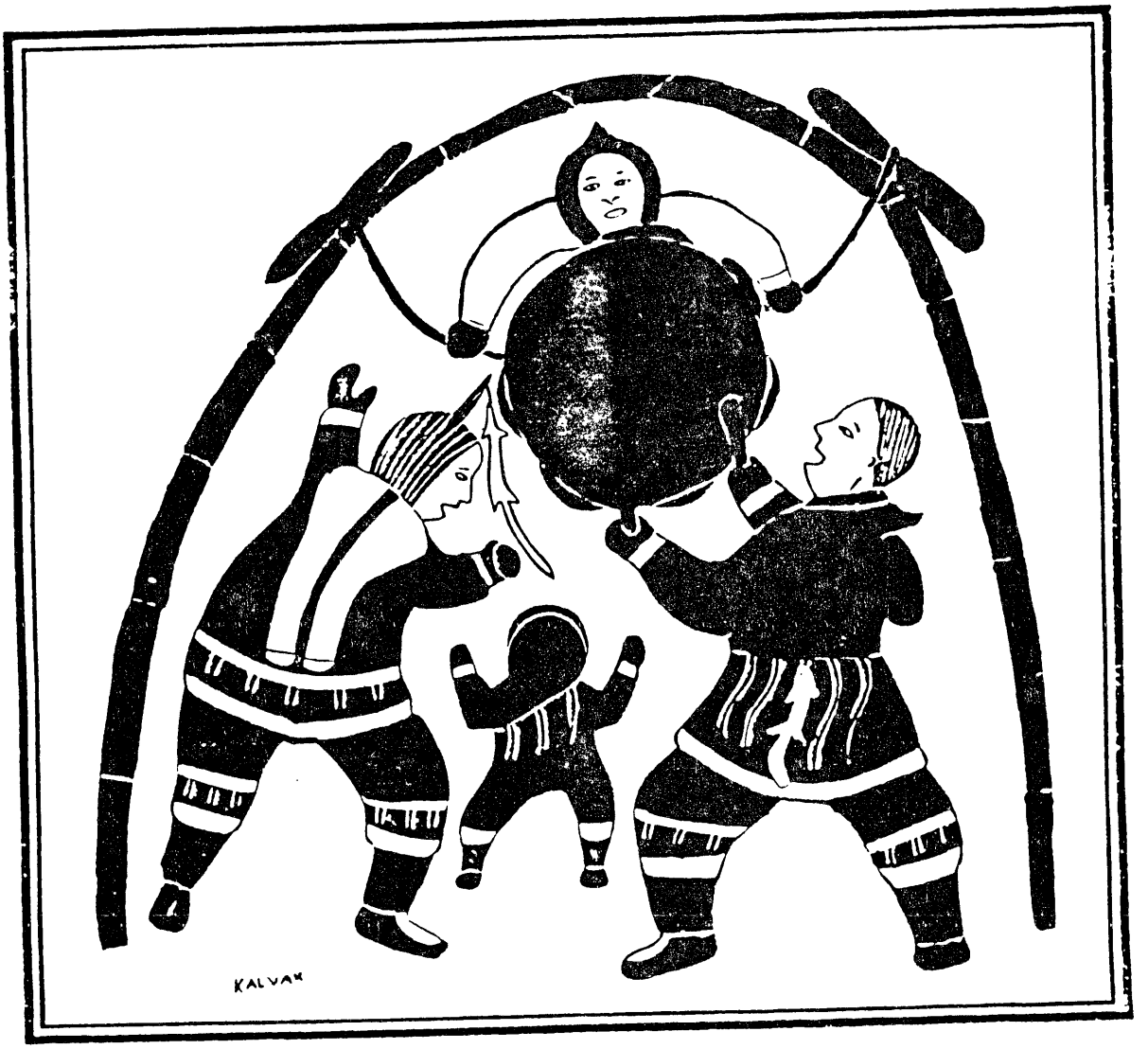
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