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MEDIA RELEASE

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Australia's "admissions against their own interest": an alert to the Canberra Centenary

Michael Ghillar Anderson said from Coonamble today:

On the centenary of Canberra (12 March) it is timely to draw attention to the fact that the sovereignty question, as it relates to Aboriginal nations and peoples, is now a living and active thought and aspiration, which is steadily developing into a nationwide movement.

It is now essential that we look at some international legal factors that give rise to the strengthening of our asserted positions of 'sovereignty never ceded' and 'continuing sovereignty'.

We must all understand and appreciate the concerns of the politicians and the established legal advocates when they attempt so vainly to put down our assertion of sovereignty, by incorrectly stating that sovereignty exchanged hands on the 17 February 1788 when Governor Phillip officially proclaimed the colony of New South Wales. Phillip claimed, on behalf of his English King, all the lands and waters from the east coast to the 135th parallel. At that time invading party brought with them the amount of English law (Admiralty law) that was applicable to the British colonials at that time. Later as the civilian population grew, British civil courts and law were established.

[I do not wish to canvas the question of legal jurisdiction at this point but it is sufficient to say that this is a question that will become clearer once we settle the issue of continuing sovereignty.]

On 11 April 1836 the New South Wales Supreme Court heard the case of *R v Murrell and Bummaree* [(1836) 1 Legge 72; [1836] NSW SupC 35] and it is in the case that the furphy of *terra nullius* was born, in order to shield Britain from compensating the original owners and custodians of the land for the loss of their lands and waters. So it was the court's conclusion, at that time, that Aboriginal peoples did not have any standing that could be equated to civility, in order to deny Aboriginal peoples the right to sue the British government and the Crown for compensation for the theft of their lands.

Justice Forbes declared:

...although it be granted that the aboriginal natives of New Holland are entitled to be regarded by Civilized nations as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them, yet the various tribes had not attained at the first settlement of the English people amongst them to such a position

in point of numbers and civilization, and to such a form of Government and laws, as to be entitled to be recognized as so many sovereign states governed by laws of their own.

Now let me bring you to the 1992 High Court Mabo (No 2.) judgement. As we all know the High Court overturned the idiotic racist notion of *terra nullius*, as was first introduced in the Murrell case. When the Mabo judgment overturned this legal dictum it reopened the whole question of the need for compensation for lands seized by the colonising power. (Some lawyers now try and argue that the statute of limitations may prevail in order to prevent such a law suit, but this is yet untested.)

In Mabo the High Court concluded that it did not have jurisdiction to decide on the question of sovereignty. Simply put – international legal norms prevent the High Court, as a domestic court, to decide the sovereignty of a competing nation(s), particularly as it relates to many Aboriginal nations versus the alleged established British sovereignty that now exists on our soil. So the full bench of the High Court correctly judged that they belong to the invader state and not the competing sovereign Aboriginal nations.

The High Court in Mabo did, however, create another legal complication. In my opinion the court recognised that this country had not followed any precedents when the Crown first claimed acquisition of Australia. This is so because:

1. War was never declared against the Aboriginal nations, instead there were only martial law proclamations, which equate to civil unrest;
2. Aboriginal nations never ceded sovereignty at any time through arrangements, treaties or other agreements;
3. It cannot be argued that Aboriginal nations and peoples have acquiesced to the invader state, since our resistance has been overt and continuous, but we are now working from a position of absolute duress to take back or protect that which is left.

Our people, however, are very clever at survival techniques. It may be argued that Aboriginal people's negotiations with governments over land could well be turned around and used against Aboriginal people by those who argue that some of our people have acquiesced and recognise the sovereign state of Australia. When we speak to our people about the agreements they have signed, they insist that they sign to protect Country and to register their names on the title. Often the land is then leased back to the government for public use as in national parks.

Now let's look at this Aboriginal strategy to see if it has worked. In our case some of it is very well planned, in others it was the only option left and done under duress. Nevertheless, we have to show our continuing sovereignty in various ways: by stealth; by constant advocacy; by resistance; by agitation; and by civil disobedience.

Now we need to understand a well-recognised international legal norm, that is, *admissions against interest*, which have one of the highest evidence values

in a court. In other words, if the culprit him/herself admits to the wrong a court regarded this as the truth. When we study this legal norm, which is recognised by all courts around the world, Aboriginal strategies of civil disobedience and political agitation have won out, in my opinion.

Some key aspects of *admissions against interest* as they relate to continuing Aboriginal sovereignty in Australia:

We now have a recognised Aboriginal embassy standing on the front lawns of Old Parliament House where our national political confrontations go through.

The Aboriginal embassy is not a protest. It was established in 1972 as an *embassy*. I was appointed by my peers as its ambassador at that time. Gough Whitlam, the then ALP leader of the opposition, held a policy meeting on ways forward at the embassy with the Aboriginal embassy caucus. Policies and pathways were decided there and so, when in power, the Labor government introduced the land rights regime that sought the recognition and continuation of Aboriginal land ownership by the national parliament, highlighted by an act that saw Vincent Lingiari and his Gurinji people given back parts of their land.

Despite having been introduced by the Whitlam Labor government, the Fraser Liberal national coalition government concluded the Northern Territory Land Rights Act that saw a special court established to take evidence on continuing Aboriginal law, which established First Nations' title to land under their own law, resulting in land being given back to the people. After Mabo (No.2) the Commonwealth *Native Title Act* followed and adopted the same principle.

In the 1970s the federal government convened a body of lawyers to look at the compatibility of Aboriginal customary Law and how it could fit within the existing British legal system. A number of initiatives have been introduced as a consequence, in terms of recognition of certain customary practices that the British legal system could accept.

From the 1970s under the Whitlam and Fraser regimes Aboriginal self-determination was accepted through the funding of various community-based service delivery organisations (housing, legal services, medical services and preschools for education). The Fraser government, however, realised the legal and political consequences of these self-determining acts by Aboriginal peoples. It cautiously changed the definition of these programs, and the governments' policies under which these programmes were operating, from those of an act of 'self-determination' to one of 'self-management'. Under international law the changes to these definitions were to protect Australia from Aboriginal peoples asserting and operating in a self-determining sovereign way.

In fact, when we review some internal legal advice from the Fraser Attorney-General their fear is confirmed in black and white. On 15 July 1980 the Attorney-General advised on two things:

- a. That the nationally elected National Aboriginal Conference (NAC) could be seen by the international community as a single Aboriginal

nation where the Aboriginal nations across Australia united in a democratic manner under one banner and

- b. the legal advice went on to suggest that with this being the case Aboriginal peoples could argue that under international law we have two independent States treatying with each other, using internationally legally accepted processes. The legal advice concluded by arguing that the Commonwealth government could not allow this to develop, as it could lead to Aborigines being seen as a separate state. The ramifications that flow from this written legal advice are telling.

A careful rereading of the *Native Title Act* reveals that John Howard's certainty of tenure was not really his concern at all. His concern was the ramifications and implications of the wording of sections of the Act itself. The first one being that in this Commonwealth Act the Parliament of Australia recognises Aboriginal customary practices that originate from the ancient law. Our law established our title. The way in which the government put a curb on this was to strengthen the criteria and evidence through which Aboriginal peoples had to prove their connection to country, in order to become registered as 'traditional owners' under our law and custom. Howard also increased the difficulty of proving continuing connection to land under our law and custom. His government also increased the powers of the National Native Title Tribunal (NNTT) and the courts to overturn Aboriginal objections to any form of development on their land. The fact that the Commonwealth government has done this is an admission against their interest.

Further admissions against interest have very serious legal consequences for the Australian governments and have serious ramifications:

The New South Wales government's recognition that Aboriginal peoples are the first peoples in New South Wales, but then try and find the legal means to indemnify themselves against injury to the first peoples.

The Aboriginal Studies form from Centrelink asks whether you are married under Torres Strait or Aboriginal law, which is a clear admission of continuation of Aboriginal sovereign law.

Aboriginal and Torres Strait Islander flags have been enshrined in Australian law as 'official flags of Australia' since 1995 and are now national icons and symbols. For Australia this is a very serious admission against interest. The flying of our flag at every official government location in Australia is an act of recognition of joint sovereignty.

By realising these facts we now need to come together in a national summit on sovereignty to define the national pathway forward for our nations and peoples.

Other admissions against interest by the Commonwealth are Paul Keating's Redfern speech of 10 December 1992 to mark the beginning of the International Decade of the World's Indigenous Peoples:

<http://audioboo.fm/boos/1104444-audio-paul-keating-the-redfern-address> and former Prime Minister, Kevin Rudd's National Apology of 13 February 2008.

Prof Maivan Lam, a professor of high standing in international law and specialising in Aboriginal rights explains by example the high level of evidentiary proof of admissions against interest:

"The wonderful thing about the Apology Resolution (in the USA) is that in international law it is what we call an admission against interest.

If I say to the court: 'Yes I murdered my neighbour' it is an admission against my interest. I'm not likely to tell a lie about something that hurts me.

Admissions against interest have high evidence value in a court. ... So when the United States says (about Hawaii): 'The Kanaka Moari never agreed to give up their sovereignty' that is an admission against the interest of the United States ... a high value as to truth in any tribunal – national or international.

Kanaka Moari knew that, but to have the opponent the US to admit: 'yes that's true they have never given us their sovereignty,' ... so how come you are holding this power over them?

So that is like a wonderful piece of legal evidence that will stand the Kanaka Moari in very good stead in any political or judicial tribunal internationally, whether it be the General Assembly or some other international tribunal.

And the people in Washington are not stupid. That was Bill Clinton being touchy feely: 'Oh yes I apologise, I'm so sorry.' Then they sort of thought: That's a pretty bad admission he has just made, so we'd better have the Akaka Bill which says: So now you agree to hand over your sovereignty ...

<http://www.hegemonystudies.org/journeytojustice/2011/09/a-conversation-with-maivan-clech-lam-part-2/>

In conclusion, there are many more admissions against interest made by governments in Australia, but one final example is in Mabo (No. 2) the High Court admitted that the statehood of Australia is a weak skeletal framework that can fracture:

However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system. The proposition that the Crown became the beneficial owner of all colonial land on first settlement has been supported by more than a disregard of indigenous rights and interests.

[para 43 Mabo v Queensland (No 2) ("Mabo case") [1992] HCA 23; (1992) 175 CLR (3 June 1992)]

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