

**ABORIGINAL SELF-GOVERNMENT**  
in Australia and Canada

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## PREFACE

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The constitutional reform process, as it relates to aboriginal peoples, has come to focus on one major agenda item -- aboriginal self-government. At the First Ministers' Conference in March 1984, aboriginal peoples' leaders were calling for self-government, while many federal and provincial ministers were openly questioning "What does it mean?" The aim of Phase One of the Institute's project on Aboriginal Peoples and Constitutional Reform, which is subtitled "Aboriginal Self-Government: What Does It Mean?," is to shed some light on this question, by examining attitudes toward the principle of aboriginal self-government, and by examining alternative concepts and models of aboriginal self-government.

Aboriginal peoples, being no more homogeneous than non-aboriginal Canadians, have in mind no single model of self-government. It would appear, from those models proposed to date, that any formula will have to be flexible enough to accommodate diverse structures and allocations of policy responsibility. The wide variety of views as to what aboriginal self-government means -- ranging from "nationhood" to local school boards -- have yet to be clearly articulated and fully elaborated. This situation has led some observers to express alarm at the yawning gap between the expectations of aboriginal peoples, and the political wills of federal and provincial governments.

Diverse and conceivably conflicting views cannot be accommodated without a clear understanding and shared perceptions of what is at issue. Phase One of the project, including this series of papers, is designed to help take the first step toward developing such an understanding. This useful and important role can only be played by a body which does not have a vested interest in the outcome of the constitutional negotiations, and which is not a party to the debate. The Institute of Intergovernmental Relations, which is at arm's length from all of the parties, is ideally placed to perform the role of clarifying and extending public knowledge of the issues.

We are not alone in this viewpoint. The Institute has received support, encouragement and full cooperation from all parties to the negotiations -- federal, provincial and territorial governments, and aboriginal peoples organizations. I would also like to acknowledge the financial support which the Institute has received for the project, in particular the generosity of the Donner Canadian Foundation, the Government of Ontario, the Government of Alberta, the Government of Quebec, the Government of New Brunswick, and the Government of Yukon.

The principal objective is to identify and operationalize alternative models of self-government, drawing upon international experience, and relating that experience to the Canadian context. Brad Morse's paper on "Aboriginal Self-Government in Australia and Canada" is a comprehensive survey of developments in Australia and their relevance to the Canadian situation. In an ambitious yet

concise analysis, Professor Morse describes the Aboriginal people of Australia, how their "aboriginality" is defined, their land base, and the jurisdiction of Commonwealth and State governments with respect to Aboriginals. He examines the powers and activities of Aboriginal governments, and their relationship to non-Aboriginal (Commonwealth and State) governments.

Although Professor Morse warns against the "adoption of Australian ideas and implementing them on a national scale" in Canada, his analysis suggests that consideration should be given to Australian experience in a number of fields, including the definition of "aboriginality," land rights, economic development and customary law.

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November 1984





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I would like to thank my secretary, Rachel Bigras, for her invaluable help in responding cheerfully and efficiently to my impossible demands as well as Mona Carkner for typing the many drafts.

I am especially indebted to the large number of people within Aboriginal organizations, universities, and governments in Australia who have shared with me their insights, information, ideas, patience and friendship during the six months I was fortunate to spend in Australia in 1982-83 learning about these and other matters, as well as their assistance since that visit. There are too many to name, but particular thanks are deserved by Professor James Crawford, University of Adelaide and Commissioner in charge of the Aboriginal Customary Law Reference for the Australian Law Reform Commission; Professor Garth Nettheim,

University of New South Wales and Director of the Aboriginal Law Research Unit; Mr. Bryan Keon-Cohen, Barrister; Mr. Charles Perkins, Chairman of the Aboriginal Development Commission; Mr. Kevin Cook, Director of Tranby Aboriginal Co-operative College; and Professor Diane Bell, Australian National University. This study would not have been possible without the assistance of them all. Although any errors are mine, whatever credit is due truly belongs to them.

The information contained herein is believed to reflect conditions in Australia as of November 1984.

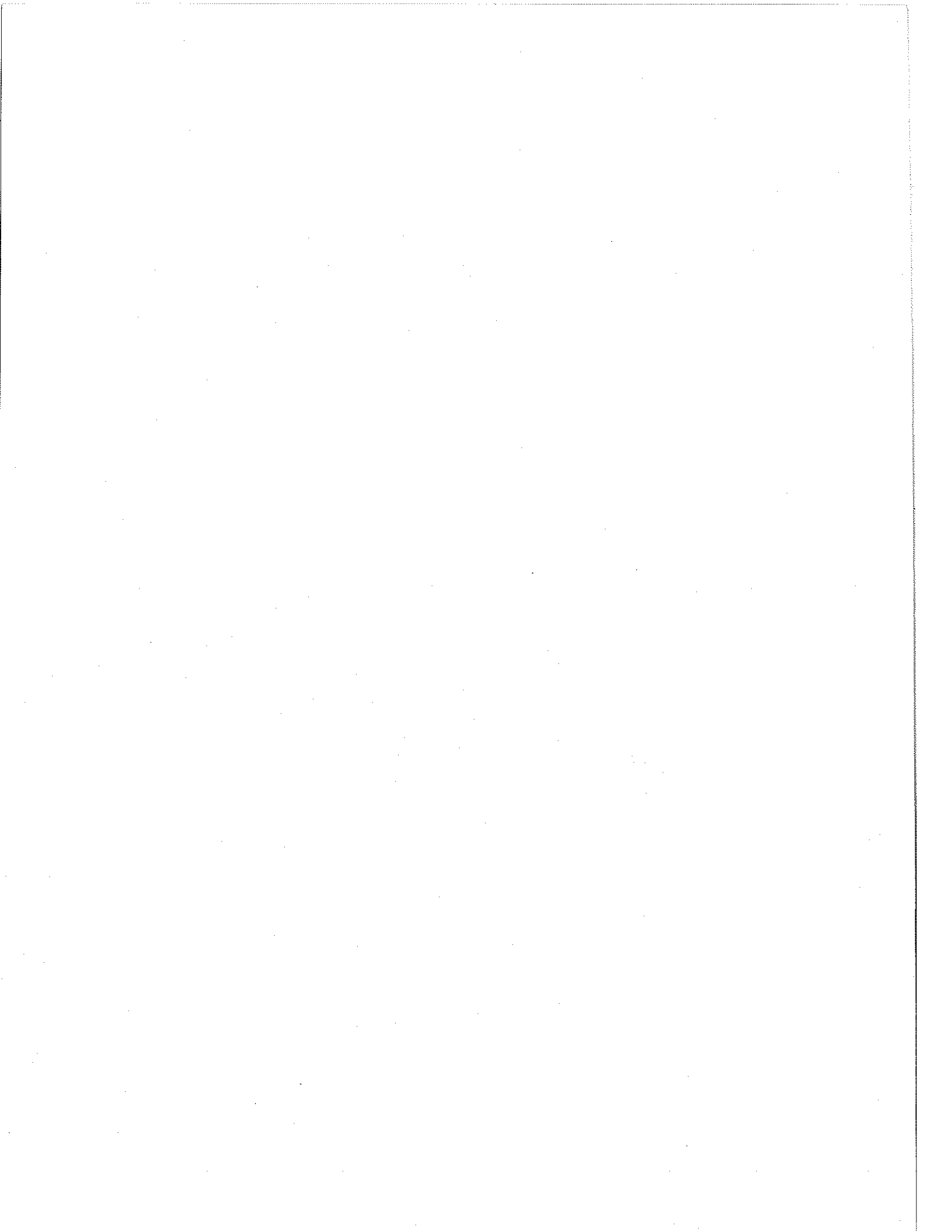
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November 1984

## ABSTRACT

Aboriginal self-government requires a territorially defined land base under Aboriginal jurisdiction, a population which controls its own membership, natural resources, a system of government, a prosperous economy, and a legal regime that is free both to maintain traditional or customary law while adapting to changing circumstances. The experience of Aboriginals and Torres Strait Islanders in Australia is examined in some detail regarding each of these essential attributes of self-government so as to provide information and potentially useful ideas for consideration by Indian, Métis and Inuit organizations and communities in Canada. Although it is not possible simply to adopt the experiences of others as a model, it is suggested that some developments in Australia are worthy of greater inspection.

## SOMMAIRE

Pour un gouvernement aborigène autonome, il faut un territoire bien délimité où s'exerce la juridiction aborigène, le droit de contrôler les adhésions à la réserve, des ressources naturelles, un régime politique, une économie saine et le pouvoir législatif à la fois de préserver le droit traditionnel ou coutumier et de l'adapter aux nouveaux besoins d'une société qui évolue. Les caractéristiques essentielles du gouvernement autonome, telles qu'elles ressortent de l'expérience des aborigènes et des insulaires du détroit de Torres, en Australie, sont étudiées en détail, afin d'en dégager tous les renseignements et les idées qui semblent prometteuses et qui pourraient être d'intérêt pour les organisations et les communautés d'Indiens, de Métis et d'Inuit du Canada. Bien qu'il soit impossible de calquer à la lettre l'expérience des autres, il est suggéré que certains développements australiens méritent une analyse plus approfondie.



## 1 INTRODUCTION

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This study will focus upon a number of aspects related to self-government of the Aboriginal people of Australia. The purpose of the paper is to describe the Australian situation as it exists currently and how it is likely to evolve in the near future so as to elicit possible suggestions and ideas for consideration in Canada. Parallels will be drawn with Canadian experiences where they are applicable and criticisms of Australian developments, as well as positive comments, will be offered so that the reader will be aware of those initiatives which appear not to have worked, those which have been regarded as unsatisfactory by the indigenous population, and those which have been widely praised.

Certain specific issues which have arisen in the Australian experience are of particular interest to the Indian, Métis and Inuit peoples of Canada, as well as to federal and provincial governments. This is particularly so in the present context as attention is focussed on indigenous self-government in Canada through the constitutional process of ss. 35 and 37, of the **Constitution Act, 1982** general federal legislative initiatives (Bill C-52, the **Indian Self-Government Act**), recent

specific federal legislation (Bill C-46, the **Cree-Naskapi (of Québec) Act**), land claims settlements involving some degree of self-government (the James Bay and Northern Québec Agreement, the Northeastern Québec Agreement, and the Inuvialuit or COPE Agreement of the Western Arctic), land claims negotiations including self-government (the Dene/Métis claim, Council for Yukon Indians claim, Tungavik Federation of Nunavut claim, Nishga claim, etc.), provincial review of self-government legislation for the Métis in Alberta, constitutional division of the Northwest Territories into Denendeh and Nunavut, and the provincehood aspirations of the Yukon Territory.

Australian developments are also relevant to Canada in related areas of land rights and tenure, wildlife harvesting, environmental management, customary law, and the legal determination of who controls the definition of the Aboriginal peoples, for what purposes and on what basis. Therefore, this paper will attempt to answer the following questions:

- Who are the indigenous peoples of Australia? (i.e., a descriptive overview of demographic, socio-economic, educational, employment, health and justice system contact data as well as a brief review of historical and cultural information);
- How are the Aboriginal people of Australia defined? (i.e., a review of legislation and governmental programs to determine the definition used to indicate how the Aboriginal person and community is defined and by whom);
- What is the constitutional arrangement in Australia concerning the indigenous peoples? (i.e., a review of the constitutional status of Aboriginal people plus the division of powers and responsibilities among the federal, state and territorial governments in Australia regarding the original inhabitants);

- What is their land base, how has it been created and why? (i.e., an analysis of aboriginal land rights through case law and legislation);
- What are the systems and types of land tenure for Aboriginal lands? (i.e., who holds title, in what way, on what terms, and what is the source of title);
- What are the types and bases of Aboriginal governments in existence in Australia? (i.e., how have these governments been established, by whom, and what types of governmental structures have been created);
- What are the powers and activities of Aboriginal governments? (i.e., an analysis of the scope of legal and administrative powers possessed by Aboriginal governments and how they are enforced);
- How do these powers function in relation to non-Aboriginal governments? (i.e., regarding off-reserve issues, within reserve borders when conflict with federal, state or territorial laws, or when Aboriginal governments wish to incorporate and apply the laws of non-Aboriginal governments within their lands); and
- What is the status and role of Aboriginal customary law in Australia? (i.e., accepted and applied by general courts, stemming from recognition through general and/or specific legislation, and as enforced within Aboriginal communities).

All of these issues are critical components to any regime of self-government and each warrants very extensive consideration and detailed analysis. Given space limitations, the author is unable to give full justice to the treatment of all of these matters. Nevertheless, it is hoped that this overview will provide sufficient information to allow the reader to understand the gist of the Australian scene and to spark further exploration into those aspects of particular interest. Ideas generated by this examination of Australian initiatives will be considered in light of their possible practicality and adaptability to the Canadian context. Personal observations and suggestions of the author will naturally be made based

upon available written information and communications with various people in Australia.



## 2 THE INDIGENOUS PEOPLES OF AUSTRALIA

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The original inhabitants of Australia are called Aboriginals (the term "Aborigines" is disappearing due to its derogatory overtones) and Torres Strait Islanders. Somewhat similar to the situation in Canada and the United States, the indigenous population consists of more than one culturally and racially distinct people living different lifestyles on their own lands.

The Torres Strait Islanders obtain their common title as such from their traditional occupation of the islands in the Torres Strait, which separates northeastern Australia from Papua New Guinea. They continue to maintain their traditional economy based primarily on the fishery and reside in their settled villages on a number of islands as they have done for thousands of years. Their origins and culture are dramatically different from the Aboriginals of continental Australia and Tasmania. The Torres Strait Islanders are instead related by culture, language and family ties to some of their Papua New Guinean neighbours. They were spared the impact of European colonization until the late 1800s and even today have not suffered as dramatically as Aboriginals from forced displacement from traditional lands or significant marginalization of their economy.

Aboriginals have lived in Australia for over 40,000 years, with some archaeological evidence indicating their existence there up to 100,000 years ago. They clearly possess one of the oldest, if not the oldest, surviving cultures in the world today. Although Aboriginals are believed to have a single racial origin, they have naturally evolved in many different ways across Australia in adapting to environmental influences owing to dramatic climatic, geological and wildlife variations.

Aboriginals were largely nomadic hunter-gatherers who travelled throughout their tribal lands. Prior to English settlement, there were thought to be from 300,000 to 600,000 Aboriginal people living in 500 different tribes ranging in size from 100 to 1500 people, possessing approximately 600 different languages. Each tribe was known to occupy a particular region for which it had exclusive gathering rights and sacred ceremonial obligations. The tribe shared a language, or dialect thereof, as well as a common culture, history, set of religious beliefs, and legal principles. Since survival was a constant concern in a land of limited wildlife, the tribe gathered as a whole only briefly in good seasons and existed otherwise in smaller, self-sufficient economic units in harmony with their environment.

Aboriginal society, culture and law was extremely rich and complex with a highly developed kinship system. They created an informal governing structure based primarily upon the decisions of separate councils of male and female elders who knew the sacred laws. Aboriginal art, culture, religion and law were inextricably intertwined with each other and with the land. This view of the life

cycle and the land as a nurturing mother has much in common with traditional Indian and Inuit beliefs.

European colonization began in Sydney in 1788 with the arrival of the first convict-settlers. Aboriginal people underwent incredible hardship through the detrimental effects of exploitation, racism, disease and colonialist policies in conflict with the continued existence of their traditional way of life. The vast majority of languages and tribes were lost through decimation or intentional destruction as the Aboriginal population dropped to as low as 60,000 by the end of the 19th century.

Although outright warfare never occurred, massacres of Aboriginals were not uncommon nor was their guerilla resistance to being displaced by the expansion of settlement. They were continually moved westward and northward by colonists seizing productive lands until only reservations or harsh wilderness remained. Settlers viewed the original inhabitants as "primitive" and sub-human possessing nothing recognizable to them as governments, cultures, land ownership, economies, or laws. Therefore, there was no willingness whatsoever to negotiate treaties, to develop friendship, to promote trade, to purchase land, or to engage in government-to-government relations.

Although the British policy of recognizing aboriginal title and negotiating nation-to-nation treaties was well known, colonial governments viewed this approach as primarily applicable only to North America where the indigenous population was regarded as "civilized." The absence of European competitors

made such a different policy far easier to follow as did the fact that Aboriginals were largely non-militaristic in nature and lived in small decentralized communities which posed little concerted threat to settlement. The original inhabitants of Australia were not regarded as economically important either as trading partners or as teachers who could advise the foreigners how to survive in a different environment. There was, then, no factor present to force or prod the colonizers to treat the indigenous people fairly. The debate amongst the colonists centred solely on such issues as extermination versus assimilation versus segregation, while Imperial demands for adherence to aboriginal title policy were simply rejected or ignored.

Despite obvious differences between their histories, there are many parallels between the two countries. Australia has also had its periods in which Christian missionaries were relied upon to convert and assimilate the Aboriginals through the destruction of their traditional languages, cultures and religions. The reservation system was used to segregate Aboriginal adults whereas residential schools and the child welfare system were utilized to assimilate the young, particularly with mixed blood children. While Aboriginal males were trained to become cheap labour on cattle stations and sugar cane plantations, Canadian Indians were being taught to become farmers.

Official policies ranged from being ethnocentric, at best, to genocidal. As Mr. Justice Murphy of the High Court of Australia stated:

The history of the Aboriginal people of Australia since European settlement, is that they have been the subject of unprovoked

aggression, conquest, pillage, rape, brutalisation, attempted genocide and systematic and unsystematic destruction of their culture.

Professor James Crawford of the Australian Law Reform Commission summarized this history in these words:

In 200 years Aborigines have seen dispossession, disintegration of much of their religion and culture, and damage to or destruction of their environment. They have come to know poverty, inequality and demoralization.

Fortunately, things have improved somewhat in the last three decades. The Aboriginal and Torres Strait Islander population has been on the rise since the 1950s. According to the 1981 national census, 159,897 people identified themselves as Aborigines or Torres Strait Islanders, with the latter numbering 15,232. Their lifestyles vary dramatically from traditional living in remote areas relatively unaffected by western influences to that of urbanized people who have fully joined the wage economy.

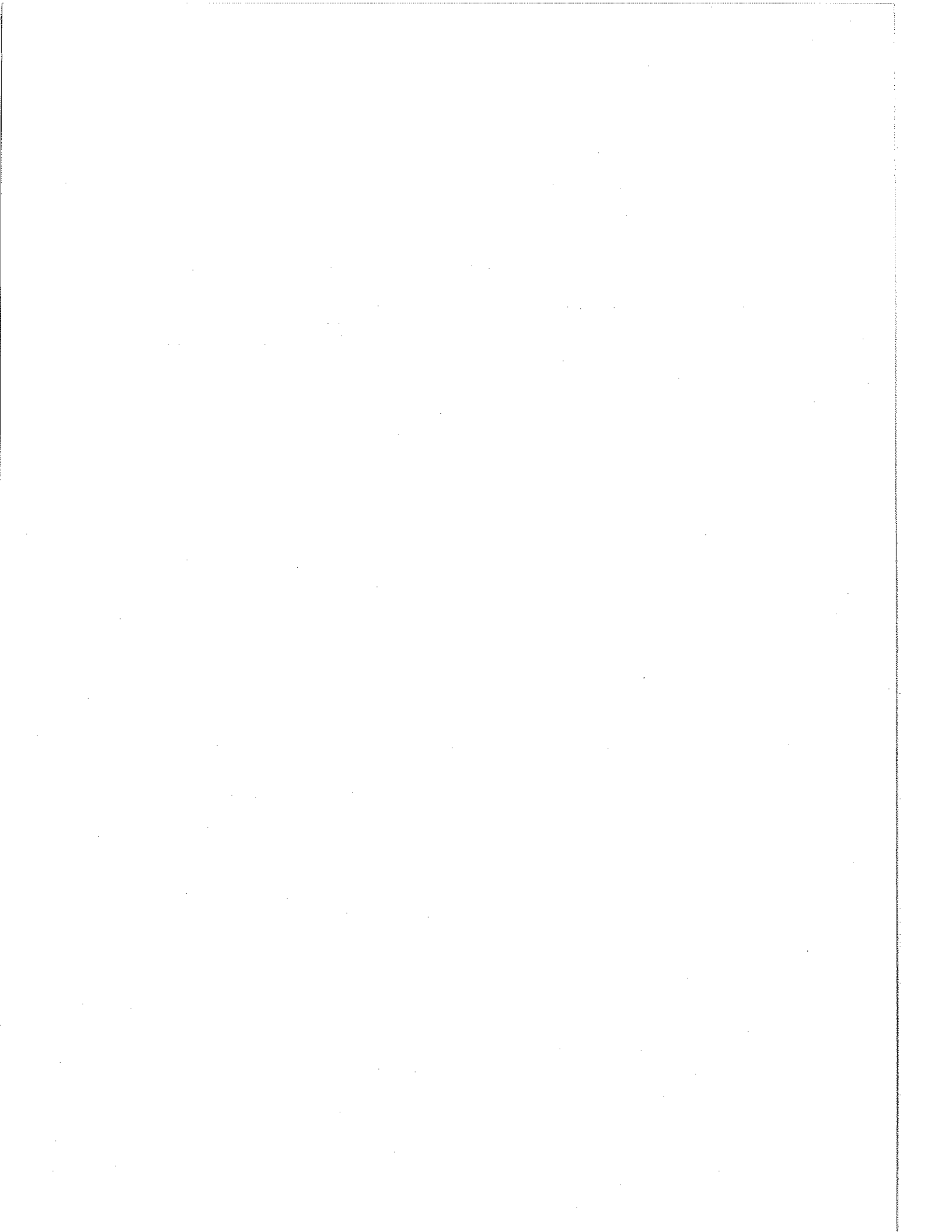
Secondary school enrollment has leapt from 3000 in 1967 to 19,000 by 1981; however, one quarter of all Aborigines over 15 have never attended school. Post-secondary education enrollment is growing rapidly, although fewer than 300 Aborigines had any form of tertiary degree as of 1981. The known unemployment rate for Aborigines is six times higher than the national average, or 32 per cent of the possible Aboriginal workforce, while those of Aboriginal descent have only 40 per cent of the jobs with the Commonwealth government that they should have in proportion to their percentage of the total population. Infant mortality is three

times higher and the prevalence of trachoma is 15 times greater than in the non-Aboriginal population, while life expectancy is 20 years lower. Inadequate housing, poor health, over-representation in prisons, unemployment, low educational success, alarmingly high child welfare apprehension rates and alcoholism continue to be the reality for far too many Aboriginals and Torres Strait Islanders -- as it is for many Indian, Métis and Inuit people in Canada.

One bright spot has been the success of the Aboriginal Development Commission. Created in 1980 by the Commonwealth Parliament to assume the functions of two former statutory bodies (the Aboriginal Land Fund Commission and the Aboriginal Loans Commission) and certain aspects of the federal Department of Aboriginal Affairs, it has exclusive responsibility for federal grants to Aboriginal housing associations, housing loans to individuals, economic development grants and loans for commercial enterprises. The ten-member all-Aboriginal Commission receives an annual budget approved by Parliament, which now is well in excess of \$60 million, to devote as it thinks best to meet the needs of Aboriginals and Torres Strait Islanders for housing and economic development initiatives. It also has the authority to acquire land by purchase so as to provide an economic base for land-poor Aboriginal communities. It is now the largest quasi-private landholder in Australia.

The above statistics generally paint a very bleak picture of the conditions in which Aboriginals and Torres Strait Islanders live. This is comparable to the

situation which confronts the Indian, Métis and Inuit peoples in Canada. Fortunately, there are a number of bright spots disclosed among the tragic data reflecting the significant progress that has been made over the last decade. The balance of this study will focus upon certain critical areas in which this progress is occurring.





### 3 DEFINING INDIGENOUSNESS IN LAW

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A major problem for the original inhabitants of Canada has been the way in which they have been defined in statute law. The **Indian Act** over the years, and its pre-confederation forebears, contained provisions whereby "Indianness" was defined by law to determine who was eligible to obtain the benefits and suffer the disadvantages accruing to those included within the scope of the legislation. Although the original rationale in colonial days was the necessity to distinguish from all others who had the right to reside on Indian reserve lands, the effect of such a statutory definition has been very far-reaching.

The complex regime of defining Indians, along with the cumbersome registration system contained within the **Indian Act**, has come to control eligibility for all special programs and services offered by the Government of Canada to "Indians." It has also been decisive in relation to other federal legislation (for example, the **Income Tax Act**) and has frequently been falsely assumed to define the term "Indian" in constitutional enactments such as s. 91(24) of the **Constitution Act, 1867** and the 1930 amendments thereto via the Natural Resources Transfer Agreements.

As a result, people of Indian ancestry have been separated into those who are legally Indians (called registered or status Indians) and those who are not (known as non-registered or non-status Indians). This legal sleight-of-hand has been rendered more absurd through the inclusion of people with no such ancestry as Indians (through the marriage of a woman to a registered Indian male (s. 11(1)(f)). Others can lose such a position after birth via marriage of an Indian woman to a man who is not a registered Indian (s. 12(1)(b); the double mother rule (s. 12(1)(a)(iv); or the enfranchisement of one's parent (s. 109(1)).

The Inuit and Métis have been largely spared from this paternalistic and destructive approach; however, this is largely through governmental indifference rather than design. They have, therefore, generally not been the beneficiaries of "protective" legislation intended to ensure their continued existence as a separate and distinct people within Canadian society.

Early Australian practice also had its fair share of paternalism and assimilative impulses. Legislation in various states defined Aboriginality by reference to degrees of blood by segregating people or extending certain benefits to those Aboriginals possessing the required degree of non-Aboriginal blood. Statutes were replete with terms which today sound ludicrous, such as octoroon, quadroon and half-caste.

This was, however, never to play the same significantly important role that it has in Canada nor was it ever particularly accepted as meaningful by Aboriginal communities. As such, it was relatively easy for Australia to jettison this

approach as part of its racist past when it entered a somewhat more progressive era in recent years.

The fact that the federal government of Australia was constitutionally precluded from developing any special relationship with Aboriginals and Torres Strait Islanders until after 1967 has been an advantage. Coming late to this field, the Commonwealth (federal) government had not created a history of restrictive, technical or bureaucratic definitions of what constitutes Aboriginality or what standard must be met by an individual to be regarded as a member of the Aboriginal and Torres Strait Islander peoples. The Commonwealth initially developed an administrative definition for program eligibility purposes which subsequently became a statutory definition. To be an Aboriginal, a person must meet three requirements, namely: (1) be of Aboriginal descent; (2) regard oneself as such; and (3) be accepted by other Aboriginal people as an Aboriginal.

As is readily apparent, this broad definition was phrased so as to favour maximum flexibility and breadth of coverage rather than principles of certainty or exclusivity. It was designed so as to encompass all possible people of Aboriginal descent, regardless of degree of blood quantum, yet at the same time reflect concerns for freedom of choice (by way of self-inclusion or exclusion) and community control of membership. The same approach has also been used in defining Torres Strait Islanders.

This broad definition has now been accepted by the High Court of Australia (the highest court in the land) as corresponding with the constitutional definition

of the "Aboriginal race" within s. 51(xxvi) of the Constitution. Mr. Justice Deane put it this way in the recent decision of the **Commonwealth v. Tasmania**:

by "Australian Aboriginal" I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal.

This is not to say, however, that this "conventional meaning" is always given to the term even in federal legislation. For example, the **Aboriginal Land Rights (Northern Territory) Act 1976** defines the term in this way:

s. 3(1) 'Aboriginal' means a person who is a member of the Aboriginal race of Australia.

This same definition is used in several other Commonwealth statutes (e.g., **Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975**, s. 3; and **Aborigines and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978**, s. 3) while some enactments do not define Aboriginal people at all (e.g., **Aboriginal Development Commission Act 1980**).

The Northern Territory generally adopts the Commonwealth's legislative definition (e.g., **Aboriginal Land Act**, s. 3, **Aboriginal Sacred Sites Act**, s. 3) or is silent (e.g., **Community Welfare Act**, 1983).

Some states use definitions which rely solely upon racial characteristics with occasional historical overtones. Some selected examples are as follows:

1) Tasmania

**Aboriginal Relics Act 1975**

s. 2(2) For the purposes of this Act, any person who has wholly or partly descended from the original inhabitants of Australia is a person of Aboriginal descent.

2) Victoria

**Aboriginal Lands Act 1970**

s. 2 'Aborigine' means a person who descended from an Aboriginal native of Australia.

**Archaeological and Aboriginal Relics Preservation Act 1972**

s. 2 'Aborigine' means inhabitant of Australia in pre-historic ages or a descendant from any such person.

3) South Australia

**Community Welfare Act 1972**

s. 6 'Aboriginal' means a person who is wholly or partly descended from those who inhabited Australia prior to European colonization.

**Aboriginal Heritage Act 1979**

s. 5 'Aboriginal' means of, or pertaining to, the Aboriginal people. 'Aboriginal people' means the people who inhabited Australia prior to European colonization and includes the descendants of those people.

4) Queensland

**Aborigines Act 1971**

s. 5 'Aborigine' means a person who is a descendant of an indigenous inhabitant of the Commonwealth of Australia other than the Torres Strait Islands.

**Aboriginal Relics Preservation Act 1967**

s. 3 'Aboriginal' means pertaining to the indigenous inhabitants (whether Aborigines or Torres Strait Islanders) of the Commonwealth.

5) Western Australia

**Aboriginal Heritage Act 1972**

s. 4 'Aboriginal' means pertaining to the original inhabitants of Australia and to their descendants.

'person of Aboriginal descent' means any person wholly or partly descended from the original inhabitants of Australia.

On the other hand, the three part definition is used in various other statutes, for example:

1) Western Australia

**Aboriginal Affairs Planning Authority Act 1972**

s. 4 'person of Aboriginal descent' means any person living in Western Australia wholly or partly descended from the original inhabitants of Australia who claims to be an Aboriginal and who is accepted as such in the community in which he lives.

**Fisheries Act 1905**

s. 56(3) 'person of Aboriginal descent' means any person living in Western Australia who --

- a) is wholly or partly descended from the original inhabitants of Australia; and
- b) claims to be an Aboriginal and is accepted as such in the community in which he lives.

2) New South Wales

**Aboriginal Land Rights Act 1983**

s. 4(1) 'Aboriginal' means a person who --

- a) is a member of the Aboriginal race of Australia;
- b) identifies as an Aboriginal; and
- c) is accepted by the Aboriginal community as an Aboriginal.

It should be noted, however, that all of these statutory definitions are just that - definitions contained in ordinary statutes. As such, they can be readily altered by the enacting body, although the High Court of Australia's view in **Commonwealth v. Tasmania** as to federal constitutional authority is not susceptible to such change. Furthermore, the Aboriginal and Torres Strait Islander people do not possess express control over membership in the manner that has been sought in Canada by the Assembly of First Nations.

Nevertheless, a definition based on race, self-determination and community acceptance has much to offer for Canadian consideration. It could be adopted to clarify the meaning of terms used in the Constitution, such as the reference to Indians in the Terms of Union of British Columbia, the Natural Resource Transfer Agreement of 1930 and the following:

**Constitution Act, 1982**

s. 35(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

**Constitution Act, 1867**

s. 91(24) Indians, and Lands reserved for the Indians.

Considerable uncertainty exists in Canadian law as to the precise parameters of these provisions. Although s. 91(24) of the **Constitution Act, 1867** has been judicially interpreted to include the Inuit, it has never been firmly resolved if non-status Indians and the Métis are also included. Even if it does, as s. 35(2) of the **Constitution Act, 1982** was clearly intended to do, this does not

answer the practical questions of whether or not any particular person is covered by these constitutional provisions, on what specific criteria is the decision made and by whom.

The Australian approach is not only flexible, but it also meets indigenous demands for a voice in deciding who their members are and ensuring that ancestry is a vital element in the judgment. In addition, this model assuages the concern from some provincial and federal government representatives that individuals should have the right to decide for themselves whether they wish to receive this special status.



#### 4 AUSTRALIAN CONSTITUTIONAL ARRANGEMENTS

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During Australia's colonial period, just as in Canada prior to confederation, relations with Aboriginal and Torres Strait Islander people were officially a matter within Imperial control exercised in the name of the Crown, but were in fact delegated to the local colonial governments within Australia for actual implementation. This permitted the individual colonies to do generally what they pleased.

The parallel with Canadian historical development in this area is dramatically broken with the bestowal of independence upon Australia in 1900. Rather than transferring this royal responsibility and power to the federal government as was done through s. 91(24) of the **British North America Act** of 1867 (now the **Constitution Act, 1867**), the framers of the Australian Constitution decided to keep this subject area within the authority of the local (now known as state) governments by expressly excluding any role for the national (now Commonwealth) government. Thus, when the Commonwealth Constitution<sup>1</sup> came into force on January 1, 1901, it treated the development and implementation of Aboriginal Affairs policies solely as a state responsibility.

This was instituted indirectly by granting the Commonwealth Parliament its legislative powers in s. 51 to "make laws for the peace, order and good government of the Commonwealth with respect to ... (26) the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws." The key phrase, "other than the aboriginal race in any State," clearly had the effect of limiting federal power regarding Aboriginal and Torres Strait Islander people strictly to the Northern Territory.

This exclusion appears to have drawn no attention within the debates on this clause.<sup>2</sup> One leading authority rationalizes this on the basis that, in the 1890s, the founding fathers had little interest in the welfare of the indigenous population and "it was widely thought that the Aborigines were a dying race whose future was unimportant."<sup>3</sup> Contemporary commentators wrote of its purpose in these terms:

It enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth, to localize them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.<sup>4</sup>

In other words, it was designed to empower the Commonwealth Parliament to enact racially discriminatory legislation to respond to fears flowing from past influxes of Pacific Islanders and Chinese immigrants.

The decline in Aboriginal population from at least 300,000 at contact to a mere 66,950 by 1901 would have reduced the threat perceived by the "founding

fathers" from the original inhabitants such that it could happily be left to the states to oversee the expected ultimate assimilation or extinction of the indigenous peoples. The Constitution further buttressed this view by expressly prohibiting the counting of "aboriginal natives in reckoning the numbers of people of the Commonwealth" in s. 127.

Public pressure and Parliamentary initiatives began building in the late 1950s to amend the Constitution by repealing s. 127 and deleting the aforementioned restriction within s. 51(xxvi). After several false starts and half measures, Prime Minister Harold Holt introduced the **Constitution Alteration (Aboriginals) Bill** on March 1, 1967. He described the effect of the amendment to s. 51(26) as:

... the removal of the existing restriction on the power of the Commonwealth to make special laws for the people of the Aboriginal race in any State if the Parliament considers it necessary. As the Constitution stands at present, the Commonwealth has no power, except in the Territories, to legislate with respect to people of the Aboriginal race as such. If the words "other than the Aboriginal race in any State" were deleted from Section 51(xxvi), the result would be that the Commonwealth Parliament would have vested in it a concurrent legislative power with respect to Aboriginals as such, they being the people of a race, provided that Parliament deemed it necessary to make special laws for them. It is the view of the Government that the National Parliament should have this power.<sup>5</sup>

The Bill was ultimately passed by both Houses of Parliament and approved by a public referendum with 5,183,133 voting in favour and only 527,007 against the change.

Therefore, the present constitutional situation in Australia is that of co-operative federalism in that both the States and the Commonwealth have

concurrent jurisdiction regarding Aboriginal peoples. The critical sections defining the jurisdiction of each level are reproduced in full in Appendix I.

The Australian Constitution possesses many similarities to the **Constitution Act, 1867**. The Parliament of Australia, which consists of an elected House of Commons and Senate, is given legislative jurisdiction over a long list of specific subjects in s. 51 much like the Canadian Parliament receives in s. 91. Both obtained the additional authority to pass laws for the "peace, order and good government" of their respective countries. The States retained their former powers as colonial governments except to the extent that the Parliament was empowered to legislate in that field (s. 107). The paramountcy of Parliament is expressly established by s. 109, as any conflicts between federal and state statutes will be resolved in favour of the former. The States are also granted or denied powers regarding certain additional fields (ss. 110-120). Furthermore, Parliament has exclusive authority over any territories (s. 122) or any other head of power granted to it by the States as a whole or by an individual State (ss. 51(xxxvii) and 111).

Although the constitutional amendment of 1967 clearly authorized the Commonwealth to legislate for Aboriginal and Torres Strait Islander peoples, this neither required such action nor clarified the extent of its power. The approach for over a decade was to establish special programs or services for the original inhabitants through the Department of Aboriginal Affairs or newly created commissions. Federal legislation in this field was restricted to the Northern

Territory, where the Commonwealth could safely act without incurring the wrath of state governments which might view general federal Aboriginal legislation as an invasion of state jurisdiction.

This position recently changed as a result of two completely unrelated developments. Firstly, the Government of Queensland has had a rather long and notorious record of maintaining apartheid-like conditions for Aboriginal and Torres Strait Islander people on reserves set aside for their exclusive use. As a result of this general situation, and certain specific threats of the State to adopt even more restrictive legislation, the Commonwealth Parliament was moved to enact the **Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975** and the **Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978** as initiatives to forestall the State's intentions by overriding any contradictory aspects in state laws.

The second development occurred through the courts as the Commonwealth attempted to uphold legislation primarily enacted to meet other purposes. The High Court of Australia had occasion to consider the scope of the s. 51(xxvi) power in **Koowarta v. Bjelke-Petersen and Others** ((1982), 39 A.L.R. 417). The plaintiff, an Aborigine, brought an action under the **Racial Discrimination Act 1975 (Cth)** alleging racism on the part of the Queensland Government in refusing to approve the transfer of a pastoral lease acquired by the Aboriginal Land Fund Commission to an Aboriginal group of which he was a member. Although the decision turned on the external affairs power (s. 51(xxix)), the majority of the

Court interpreted s. 51(xxvi) to have a wide meaning. Chief Justice Gibbs, Aickin and Wilson JJ concurring, viewed this subsection as empowering legislation for a racial group for whom Parliament decides it is necessary to make special laws.

He goes on to say, at p. 429:

The Parliament may deem it necessary to make special laws for the people of a particular race, no matter what the race. If the Parliament does deem that necessary, but not otherwise, it can make laws with respect to the people of that race. The opinion of Parliament that it is necessary to make a special law need not be evidenced by an express declaration to that effect; it may appear from the law itself. However, a law which applies equally to the people of all races is not a special law for the people of any one race.

Ironically, although the High Court gave this power a broad interpretation, it rejected it as supporting the statute under consideration in that case because it was a general rather than "special" law and applied to all races rather than "the people of any race."

The High Court had a further opportunity to reconsider the matter in *Commonwealth v. Tasmania* ((1983), 46 A.L.R. 625). The Tasmanian Government sought to build a large dam to generate hydro-electric power on the Gordon-below-Franklin River. This was a wilderness area which had previously been registered by the Commonwealth as a world heritage area under the United Nations-sponsored Convention for the Protection of the World Cultural and National Heritage of 1972. The flooding caused by the dam would also have destroyed several sites of sacred and archaeological significance concerning the early Aboriginal people of Tasmania. After a national election campaign, in

which this dam was a major issue, the new Commonwealth Government passed legislation prohibiting further construction on the project. One of the grounds relied upon as substantiating this unprecedented action was s. 51(xxvi) so as to protect the Aboriginal sites.

A bare majority (4 - 3) of the High Court upheld the constitutionality of the federal statute, on several grounds, including this power. Since the enactment was not solely directed at special laws for a particular race, but had a much broader and widely known purpose, this decision can only be viewed as ratification for a very broad interpretation of s. 51(xxvi).

Mr. Justice Mason (at p. 121) described the power as sufficiently extensive to allow Parliament:

- a) to regulate and control the people of any race in the event that they constitute a threat or problem to the general community; and
- b) to protect the people of a race in the event that there is a need to protect them.

Murphy J. viewed the power as solely beneficial when he said (at p. 147):

A broad reading of this power is that it authorizes any law for the benefit, physical and mental, of the people of the race for whom Parliament deems it necessary to pass special laws.

Mr. Justice Brennan adopted the same approach by inferring this as the primary purpose of the 1967 referendum. He went on (at p. 220):

Where Parliament seeks to confer a discriminatory benefit on the people of the Aboriginal race, par. (xxvi) does not place a limitation upon the nature of the benefits which a valid law may confer, and none should be implied.

Deane J. conceived of the power as being so comprehensive as to authorize Commonwealth legislation for Aboriginal people as a whole or for a tribal subgroup. He put it most eloquently by stating (at pp. 256-7):

The relationship between the Aboriginal people and the lands which they occupy lies at the heart of traditional Aboriginal culture and traditional Aboriginal life ... one effect of the years since 1788 and of the emergence of Australia as a nation has been that Aboriginal sites which would once have been of particular significance only to the members of a particular tribe are now regarded by those Australian Aboriginals who have moved, or been born away from ancient tribal lands, as part of a general heritage of their race.

Deane J. did not view the power as limited to sites of archaeological significance only, as he defined its reach in these words (at p. 258):

The reference to "people of any race" includes all that goes to make up the personality and identity of the people of a race: spirit, belief, knowledge, tradition and cultural and spiritual heritage. A power to legislate "with respect to" the people of a race includes the power to make laws protecting the cultural and spiritual heritage of those people by protecting property which is of particular significance to that spiritual and cultural heritage.

The Senate Standing Committee on Constitutional and Legal Affairs has regarded the **Tasmanian Dam Case** as having clarified Parliament's power to include, on "the narrowest view of s. 51(xxvi)" any statutes so long as they are "special laws for the benefit of people of the Aboriginal race."<sup>6</sup> The Committee



concluded that this power would support the passage of a treaty or compact with Aboriginal people and/or "laws dealing with the language and culture of Aboriginal communities; laws for the protection of Aboriginal sacred sites and artefacts; laws recognising and giving effect to Aboriginal law; and laws protecting language rights so as to guarantee the assistance of interpreters to Aboriginal people involved with the police, the courts or government departments."<sup>7</sup>

The Commonwealth has since enacted the **Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984** to preserve and protect places, areas and objects of particular significance to Aboriginals. This legislation binds the Crown in right of the Commonwealth, of each state, of the Northern Territory and of Norfolk Island (s. 6). Permanent legislation of a broader scale is under joint study with Aboriginal organizations concerning the advisability and content of national Aboriginal land rights legislation.<sup>8</sup>

It now appears clear that the Commonwealth has concurrent legislative jurisdiction with the states; however, the existence of any inconsistency or conflict between statutes enacted by the two levels of government will be resolved in favour of the federal legislation by virtue of s. 109 of the Constitution. The present Commonwealth government is attempting to avoid strife by maintaining the policy initiated by former governments of "co-operative federalism" wherever possible. Nevertheless, it has served notice on the states that it will exercise its superior legislative authority if necessary to implement its objectives in fostering justice and self-sufficiency for the Aboriginal people of Australia.

Canadians can readily see comparable themes and directions in this Australian experience.

## 5 ABORIGINAL LAND

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This chapter will briefly outline the history of Aboriginal title in law and in governmental policy in Australia culminating in the present situation. State and Commonwealth legislation establishing land trusts for existing reserves as well as the more recent land rights statutes in Australia will be examined in broad terms. Parallels and contrasts with Canadian developments will be indicated.

### ABORIGINAL TITLE

The land is my backbone. I only stand straight, happy, proud and not ashamed about my colour because I still have land. The land is the art. I can paint, dance, create and sing as my ancestors did before me. My people recorded these things about our land this way, so that I and all others like me may do the same. I think of land as the history of my nation. It tells us how we came into being and what system we must live. My great ancestors who lived in the times of history planned everything that we practice now. The law of history says that we must not take land, fight over land, steal land, give land and so on. My land is mine only because I came in spirit from that land, and so did my ancestors of the same land ... My land is my foundation. I stand, live and perform as long as I have something firm and hard to stand on ... We will be the lowest people in the world, because you have broken down my backbone, took away my arts, history and foundation. You have left me with nothing. Without land, I am nothing. (James Galarrwuy Yunupingu, "Letter from Black to White," **Land Rights News**, Northern Land Council, Northern Territory, December 1976, at p. 9).

... Wherever I have travelled in the Aboriginal World, there has been a common attachment to the land. This is not the land that can be speculated, bought, sold, mortgaged, claimed by one state, surrendered or counterclaimed by another. These are things that men do only on the land claimed by a king who rules by the grace of God, and through whose grace and favour men must make their fortunes on this earth. The land from which our culture springs is like the water and the air, one and indivisible. The land is our Mother Earth. The animals who grow on that land are our spiritual brothers. We are a part of that Creation that the Mother Earth brought forth. More complicated, more sophisticated than the other creatures, but no nearer to the Creator who infused us with life. (George Manuel and Michael Polunin, **The Fourth World: An Indian Reality**, Don Mills, Ontario: Collier-Macmillan Canada Ltd., 1974, at p. 6).

Once again as in Canada, Australian Aboriginals and Torres Strait Islanders possess a land base which has had an erratic and unusual history. Dispossession of communities from their traditional lands began with the establishment of the first white settlement and has continued until the present.

During much of this 196 year period, Australia followed the North American lead of developing a reserve policy and system. It, too, relied in part on religious organizations to establish church missions. The Crown then gave land to the particular religious order to hold as an Aboriginal mission for the purpose of "christianizing and civilizing" Aboriginals while transforming them from migratory to sedentary people. All of this met colonialist objectives as it released land for white settlement while encouraging Aboriginals to assimilate into the wage economy as cheap and suppliant labour. The use of religious societies for this purpose has faded in recent decades and only 691 square kilometres are still being set aside as Aboriginal missions today.<sup>9</sup> This represents a significant decline from 6,632 square kilometres in this status in 1980.<sup>10</sup>

The more popular approach of the 20th century in Australia has been the creation of Crown-owned reserves. One fundamental difference between the Australian and Canadian experience in this regard is in terms of which Crown is the creator of the Reserve. In Australia, it is the Crown in right of the state which has established the reserves, whereas the Crown in right of the Commonwealth has been historically limited in this capacity to non-state areas, i.e., the Northern Territory and the Australian Capital Territory.

A further important difference is that indigenous consent is not required by law to any changes in these reserves after their creation. There has not been, in either the state or federal legislation, any parallels to the surrender provisions found in the **Indian Act**, which require approval by a majority of adult residents of the reserve to any sales or leases of Indian band land. As a result, huge amounts of Aboriginal reserve lands have been withdrawn from Aboriginal hands without their approval, and often without their knowledge, at the whim of the state governments. For example, the Victorian Aboriginal Legal Service has assembled records indicating that some 242,000 acres of land in the State of Victoria have been de-gazetted and thereby removed from reserve status since the late 1830s. These lands later became white farms, communities, and vacant Crown lands and, amongst other things, the home of the Royal Botanical Gardens and Government House in Melbourne.<sup>11</sup> There are now only two reserves left in existence in Victoria totalling only 20 square kilometres, yet the Aboriginal population is over 10,000.

Another significant distinction between Canadian and Australian reserves is a function of the refusal of governments and courts in Australia to recognize

aboriginal title. Although this will be discussed *infra*, this point should be mentioned in passing at this stage. The effect of this view has been that Aboriginal lands are set aside solely as *ex gratia* acts of the Crown. They never have had the required mandate of treaty commitments nor the stature of retained aboriginal title or the Australian equivalent of the Royal Proclamation of 1763 lands. This variation is at the heart of the preceding difference as it underlies the *raison d'être* for the consent requirements in the **Indian Act**.

Not surprisingly, the impact of this has been devastating upon the Aboriginals of Australia as their affinity to, and the importance of, the land is at least as vital to them as it is for the indigenous people of Canada. One writer described the effect of this experience:

For tens of thousands of years prior to the establishment by the British of a penal colony at Botany Bay in 1788, the Australian Aborigines based their life and law on their complex relationships to land. They looked to the Dreamtime, a creative era, when their mythical ancestors wandered across the land, named important sites and features, explained social institutions, and performed rituals. Today their living descendants must perform these rituals and celebrate the activities of the ancestral heros in order to maintain and reaffirm the strength and relevance of the law as an ever present and all guiding force in people's lives ... The loss of land over which to hunt has been more than an economic loss, for it was from the land that Aboriginal people gained not only their economic livelihood but also their sense of being.<sup>12</sup>

This cultural, spiritual and economic significance was simply rejected, misunderstood or dismissed. Another commentator summarized the legal situation succinctly:

Despite the indisputable importance that the land carried, no account was taken of any prior Aboriginal title to the Australian continent or any part of it on settlement. The land holdings of Aboriginal clans and tribes were ignored by the first Europeans. Their special relationship with the land was denied. Under the principles of English common law applying to the Australian colonies it was assumed that all land was vested in the British Crown. This was judicially confirmed in 1825. No title to land could be recognised by the law unless it had been acquired through an express, formal grant from the Crown. In 1889 the Privy Council reaffirmed this position in **Cooper v. Stuart** ((1889), 14 A.C. 286 at 292):

There was no land law or tenure existing in the colony at the time of its annexation to the Crown; and in that condition of matters, the conclusion appears to their Lordships to be inevitable that as soon as colonial land became a subject of settlement and commerce, all transactions in relation to it were governed by English law, and in so far as that law could be just and conveniently applied to them.<sup>13</sup>

Space does not permit a thorough analysis of the Australian jurisprudence and the many flaws that exist in the few cases which have addressed this issue.<sup>14</sup> It must suffice, therefore, to say merely that the issue of the existence or non-existence of aboriginal title in Australia is an open one.

Although many assumed that such a property interest was not part of the Australian law, this has never truly been decided definitively by the High Court of Australia. The colonial decisions rest on virtually no substantive reasoning or analysis, whereas the Privy Council did little better in **Cooper v. Stuart** at the same time as it upheld the concept of aboriginal title in Canada through its decision in **St-Catherines Milling and Lumber Co. v. The Queen** ((1889), 14 A.C. 46). A more recent attempt to assert land claims based on traditional occupancy since time immemorial was rejected by a single judge of the Northern Territory

Supreme Court (**Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth** (1971), 17 F.L.R. 141) while the High Court dealt with it as a side issue only in another case (**Coe v. The Commonwealth** (1979), 24 A.L.R. 118). A substantive test case concerning the aboriginal title of Torres Strait Islanders is before the High Court at the time of writing upon an agreed statement of facts (**Mabo and Others v. Queensland and the Commonwealth**). This action is likely to resolve the debate as the issues have been fully researched and will be fully argued for the first time in the court of last resort in Australia.

#### LAND RIGHTS LEGISLATION

The failure to recognize aboriginal title in Australian law has, somewhat surprisingly, not been a complete obstacle to land rights for Aboriginal people. Its impact, however, has been to shift the focus of debate from whether, or to what extent, the Crown was under **legal** obligations to compensate the indigenous population for breaches of that title and questions concerning **moral, ethical, and political** obligations to do so. Thus, judges and lawyers have played a minimal role in the process of deciding if aboriginal land rights were to be acknowledged. The arenas for discussion of this vital question have been the churches, the press, the streets, the classrooms and the legislatures rather than the courts or government departmental offices.

The first initiative to grant title to land to Aboriginal people taken by any government occurred in South Australia in the mid-1960s. The **Aboriginal Lands**



**Trust Act** 1966 was enacted by that State and proclaimed on December 8, 1966. The purpose and effect of the statute was to convey title to the Aboriginal reserves then in existence in South Australia to a corporate body composed of Aboriginal people independent from government. The Act has been amended on several occasions over the years and additional lands have been transferred to the Aboriginal Lands Trust such that it holds a total of 485,582.8 hectares of land contained in 43 separate parcels.

This development received considerable publicity and sparked demands for similar action elsewhere. Governmental policy reviews were undertaken in New South Wales, Victoria, Western Australia and Queensland over the next few years. Victoria adopted the South Australian lands trust model when it enacted **The Aboriginal Lands Act** 1970, however, there were only two reserves left in existence to be affected (Lake Tyers and Framlingham). New South Wales rejected then endorsed the land trust vehicle by passing an amendment in 1973 to **The Aborigines Act**, 1969. Western Australia also created an Aboriginal Lands Trust as a statutory corporation under the **Aboriginal Affairs Planning Authority Act** 1972; however, this was not a true implementation of the same concept. This Trust is an advisory body only. Title is vested in the Authority, which is, in reality, the state Minister of Aboriginal Affairs. Ownership of reserve lands was, thus, not truly placed in Aboriginal hands.

Queensland did not even bother to create a sham trust when it enacted new legislation in this same era (the **Aborigines Act** 1971 and the **Torres Strait**

**Islanders Act 1971**). In fact, its thrust was to continue to eliminate some reserves, particularly mineral rich ones, by consolidating communities and maintaining tight governmental control over life on the remaining reserves so as to prompt the indigenous peoples to leave and blend into urban and country town society.

This first step of granting land rights to the original inhabitants of Australia was clearly a very limited one. Even under the best of the schemes implemented, it still only conveyed title over a land base that was already inadequate at meeting the needs of the Aboriginal population as a whole. This is analogous to the Canadian federal proposals of the 1969 White Paper and the 1984 **Indian Self-Government Bill**. Furthermore, the land trust vehicle used the mechanism of a statewide body to hold title to all reserve lands. This defeated the objective of community control, fostered some internal conflict, and forced people to accept a foreign concept. Some of these deficiencies were later minimized in South Australia by the issuance of 99 year leases by the Aboriginal Lands Trust to local incorporated communities representing the residents of the former reserves. These communities also obtained all assets on the land and have repeated rights of renewal of the leases at a rental of ten cents per annum.

Due to the shortcomings inherent in this concept and the resistance to implementing even this most modest of reforms in some jurisdictions, the struggle for true land rights continued. The rejection of the land claim of the Yirrkala people of title to parts of Arnhem land in the Gove Peninsula by Mr. Justice

Blackburn of the Northern Territory Supreme Court on April 27, 1971 (in **Milirrpum v. Nabalco Pty Ltd., supra**), triggered a nationwide protest. The election of a new federal government generated the historic policy speech of Prime Minister Gough Whitlam of November 13, 1972 when he promised

We will legislate to give Aborigines land rights -- not just because their case is beyond argument, but because all of us as Australians are diminished while the Aborigines are denied their rightful place in this nation.

This was quickly followed by the appointment of Mr. Justice Woodward as the Aboriginal Land Rights Commissioner in February of 1973. His reports of July of that year and the following May were instrumental in changing the tenor of the public debate from whether there should be land rights to one of how much land should be granted, on what terms, and how the decision should be made.

The Labour Government introduced the **Aboriginal Land (Northern Territory) Bill 1975** in the House of Representatives on October 16, 1975 and immediately appointed Mr. Justice Ward as the Interim Aboriginal Land Commissioner pending the passage of the legislation. He began his hearing in Alice Springs, Northern Territory within days of this appointment. Even the defeat of the Whitlam Government in Parliament on November 11, 1975, and its subsequent defeat at the polls, did not stop the momentum for land rights. The impetus given by all of these actions could not be reversed and eventually led one year later to the passage of a slightly watered down version in the form of the **Aboriginal Land Rights (Northern Territory) Act 1976**.

Further major land rights legislation has been enacted in South Australia in 1981 (the **Pitjantjatjara Land Rights Act**) and this year (the **Maralinga Tjarutja Land Rights Act, 1984**) while New South Wales passed a financial compensation statute containing limited land grants last year (the **Aboriginal Land Rights Act 1983**).

Other initiatives underway are not yet completed. A draft land rights bill was tabled by the Victoria Government for review and comment in December of 1982, while the Social Development Committee of the Parliament of that state released a discussion paper on financial compensation in June 1984. Both are the subject of debate and negotiations at present. The Western Australian Government appointed an inquiry to report on the best ways of implementing land rights in early 1983. Its first report was released in January of 1984 and its final report has just been completed. Land rights legislation is also a possibility in Tasmania and nationally, while Queensland has passed new legislation based in part on the lands trust approach of the 1960s and early 1970s which has been widely denounced.

The details of these different developments will not be considered in full, although some aspects will be pursued in the next two chapters. It should be mentioned here, however, that legislation in all states (with the exception of New South Wales) and in the Northern Territory expressly protects Aboriginal sacred and significant sites.<sup>15</sup> Previously mentioned Commonwealth legislation<sup>16</sup> was enacted earlier this year to permit the federal Minister of Aboriginal Affairs to

step in to ensure the preservation of sacred and significant sites when state or territorial legislation is not being fully utilized or is inadequate to guarantee their continuing security. Many thousands of such sites have been registered over the past decade by officials of State and Territorial agencies, by the Heritage Commission and by the Australian Institute for Aboriginal Studies.



## 6 ABORIGINAL LAND TENURE

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The Aboriginal and Torres Strait Islander people reside upon land in Australia which is subject to a number of different regimes. The preceding chapter indicated several of these: namely, reserves, missions, Aboriginal trust lands, leaseholds from Aboriginal trusts, and areas dedicated under land rights legislation. To this list should be added lands purchased by the former Aboriginal Land Fund Commission or the present Aboriginal Development Commission. Owing to the different land holding structures, sources of title and nature of tenure amongst these regimes, it is necessary to discuss them individually and in some depth.

### RESERVES AND MISSIONS

The latest information available to the writer on this point indicates that there are 213,766 square kilometres of reserve lands in Australia (21,344 square kilometres in Queensland for Aboriginals and Torres Strait Islanders and 192,422 square kilometres for Aboriginals in Western Australia) and 691 square kilometres of mission lands (649 square kilometres in Western Australia and 42 square

kilometres in the Northern Territory).<sup>17</sup> In other words, 2.79 per cent of Australia is still set aside as Aboriginal reserves and missions. As indicated in the last chapter, these lands are vestiges of 19th century paternalistic policies. The major difference between the two types is in terms of who is in control, but in neither case is it the local Aboriginal residents.

The missions today consist of relatively small areas of land granted by the Crown many years ago to a particular religious organization for the purpose of establishing a settlement for Aboriginal people. The religious group built a church, school and housing. It still holds the land either in fee simple or on a long term lease and often subject to a restriction that the land will revert to the Crown if it ceases to be used as an Aboriginal mission. The Aboriginal residents have no legal interests recognized in the land and can be evicted at the pleasure of the religious organization. In fact, numerous such missions were closed in Queensland by agreement between the State and the particular religious groups involved without consultation with and consent of the Aboriginal residents. The latter were simply forced to move to other missions or reserves. In other cases in that state, the missions were transformed into reserves in the same high-handed fashion.<sup>18</sup>

Missions in other states have disappeared over the years by reversion to the Crown to be held as Aboriginal reserves or as vacant Crown land or, in recent years, by transfer to lands trusts. In the Northern Territory, they are slowly being transferred into Aboriginal hands by virtue of the terms of the **Aboriginal Land Rights (Northern Territory) Act 1976** after which the Aboriginal residents decide if they wish to allow the religious group to remain (s. 18).



Reserves are owned directly by the Crown in right of the particular state. The remaining ones in Queensland and Western Australia are administered by the Department of Aboriginal and Islander Affairs or the Aboriginal Affairs Planning Authority respectively, pursuant to the terms of the applicable state legislation. The situation is analogous to the old Indian agency system in Canada as state civil servants exercise almost total control over the lives of the residents. Permits are required for all persons, other than departmental officials or elected members of Parliament, to enter the reserves and these permits are generally under the control of a senior civil servant rather than the local community. Aboriginal people themselves must obtain such permits to visit and special approval to reside on a reserve.

The effect of the prevailing legislation is that the government has given itself the rights to terminate reserves, or alter their boundaries, or control who resides there without consultation with the individual communities, let alone requiring their consent. The Crown's authority is free from any restraints and protest can result in jail or dissolution of the reserve. It is no wonder, therefore, that the indigenous people are far from pleased with this arrangement and have fought for land rights.

#### ABORIGINAL LANDS TRUSTS

As previously indicated, this concept was first implemented in South Australia in 1966. It involved the transfer of existing reserves and missions to a

corporate body created under the **Aboriginal Lands Trust Act, 1966**. Whatever land title existed at that point in time (i.e., leasehold or freehold) passed to the Trust (although the state has since embarked upon a policy of converting all leases into fee simple ownership). Since New South Wales and Victoria followed South Australia's lead closely, a review of the latter will suffice for the objectives of this paper, although some important differences do exist.<sup>19</sup>

Membership in the Trust is limited to people of Aboriginal descent. The Governor in Council appoints the Chairman and two other members together with additional members recommended by the communities living on Trust land. These people become the trustees for three years and are eligible for reappointment.

The Trust is only somewhat independent from government as it relies heavily upon the State for annual grants. The statute expressly declares that the Trust is neither the agent nor a part of the government and the trustees are not civil servants. The Act does provide, however, that a non-voting representative of the Minister must be present at all official Trust meetings. The Minister must approve the annual budget and the terms of employment for all staff even though they are not members of the public service.

The Trust is empowered to develop its lands for economic purposes including the ability to benefit from mining activity. It also has the ability to sell, lease or mortgage its lands to Aboriginal persons, or to anyone else with Ministerial approval if the ultimate result benefits the Aboriginal people. In addition, the Trust can use its grant money or royalty income to acquire additional land where appropriate.

The basic activity of the Trust has evolved into being a landlord. It holds title to preserve it and offers some technical assistance, but it has leased almost all land to Aboriginal communities, groups, companies or individuals on a long-term basis. This is only natural as the Trust is a small state-wide body with scattered land holdings which include all houses and other buildings that were contained thereon when they were transferred to the Trust from reserve or mission status. Leasing individual land holdings allows the Trust to provide security of tenure to local Aboriginal communities and to delegate much of the daily administrative responsibilities and powers to each community.

The Aboriginal Lands Trust in South Australia, and its counterparts in Victoria and New South Wales, have been consistently criticized in recent years for being subject to too much actual and potential governmental influence. The Western Australian Aboriginal Land Trust has been attacked even more for it is clearly subject to governmental control. Being a landlord is rarely a popular position and this has been enhanced by grossly inadequate funding such that the Trusts have been unable to pursue an aggressive policy of upgrading existing holdings and expanding the total land base. This dissatisfaction has caused investigation and implementation of alternative models.

#### LAND RIGHTS REGIMES

Since the land rights regimes established in recent years vary significantly in each state or territory, they will be discussed individually in the following pages.

### **Northern Territory**

The best known Australian land rights legislation in Canada is the **Aboriginal Land Rights (Northern Territory) Act 1976** mentioned earlier. It provided for the transfer of title to all existing reserves and most missions in the Northern Territory, as listed in Schedule 1 of the Act, to Aboriginal Land Trusts. As each Land Trust was organized, it would be officially recognized by being gazetted by the Governor-General. A deed of grant was then executed by the Governor-General and the Trust which formally vested title to the reserve or mission in that individual Trust. This simple procedure proved to be time-consuming and troublesome when the Northern Territory Registrar General initially refused to register the deeds because of disputes over public roads and ownership of minerals within the Aboriginal lands concerned. Two years of negotiations were required to resolve these problems.

A Land Trust derives its authority from the Act. It is a title-holding body composed of several traditional owners selected by the local Aboriginal community whose lands are held by the trust. These individuals become "bare" trustees in the sense that real management powers are in the hands of the beneficiaries as a whole (i.e., the residents of the community) or are delegated to a regional organization representing all Aboriginal people in the area (either the Northern Land Council, the Central Land Council or the Tiwi Land Council).<sup>20</sup>

The more significant feature of this legislation from a Canadian standpoint, as well as being a historic breakthrough from an Australian perspective, is the

land claims process created by the Act. It authorized traditional land owners to submit claims to their lands on the basis of traditional ownership. Section 3 of the Act defines "traditional Aboriginal owners" to mean:

a local descent group of Aboriginals who -

- (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
- (b) are entitled by Aboriginal tradition to forage as of right over the land.

Claims on the basis of need, which had been permitted under the 1975 Bill and were recommended by the Woodward Commission, are excluded under the Act. Traditional owners also cannot claim land which is part of a "Town" as defined in s. 3, which is "set apart for, or dedicated to, a public purpose" under any statute (s. 3), or which is subject to private interests.

As a result, claimants can only seek "an area of land, being unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals" (s. 50(1)(a)). An amendment in 1978 also rendered all lands in the Alligator Rivers Area held by the Director of National Parks and Wildlife subject to claim by being "deemed to be unalienated Crown land" (s. 50(1)(1A)).

Under the process created by the Act, the Aboriginals who claim to be traditional owners of land, which can be the subject of a claim, make an application to the Aboriginal Land Commissioner, which is an office established

under section 49. The Commissioner, who must be a judge of the Supreme Court of the Northern Territory (s. 53(1)) and who is appointed by the Governor-General (s. 52(1)) for a term not exceeding three years (s. 52(2)), receives the application and holds hearings "to ascertain whether those Aboriginals or any other Aboriginals are the traditional owners of the land" claimed by the applicants (s. 50(1)(a)(i)).

The Commissioner's main responsibility is to conduct these hearings. The Commissioner is also mandated as follows (including minor amendments in 1978):

- s. 50(1)(a)(ii) to report his findings to the Minister and to the Administrator of the Northern Territory, and, where he finds that there are Aboriginals who are the traditional Aboriginal owners of the land, to make recommendations to the Minister for the granting of the land or any part of the land in accordance with sections 11 and 12;
- (b) to inquire into the likely extent of traditional land claims by Aboriginals to alienated Crown land and to report to the Minister and to the Administrator of the Northern Territory, from time to time, the results of his inquiries;
- (c) to establish and maintain a register of the traditional land claims referred to in paragraph (b);
- (d) to advise the Minister in connection with any other matter relevant to the operation of this Act that is referred to the Commissioner by the Minister; and
- (e) to advise the Minister and the Administrator of the Northern Territory in connection with any other matter relating to land in the Northern Territory that is referred to the Commissioner by the Minister with the concurrence of the Administrator of the Northern Territory.

The Act goes on in section 50 to say:

- (3) In making a report in connection with a traditional land claim the Commissioner shall have regard to the strength or otherwise of the

traditional attachment by the claimants to the land claimed, and shall comment on each of the following matters: --

- (a) the number of Aboriginals with traditional attachments to the land claimed who would be advantaged, and the nature and extent of the advantage that would accrue to those Aboriginals, if the claim were acceded to either in whole or in part;
  - (b) the detriment to persons or communities including other Aboriginal groups that might result if the claim were acceded to either in whole or in part;
  - (c) the effect which acceding to the claim either in whole or in part would have on the existing or proposed patterns of land usage in the region; and
  - (d) where the claim relates to alienated Crown land - the cost of acquiring the interests of persons (other than the Crown) in the land concerned.
- (4) In carrying out his functions the Commissioner shall have regard to the following principles: --
- (a) Aboriginals who by choice are living at a place on the traditional country of the tribe or linguistic group to which they belong but do not have a right or entitlement to live at that place ought, where practicable, to be able to acquire secure occupancy of that place;
  - (b) Aboriginals who are not living at a place on the traditional country of the tribe or linguistic group to which they belong but desire to live at such a place ought, where practicable, to be able to acquire secure occupancy of such a place.

If the Commissioner decides after receiving extensive anthropological and oral evidence that the claimants are indeed "traditional Aboriginal owners," he then must decide that other evidence regarding the factors in s. 50(3) and (4) favour the claimants in the particular case. The Commissioner also receives lengthy legal argument concerning the eligibility of the land to be claimed as well as the weight he should put on specific evidence.

The hearings are intended to be as informal as possible, yet the Commissioner does have the power to subpoena witnesses or documents (s. 54(1)), administer oaths or affirmations (s. 54(4)), and initiate criminal charges for refusal to answer questions or produce documents (s. 54(6)) or for furnishing false information (s. 54B). Financial assistance to provide legal representation can be sought from the Attorney General of Australia for those affected by the claim (s. 54C), while an Aboriginal Land Council will provide legal assistance at its expense to traditional Aboriginal owners pursuing a claim (s. 23(1)(f)). The effect of these provisions, when combined with the use of expert witnesses and Aboriginal elders, creates a hearing process which is a blend of informal fact-gathering somewhat like a task force and an adversarial system analogous to labour arbitration. This results in a situation that is confusing for both Aboriginal and non-Aboriginal witnesses and observers.<sup>21</sup>

If the Commissioner upholds the claim in his positive report to the Commonwealth Minister of Aboriginal Affairs under s. 50(1)(a), then the Minister has the following mandate under s. 11(1) by virtue of the **Aboriginal Land Rights Legislation Amendment Act 1982**:

(b) the Minister is satisfied --

- (i) that the land, or a part of the land, should be granted to a single Land Trust to be held for the benefit of Aboriginals who are the relevant Aboriginals in relation to that land or that part of that land; or
- (ii) that different parts of the land should be granted to different Land Trusts so that each Land Trust holds



the land granted to it for the benefit of Aboriginals who are the relevant Aboriginals in relation to that last-mentioned land;

- (c) establish --
  - (i) in a case where he is satisfied that the land, or a part of the land, should be granted to a single Land Trust - a single Land Trust under section 4 to hold that land, or that part of that land, for the benefit of Aboriginals who are the relevant Aboriginals in relation to the land, or the part of the land, proposed to be held by that Land Trust; or
  - (ii) in a case where he is satisfied that different parts of the land should be granted to different Land Trusts - 2 or more Land Trusts under section 4 respectively to hold those different parts of that land for the benefit of Aboriginals who are the relevant Aboriginals in relation to the parts of the land respectively proposed to be held by each of those Land Trusts;
- (d) where land in respect of which a Land Trust has been or is proposed to be established in accordance with paragraph (c) is, or includes, alienated Crown land, ensure that the estates and interests in that land of persons (other than the Crown) are acquired by the Crown by surrender or otherwise; and
- (e) after any acquisition referred to in paragraph (d) has been effected in relation to land and a Land Trust has been established in accordance with paragraph (c) in respect of that land, recommend to the Governor-General that a grant of an estate in fee simple in that land be made to that Land Trust.

Once the Minister decides to accept the Commissioner's recommendations in favour of the claim, he approaches Cabinet with a request to transfer the land either to the claimants or to a Land Council representing them. If Cabinet concurs, the Governor-General formally grants the land in their favour under s. 12 of the Act (as amended in 1978 and 1980) as indicated as follows:

12(1) Subject to this section, on the receipt of a recommendation under section 10 or 11 with respect to land, the Governor-General may --

- (a) in the case of a recommendation under sub-section 10(1) or section 11 - execute a deed of grant of an estate in the land in accordance with the recommendation and deliver it to the grantee; or
- (b) in the case of a recommendation under sub-section 10(2) - execute a deed of grant of an estate in the land in accordance with the recommendation and deliver it to the Land Council referred to in the recommendation on the condition that it be held by the Land Council in escrow, and subsequently delivered to the grantee, in accordance with the recommendation.

(2) A deed of grant under this section shall be expressed to be subject to the reservation that --

- (a) the right to any minerals existing in their natural condition, or in a deposit of waste material obtained from any underground or surface working, on or below the surface of the land, being minerals all interests in which are vested in the Commonwealth, remains with the Commonwealth; and
- (b) the right to any minerals existing in their natural condition, or in a deposit of waste material obtained from any underground or surface working, on or below the surface of the land, being minerals all interests in which are vested in the Northern Territory, remains with the Northern Territory;

(2A) [ deleted as it refers only to the Alligator Rivers Area. ]

(2AA) For the purposes of the operation of sub-section (2), any interest in minerals vested in a person, other than the Commonwealth or the Northern Territory, shall be disregarded, and any reservation inserted in a deed of grant in accordance with that sub-section is subject to such an interest.

- (3) A deed of grant under this section in respect of land that is not Schedule 1 land --
- (a) shall identify any land on which there is, at the time of the execution of the deed of grant, a road over which the public has a right of way; and
  - (b) shall be expressed to exclude such land from the grant.
- (3A) A deed of grant under this section in respect of Schedule 1 land shall be expressed to exclude from the grant:
- (a) any land on which there was, at the time of the commencement of section 3, a road over which the public had, at that time, a right of way; and
  - (b) any land on which there is, at the time of the execution of the deed of grant, a road over which the public has a right of way.

In other words, the successful claimants receive title to the land in fee simple and full use of it except for ownership of any existing public roads and all "minerals" as defined in s. 3 so as to include petroleum, coal, precious and semi-precious minerals, metals and water. This restriction on minerals only applies to those substances vested either in the Commonwealth (particularly for uranium) or the Northern Territory. Minerals vested in third parties are to be disregarded. Aboriginal land is also inalienable except by way of a lease or licence from the Land Trust with the consent of the traditional Aboriginal owners (ss. 19 and 20).

To facilitate the land claims process, a freeze was placed on the use of unalienated Crown land with the acceptance of the Aboriginal Land Rights Commission (Woodward) Second Report in April 1974. This freeze was extended several times until its expiry on August 24, 1980.

Not only are "traditional Aboriginal owners" the only ones who can tender a "traditional land claim" (s. 3(1)) under the Act (s. 50(1)), but they also enjoy special powers and advantages under the Act once their claim is upheld and implemented. For example, their land can "not be resumed, compulsorily acquired or forfeited under any law of the Northern Territory" (s. 67), nor can any road be constructed over it without their consent (s. 68(2)(a)). They also have the power to veto any proposed grants of mining interests in their lands (s. 48(a)) subject to arbitration (s. 45) or an override by the Governor-General based on the national interest (s. 40(1)(b)), which is upheld by Parliament (s. 42). The traditional owners have a further right to exclude people from their lands (s. 70), including those that have a "miner's right" under Northern Territory legislation (s. 75). The consent of the traditional Aboriginal owners is also required before a Land Trust can grant a lease or licence for any purpose to any person (s. 19(4) and (5)).

The Act is also of interest to Canadians for the way in which it specifically incorporates Aboriginal customary law so as to regulate the rights of Aboriginals on those Aboriginal lands which are conveyed into Aboriginal hands under this Act. This is accomplished by virtue of s. 71(1) which states:

Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.

Lest it be believed that the retention of ownership of all minerals by the Crown under s. 12 robs successful Aboriginal claimants of a key resource, it should be indicated that this would not be a fully accurate assumption. Ownership of the surface entitles Aboriginal people to negotiate the terms of any licences to enter and explore upon Aboriginal lands as well as any leases to mine sub-surface resources. These agreements can include payment of additional royalties to the traditional owners who also receive all rental payments made to the Crown for their lands (ss. 16 and 35(4)).

Furthermore, the Act creates the Aboriginal Benefit Trust Account (s. 62). This Account received all moneys standing to the credit of the former Aborigines Benefits Trust Fund (s. 62A) as well as "amounts equal to the amounts of any royalties received by the Commonwealth or the Northern Territory in respect of a mining interest in Aboriginal land" (s. 63). This Account also earns interest (s. 62(3)). Forty per cent of the amounts paid into the Account are redistributed to the Land Councils for their administrative costs (s. 64(1)) and the balance can be given or loaned for purposes that benefit Aboriginals in the Northern Territory (s. 64(4) and (4A)).

One deficiency in this scheme is that the latter grants and loans are under the exclusive control of the federal Minister of Aboriginal Affairs. In addition, the Minister can use this money for any purpose so long as it is, in his opinion, "for the benefit of Aboriginals living in the Northern Territory." This could authorize reimbursement of federal and territorial departments and agencies for the costs

of government programs. The Act was further amended by the insertion of s. 64A, which allows the Minister complete discretion to transfer money after June 30, 1982 from this Trust Account to the federal Consolidated Revenue Fund as the Minister wishes.

As a result of this statute, claims have been lodged over almost all unalienated Crown land eligible for claim in the Northern Territory totalling over 50 individual cases. Over fifteen claims have been completely processed through the hearing, the Commissioner's Report, the Minister's acceptance and the issuance of the grant. Of these, seven were wholly successful and eight successful in the greater part. The balance are at various stages in this process.

Between the Schedule 1 lands conveyed under the 1976 Act itself (representing 256,667 square kilometres or 19.06 per cent of the Northern Territory) and those successful claims which have been implemented, Aboriginal freehold title consists of 388,796 square kilometres in the Northern Territory. When leasehold lands are added in, Aboriginals now own over 30 per cent of the Territory in which they are 24 per cent of the population. The remaining claims cover a further area of approximately 172,176 square kilometres or an additional 12.79 per cent of the Territory. It is likely that a significant portion of these lands will also be conveyed to Aboriginal Lands Trusts.

There is also significant Territorial legislation which complements the federal **Aboriginal Land Rights (Northern Territory) Act**. This has accelerated since the Commonwealth delegated most of its powers in the region to the

Territorial Government via the **Northern Territory (Self-Government) Act 1978**. In addition, the Territory passed the **Cobourg Peninsula Aboriginal Land and Sanctuary Act 1981** after extensive negotiations with the Northern Land Council. It effectively conveys title to the Cobourg Peninsula to a Land Trust for "the Aboriginals entitled to the use and occupation" of those lands on the condition that a sanctuary is "established in perpetuity as a national park for the benefit of all people." This park is managed by a joint board comprising an equal number of representatives of the Land Council and the Territorial Government. A similar arrangement is taking shape regarding the Ayers Rock (or Uluru) National Park involving the Central Land Council and the Territorial Government as well as the Kakadu National Park involving the Northern Land Council.

The benefits of such an arrangement are extensive. It recognizes Aboriginal ownership, guarantees equal participation of Aboriginal representatives in all decision-making, and preserves sacred sites within large areas of land which are also of great recreational and environmental significance to the general population. It also provides jobs to individual Aboriginals as park officials, entrenches Aboriginal hunting, fishing and gathering rights on these lands, and authorizes Aboriginal people to establish or retain communities within the park lands subject to environmental safeguards. These benefits are based on negotiating a special agreement and, thus, do not automatically appear or follow upon recognition of Aboriginal ownership of the park land.

Aboriginals also have benefitted from legislation which guarantees them rights to traverse or settle lands which are subject to huge pastoral leases to

station owners. Thousands and thousands of acres of land have been voluntarily excised from pastoral leaseholds by the private lessees as a result of negotiations conducted by the Department of Aboriginal Affairs or the Central Land Council. This gives security of tenure to those traditional Aboriginal owners regarding lands which would not be subject to claim under the **Land Rights Act**. Several thousand acres have also been leased to Aboriginal organizations for town camps in the three major towns in the Northern Territory.<sup>22</sup>

### **South Australia**

The first government to follow the federal lead was, once again, the innovative State of South Australia. After several years of negotiations with the traditional owners of the northwestern portion of that state, the **Pitjantjatjara Land Rights Act** was passed on March 5, 1981. It conveyed freehold title to over 102,630 square kilometres to a corporate body called Anangu Pitjantjatjaraku (or the Pitjantjatjara People) which is to represent all Yungkutatjara, Ngaanatjara and Pitjantjatjara people. A further 50,000 square kilometres was conveyed earlier this year to another body corporate, Maralinga Tjarutja, to represent the Maralinga people in the southwestern part of the state via the **Maralinga Tjarutja Land Rights Act, 1984**. Due to the similarity between the two statutes, they will be addressed together. (The latter is used when section numbers or quotations are indicated).

All traditional owners are automatically made members of their respective body corporate. They are not shareholders as such but members so that the



problem of alienability of shares does not arise as it will under the **Alaskan Native Claims Settlement Act** in 1991. The powers and functions of the body corporate, as seen from the **Maralinga Tjarutja Land Rights Act, 1984**, are the following:

s. 5(1) The functions of Maralinga Tjarutja are as follows:

- (a) to ascertain the wishes and opinions of traditional owners in relation to the management, use and control of the lands and to seek, where practicable, to give effect to those wishes and opinions;
- (b) to protect the interests of traditional owners in relation to the management, use and control of the lands;
- (c) to negotiate with persons desiring to use, occupy or gain access to any part of the lands;

and

- (d) to administer land vested in Maralinga Tjarutja.

(2) Maralinga Tjarutja has the following powers:

- (a) the power to sue and be sued;
- (b) the power --
  - (i) to grant a lease or licence, for any period it thinks fit, in respect of any part of the lands (being a part of the lands vested in Maralinga Tjarutja) to a traditional owner or an organization comprised of traditional owners;
  - (ii) to grant a lease or licence, for a period not exceeding fifty years, in respect of any part of the lands (being a part of the lands vested in Maralinga Tjarutja) to an agency or instrumentality of the Crown;
  - (iii) to grant a lease or licence, for a period not exceeding five years, in respect of any part of the

lands (being a part of the lands vested in Maralinga Tjarutja) to any other person or body of persons;

- (c) the power to acquire by agreement, hold, deal in, or dispose of, land outside the lands;
- (d) the power to enter into contracts;
- (e) the power to appoint and dismiss staff;
- (f) the power to receive and disburse moneys;
- (g) the power to obtain advice from persons who are expert in matters with which Maralinga Tjarutja is concerned;
- (h) the power to establish offices.

The power to lease land to the Crown indicated in s. 52(2)(ii) is in relation to "purposes connected with the health, education, welfare or advancement of the traditional owners" (s. 27). This power is a hollow one regarding existing uses until 50 years from the commencement of the Act since the Crown retained the right to continue its occupation for these purposes rent free (s. 27). The corporation does, however, have significant authority within s. 5 to regulate land usage and to control road construction under ss. 28-29. It received fee simple title (s. 13) which is neither alienable by Maralinga Tjarutja (s. 15(a)) nor subject to expropriation under State law (s. 15(b)). It also can control entry to those lands by non-traditional owners except for certain specified categories of people (s. 18) and obtain additional lands if it so desires (s. 5(2)(c)).

The two bodies corporate also can regulate all mining activities on their lands. The statutes make it an offence to mine these lands even where a company

has the permission of the State Minister of Mines and Energy (s. 21). The consent of the body corporate is essential, subject to a right to seek a special form of arbitration under the legislation by a mining company if negotiations are unsuccessful. This procedure further guarantees the protection of all sacred sites from any negative impacts stemming from mining operations (s. 22).

These two statutory corporations can further negotiate compensation from a mining company for any permitted operations as well as receive a one-third share of all royalties payable to the State Government (s. 24(2)(a)). A further one-third of royalties is to be paid to the State Minister of Aboriginal Affairs "to be applied towards the health, welfare and advancement of the Aboriginal inhabitants of the State generally" (s. 24(2)(b)) so as to share any wealth amongst all Aboriginals, while the balance goes to the "General Revenue of the State" (s. 24(2)(c)). The Minister and the South Australian Government, nevertheless, retain substantial control over royalty payments by setting royalty rates or establishing a limit over which all excess goes to the State (s. 24(3)). As a modest counterbalance, these lands are exempt from all land tax (s. 38) while Parliament must provide all moneys required to meet the purposes of the legislation (s. 39).

The powers and functions of the two body corporates are conducted by two all-Aboriginal agencies. The 1981 Act establishes a nine member Pitjantjatjara Executive Board elected at an annual general meeting in section 9, whereas the most recent settlement creates a Council composed of all persons who "are for the time being leaders of the traditional owners" (s. 6(1)). In either case, this

agency must consult with the traditional owners before making any decisions (s. 8).

A further interesting provision in both statutes is the creation of a post called a tribal assessor. This individual is appointed by the Minister with the approval of the body corporate. Any individual Aboriginal member who feels aggrieved by a decision of the body corporate or any other members may appeal to the tribal assessor. The tribal assessor can hear the appeal at any "suitable place upon the lands" (s. 34(2)(a)) as soon as possible "without undue formality" (s. 34(2)(b)). He is not bound by rules of evidence (s. 34(3)) but is to give effect to "the customs and traditions of the traditional owners" (s. 34(4)). He or she can give any direction that is "just or expedient to resolve any matters in dispute" (s. 34(5)(a)), which is enforceable in the general courts (s. 35).

In addition, the legislation creates a Parliamentary Committee to review the overall operation and any problems arising under the legislation as well as its implementation (s. 43). The Cabinet is also given some limited regulatory power most of which can only be used with the "approval of," "consultation with" or "recommendation of" the body corporate as the subject matter requires (s. 44).

The net result of these two Acts is that they convey over 15 per cent of the State, in which the total Aboriginal population is 0.74 per cent, to certain traditional Aboriginal owners. Unfortunately, those Aboriginal people living elsewhere in South Australia are left with only about 15,000 hectares of land in the hands of the aforementioned South Australian Aboriginal Lands Trust.<sup>23</sup>

## New South Wales

As previously indicated, the Government of New South Wales introduced and passed the **Aboriginal Land Rights Act 1983** as an imposed settlement of Aboriginal land claims. Although the Legislative Assembly initiated a public review by a Select Committee in 1978, which reported in 1980,<sup>24</sup> the State Government chose to proceed in its own fashion. After a two-year period of informal, irregular and inconsistent discussions with Aboriginal organizations, it released a Green Paper on December 24, 1982 consisting of draft legislation with several pages of explanatory text.<sup>25</sup> It adopted many of the recommendations of the Select Committee, but also rejected other important ones. No direct funding was provided to Aboriginal organizations or formal mechanisms established for consultation with Aboriginal people. Despite public protest, demonstrations, criticisms,<sup>26</sup> and universal rejection of the Green Paper, the Government quickly enacted the new law on the day it was introduced, March 24, 1983, along with the **Crown Lands (Validation of Revocation) Act, 1983**. This latter statute abolished the Aboriginal Lands Trust of New South Wales and conveyed those lands (totalling 4,378.364 hectares valued in July 1982 at A\$8,371,165) with all their structures (some 815 houses and 150 shacks) to Local Aboriginal Land Councils in freehold. Each Local Aboriginal Land Council (LALC) is to represent all Aboriginal persons living on a particular parcel of former Trust land. It is to be incorporated as a statutory body under the Act charged with management of the land to which it holds the title. The precise powers of the LALCs granted by the Act are as follows:

s. 12 A Local Aboriginal Land Council shall have the following functions: --

- (a) the holding of lands vested in or acquired by the Council;
- (b) the purchase of private lands, including the making of applications to the Regional Aboriginal Land Council for funds for the purpose;
- (c) the implementation of the wishes of its member (as decided at a meeting of the Council) with respect to the management, use and control of lands and the establishment and operation of enterprises;
- (d) the consideration of applications to prospect or mine for minerals on its lands;
- (e) the submission to the Regional Aboriginal Land Council of proposals to lease or change the use of its lands;
- (f) the making of claims to Crown land;
- (g) the upgrading and extending of local residential accommodation of Aborigines;
- (h) the protection of the interests of Aborigines in its area in relation to the management, use and control of its lands;
- (i) negotiating with persons desiring to use, occupy or gain access to any part of its lands;
- (j) with the consent of the parties concerned, the conciliation of disputes between individual Aborigines or groups of Aborigines in its area;
- (k) such other functions as are conferred or imposed on it by or under this or any other Act.

Each LALC owns all minerals on their lands except gold, silver, petroleum and coal. It then can refuse permission to all mining operations on these lands under its control and this decision is final. The bulk of the royalties received

from mining activities approved by the LALC is directed to the New South Wales Aboriginal Land Council, a state-wide body. Considering that less than 10,000 acres has been conveyed, these rights may not prove to be too significant.

This latter organization sits at the pinnacle of a three level system. LALCs are grouped together in districts to elect representatives to Regional Aboriginal Land Councils which are designed to provide assistance to the individual LALCs and co-ordinate shared programs and resources. These Regional Councils then select representatives on the NSW Aboriginal Land Council. All of these are created as statutory corporations with roles and functions defined by the Act.

The central body is to receive an allocation of monies out of the Government's Consolidated Revenue Fund annually from 1984 to 1998, equivalent to 7.5 per cent of state land taxes collected in the previous year (s. 28). This money is regarded as compensation for the fact that almost all land in the state is privately owned and cannot be claimed as well as in recognition of historic injustices. The Green Paper indicated a further purpose, namely, that "if self-determination is to be realised and if Land Rights are to have any real meaning by giving Aborigines an economic base, there will need to be an assured source of adequate funding over a long term."<sup>27</sup> This is the first time in Australian history in which financial compensation has been paid "to Aboriginal people for the loss of their lands through dispossession and illegal revocation of reserves."<sup>28</sup> The exact amount of this compensation is a subject of major debate with projections ranging from A\$130 million to A\$400 million. The money is to be used for meeting all

operating expenses of the three levels of Land Councils, to purchase additional lands on the open market, to foster economic development initiatives in these communities, and to mount land claims under the Act.

The LALCs can apply to the Government to obtain "claimable Crown lands" which must be Crown owned, not be "lawfully used or occupied" (s. 36(1)(b)) by anyone under any arrangement including "permissive occupancy" and "are not needed, nor likely to be needed, for an essential public purpose" (s. 36(1)(c)) at any time in the future in the opinion of the Minister of Lands. A rejection of the claim by the Government could be appealed to the Land and Environment Court. The Government admitted that very little land would be eligible for claim under these restrictions. In addition, the Act retroactively validates all illegal revocations of Aboriginal reserves whenever they occurred, which involves more land than what was conveyed under the Act. It also had the effect of blocking a lawsuit which had been filed with the courts contesting the legality of prior revocations. The first claim filed under this new scheme was recently rejected by the Minister of Lands. An appeal to the Land and Environment Court is under consideration.

### **Other Jurisdictions**

Although land rights legislation is currently under active consideration in Victoria and Western Australia,<sup>29</sup> at the present time the only lands under any form of Aboriginal control are through the respective Land Trusts. This is expected to change in the very near future by virtue of the passage of such legislation as the Premiers of both states have publicly committed their



governments to enact land rights legislation. The Premier of Western Australia, however, responded to the receipt of the final report of a special inquiry he had earlier established by announcing that Aboriginals would not be able to impede mining activity on any lands they obtain in the future.

The Queensland Government has tried to preempt the land rights movement by enacting legislation that repeals prior statutes and thereby abolishes reserves.<sup>30</sup> The effect is to transfer the reserve lands to local Aboriginal or Torres Strait Islander community councils through "Deeds of Grant in Trust." These grants are for fifty year periods only and subject to considerable governmental control as the Governor-in-Council may remove any trustee appointed by the community if it is of the opinion that it would be "in the public interest."<sup>31</sup> The Queensland Government is so notorious for seizing Aboriginal lands<sup>32</sup> and imposing developments upon the original inhabitants<sup>33</sup> that any initiative it takes would be greeted with great skepticism. The latest statutory approach, which has not yet been proclaimed to this writer's knowledge, justifies this skepticism.<sup>34</sup>

If one adds the results of the Land Trusts and the land rights schemes to date to the remaining reserves and missions, then over 800,000 square kilometres of lands is dedicated to exclusive Aboriginal use, or approximately 10.5 per cent of the total land mass of Australia. This is particularly impressive when one remembers that Aboriginals and Islanders represent only 1 per cent of the total population. Of this total, approximately 550,000 square kilometres is held in fee

simple by Aboriginal organizations or communities under the land rights statutes in force at present. It should be noted, however, that little of this land is arable and able to sustain more than very small and widely scattered communities. On the other hand, much of the land is believed to be rich in subsurface resources.

#### DIRECT PURCHASE

A final method for obtaining a land base for Aboriginal communities is to buy available land in the market place like any other corporate or individual purchaser. Just as some Indian bands in Canada have had to use their own money to augment their reserves, or to establish a reserve in the first place, many Aboriginal communities have found themselves officially landless. The response to this problem for some has simply been to return to their own country and set up traditional camps to live off the land. This "homelands" or "outstation" movement receives tacit support from the Commonwealth in the form of financial assistance to support the basic necessities of life such as safe water supplies, means of transportation, provision of wireless communication, and minimal shelter materials. As of mid-1983, over 5,000 Aboriginals were living at 175 homeland centres. Some of these are within lands dedicated for exclusive Aboriginal use whereas others are on unoccupied Crown land or in remote areas of private pastoral leaseholds.

A more permanent and secure approach has been to acquire freehold title from willing sellers or procure the interests of lessees. Small amounts of land

have been purchased over the years by the former New South Wales Aboriginal Lands Trust. It is anticipated that the New South Wales Aboriginal Land Council will use much of its annual grant under the **Aboriginal Land Rights Act 1983** to purchase land for Aboriginal communities in that state.

The primary vehicle created by the Commonwealth to carry out this purpose has been the Aboriginal Land Fund Commission and its successor, the Aboriginal Development Commission. Since the Commonwealth was unwilling to impose land rights legislation on the State Governments, this was seen as the way to carry out its constitutional responsibility for Aboriginals without causing federal-state conflict. The former existed from 1975 to 1980 and received annual funding to implement its statutory mandate under the **Aboriginal Land Fund Act 1974** to purchase land for Aboriginal corporate groups (s. 20) or to make grants to such groups to buy their own land (s. 19). During its five years of operation, it spent A\$6,058,572 to acquire 59 properties (leases or fee simple title) ranging in size from 7,368 square kilometres to 0.1 hectares and totalling 40,101.34 square kilometres. Although the thrust of the Commission's activities was in the states, owing to the presence of the federal land rights statute in the Northern Territory, it did procure over 13,000 square kilometres in the latter region to accommodate the needs of Aboriginal communities residing in areas where virtually all land was possessed by large pastoralists and was thus exempt from claim.<sup>35</sup>

Since the Aboriginal Land Fund Commission (ALFC) consisted only of a majority of Aboriginal Commissioners, rather than being exclusively under

Aboriginal control, it was being starved of funds (it received over two-thirds of its money in its first year of operation), and suffered restrictions on what it could buy, this Commission was the subject of considerable criticism from Aboriginal quarters. As previously indicated, it was replaced by the Aboriginal Development Commission (ADC) in July 1980. The ADC received all the assets of the ALFC on its establishment.

The ADC has maintained the commitment of the former ALFC to acquire further suitable lands for Aboriginal organizations and communities that are available on the market as one of its primary activities. It has also been buying buildings to house the offices of Aboriginal organizations, such as legal services, medical services, housing associations, co-ops, and social centres. It now receives over A\$60 million per year of which approximately A\$10 million is devoted to supplement the Aboriginal Entitlement Capital Account created by the **Aboriginal Development Commission Act 1980**. This capital fund is designed to accumulate funds by an annual grant and through investments such that the ADC will become fully self-sufficient at some stage in the future. It will then be able to finance all its ongoing objectives solely from the interest income accruing on this capital account.

The ADC either acquires interests in land directly in its own name or makes grants to Aboriginal corporations or Aboriginal Land Trusts to purchase land. In the former case, it is responsible for full management of the resource like any other landholder until it ultimately transfers title to an Aboriginal organization or

community. Ironically, when the ADC or the ALFC buys land in the Northern Territory from private interests, it renders the land subject to claim by traditional Aboriginal owners under the **Aboriginal Land Rights (Northern Territory) Act**. The ADC has surrendered its interest in lands to successful claimants.

In its first two years of operation, the ADC spent over A\$4 million and acquired over 5,745 square kilometres of land and numerous buildings, as well as aided communities to improve the old ALFC holdings and these new ones. The ADC has also been intensively reviewing various options for the conveyance of title to the local Aboriginal people while ensuring the protection of the interests of future generations. It is expected that the ADC will continue to procure additional freeholds and leaseholds to implement its statutory objectives of satisfying the economic, social and cultural needs of Aboriginals or Torres Strait Islanders (s. 3).

It is now necessary to examine the Aboriginal governmental regimes in place concerning these lands.

The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the integrity of the financial system and for the ability to detect and prevent fraud. The text outlines the various methods used to collect and analyze data, including the use of statistical techniques and computerized systems. It also mentions the role of the auditor in ensuring that the records are complete and correct.

In addition, the document highlights the need for transparency and accountability in the financial reporting process. It stresses that stakeholders, including investors and the public, have a right to know how their money is being managed. The text discusses the various ways in which financial information is disseminated and the importance of providing clear and concise reports. It also mentions the role of regulatory bodies in overseeing the financial industry and ensuring that all participants are held to the same standards.

Finally, the document concludes by emphasizing the importance of ongoing education and training for all those involved in the financial system. It notes that the financial landscape is constantly evolving, and those who do not stay up-to-date on the latest developments will be at a disadvantage. The text encourages individuals and organizations to invest in their own education and to seek out opportunities for professional development.

## 7 ABORIGINAL GOVERNMENTS

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As previously indicated, the issue of Aboriginal sovereignty has never received its full day in court. Colonial governments and courts simply assumed that the indigenous population did not consist of sovereign nations with their own governments and legal systems.<sup>36</sup> This ethnocentrically-based presumption was continued after independence. Even when prior land ownership began to be politically accepted, it still did not generate a change in attitude on sovereignty. A good example of this can be seen in the following resolution unanimously adopted by the elected federal Senate on February 20, 1975:

That the Senate accepts the fact that the indigenous people of Australia, now known as Aborigines and Torres Strait Islanders, were in possession of this entire nation prior to the 1788 First Fleet landing at Botany Bay, urges the Australian Government to admit prior ownership by the said indigenous people, and introduce legislation to compensate the people now known as Aborigines and Torres Strait Islanders for the dispossession of their land.

It is clear that the Senate was recognizing Aboriginal title to land and the need to provide compensation for the violation of that title as a property interest

only. There is no hint in this declaration of any acceptance of the original presence of sovereign nations in 1788 and their continuing existence today, or even a recognition of a restricted form of internal sovereign self-government, as in the United States.

The present Commonwealth Government has made considerable strides in advancing its thinking in this area such that it now fosters the protection of Aboriginal cultures and is prepared to respect continuing Aboriginal customary law. It is also in favour of transferring more control to Aboriginal communities. These developments are clearly and concisely articulated in the following resolution introduced by the Minister of Aboriginal Affairs, The Honourable Clyde Holding, in the House of Representatives on December 8, 1983:

That this House,

**Noting** that, in 1967, an overwhelming majority of the people of Australia voted to amend the Constitution so that this Parliament would have the power to legislate for the peace, order and good government of the Commonwealth with respect to the people of any race for whom it was deemed necessary to make special laws;

**Noting also** that the change to the Constitution was made to enable the national Parliament to discharge a national responsibility to the Aboriginal and Torres Strait Islander people of Australia; and

**Bearing in mind** that the Senate unanimously adopted the following resolution on 20 February 1975:

"That the Senate accepts the fact that the indigenous people of Australia, now known as Aborigines and Torres Strait Islanders, were in possession of this entire nation prior to the 1788 First Fleet landing at Botany Bay, urges the Australian Government to admit prior ownership by the said indigenous people, and introduce legislation to compensate the people now known as Aborigines and Torres Strait Islanders for the dispossession of their land;"



(1) **Acknowledges** that

- (a) the peoples whose descendants are now known as the Aboriginal and Torres Strait Islander people of Australia were the prior occupiers and original owners of Australia and had occupied the territory of Australia for many thousands of years in accordance with an Aboriginal system of laws which determined the relationship of Aboriginal responsibility for and to the land to which they belonged;
- (b) from the time of arrival of representatives of King George III of England, and the subsequent conquest of the land and the subjugation of the Aboriginal people, no settlement was concluded between those representatives and the Aboriginal and Torres Strait Islander people;
- (c) as a result of the colonization of the land by Great Britain the rights of the original owners and prior occupiers were totally disregarded;
- (d) since the arrival of European settlers in Australia, the original inhabitants have been dispersed and dispossessed with the result that their descendants are, as a group, the most disadvantaged in Australian society;
- (e) this disadvantage persists, despite measures taken by State, Territory and Australian Governments, and by Aboriginal and Torres Strait Islander people themselves, so that further measures by Australian society as a whole, and by the Parliament of the Commonwealth in particular, will be required to ensure real equality and advancement for the Aboriginal and Torres Strait Islander people.

(2) **Considers**, therefore, that the special measures which must be taken include action in the following main areas:

- (a) the development of effective processes of consultation with Aboriginal people in order that the Aboriginal people may assert control of all aspects of their lives, having regard to the National Aboriginal Conference's responsibility to represent and present the views of Aboriginal and Islander people throughout Australia;

- (b) the recognition by this Parliament of Aboriginal and Torres Strait Islander people's rights to land, in accordance with the following five basic principles:
  - (i) Aboriginal land to be held under inalienable freehold title;
  - (ii) protection of Aboriginal sites;
  - (iii) Aboriginal control in relation to mining on Aboriginal land;
  - (iv) access to mining royalty equivalents; and
  - (v) compensation for lost land to be negotiated.
- (c) the continuation and acceleration of programs designed to ensure Aboriginal equality of opportunity in fields including health, education, housing, employment and welfare;
- (d) the development of programs by all appropriate means to enable Aboriginal people to take part in economic activities for their own advantage;
- (e) the promotion and protection of Aboriginal cultural identity, in ways considered appropriate by Aborigines, including measures designed to:
  - (i) codify in writing Aboriginal languages, and assist in recording oral history;
  - (ii) preserve and protect Aboriginal sites and objects;
  - (iii) restore to Aboriginal people sacred objects relevant to their history, tradition and culture;
  - (iv) enhance the development of traditional or contemporary art forms; and
  - (v) provide interpreter services.
- (f) restoration of the rights of Aboriginal families to raise and protect their own children by means of uniform laws and procedures in respect of child custody, fostering and adoption;
- (g) respect for, and in appropriate circumstances, the application of, Aboriginal customary law and related practices as part of the law of Australia; and
- (h) the development of improved community relations between Aboriginal and non-Aboriginal Australians, which requires a growing understanding on both sides by means of:

- (i) public education programs; and
- (ii) fostering the study of Aboriginal history, language, anthropology and archaeology in Australian schools and institutions of learning.

(3) **It is therefore of the view that**

- (a) the Australian people will be truly free and united only when the Aboriginal and Torres Strait Islander people of this nation are free of the distress, the poverty and the alienation that has been their lot; and
- (b) the Bicentennial year of 1988 provides an immediate focus point towards which all Australians can work together to achieve the objectives set out in this resolution.

This still does not reflect any acceptance of either original sovereignty or a present right to self-government derived from that sovereign authority modified as necessary by the loss of full independence or a plenary power over external affairs. This may, in part, be due to the fact that there is no jurisprudence available in Australia to support this position.

The only significant decision on this subject, **Coe v. The Commonwealth** ((1979) 53 ALJR 403), sidestepped the issue. The plaintiff, who is an Aboriginal lawyer and Chairman of Aboriginal Legal Services of New South Wales, brought a declaratory action on behalf of himself and all other Aboriginals to obtain recognition of their nationhood and ownership of Australia. He argued that all of the early English claims of sovereignty were invalid because of Aboriginal prior occupation such that the basis of Australian law and governmental control rested on the false premise of the settled colony principle as originally being **terra nullius**, or land belonging to no one. After losing at trial ((1978), 52 ALJR 334), he

appealed to the High Court of Australia. The High Court dismissed the action on procedural grounds such that it did not have to address the sovereignty issue. Nevertheless, Mr. Justice Gibbs, with Aickin J. concurring, did state, as *dicta*, that the settled colony principle applied to Australia. He further stated that Aboriginal people had no legislative, executive or judicial organs by which they could have exercised sovereignty such that they were not, in his view, ever sovereign or capable of being sovereign. Therefore, there could be no continuing sovereignty to upset the accepted legal foundations of Australia.

On the other hand, Mr. Justice Murphy described the settled colony principle as a "convenient falsehood" (at p. 412). Although not concluding that the Aboriginal people were sovereign, he did go on to say (at p. 412) that the plaintiff was:

entitled to argue that the sovereignty acquired [over Australia] by the British Crown did not extinguish "ownership rights" in the Aborigines and that they have certain proprietary rights (at least in some lands) and are entitled to declaration and enjoyment of their rights or compensation.

The issue is still, thus, a subject of debate in Australia. Not only are some Aboriginal people continuing to assert their sovereign status, but the National Aboriginal Conference is pursuing a "Makarrata," or compact, with Australia that would redefine the Aboriginal-settler relationship. In the Makarrata demands they proposed in 1981, they sought a recognition of self-government in these terms:

2. The development of self-government in each respective tribal territory to take due respect for the culture of the Aborigines and to ensure their political, economic, social and educational advancement, and by virtue of this, that they have the right to freely determine their political status and freely pursue their economic social and cultural development.<sup>37</sup>

This position has received support by the Senate Standing Committee on Constitutional and Legal Affairs.<sup>38</sup> It has concluded that sovereignty is not now legally vested in the Aboriginal peoples; however, the strength of their claim warrants the negotiation of a compact between the Commonwealth and the original inhabitants. They recommended that a constitutional amendment to s. 105A of the Australian **Constitution** be sought by the federal government through a public referendum to authorize the Commonwealth to enter into such a compact on broad terms. The specific provisions would depend upon the result of negotiations, after such a constitutional amendment was approved, between the National Aboriginal Conference and the Federal Government. This final document would then be passed by the Parliament by virtue of the new amendment to s. 105A.

In the meantime, however, Aboriginal governments have neither a special basis in sovereignty nor in the Constitution of Australia to claim the right of self-government. Those governing structures that do exist derive their status from regular legislation. Aboriginal people continue to assert such a right and point to international conventions to which Australia is a signatory.

The land rights legislation previously referred to as being in force in New South Wales, South Australia, and the Northern Territory have created new

entities with more expansive powers than the old state-wide Aboriginal Land Trusts. Nevertheless, their primary function is land oriented. They are empowered to represent the local inhabitants, administer land, negotiate economic development projects (both joint ventures or royalty arrangements), acquire additional lands, and have all the other legal powers of a normal corporation. In addition, these statutory bodies are also political organizations in that they represent their constituents in dealing with federal, state, territorial and municipal governments.

One could argue, however, that they are not Aboriginal governments *per se*, but merely land companies. This writer would suggest that such a view is incorrect. If one realizes that not all governments as such are sovereign (e.g., territorial, municipal, county and regional governments), then this assertion begins to lose its force. In light of the three-part definition of Aboriginality in common usage in Australia, these statutory corporations do exert control over membership in that the Aboriginal communities must accept someone as being an Aboriginal for that person to be a member of the corporation. Furthermore, if one views the possession of a land base as a necessary element of being a government such that its territorial limits are defined, then this requirement is also met.

It must be conceded, however, that these body corporates do not have their own judicial and legislative arms. The **Maralinga Tjarutja Land Rights Act, 1984** and the **Pitjantjatjara Land Rights Act, 1981** do create special dispute resolution

mechanisms in the form of a "tribal assessor." These assessors can only be appointed with the approval of the statutory body and they must observe the customs and traditions of the traditional owners wherever possible. Their jurisdiction is to hear complaints of any traditional owner regarding any decision or action taken by the statutory body or by any other member. This gives a very broad scope to the tribal assessor, whose decisions are enforceable by a local court of full jurisdiction. Although this is a special, innovative and informal dispute resolution system, which adheres in large part to customary law, it is still not a court process created by Aboriginal governments themselves. It was, however, established by negotiated agreement with the Aboriginal peoples affected by the two statutes.

The **Aboriginal Land Rights Act, 1983** of New South Wales also contains a special variation of the regular justice system. It is a far more limited one in that Aboriginal assessors are appointed unilaterally by the government to advise judges of the Land and Environment Court. The jurisdiction of that Court is also not as wide as the tribal assessors under the South Australian legislation. The Land Councils created by the **Aboriginal Land Rights (Northern Territory) Act 1976**, as amended, do not have a judicial function nor is a special system created. The Councils are mandated only to use their "best endeavours by way of conciliation for the settlement or prevention" of any dispute regarding land (s. 25(2)). The Local Aboriginal Land Councils in New South Wales have a similar mandate. The Land Councils in these latter two jurisdictions have no legislative powers as such beyond the normal regulatory authority of any company over its internal affairs.

Maralinga Tjarutja do have an indirect legislative capacity. The South Australian Cabinet may make regulations that would govern within these lands concerning the supply, consumption or confiscation of alcohol; the regulation of any activity that may have adverse environmental consequences; any other matter that fosters the purposes of the Act; and penalties of up to A\$2,000 for breach of these regulations. The regulations concerning liquor can only be enacted upon the recommendation of Maralinga Tjarutja, while the environmental ones cannot be passed without prior consultation.

Anangu Pitjantjatjaraku has the additional power to make its own constitution governing "procedures to be followed in resolving disputes" (s. 6(2)(i)(b)) and "any other matter that may be necessary or expedient in relation to the conduct or administration of the affairs of Anangu Pitjantjatjaraku" (s. 6(2)(i)(c)). Not only does this body initiate all state regulations on liquor like Maralinga Tjarutja, but it also has the sole power to recommend all environmental regulations. Admittedly, in both cases, the legislative instruments are being enacted by Cabinet rather than by the Aboriginal governments, and that Cabinet must decide to act on this demand.

Somewhat ironically, the Aboriginal governments with the most legislative and judicial authority exist under what is widely regarded as the repressive Government of Queensland. Aboriginal and Torres Strait Islander reserves have had a relatively long history of possessing local Councils. These bodies have been created under State legislation with defined by-law making powers similar to



those possessed by band governments under the Canadian **Indian Act**. The status and powers of the Aboriginal and Islander governments have varied significantly over the years owing to relatively frequent statutory changes in the enabling legislation by the Queensland Government.<sup>39</sup> Overall, their power has been quite minimal and was heavily controlled by the local agent of the state government.

This situation has recently changed somewhat as the Queensland Government has adopted a more "enlightened" form of assimilation. In conjunction with the aforementioned 50 year grants of deeds in trust to reserve lands legislation, the Government enacted new local government legislation for the Torres Strait Islanders (replacing the **Torres Strait Islanders Act 1971-1979**) and for the Aboriginals (replacing the **Aborigines Act 1971-1979**) in 1984 after two years of discussion and debate. It mirrors in many ways the 1969 White Paper on Indians of the Canadian federal government and the local or band government proposals of the federal Department of Indian Affairs and Northern Development in Canada up until 1983. Their proclamation has been withheld pending the issuance of the 50 year trust deeds.

The two new statutes maintain much of the overriding power and authority in the hands of the state government, but shifts the departmental management role to the Department of Community Services by dissolving the Department of Aboriginal and Islanders Affairs. It retains the special Aboriginal and Islander police forces and court systems while expanding their jurisdiction slightly. The economic development bodies (the Aboriginal Industries Board and the Island

Industries Board) are maintained as is the considerable power of the Under Secretary (the Queensland equivalent to an Associate Department Minister).

The most significant features of the two Acts are those in relation to the new Councils. Their territorial jurisdiction is limited to the trust area (former reserve lands) (s. 14(2)) and they are incorporated as body corporates (s. 15(1)). As such, they have perpetual succession, an official seal, legal standing to sue or be sued, power to acquire or administer property (both real and personal) in any way, and "of doing and suffering all such acts and things as bodies corporate may in law do and suffer" (s. 15(3)). The Councils also have legislative and executive functions as follows (s. 25 for Aboriginal Councils and s. 23 for Island Councils):

**25. Functions of Aboriginal Councils** (1) An Aboriginal Council has and may discharge the functions of local government of the area for which it is established and is hereby charged with the good rule and government thereof in accordance with the customs and practices of the Aborigines concerned and for that purpose may make by-laws and enforce the observance of all by-laws lawfully made by it.

(2) Without limiting the functions and powers of an Aboriginal Council, a council may make by-laws for promoting, maintaining, regulating and controlling --

the peace, order, discipline, comfort, health, moral safety, convenience, food supply, housing and welfare of the area for which it is established;

the planning, development and embellishment of the area for which it is established;

the business and working of the local government of the area for which it is established.

(3) Matters with respect to which an Aboriginal Council may exercise its powers and discharge its functions include --

- (a) the provision, construction, maintenance, management, and control of roads, bridges, viaducts, culverts, baths and bathing places; the undertaking and execution of work in connexion therewith; the regulation of the usage thereof;
- (b) health, sanitation, cleansing, scavenging and drainage, the removal, suppression and abatement of nuisances, public conveniences, water conservation, agricultural drainage, village planning, subdivision of land, the usage and occupation of buildings, protection from fire, boundaries and fences, disposal of the dead, the destruction of weeds and animals;
- (c) works, matters and things that, in its opinion, are necessary or conducive to the good rule and government of the area or community for which the council is established or to the well-being of its inhabitants.
- (4) The power conferred on an Aboriginal Council to regulate or control includes power to license or permit or to refuse to license or permit and to prohibit by by-law made in that behalf.
- (5) Fees, charges, fares, rents, and dues may be imposed by by-law or resolution of an Aboriginal Council.
- (6) A by-law of an Aboriginal Council may impose a penalty in respect of any breach thereof or of another by-law but any such penalty --
  - (a) shall not exceed \$500; or
  - (b) if it is expressed as a daily penalty, shall not exceed \$50 per day.
- (7) For the purposes of exercising its powers and discharging its functions an Aboriginal Council may engage such servants and agents as it thinks fit.

The Councils have the power to develop their annual budget, control entry to non-public areas within their communities and impose taxes on "any property, service, matter or thing for the purpose of enabling it to discharge and exercise

its functions and powers." The Councils also can enact by-laws governing beer distribution and can operate the beer business if they so choose. The councillors are elected by the voters within the community every three years from a roll compiled in accordance with the provisions governing non-indigenous communities under the **Local Government Act 1936-1984**. As a result of the complementary legislation granting deeds of grants in trust, the councils can control all developments on their lands over and above their specific legislative powers. There are clear parallels with the Canadian **Indian Act** and the federal Indian self-government proposal of 1984 concerning many specific legislative and executive powers.

The Aboriginal or Islander police forces are created by the Councils to enforce these by-laws within their territorial limits. Island or Aboriginal courts are also established by the Councils to hear and determine charges under the by-laws and other disputes. Each court consists of two justices of the peace appointed by the Council from among the residents, or by the members of the Council themselves. The jurisdiction of these courts are limited to the residents of the community, including non-indigenous people, concerning matters arising only within the borders of the trust lands. The courts can apply the law as defined by the precise terms of the by-laws as well as apply the "usages and customs" of the community. This latter source of authority naturally permits the courts to give full attention to traditional law. Appeals lie from this court system to the superior courts on the same basis as if the matter were emanating from a Magistrates Court.

It must be mentioned, however, that the Queensland Government retains extensive control over this local government regime. The Governor in Council must approve each by-law before it comes into effect (which is somewhat analogous to s. 82 of the Canadian **Indian Act**) and may dissolve a Council "in his absolute discretion" or on a petition of 20 per cent of the community electors. If dissolution occurs, the Governor in Council may appoint an Administrator for as long as he sees fit before calling a new election (somewhat akin to the provisions in the federal **Indian Self-Government Bill** of June 1984). The Minister also has the power to veto the annual budget of a Council and report to the Legislative Assembly each year on the operation of the two statutes. The Governor in Council has the further authority to appoint official commissions of inquiries for any purpose or appoint existing judges to visit the trust areas to hear complaints and inspect the sentencing records of the Aboriginal and Islander Courts. Extensive power to enact regulations on critical matters is also granted to the Governor in Council under these statutory regimes.

These two state enactments also create an Aboriginal Co-ordinating Council and an Island Co-ordinating Council consisting of all the chairmen of the individual Aboriginal and Island Councils respectively. These regional bodies are mandated to advise the Minister and Under Secretary on all matters "affecting the progress, development and well-being" of the Aboriginals and Islanders respectively. They also choose their representatives to the two Industries Boards, who constitute a majority.

Each Industries Board is designed to act as the catalyst for economic development in the communities. It has legal status as a body corporate so that it can deal in real or personal property and be involved in litigation. It also has the following specific powers (s. 57(2) for the Island Industries Board and s. 59(2) in regard to the Aboriginal Industries Board):

(2) The Board may:

- (a) carry on the business of banker, blacksmith, building, carpenter, commission agent, common carrier (by land or water), dealer (wholesale or retail), engineer, exporter, factor, farmer, fisherman (including the gathering of pearl-shell, trochus-shell, and Beche-de-mer), forwarding agent, freight contractor, general merchant, grazier, importer, ironworker, joiner, labour agent, lighterman, manufacturer, mining, money-lender, plumber, shipping agent, ships chandler, shipbroker, shipbuilder, shipowner, shopkeeper, stevedore, storekeeper, timber merchant, tinsmith, trustee, warehouseman, wharfinger, and any other business incidental or ancillary to any of the businesses specified or which, in the Board's opinion can be profitably or effectually carried on in connexion with any of the businesses specified;
- (b) acquire, lease, erect, maintain and renovate such buildings, wharves, vessels, tramways, plant and machinery, and undertake such works as, in the Board's opinion, are necessary or desirable for the proper exercise of the powers conferred on it by this Act;
- (c) obtain and disseminate information with respect to the best manner of carrying on any business specified or referred to in paragraph (a) of this subsection, undertake the instruction of Aborigines and other persons in any such business and, for that purpose, establish, maintain and conduct such schools, and classes as the Board considers necessary or desirable and enter into contracts of apprenticeship;
- (d) for the purpose of carrying on any business specified or referred to in paragraph (a) of this subsection, exercise all such powers, authorities and discretions and do all such acts and things as a natural person conducting such a business in the State might exercise and do;

- (e) cause investigations to be made and, from time to time, report and recommend to the Under Secretary concerning --
  - (i) any question touching trade, commerce or business carried on by Aborigines or in which they are interested or engaged;
  - (ii) markets for the produce of Aborigines, trade in and methods of marketing such produce;
  - (iii) the encouragement, development and protection of the trade, commerce and industries of Aborigines;
- (f) finance any business specified or referred to in paragraph (a) of this subsection and, for that purpose, raise money on loan from the Treasurer of Queensland, the Corporation, the Corporation of the Agricultural Bank, or any bank, financial institution, or person and mortgage or assign by way of security property of the Board (including the rights of the Board under contracts made with Aborigines or other persons in connection with any such business).

Primarily owing to dissatisfaction with the other half of the Queensland initiative (i.e., the deeds of grants in trust) and the history of misuse of state power over reserve life, the original inhabitants of Australia and their supporters lobbied the former Commonwealth government to intervene. It had previously passed the **Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978** to use if need be to guarantee reserve dwellers the right to control their own affairs. As previously mentioned, the doctrine of paramountcy exists in Australia such that validly enacted federal legislation will prevail over valid state legislation if there is any conflict between the two.

The Senate responded to the latest developments in Queensland by enacting the **Queensland Aborigines and Torres Strait Islanders (Self-Management and**

**Land Rights) Act 1982** in March of that year. It was to repeal the prior 1978 Act and was expressly rendered binding on the Crown in right of Queensland as well as on the Crown in right of the Commonwealth (s. 4). The scheme of the Act is predicated upon a request from an existing Council, or a majority of the adult Aboriginal or Islander residents of the reserve, to seek to come within the terms of this Act (s. 5). It, thus, has an opt-in clause analogous to Bill C-52, the proposal of the Canadian federal government relating to Indian self-government.

After seeking status under this Act, the Council is given the broad authority to "manage and control the affairs" of its community (s. 7), to which it is responsible (s. 8), and to "do all things that are necessary or convenient to be done for or in connection with the performance of its functions" (s. 11(1)). It is exempt from control under any Queensland laws and directions (s. 14(1)) and can control entry to premises on the reserve (s. 13) or to the reserve as a whole (s. 12). The Council also can provide any service it sees fit including the following under s. 9(1):

- (a) housing;
- (b) health;
- (c) sewerage;
- (d) water supply;
- (e) electricity supply;
- (f) communications;
- (g) education or training;



- (h) relief work for unemployed persons;
- (j) roads and associated works;
- (k) garbage collection and disposal;
- (l) welfare;
- (m) community amenities;
- (n) forestries;
- (o) waterways;
- (p) fisheries.

The Council may make by-laws for purposes connected with any of the preceding services (s. 10(1)), including service charge by-laws (s. 10(2)), and may impose fines of up to A\$50 (s. 10(11)). These by-laws bind both the state and federal Crowns (s. 10(4)). They are not subject to being overturned or vetoed by the federal Cabinet, however, the Minister responsible must be given a copy (s. 10(6)) which he must put before each House of Parliament (s. 10(7)).

The other side of this legislation is that it authorized the Commonwealth to make land available to Councils upon their request (s. 15). The federal government obliged itself under the Act to pay compensation to any person, including the Queensland government, for any land acquired to meet such a request (s. 16). The Act requires the Minister to acquire the land within 12 months so long as he is "reasonably satisfied" that the request has the support of "a majority of the traditional land owners" or of the adults "entitled to live on the Reserve" and that it is in their interest to grant the application (s. 21).

The Act then continues to direct the Minister to establish a separate Land Trust for each grant consisting of people nominated by the Council. The procedures outlined under the Act as well as the powers and functions of the Land Trusts are heavily drawn from the experience in the Northern Territory and the language of the **Aboriginal Land Rights (Northern Territory) Act 1976**. The present Commonwealth Government has not yet moved to seek passage of this Act in the House.

The present situation might be characterized as somewhat of a "Mexican stand-off." The Queensland Government has refrained from proclaiming its legislation and deeding reserve land under the 50 year grants of trust as it believes that such action would force the Commonwealth to pursue its statute and intervene. On the other hand, if the federal government moves first to seize the reserve lands, then it will have to compensate the State for the fair market value of these lands consisting of over 30,000 square kilometres, or 1.74 per cent of the state. The Commonwealth would rather see the Government of Queensland issue the inalienable 50 year leases and then intervene, as the fair market value figures it would be required to pay as compensation for land under such restrictions would be considerably less.

In the meantime, the federal government is still pursuing the possibility of national land rights legislation with the support of the other states (four of the other five have Labour Party Governments like the Commonwealth) so as to reflect broad popular support and avoid the image of confrontation with the

Queensland Government. Furthermore, there is the possibility of a change in the state government at the next election, while the federal Cabinet has shifted its attention to its own re-election campaign in the face of a rising anti-Aboriginal backlash.

Despite the present impasse and the many flaws in both the Queensland and Commonwealth statutory regimes, there are elements of each worthy of further consideration by Canadians focussing upon systems of Aboriginal self-government. The existence of a separate court system with authority over both Aboriginal legislative enactments and customary law has much to commend it as does its jurisdiction concerning all residents regardless of race. The broad powers given to the two Industries Boards to promote economic development on a local and regional scale is also attractive, as is its separation from Aboriginal governments while being responsive to them at the same time.

There is little, however, in the specific legislative jurisdiction granted to the Aboriginal and Islander governments under either approach which is particularly new or innovative from a Canadian vantage point. The Queensland legislation basically delegates even less power than band councils in Canada have under sections 81 and 83 of the **Indian Act**, whereas the Commonwealth Act duplicates the **Indian Act** and Bill C-52 heads of legislative jurisdiction.

It should be noted, however, that the Commonwealth statute does give power over electricity and waterways which are not clearly present in the Canadian scene as well as communications, which was limited to an executive

power rather than a legislative one under Bill C-52. In addition, these by-laws expressly bind on both the state and federal governments while the situation in Canada is the subject of some debate. There is also something positive which can be said about the Queensland regime in that it uses very broad language similar to the Government of Canada's "peace, order and good government" power under s. 91 of the Constitution. This leaves open for future decision by the Superior Courts the exact parameters of Aboriginal governmental authority such that it can evolve and expand to meet new issues as they arise without requiring an amendment to its statutorily prescribed jurisdiction.

A somewhat analogous yet even more limited approach to that of the Queensland Government prior to its latest legislation was taken by a former government of Western Australia when it enacted the **Aboriginal Communities Act 1979**. Two communities were immediately brought under the Act (s. 4(1)(a)) and a mechanism was created whereby the Governor in Council could declare additional incorporated communities to be governed by this Act (s. 4(1)(b)) so long as the communities concerned have constitutions ensuring that their councils are representative (s. 4(2)). The councils can pass by-laws, subject to acceptance by the Government (s. 8), which apply to all persons within the boundaries of the community lands (s. 9(1)). The precise scope of this legislative jurisdiction is as follows:

7. (1) The Council of a community to which this Act applies may make by-laws relating to the community lands of the community for or with respect to --

- (a) the prohibition or regulation of the admission of persons, vehicles, and animals to the community lands or a part of the community lands;
- (b) the prohibition or regulation of the use of vehicles on the community lands, including provisions as to speed, manner of driving, class of vehicles, routes, entrances and exits, one-way traffic, noise, parking or standing, the removal of vehicles by a person authorized under the by-laws, and for the control of traffic generally;
- (c) the prevention of damage to or interference with the grounds of the community lands and the trees, shrubs, bushes, flowers, gardens and laws on or in those lands;
- (d) the use, safety and preservation of buildings, structures, erections, fixtures, fittings and chattels on the community lands;
- (e) the regulation of the conduct of meetings and the interruption of meetings by noise, unseemly behaviour or other means;
- (f) the prohibition of nuisances, or any offensive, indecent or improper act, or disorderly conduct, language or behaviour;
- (g) the prohibition, restriction or regulation of the possession, use or supply of alcoholic liquor or deleterious substances;
- (h) the prohibition or regulation of the possession or use of firearms or other offensive weapons or of dangerous materials;
- (i) the depositing of rubbish and the leaving of litter on community lands;
- (j) the prohibition of the obstruction of any person acting in the execution of his duty under the by-laws or in the exercise and enjoyment by him of any lawful activity on the community lands;
- (k) the prescribing of any other matter that it is necessary or convenient to prescribe for the purpose of securing decency, order and good conduct on the community lands.

(2) By-laws made by the council of a community under subsection (1) of this section --

- (a) may empower a member of the police force --
  - (i) to apprehend any persons guilty of a breach of any by-law and to remove such a person from the community lands;
  - (ii) to remove any vehicle, animal or other thing from the community lands;
  - (iii) to request the name and address of any other person who, in the reasonable belief of the member of the police force, is on the community lands in breach of any by-law or has committed a breach of a by-law;
  - (iv) to take proceedings for any breach of a by-law; and
  - (v) generally to enforce the provisions of the by-laws;
- (b) may be limited in their application to time, place or circumstance;
- (c) may provide that any act or thing shall be done subject to the approval or to the satisfaction of the council or a specified person or class of persons and may confer a discretionary authority on the council or a specified person or class of persons;
- (d) may impose as the penalty for a breach of a by-law a fine, or a term of imprisonment, or both, but no fine so imposed shall exceed one hundred dollars and no term of imprisonment so imposed shall exceed three months;
- (e) may empower a court to order a person to pay compensation not exceeding two hundred and fifty dollars to the community or another person where the court has convicted him under the by-laws of an offence and, in the course of committing that

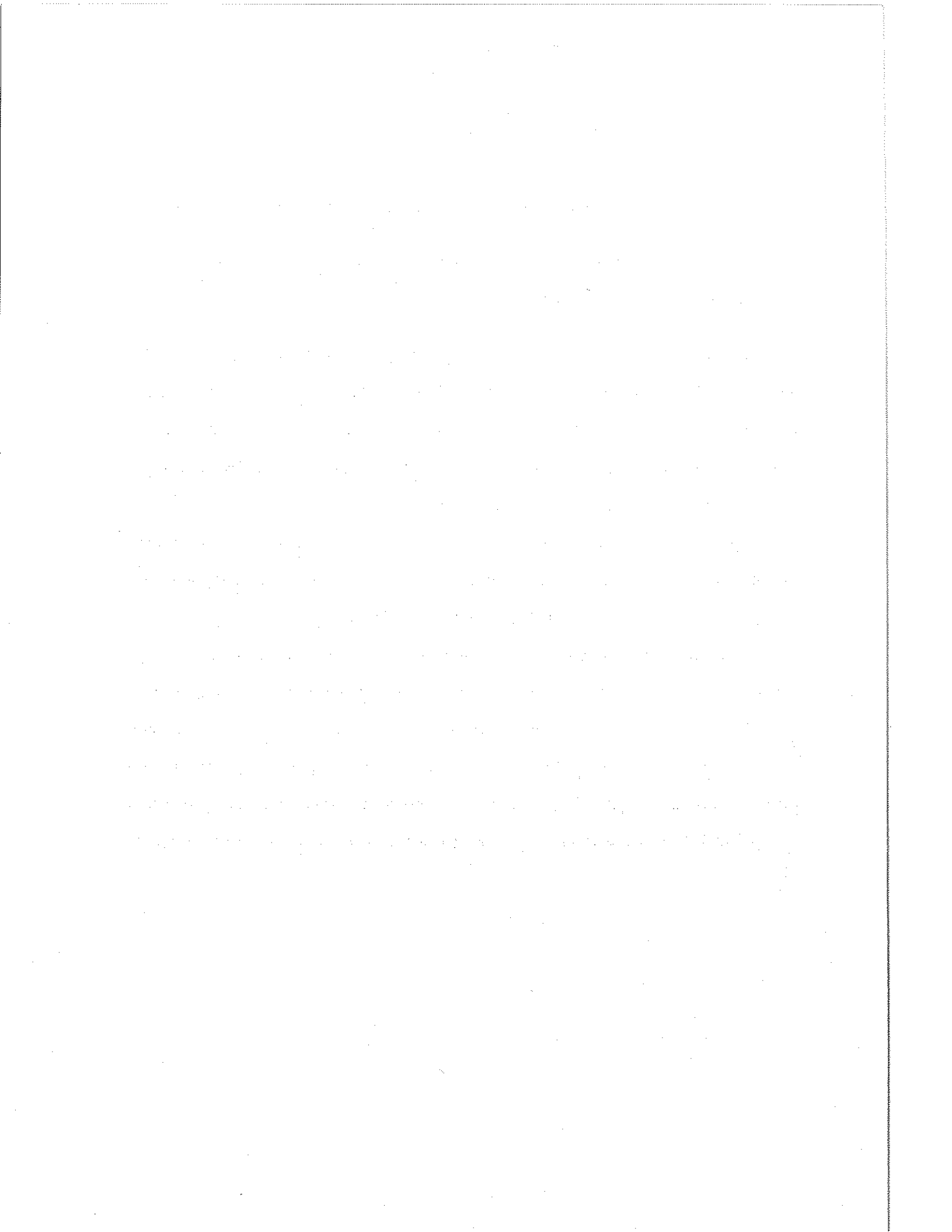
offence, he has caused damage to property of the community or that other person.

(3) Nothing in this Act affects the power of a community or its council to make other by-laws, rules or regulations under and in accordance with the constitution of the community.

The parallels with the Queensland legislation and the **Indian Act** are readily apparent. All fines imposed under the by-laws are to be paid to the council for the use of the community (s. 12), just as the discretion available under s. 104 of the **Indian Act** to convey all fines, penalties and forfeitures to the Crown in right of Canada for the benefit of the individual band involved.

Aboriginal community councils in the Northern Territory also receive very limited powers to enact by-laws governing the use of firearms and the possession of liquor by virtue of the **Local Government Act (No. 4) 1978 (N.T.)**.

Aboriginal governments created under any of the federal or state statutes discussed are free to borrow from the substance of general law or to incorporate specific statutes by reference within their own laws. The degree to which they are free to reject these external models and develop contradictory legislation depends upon the precise language of their enabling legislation. Unfortunately, this writer is not aware of any court decisions that have addressed this important area.





## 8 ABORIGINAL CUSTOMARY LAW

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One of the issues which has received major attention in Australia for over a decade is the area of Aboriginal customary law. Its treatment by the courts originally was mirrored by the attitude towards Aboriginal title. That is, it did not exist both because it was not visible to the European eye (like Aboriginal land usage) and because of the prevalence of a belief in racial supremacy which defined the original inhabitants of Australia as sub-human. So long as the courts conceived of Aboriginals and Islanders in this fashion, the judiciary could not possibly perceive of the existence of a highly intricate and well-developed legal system maintained by oral tradition.<sup>40</sup>

This approach only began to break down in the 1960s. Ironically, one of the landmark decisions occurred in the rejection of an Aboriginal title claim in the **Gove Land Rights Case (Milirrpum v. Nabalco Pty Ltd and the Commonwealth of Australia, supra)**. Mr. Justice Blackburn was able to accept that there was and still is "law" developed and adhered to by the Aboriginal people of northeastern Arnhem Land:

The evidence showed a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. (pp. 266-267).

It is simply not humanly possible to reflect adequately the full breadth and depth of the considerable quantity of anthropological and legal literature that has developed in Australia over the last decades,<sup>41</sup> nor encapsulate the wealth of research material generated by the Australian Law Reform Commission since it commenced its reference from the Attorney-General of the Commonwealth in 1977 on the recognition of Aboriginal customary law.<sup>42</sup> Nevertheless, it is important in this study to do more than merely mention this subject, or only refer to it in an historical fashion.

As is evident from some of the preceding discussion, customary law is a critical component to the lodging of land claims by traditional Aboriginal owners in the Northern Territory. It remains very relevant after transfer of title as an aspect to which the statutory bodies corporate must pay serious attention in South Australia as well as the Northern Territory. Customary law also forms a part of the jurisdiction of the Aboriginal and Islander courts in Queensland, while it governs the role of the tribal assessors established under the Pitjantjatjara and Maralinga legislation. Its importance is further evidenced by the prevalence of statutes designed to protect sacred and significant sites.<sup>43</sup>

Furthermore, traditional Aboriginal law is not solely of importance to those Aboriginal people who are said to still be living a "tribal" lifestyle. The

Australian Law Reform Commission has regularly received submissions from urban Aboriginals concerning the continuing relevance of at least some aspects of customary law to them, not to mention the ongoing revival of Aboriginal cultures that derive so much of their sustenance from traditional law.

The legal system has changed its attitude in recent years as a result of the shift in judicial attitude reflected in Mr. Justice Blackburn's decision. The approach usually adopted has been to minimize the negative impact of the general law's different values while still applying the common law and prevailing statutes to Aboriginals. There are instances in which the courts have used the Canadian approach<sup>44</sup> of recognizing and applying traditional Aboriginal family law in the interpretation of general legislation.<sup>45</sup> A more common avenue has been to give great weight to customary law in the exercise of judicial discretion in the sentencing of Aboriginal offenders.<sup>46</sup> Aboriginal traditional law has also been a vital factor in applying established common law developed criminal defences of provocation, duress, claim of right and self-defence.<sup>47</sup> The loss of status and privileges under traditional law as a result of physical injury has been recognized as compensable in accident cases.<sup>48</sup>

The courts have also established special requirements for police interrogation of Aboriginal suspects, known as the "Anunga rules." These rules direct the police during questioning of any suspects or accused persons to provide an interpreter where necessary, secure the presence of a "prisoner's friend" acceptable to the individual, notify the nearest Aboriginal legal service,

administer the caution against self-incrimination in terms sufficiently clear to be sure that it is understood, not engage in cross-examination through the use of leading questions or a belligerent tone, not rely solely on confessions but to seek other evidence, provide full use of facilities including food and drink, discontinue interrogation after the individual declines to answer questions, and pursue interrogation only when the Aboriginal person is not suffering from illness, intoxication or tiredness.<sup>49</sup> These principles, created by Mr. Justice Forster of the Northern Territory Supreme Court, have now become official police policy in South Australia and the Australian Capital Territory as well as in the Northern Territory. There are weaker statutory versions of them in force in Western Australia and Queensland. A federal Bill to codify this procedure was introduced in Parliament in 1981 but has yet to be enacted.

Not only is customary law recognized in these limited ways by the courts, but it also receives unofficial, yet effective, status in the administration of various social security and social welfare schemes. Furthermore, some legislation specifically validates traditional marriages so as to render children legitimate,<sup>50</sup> enable spouses to seek testator's family maintenance,<sup>51</sup> extend intestacy provisions to family members,<sup>52</sup> benefit spouses of government employees,<sup>53</sup> and cover family members in worker's compensation and motor vehicle injury compensation legislation.<sup>54</sup>

The Australian Law Reform Commission has tentatively recommended federal legislation in its preliminary reports that would give functional

recognition to Aboriginal customary law in the following areas: (1) the distribution of property on death; (2) the receipt of benefits under all statutory social assistance and financial compensation schemes; (3) acknowledgement in child custody and placement decisions; (4) admissibility of customary law as relevant evidence in criminal trials notwithstanding any violations of the general law of evidence; (5) the determination of intent and the reasonableness of acts committed which violate the general criminal law; (6) the exercise of the judicial discretion in sentencing; (7) the exercise of the discretion to prosecute; (8) the inclusion of a partial customary law defence so as to reduce the charge of murder to manslaughter; and (9) the institution of special procedural and evidentiary safeguards both in police interrogations and criminal trials. The final report of the Commission accompanied by draft legislation is expected to be released in December 1984 or early in 1985.

It must be emphasized, however, that all of these initiatives focus upon the general legal system in Australia and its willingness to give serious weight to Aboriginal customary law or to incorporate it into the general law. This is occurring solely out of a desire to do so rather than as a result of any legal requirement. It also is neither based on any conflicts of laws principle nor on any acceptance of the non-applicability of Australian law and courts to Aboriginals and Islanders. Although some formal indigenous courts do exist and more are under consideration, the major thrust of these developments and proposals is upon modifying the general law so as to accommodate the different cultural values and laws of Aboriginal and Islander societies.

On the other hand, inclusion or rejection of Aboriginal customary law does not affect its continued vitality. Aboriginal law remains respected, adhered to and enforced in all traditional communities and, to varying degrees, in country town camps and urban centres. It is this enduring vigor which prompts Australian governments and courts to consider the necessity to alter the prevailing law so as to reduce any conflicts between the two legal systems.

## 9 CONCLUSION

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Although this is not truly a brief paper, the author has merely skimmed the surface of developments in Australia in aboriginal self-government. It has not been possible, given time and space constraints, to delve in greater detail into the many topics discussed. For the same reasons, the voice of individual Aboriginals and Islanders, as well as that of other commentators, has been restricted to a bare minimum. One must turn to the wealth of published and unpublished literature emanating from academics, governments, Aboriginal organizations and individual Aboriginals and Islanders to obtain a more complete picture. At the same time, comparisons between Australia and Canada have been restrained.

I would suggest that there is a great deal of valuable experience in this whole area in Australia to be drawn upon and learned from by Canadians. The three part definition of aboriginality in use in many parts of Australia has much to offer us in addressing the present debate regarding repatriation of non-status Indians versus First Nations' rights to control their own membership, the proper

definition of Métis, and the regulation of eligibility for entitlement under comprehensive claims settlements. The Australian model focusses upon ancestry (thereby excluding non-indigenous spouses) without engaging in blood quantum dividing lines. To this is added an element of freedom of choice in that an individual must decide on his or her own whether to assert aboriginality. Finally, the community has its say in determining whether or not an individual will be recognized as Aboriginal.

We can also benefit significantly from paying serious consideration to land rights in Australia. They have avoided our penchant for concentrating on the law and "lawful obligations." Instead, they have turned their attention to more fundamental concerns of fairness, justice and morality in the broadest sense at a political and ethical level. While they can learn from us about the financial compensation component to land claim settlements, we clearly can benefit from reviewing the systems of land title holding in use in Australia as well as the quantities of land transferred into the hands of Aboriginal and Islander organizations.

Australian experience in Aboriginal controlled economic development initiatives is very exciting and far more independent from non-Aboriginal influence than has generally been the situation in Canada. We also can profit from the high degree of experience of Aboriginal people in the areas of subsurface resource extraction, joint management of parks, and the protection of sacred sites. At the same time, the developments in customary law recognition and the



possible negotiation of a national compact or treaty to redefine the indigenous-immigrant relationship offer much promise for further examination by Canadians. On the other hand, there is relatively little on the Australian scene concerning the precise scope of Aboriginal government legislative and executive powers, or the foundations of these governments, which is new and interesting to anyone fully familiar with the **Indian Act**, except concerning land use management. The American Indian tribal governments provide a far more useful source of information and inspiration on this particular subject.

It is also worth mentioning that Canada would benefit from examining the Aboriginal and Islander legal service programs, health organizations, hostels and co-operative housing projects, community colleges, post-secondary education financial assistance, and the value of a national research centre in the form of the Australian Institute for Aboriginal Studies.

Although this study outlines both some of the successes and the flaws in Australian developments, we would be well served by seriously considering the utility of borrowing from the positive achievements. Naturally, Canada cannot simply adopt the experience of a different historical and legal evolution. Aboriginal and Islander cultures are many and diverse. Although they share internal similarities and possess common elements with Indian, Métis and Inuit societies, they are also dissimilar in some important ways. Therefore, the process must be one of adapting and modifying attractive concepts under the direction and control of local Indian, Métis and Inuit communities, rather than the adoption

of Australian ideas and implementing them intact on a national scale. This is, in fact, one of the more valuable lessons that we can learn from our friends in the South Pacific.

## NOTES

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1. **Commonwealth of Australia Constitution Act, 1900.**
2. P. Hanks, "Aborigines and Government: the Developing Framework" in P. Hanks and B. Keon-Cohen, eds., **Aborigines and the Law** (North Sydney: George Allen & Unwin Australia Ltd., 1984), at 20.
3. G. Sawyer, "The Australian Constitution and the Australian Aborigine" (1966), **2 Federal Law Review** 17, at 17-18.
4. J. Quick and R.R. Garran, **The Annotated Constitution of the Australian Commonwealth**, London, 1901, at 622.
5. Parliament of the Commonwealth of Australia, **Two Hundred Years Later ... Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Feasibility of a Compact or 'Makarrata' Between the Commonwealth and Aboriginal people**, Canberra, 1983, at 81.
6. **Ibid.**, at 92.
7. **Ibid.**
8. National Aboriginal Conference, **National Aboriginal Land Rights Legislation - Discussion Paper**, Canberra, 1984.

9. Commonwealth of Australia, **Aboriginals in Australia Today**, Canberra, 1982, Australian Government Publishing Service, at 9.
10. N. Peterson, ed., **Aboriginal Land Rights: a Handbook**, Canberra, 1981, Australian Institute of Aboriginal Studies, at 2.
11. National Aboriginal Conference, note 7, *supra*, at 6. See also, P. Felton, "Victoria - Lands Reserved for the Benefit of Aborigines 1835-1971" and B. Moore, "Victoria - Present Situation," both in N. Peterson, note 9, *supra*.
12. D. Bell, "Women's Business is Hard Work: Central Australian Aboriginal Women's Love Rituals" (1981), 7 **Journal of Women in Culture and Society**, 314, at 315-6.
13. J. Crawford, "The Australian Land Rights Commission's Reference on the Recognition of Aboriginal Customary Law," August 1983, at 34.
14. For further information, see, e.g., N. Peterson, note 10, *supra*; N. Peterson and M. Langton, eds., **Aborigines, Land and Land Rights**, Canberra, 1983, Australian Institute of Aboriginal Studies; B. Keon-Cohen and B. Morse, "Indigenous Land Rights in Australia and Canada," in P. Hanks and B. Keon-Cohen, note 2, *supra*, at 74-102; J. Hookey, "The Gove Land Rights Case: a Judicial Dispensation for the Taking of Aboriginal Lands in Australia" (1972), 5 **Federal Law Review** 85; and J. Little, "Land Rights" in G. Nettheim, ed., **Aborigines, Human Rights and the Law**, Sydney, 1974, Hogkin, Polle.
15. That is, the **Aboriginal Relics Preservation Act 1967** (Queensland); the **Archaeological and Aboriginal Relics Preservation Act 1972** (Victoria); the

**Aboriginal Heritage Act 1972** (Western Australia); the **Aboriginal Relics Act 1975** (Tasmania); the **Aboriginal Land Rights (Northern Territory) Act 1976** (Commonwealth); the **Aboriginal Sacred Sites Act 1978** (Northern Territory); the **Aboriginal Heritage Act 1979** (South Australia); and the **Cobourg Peninsula Aboriginal Land and Sanctuary Act 1981** (Northern Territory). Certain other legislation either permits only the recording of sacred sites (e.g., the **Maralinga Tjarutja Land Rights Act, 1984** (South Australia), s. 16) or generally excludes trespassers on all lands set aside for Aboriginals or Torres Strait Islanders.

16. That is, the **Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act, 1984** (Cth). The first three applications under this Act have been rejected by the Minister of Aboriginal Affairs.
17. **Aboriginals in Australia Today**, note 9, *supra*, at p. 9.
18. For further information, see, C. Anderson, "Queensland" in N. Peterson, note 10, *supra*, pp. 53-114; G. Nettheim, **Outlawed: Queensland's Aborigines and Islanders and the Rule of Law**, Sydney, 1974, ANZ Books; and G. Nettheim, **Victims of the Law: Black Queenslanders Today**, North Sydney, 1982, George Allen & Unwin.
19. See, N. Peterson, "New South Wales" and "South Australia," B. Moore, "Victoria - Present Situation" and G. McDonald, "Western Australia," all in N. Peterson, note 10, *supra*.
20. See, e.g., R. Howie, "Northern Territory" in N. Peterson, note 10, *supra*; and B. Keon-Cohen and B. Morse, note 14, *supra*.

21. See, e.g., K. Maddock, "'Owners', 'Managers' & the Choice of Statutory Traditional Owners by Anthropologists and Lawyers," in N. Peterson and M. Langton, note 14, *supra*; D.J. Barnett, "Aboriginal Land Rights in the Northern Territory" (1978), 1 *Australian Mineral & Petroleum Law Journal* 399; and K. Maddock, *Anthropology, Law & the Definition of Aboriginal Rights to Land*, Nijmegen, 1980, Institute of Folk Law.
22. For an exhaustive review of the operation of the 1976 Act and its eight amendments by its first Commissioner, see, J. Toohey, *Seven Years On - Report by Mr. Justice Toohey to the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters*, Canberra, 1984, Australian Government Publishing Service. An earlier review worthy of note is, B.W. Rowland, Q.C., Report to the Minister for Aboriginal Affairs, *Examination of the Aboriginal Land Rights (NT) Act 1976*, (Unpublished, August 1980).
23. For further information on the South Australian situation, see, N. Peterson, "South Australia" in N. Peterson, note 10, *supra*; C. Cocks, *Report of the Pitjantjatjara Land Rights Working Party of South Australia*, Adelaide, 1978, Governmental Printer; D. Vachon, P. Toyne and C. Forbes, *Not Passing Through: the Pitjantjatjara Struggle for Their Land*, Melbourne, 1984, McPhee, Gible; R. Layton, "Pitjantjatjara Processes and the Structure of the Land Rights Act" and B. Edwards, "Pitjantjatjara Land Rights," both in N. Peterson and M. Langton, note 14, *supra*. It should also be noted that the first Act has been challenged as being in violation of the **Racial**

**Discrimination Act, 1975** (Cth.) as discriminating against non-Aboriginal Australians. The High Court of Australia has been called upon to rule on this challenge in **Gerhardy v. Brown** (decision reserved as of November 1984 after oral arguments were presented in late August).

24. Select Committee of the Legislative Assembly upon Aborigines in New South Wales, **Aboriginal Land Rights and Sacred and Significant Sites** (First Report), Sydney, 1980, New South Wales Government Printer ("The Keane Report").
25. **Green Paper on Aboriginal Land Rights in New South Wales**, Sydney, 1982, New South Wales Government Printer.
26. See, e.g., B.W. Morse, "Submission to the Government of New South Wales in Response to the Green Paper on Aboriginal Land Rights in New South Wales" in **Comments on the New South Wales Government Land Rights Proposals**, Canberra, 1980, Aboriginal Development Commission; and M. Wilkie, "New South Wales Bill Opposed" (1983), 7 **Aboriginal Law Bulletin** 1.
27. Note 25, *supra*, p. 12.
28. **Ibid.**
29. For further information on Western Australia, see, P. Seaman, Q.C., **The Aboriginal Land Inquiry**, First Report (January 1984), and Second Report (October 1984) Perth; on Victoria, see, Social Development Committee, **Discussion Paper on Matters Before the Committee Conducting an Inquiry into Aboriginal Compensation**, Melbourne, June 1984, Parliament of Victoria; **Aboriginal Land Claims Bill 1983; Aboriginal Lands (Framlingham**

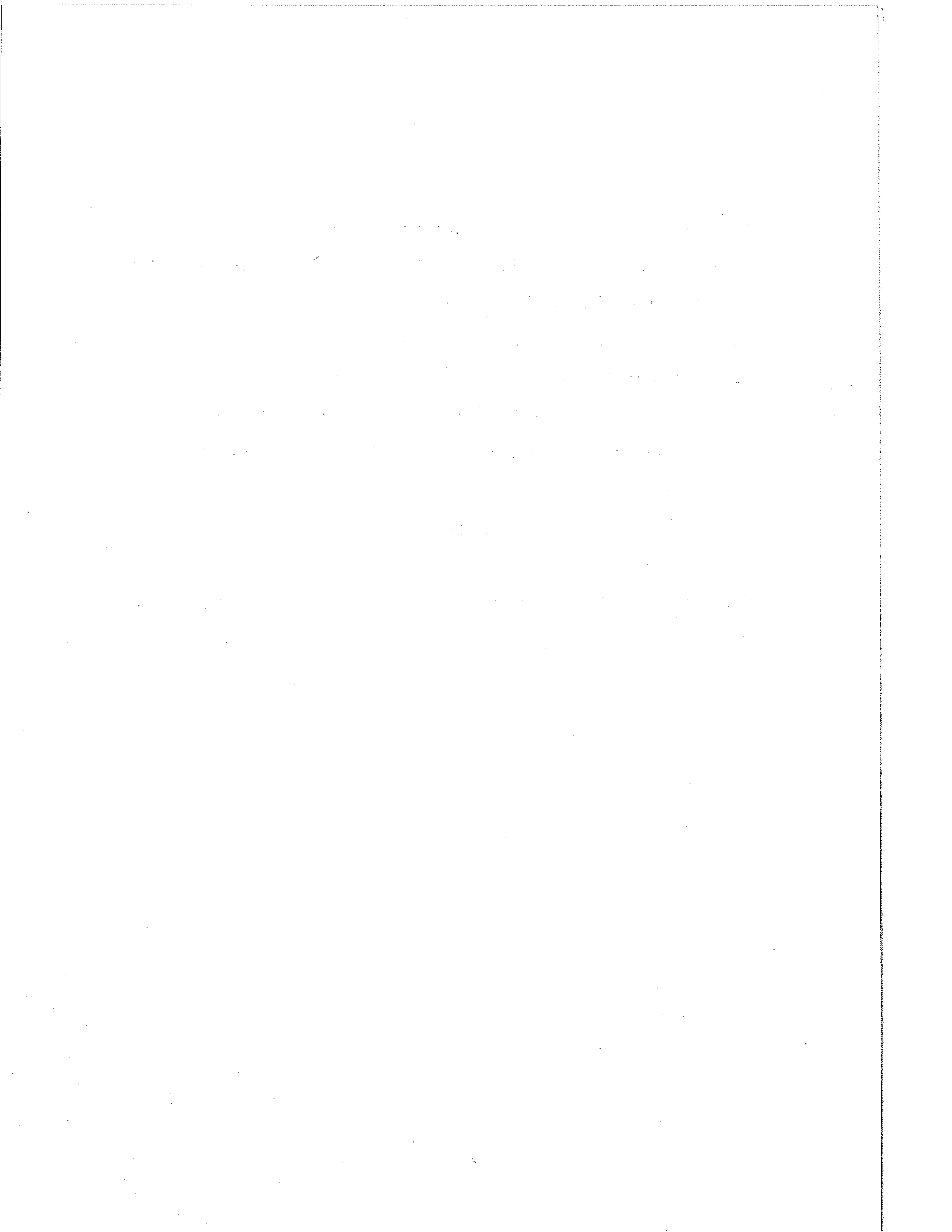
- Forest) Bill 1982** and Victorian Government Aboriginal Affairs Discussion Paper, Melbourne, September 1984.
30. **Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982**, as later amended by the **Land Act (Aboriginal and Islander Land Grants) Amendment Act 1984**, both of which must be viewed in conjunction with the **Land Act 1962-1984**.
  31. **Land Act 1962-1984**, s. 340(3).
  32. See, for example, **Local Government (Aboriginal Lands) Act Amendment Act 1978** in which Torres Strait Islander lands in Mornington Shire were vested in an Administrator.
  33. See, e.g., **Aurukun Associates Agreement Act 1975**, in which bauxite mining leases were approved for the Aurukun reserve lands without local consent.
  34. For specific criticisms on the Queensland government's policies regarding Aboriginals and Islanders, see, note 18, *supra*; D.S. Trigger, "Land Rights Legislation in Queensland: The Issue of Historical Association" and J. Beckett, "Ownership of Land in the Torres Strait Islands," both in N. Peterson and M. Langton, note 14, *supra*. For recent critiques of the latest approach, see, F. Brennan SJ, "A Comparison of Deeds of Grant in Trust (amended) with Aboriginal Land Rights (NT) Act, 1976" (December 1983); "The New Laws Deed of Grant in Trust and Services" (May 1984); and "An Analysis of the Community Service Bills" (April 1984).
  35. C. Rowley, "Aboriginal Land Fund Commission", in N. Peterson, note 10, *supra*, 254-266. Professor Rowley was the Chairman of the Commission during its five year existence.



36. See, e.g., **R. v. Jack Congo Murrell**, (1836) Legge 72. "Aboriginals within the boundaries of the Colony are subject to the laws of the Colony ...".
37. Note 5, *supra*, at 177. The full list of demands is contained at 177-178.
38. Note 5, *supra*.
39. See, e.g., **The Aboriginals Protection and Restriction of the Sale of Opium Act 1897**; **The Aboriginals Preservation and Protection Act of 1939**; **The Torres Strait Islanders Act of 1938**; **The Aborigines and Torres Strait Islanders' Affairs Act of 1965**; **Aborigines Act 1971**; **Torres Strait Islanders Act 1971**; **Local Government (Aboriginal Lands) Act 1978**; **Local Government (Aboriginal Lands) Act Amendment Act 1978**; **Aborigines and Islanders Act Amendment Act 1979**; **Local Government (Aboriginal Lands) Act Amendment Act 1981**; **Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982-1984**; **Land Act 1962-1984**; **Community Services (Aborigines) Act 1984**; and **Community Services (Torres Strait) Act 1984**.
40. See, e.g., **R. v. Jack Congo Murrell**, note 36, *supra*; **R. v. Neddy Monkey** (1861), 1 W&W (CL) 40 and **R. v. Colby** (1883), 4 LR (NSW) 355.
41. See, e.g., E. Eggleston, **Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia**, Canberra, 1976, ANU Press; K. Maddock, "Aboriginal Customary Law" in P. Hanks and B. Keon-Cohen, note 2, *supra*, at 212-237; K. Maddock, note 21, *supra*; J. Crawford, note 13, *supra*; L.R. Hiatt, **Kinship and Conflict: A Study of an Aboriginal Community in Northern Arnhem Land**, Canberra 1965, ANU Press; R.M. and C.H. Berndt, eds., **Aboriginal Man in Australia**, Sydney,

- 1965, Angus & Robertson; W.E.H. Stanner, **White Man Got No Dreaming: Essays 1938-1973**, Canberra, 1979, ANU Press; D. Bell, **Daughter of the Dreaming**, Melbourne, 1983, McPhee Gribble; and D. Bell and P. Ditton, **Law: The Old and the New**, Canberra, 1980, Aboriginal History.
42. Since 1977, the Commission has issued three Discussion Papers, 15 Research Papers and several Field Reports on different aspects of its Aboriginal Customary Law Reference. A full list is contained in Appendix II.
43. Note 15, *supra*.
44. For further information on the Canadian approach, see B. Morse, "Indian and Inuit Family Law and the Canadian Legal System" (1980), 8 **American Indian Law Review** 199-257.
45. See, e.g., Research Papers 2, 3 and 4 of the Australian Law Reform Commission.
46. See, e.g., Australian Law Reform Commission's Research Paper 6A **Appendix: Cases on Traditional Punishments and Sentencing** for its discussion of 48 such cases; the issues of the **Aboriginal Law Bulletin**; the single volume consolidation of previously unreported Northern Territory Supreme Court decisions in **Northern Territory Judgments; Jadurin. v. R.** (1982), 44 ALR 424; **Neal v. R.** (1982), 42 ALR 609; and **Mamarika v. R.** (1982), 42 ALR 92.
47. See, e.g., Australian Law Reform Commission's Research Paper 6, **Aboriginal Customary Law and the Substantive Criminal Law**.
48. **Napaluma v. Baker** (1982), 4 **Aboriginal Law Bulletin** 9; and **Dixon v. Davies** (1983), 7 **Aboriginal Law Bulletin** 9.

49. **R. v. Anunga** (1976), 11 ALR 412. See, also, N. Rees, "Police Interrogation of Aborigines," in Basten, Richardson, Ronalds and Zdenkowski, eds., **The Criminal Injustice System**, Sydney, 1982.
50. **Status of Children Act 1978** (Northern Territory).
51. **Family Provision Act 1979** (Northern Territory), s. 7(1A).
52. **Administration and Probate Act 1979** (Northern Territory) ss. 6(4), 67A and 71B; **Aboriginal Affairs Planning Authority Act, 1972** (Western Australia), s. 35(2).
53. **Compensation (Commonwealth Employees) Act 1971** (Commonwealth), s. 5(1).
54. **Motor Accidents (Compensation) Act 1979** (Northern Territory), s. 4(e); **Workmen's Compensation Ordinance (No. 3) 1968** (Northern Territory), s. 6.



## APPENDICES

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### Appendix I

#### Australian Constitution Excerpts

**51. Legislative powers of the Parliament** The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (i) Trade and commerce with other countries, and among the States;
- (ii) Taxation; but so as not to discriminate between States or parts of States;
- (iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;
- (iv) Borrowing money on the public credit of the Commonwealth;
- (v) Postal, telegraphic, telephonic, and other like services;
- (vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;

- (vii) Lighthouses, lightships, beacons and buoys;
- (viii) Astronomical and meteorological observations;
- (ix) Quarantine;
- (x) Fisheries in Australian waters beyond territorial limits;
- (xi) Census and statistics;
- (xii) Currency, coinage, and legal tender;
- (xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;
- (xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;
- (xv) Weights and measures;
- (xvi) Bills of exchange and promissory notes;
- (xvii) Bankruptcy and insolvency;
- (xviii) Copyrights, patents of inventions and designs, and trade marks;
- (xix) Naturalization and aliens;
- (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;
- (xxi) Marriage;
- (xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;
- (xxiii) Invalid and old-age pensions;
- (xxiiiA) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;

- (xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;
- (xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;
- (xxvi) The people of any race for whom it is deemed necessary to make special laws;
- (xxvii) Immigration and emigration;
- (xxviii) The influx of criminals;
- (xxix) External affairs;
- (xxx) The relations of the Commonwealth with the islands of the Pacific;
- (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;
- (xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth;
- (xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;
- (xxxiv) Railway construction and extension in any State with the consent of that State;
- (xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;
- (xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides;
- (xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;

- (xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australia;
- (xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

**52. Exclusive powers of the Parliament** The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—

- (i.) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;
- (ii.) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth;
- (iii.) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

#### CHAPTER V.—THE STATES.

**106. Saving of Constitutions** The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

**107. Saving of power of State Parliaments** Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.



**108. Saving of State laws** Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State: and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of appeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

**109. Inconsistency of laws** When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

**110. Provisions referring to Governor** The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State.

**111. States may surrender territory** The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

**112. States may levy charges for inspection laws** After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the state; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

**113. Intoxicating liquids** All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

**114. States may not raise forces. Taxation of property of Commonwealth or State** A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

**115. States not to coin money** A State shall not coin money, nor make anything but gold and silver coin legal tender in payment of debts.

**116. Commonwealth not to legislate in respect of religion** The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

**117. Rights of residents in States** A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

**118. Recognition of laws, &c. of States** Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.

**119. Protection of States from invasion and violence** The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

**120. Custody of offenders against laws of the Commonwealth** Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

#### CHAPTER VI.—NEW STATES.

**121. New States may be admitted or established** The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

**122. Government of territories** The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any Territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

**123. Alteration of limits of States** The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

**124. Formation of new States** A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

**Appendix II**  
**Australian Law Reform Commission**  
**Reference on Aboriginal Customary Law**

**List of Consultative Papers**

**1. Discussion Papers**

- DP17      Aboriginal Customary Law -- Recognition? (November 1980)
- DP18      Aboriginal Customary Law -- Marriage, Children and The  
Distribution of Property (August 1982)
- DP20      Aboriginal Customary Law -- The Criminal Law, Evidence and  
Procedure (March 1984)

**2. Research Papers**

- RP 1.      Proposed Marriage in Aboriginal Society (available)
- RP 2.      The Recognition of Aboriginal Customary or Tribal Marriage:  
General Principles (available)
- RP 3.      The Recognition of Aboriginal Tribal Marriage: Areas for  
Functional Recognition (available)
- RP 4.      Aboriginal Customary Law: Child Custody, Fostering and  
Adoption (available)
- RP 5.      Aboriginal Customary Law: Traditional and Modern  
Distributions of Property (available)
- RP 6.      Aboriginal Customary Law and the Substantive Criminal Law  
(available)

- RP 6A. Appendix: Cases on Traditional Punishments and Sentencing (available)
- RP 7. Aboriginal Customary Law: The Sentencing and Disposition of Offenders
- RP 8. Aboriginal Customary Law: A General Regime of Recognition (available)
- RP 9. Separate Institutions and Rules for the Aboriginal People: Pluralism and Reverse Discrimination (available)
- RP 10. Separate Institutions and Rules for Indigenous Peoples -- International Prescriptions and Proscriptions (available)
- RP 11/12. Aboriginal Customary Law and Community Justice Mechanisms: Independent Forums (available)
- RP 13. Aboriginal Customary Law: Problems of Evidence and Procedure (available)
- RP 14. The Proof of Aboriginal Customary Law (available)
- RP 15. Aboriginal Customary Law: The Recognition of Traditional Hunting, Fishing and Gathering Rights (available)

### 3. Field Trip Reports

- Field Trip No. 1 **The Pitjantjatjara** (May 1978)
- Field Trip No. 2 **The Pitjantjatjara** (May 1979)
- Field Trip No. 3 **Northern Territory: Top End** (June/July 1978)
- Field Trip No. 4 **Kimberleys and Part of Northern Territory** (June/July 1978)

- Field Trip No. 5     **The Cape York Peninsula: Queensland** (July - August 1979)
- Field Trip No. 6     **The Torres Strait Islands** (July - August 1979)
- Field Trip No. 7     **Central Australia** (October 1982)

**Availability of Consultative Papers:** Discussion Papers are formal Commission publications freely available to interested persons on request. Research Papers are more detailed studies of particular topics prepared by the Commission's research staff. They do not necessarily represent the Commission's views, but are circulated to persons and organisations interested in commenting upon them or in assisting the Commission in its work on the Reference. Field Reports describe the more substantial field trips conducted by the Commission. They are principally intended as a source of factual material and to report opinions expressed to the Commission in the course of its visits. They are available on a restricted basis to interested persons and organizations.

Requests for copies of any of the Papers should be addressed to:

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