East Kimberley
Impact Assessment Project

THE LEGAL FRAMEWORK AFFECTING ABORIGINAL PEOPLE IN THE EAST KIMBERLEY

Ben Boer*

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A Joint Project Of The:

Centre for Resource and Environmental Studies
Australian National University

Australian Institute of Aboriginal Studies

Anthropology Department
University of Western Australia

Academy of the Social Sciences in Australia

The aims of the project are as follows:

1. To compile a comprehensive profile of the contemporary social environment of the East Kimberley region utilising both existing information sources and limited fieldwork.
2. Develop and utilise appropriate methodological approaches to social impact assessment within a multi-disciplinary framework.
3. Assess the social impact of major public and private developments of the East Kimberley region's resources (physical, mineral and environmental) on resident Aboriginal communities. Attempt to identify problems/issues which, while possibly dormant at present, are likely to have implications that will affect communities at some stage in the future.
4. Establish a framework to allow the dissemination of research results to Aboriginal communities so as to enable them to develop their own strategies for dealing with social impact issues.
5. To identify in consultation with Governments and regional interests issues and problems which may be susceptible to further research.

Views expressed in the Project's publications are the views of the authors, and are not necessarily shared by the sponsoring organisations.

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ABSTRACT

This working paper provides an analysis of the non-Aboriginal legal frameworks governing major aspects of the lives of Aboriginal people in Western Australia, with particular reference to the East Kimberley region. Both federal and Western Australian legislation is included. The areas of law and policy concentrated on relate to land rights, self-determination, treaty making, Aboriginal heritage protection, environmental and social impact assessment and participation in control and management of national parks. Where relevant, the law of other countries is referred to in order to indicate that the question of Aboriginal title at common law is still an open question. Suggestions for reform of the law are made at various points, particularly in the areas of the Australian Constitution, land claims and excisions, heritage protection, environmental impact assessment, resource development and management of national parks. The paper concludes with a comment on the role of law in shaping the structure of decision-making, particularly in terms of expanding and limiting available options, and indicates a number of areas which require further examination.

ABBREVIATIONS

AAPA	Aboriginal Affairs Planning Authority (WA)
Comm	Commonwealth
DAA	Department of Aboriginal Affairs (Commonwealth)
SA	South Australia
WA	Western Australia

WORD USAGE

The words "Aboriginal" and Aborigine" are always spelt out with a capital "A", unless a small "a" is used in a quotation.

CASE CITATIONS

An alphabetical list of cases referred to in the text can be found at the end of the reference list.

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INTRODUCTION

This study examines the legal frameworks in Western Australia relating to land, heritage, environmental impact assessment and national parks, to the extent that these frameworks affect Aboriginal people in that State. Various pieces of Western Australian and federal legislation are examined, some in detail. Where appropriate, amendments and new legislation are suggested. Although many of the criticisms and recommended reforms arise from the study of pastoralism, mining and other development in the East Kimberley region, many of the observations made will have application in other parts of the State as well as elsewhere in Australia.

A major theme of this work is the continuing demand for recognition of Aboriginal aspirations in relation to land. These aspirations are inextricably linked with the question of self-determination. A good deal of attention has been paid to these issues on the international scene in recent years, particularly in the field of international law. With the Bicentennial "celebration" of the European invasion and settlement of Australia in 1988, much of the focus of the Federal Government in the area of Aboriginal affairs has been on achievement of a treaty, or compact, between Aboriginal and non-Aboriginal Australia. One aspect of this process has been the establishment of a new body to represent the Aboriginal voice at national level. This body is to be known as the Aboriginal and Torres Strait Islander Commission, and is meant to replace the now defunct National Aboriginal Conference. It is intended to be the chief negotiating instrument between the Federal Government and the Aboriginal people of Australia. The proposed workings of the Commission are briefly looked at early in this study, to set the scene for the examination of the state of Aboriginal affairs at both Federal and State level in terms of the concerns of this project.

The various suggestions recently put to the Constitutional Commission in relation to the recognition in the Australian Constitution of traditional Aboriginal ownership of lands is part of this debate. Recent developments overseas are examined with a view to exploring the possibilities of treaties and agreements between Western Australian Aborigines and the Western Australian and Federal Governments.

The recommendations of the Western Australian Aboriginal Land Inquiry of 1984 (hereafter referred to as the Seaman Inquiry), the response of the Western Australian government to that Inquiry, the fate of the Aboriginal Land Bill of 1985 and the eventual Federal/Western Australian Agreement relating to land are analysed to the extent relevant to the study. The questions of inalienable freehold title, leases of reserve lands, excisions from pastoral leases and access to traditional lands over private property and pastoral leases are also examined. Specifically in this context the Land Act 1933 and the Aboriginal Affairs

Planning Authority Act 1972 are looked at with a view to identifying ways in which present and future potential conflict over land use and land holding may be resolved. The paper suggests that an Aboriginal Land Tribunal be established to deal with competing claims for land, as well as disputes relating to excisions, access, heritage matters and, in appropriate cases, compensation. Aspects of customary law relating to traditional uses of land for hunting, gathering and fishing are also referred to.

The paper suggests that there is a need to overhaul the processes of identification and protection of heritage sites and areas, in order to try to avoid future conflict, particularly over mining and tourism developments. The study suggests as one option that the Aboriginal Heritage Act 1972 (Western Australia) be recast in order to devolve responsibility for Aboriginal heritage matters onto an independent Western Australian Aboriginal Heritage Commission with appropriate representation of Aboriginal interests.

Another area examined is the system of environmental impact assessment in Western Australia. Specific amendments are suggested for the Environment Protection Act 1986 (WA) in relation to development proposals on land in which Aboriginal people have an interest.

A further theme relates to the planning and management of national parks. The study suggests that in order to meet Aboriginal aspirations, as well as satisfying conservation interests, those national parks and nature reserves which are regarded as Aboriginal lands be ceded to the traditional owners and leased back to the State, with a joint management agreement between the traditional owners and the Department of Conservation and Land Management, along the same lines as found at Uluru National Park in the Northern Territory.

The area of resource development is also briefly examined in the context of the concerns of this paper.

The author is mindful of the fact that the analysis of the law found in this study may well be, in the perception of Aboriginal people, largely irrelevant, in the sense that it is "kartiya" or "white fella's" law, and not their law. The conflict of Aboriginal culture and non-Aboriginal culture is epitomised by the conflict between the laws. The social, economic and physical impacts on Aboriginal people in the Kimberley in the last century are reflected in and reinforced by the super-imposition of what many Aboriginal people may well regard as a foreign legal system upon their own. The Aboriginal people of Australia have similar experience to that of Aboriginal people elsewhere in the world. In this study, the legal situation relating to indigenous rights New Zealand, Canada and the United States is touched upon. It can be stated with reasonable confidence that many of the indigenous people of these countries see themselves as being

bound by two sets of laws; those of the non-indigenous, dominant, colonising legal system and the legal system of their own culture (see further, Williams, 1987, and Boer, 1988).

A major difference between Australia and North America is that, in Australia, Aboriginal law is not recognised to any significant extent by the dominant legal system, whereas in North America, many aspects of indigenous law are recognised and accepted.

Thus one of the aims of this paper is to attempt to demystify the law of the dominant non-Aboriginal culture, and to indicate its potential in achieving a "just settlement" between Aboriginal and non-Aboriginal people in Australia, and in particular in Western Australia.

In the Western Australian context, it needs to be borne in mind that many Aboriginal people view the question of land rights with a great deal of suspicion. Having participated extensively in the Aboriginal Land Inquiry, (the Seaman Inquiry), and knowing of the forceful recommendations made in the Inquiry report in relation to the introduction of land rights in Western Australia, many people suffered great disappointment as a result of the failure of the Western Australian government to enact the Aboriginal Land Bill in the mid-1980's.

This study recognises that Aboriginal needs and aspirations, as expressed by them, relating to land and social change raise complex and dynamic issues. Legislative change is usually only part of the process of achieving change, and is dependent on other factors for its success. The establishment of participatory mechanisms on an administrative basis, the raising of educational standards and the development of a sustainable economic and employment base are no less important than the legal instruments which can provide the basis for those administrative changes. It is also important to be aware of the fact that the administration of particular areas can often be far more flexible than the governing legislation would appear on its face to allow. However, it is contended that there is a clear role for law in shaping issues, ensuring the provision of resources, and enabling access to and control of land and culture. At the same time, there is a need to be aware that in order to meet the actual as opposed to the supposed needs of Aboriginal people, they must have the opportunity to participate in the legislative process. It is not argued that law can effect quick results, but the legal changes canvassed may lead to progress in the longer term.

LEGAL AND INSTITUTIONAL REFORM

There have been numerous calls in recent years for legal and institutional changes in relation to Aboriginal affairs in Australia. On the international level, visits and subsequent reports by representatives of bodies such as the World Council of

Churches, and the United Nations Working Group on Indigenous Peoples have prompted debate and have no doubt contributed to the climate for change (see Australian Council of Churches 1981, United Nations 1988).

At a national level, the National Aboriginal Consultative Committee and its successor the National Aboriginal Conference were active for some years up to 1983 in putting the Aboriginal voice to government on a broad range of issues (Wright 1985:35-36). In addition, the Aboriginal Treaty Committee was instrumental in the late 70's and early 80's in ensuring that the question of a treaty between Aboriginal and non-Aboriginal Australia was kept on the political agenda (Wright 1985; Keon-Cohen and Morse 1984:87). More recently, the Aboriginal Law Centre at the University of New South Wales has ensured that the issues of human rights, land rights and the treaty issue have been discussed at successive forums involving Aboriginal and non-Aboriginal people (see Nettheim 1983; Neate 1988; also, the Aboriginal Law Bulletin published since the early 1980s). The public activities of the East Kimberley Impact Assessment Project, as well as the numerous working papers published under the project's auspices, have also played a part. The statement formulated at the 1987 Australian National University Conference, "Aborigines and Development in the East Kimberley", run in conjunction with the East Kimberley Project, is a succinct summary of the major issues Aboriginal and Torres Strait Islander people see as needing to be addressed:

> That people attending the Conference "Aborigines and Development in the East Kimberley", 11 -13 May 1987, convened by the Centre for Continuing Education, Australian National University, affirm that no meaningful arrangements are possible to reconcile the interests of Aboriginal and Torres Strait Islander people, on the one hand, and the interests of economic development and nature conservation, on the other hand, until Australian law and Australian society recognise the original and continuing ownership of land by Aboriginal and Torres Strait Islander people under the ancient Aboriginal law and the primacy of Aboriginal and Torres Strait Islander decision making in respect of land, and in particular until land rights legislation for Western Australian Aboriginal people is passed through Commonwealth Parliament. The Western Australian government commissioned and received the Seaman Report and recommendations on land rights and has now ignored them.
>
> Accordingly, the Federal Government should legislate for communal and inalienable land rights for Aboriginal people in Western Australia and for Aboriginal and Torres Strait Islander people throughout Australia and recognise in that legislation Aboriginal and Torres Strait Islander sovereign rights and prior ownership of

Australia and which gives Aboriginal and Torres Strait Islander people:

- the right to claim all unalienated land, including public purpose lands;
- the right to control access to rivers and waterways on or adjacent to Aboriginal and Torres Strait Islander land;
- the right to marine resources of the sea and sea-bed up to a limit of ten kilometres where the sea is adjacent to Aboriginal and Torres Strait Islander land;
- the right to negotiate terms and conditions under which developments take place; and the right to statutory mining equivalents;
- the right to compensation for lands lost and for social and cultural disruption;
- the right to convert Aboriginal properties or leases to inalienable freehold title;
- the right, guaranteed by legislation, to living areas (excisions) on pastoral leases, these areas to be of sufficient size to allow for the development of economic activities and to be made available on the basis of need, and/or traditional or historical affiliation (Centre for Continuing Education, 1987).

A year later, in June 1988, after a great deal of rhetoric on the part of politicians for and against a treaty and other arrangements, the Prime Minister was presented with the Barunga Statement, at Barunga in Central Australia. The text of that statement is largely consistent with the conference resolution set out above as well as with the various stated aspirations of indigenous people in recent years as manifested in international forums such as the International Labour Organisation and the United Nations Working Group on Indigenous Peoples. In the light of international developments, the resolution and the statement together form a powerful expression of what can only be seen as reasonable demands of the Aboriginal and Torres Strait Islander people. The statement is as follows:

We, the indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights:

- To self-determination and self-management, including the freedom to pursue our own

economic, social, religious and cultural development:

- To permanent control and enjoyment of our ancestral lands

- To compensation for the loss of use of our lands, there having been no extinction of original title;

- To protection of and control of access to our sacred sites, sacred objects, artefacts, designs, knowledge and works of art;

- To the return of the remains of our ancestors for burial in accordance with our traditions;

- To respect for and promotion of our Aboriginal identity, including the cultural, linguistic, religious and historical aspects, and including the right to be educated in our own languages and in our own culture and history;

- In accordance with the universal declaration of human rights, the international covenant on economic, social and cultural rights, the international covenant on civil and political rights, and the international convention on the elimination of all forms of racial discrimination, rights to life, liberty, security of person, food, clothing, housing, medical care, education and employment opportunities, necessary social services and other basic rights.

We call on the Commonwealth to pass laws providing:

- A national elected Aboriginal and Islander organization to oversee Aboriginal and Islander affairs;

- A national system of land rights;

- A police justice system which recognises our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interfere with our freedom of expression or association, or otherwise prevent our full enjoyment and exercise of universally recognised human rights and fundamental freedoms.

- We call on the Australian Government to support Aborigines in the development of an international declaration of principles for indigenous rights, leading to an international covenant.

- And we call on the Commonwealth Parliament to negotiate with us a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedoms.

The reply to this statement by the Prime Minister was uncharacteristically but perhaps not unexpectedly succinct:

1. The Government affirms that it is committed to work for a negotiated Treaty with Aboriginal people.

2. The Government sees the next step as Aborigines deciding what they believe should be in the Treaty.

3. The Government will provide the necessary support for Aboriginal people to carry out their own consultations and negotiations; this could include the formation of a committee of seven senior Aborigines to oversee the process and to call an Australia-wide meeting or Convention.

4. When the Aborigines present their proposals the Government stands ready to negotiate about them.

5. The Government hopes that these negotiations can commence before the end of 1988 and will lead to an agreed Treaty in the life of this Parliament.

The Aboriginal and Torres Strait Islander Commission is one of the substantive ways in which the government's promises may be fulfilled.

THE ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION (ATSIC)

In August 1988, the Federal Minister for Aboriginal Affairs, Mr Gerry Hand, introduced into Parliament the Aboriginal and Torres Strait Island Commission Bill. This Commission is intended to subsume the present Department of Aboriginal Affairs and the Aboriginal Development Commission, and incorporate Aboriginal Hostels Ltd and the Australian Institute of Aboriginal Studies. In his Second Reading speech Mr Hand stated:

> In proposing the establishment of ATSIC, the Government recognised and accepted the persistent demands of the Aboriginal and Torres Strait Islander people of this nation to become involved in the decision-making processes of government. ATSIC is an acknowledgment by all of us that it is no longer acceptable for governments to dictate what is best for the Aboriginal and Torres Strait Islander people; they should decide for themselves what needs to be done. And that is exactly what will happen when this legislation is enacted.
>
> . . . In this regard, ATSIC represents a significant and major step towards the achievement of self-determination for the indigenous peoples of Australia. In case there are those who are fearful of the concept of self-determination for the Aboriginal and Torres Strait Islander people, there is no cause for alarm. Self-determination does not imply separate nationhood or the granting of sovereignty; rather it embodies the ambitions and aspirations of the indigenous communities to play their role in and make their contribution to the development and advancement of this nation. They seek to do this in a way which is meaningful to them and by way of mechanisms and programs over which they exercise significant control. ATSIC provides a means by which this contribution can be made. It must be remembered, however, that the constitutional responsibility of Aboriginal and Torres Strait Islander affairs is a concurrent one shared between the Commonwealth and the States. Nothing in this legislation detracts from the responsibility of State governments to make provision for the needs and requirements of the Aboriginal and Torres Strait Islander citizens of those States, particularly in relation to basic services such as water, sewerage and education which all other Australian citizens take for granted (Australia 1988c:252).

The establishment of ATSIC may have some far-reaching implications for Aboriginal people in the Kimberley region. It is certainly clear that there will be a guarantee of representation of Aboriginal groups on the Commission. This will go some way to improving the decision-making processes in relation to access to and control of land, as well as involvement in development planning. At this stage it is uncertain as to whether ATSIC, if implemented, will have any significant effect on the achievement of land rights in Western Australia, but it would be expected that there will be a renewed push for a national land rights scheme to be drawn up and placed before the Federal Government.

ABORIGINAL LAND

> In this paper, the term "Aboriginal land" refers to lands with which Aboriginal people have a traditional association and over which they have rights and obligations, present occupancy or use, whether or not these lands are owned by or reserved for Aboriginal people under Australian federal or Western Australian law.

The complex system developed by Aborigines for control and management of their traditional lands exists side by side with the legal system introduced by the British colonisers. This duality has not been recognised by the dominant legal system on a national basis. Land rights legislation exists in the Northern Territory, South Australia and New South Wales. In Victoria, land rights exist by virtue of federal legislation in relation to two reserves. The lack of comprehensive legal recognition of Aboriginal land ownership is simply a manifestation of a non-recognition of Aboriginal law more generally. However, that there is a de facto recognition of Aboriginal ownership from the earliest times cannot be seriously denied. This is manifested by the history of dealings with Aboriginal people throughout and beyond the colonial history of Australia. The wider aspect of recognition of Aboriginal legal systems has been addressed recently by the Australian Law Reform Commission, in its report The Recognition of Aboriginal Customary Laws (Law Reform Commission 1986).

Given the relatively brief history of European exploitation of the land in the East Kimberley, and the continued access to lands by at least the Aboriginal employees of cattle stations and their families until the 1970's, the question of ownership, access and control of what Aboriginal people consider to be their land is of fundamental concern. Indeed, it is arguable that Aboriginal people in this region are able to demonstrate similar links to the land as are claimed by the Torres Strait Islanders in the Mabo case (see report of the hearing of preliminary issues, Mabo v State of Queensland and Commonwealth of Australia, such that Aboriginal title may now be established in the courts (see report of the hearing on preliminary issues, Mabo v State of Queensland and the Commonwealth of Australia (1989) 83 Australian Law Reports 16).

The system of traditional law, particularly in relation to land was recognised by Blackburn J in Milirrpum v Nabalco and by Seaman in his report:

> 3.19 A consideration of what Aboriginal people have told me demonstrates that although existing Aboriginal land relationships vary throughout the State, Aboriginal people everywhere in Western Australia are deeply concerned for the future of their race unless security of land is restored to them.

3.20 In Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141 at page 267, Blackburn J, speaking of an Aboriginal system of law in the Gove Peninsula in the Northern Territory, said:

> The evidence shows 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. If ever a system could be called "a government of laws and not of men", it is shown in the evidence before me.

3.21 I am satisfied from what I have heard and been shown at the hearings that a subtle and elaborate system of law in relation to land is still in operation in many parts of the State (Seaman 1984:12).

Control of cultural heritage, demands for involvement in environmental planning and assessment of development proposals and participation in the management of national parks largely depend on control of the land itself. In turn, land rights are a pre-condition and basis for economic strategies aimed at reducing dependence on social welfare mechanisms and eventual self-sufficiency. These sentiments are reflected in the resolution passed at the 1987 conference "Aborigines and Development in the East Kimberley" (see above p 4-5).

Australian law

A great deal of debate both in England and Australia from the late 1700's onwards has centred on the issue of whether Aborigines in fact had a proprietary interest recognisable in Anglo-Australian law in the lands they occupied. The fact that Aboriginal people were in possession of their land from time immemorial up to the point of European invasion has never been in doubt. Cook himself was given instructions:

> with the consent of the natives, to take possession of convenient situations in the country in the name of the King of Great Britain (quoted in Hocking 1988:vii).

Further, Reynolds notes:

> Natives were assumed to be in possession and therefore with property rights - only uninhabited lands were without owners. Clearly Cook's instructions accorded not only with current practice but with accepted principles of international law (Reynolds 1987:52).

Notwithstanding the quite clear recognition by the colonial power of the occupation of Australia by Aboriginal people, the legal

doctrine that was assumed by the British authorities from earliest times to govern the position was that of terra nullius. This concept assumed that Australia was for all intents and purposes a country desert and uninhabited with the consequence that Australia could be regarded as a "settled" colony where English law automatically applied, and any "prior title" of Aboriginal inhabitants could be ignored.

King has come up with an alternative interpretation of the doctrine. In his historical analysis "Terra Australis: Terra Nullius aut Terra Aboriginum", he argues that the word "nullius" referred to other European powers: "there was no denial of the natives' rights to the occupancy and enjoyment of their lands, much less a denial of their mere existence" (King 1986:81). King indicates that the initial idea under the terra nullius doctrine was that George III:

> assumed the exclusive right to purchase land from the Aborigines, and the right to prevent other European sovereigns or their subjects from purchasing such land. Conversely, recognition was implied of the right of the Aborigines to refuse to sell their land.

King states that the suggestion that land be purchased was not followed when Phillip's instructions were drafted, on the basis that the Aborigines had no idea of English property rights or of commercial transactions. Phillip's instructions to "open intercourse with natives", King explains, was possibly with a view to "whether payment for land was required and if so how it might be effected" (King 1986:82).

In the light of the Advisory Opinion of the International Court of Justice in the Western Sahara Case (Western Sahara (Advisory Opinion) 16 October 1975) it would appear that the concept of terra nullius simply does not apply in cases where the indigenous inhabitants of a colonised territory constituted a society manifesting a certain degree of social and political organization:

> The idea of terra nullius merely meant that a territory lacked such a society; if it could be proved that a particular territory did in fact possess this type of society, the simple fact is that it cannot be classified as terra nullius. Such a conclusion leaves the legal concept of terra nullius intact and merely precludes its operation in the instant case (Schaffer 1988:36).

In the 1980's there continues to be virulent and often bitter debate over the question of Aboriginal land rights. On examining the progress made in other former colonies, we see that the governments and people of Canada, the United States and New Zealand have all, in their own ways, progressed considerably further than most Australians in recognising their Aboriginal

people's rights to land and self-determination (Sutton 1981; Barsh 1988; Keon-Cohen and Morse 1984; Morse 1985; McHugh 1987; Canada 1987; Canadian Bar Association 1988: Hocking 1988).

In Australia, the legal position at common law presently is governed in the case of Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia (1971) 17 Federal Law Reports 141 (The Gove case) by the judgment of a single judge of the Supreme Court of the Northern Territory. Despite being a judgment of a single judge of the Supreme Court of the Northern Territory, the case has not been appealed, even though, as will be argued below, some basic conclusions are simply wrong. The doctrine of communal native title, contended for by the Aboriginal plaintiffs, was found not to form and never to have formed part of the law of any part of Australia. Notwithstanding evidence that the land in question "was not without settled inhabitants or settled law" (see also p 10, above), Blackburn J found himself bound by legal precedent to hold:

> Whether or not the Australian Aboriginals living in any part of New South Wales had in 1788 a system of law which was beyond the powers of the settlers at that time to perceive or comprehend, it is beyond the power of this court to decide otherwise than that New South Wales came into the category of a settled or occupied colony (at 244).

Despite the plaintiff's failure to establish the claim in this case, the decision in fact precipitated the Federal Government's inquiry into Aboriginal land rights (Woodward 1973;1974), which eventually resulted in the Aboriginal Land Rights (Northern Territory) Act 1976. This statute would clearly seem to manifest a recognition by the legislature of the time of the justness of the plaintiff's cause.

In any case, several commentators and cases have found that Blackburn's reasoning in respect of the issue of Aboriginal title was faulty. For example, Hocking notes that Blackburn J:

> erroneously equated "settled" and "occupied" and the result was not only unjust but also legal nonsense, particularly as he held that there was a "government of laws" (at 267) in Australia in 1788. Most settled colonies were not "occupied" (terra nullius) at all because they were already inhabited and so British sovereignty was derived from these prior first possessors. (Hocking editorial comment in Schaffer 1988:40 note 36)

Canadian Law

The Canadian case of Calder v Attorney-General of British Columbia, was cited in argument in the Gove case. The Canadian case raised similar issues to that of Gove. Blackburn J, relying

on the appeal case in the Supreme Court of British Columbia, found that it was authority for the following propositions:

> 1. In a settled colony there is no principle of communal native title except such as can be shown by prerogative or legislative act, or a course of dealing.
>
> 2. In a settled colony a legislative and executive policy of treating the land of the colony as open to grant by the Crown, together with the establishment of native reserves, operates as an extinguishment of aboriginal title, if that ever existed. (Gove 223).

Calder went on appeal from the Supreme Court of British Columbia to the Supreme Court of Canada. Significantly, the appeal went forward after the Gove decision in the Northern Territory was determined. A majority of the judges found in favour of the plaintiff on matters of Aboriginal title:

> Six of the seven judges, for the first time, ruled that aboriginal title was recognised by the common law in Canada, but they were evenly split on whether colonial legislation had terminated the Nishga's title. This judicial clarification amounted to a significant political victory, although it was a legal defeat. It forced the Federal Government to change its mind on the continuing importance of traditional aboriginal title, and to commit itself to negotiate claims with Indian and Inuit groups where such title could be established. (Keon-Cohen and Morse 1984:80).

The headnote of the case, primarily drawn from Hall J's judgment, summarises the attitude of the court:

> an aboriginal Indian interest [is] usufructuary in nature which is a burden on the title of the Crown, and is inalienable except to the Crown and extinguishable only by a legislative enactment of the Parliament of Canada. This aboriginal title does not depend on treaty, executive order or legislative enactment but flows from the fact that the owners of the interest have from time immemorial occupied the areas in question and have established a pre-existing right of possession. In the absence of any indication that the sovereign intends to extinguish that right the aboriginal title continues. (Calder Dominion Law Reports (3rd) 34, 1973, 146, see also Hall J at 173-174). ("Usufructuary" is a legal term meaning the right to use and take the "fruits" of something belonging to some-one else.)

Hall J goes on to state:

> extinguishment could occur (at least prior to 1982), but required competent legislation or possibly an executive act by the federal Crown. The Crown in right of Canada is also under a fiduciary obligation in its dealings on behalf of any aboriginal group that has surrendered part or all of its interest in any land to the Crown.....
>
> Although Canadian courts have grappled with the complexity of this branch of the law, they have largely refused to pronounce upon the content of aboriginal title and aboriginal rights. Recent decisions have declared the earlier jurisprudential assessment by the Privy Council in the St Catherine's Milling case to be insufficient and inaccurate; yet, a detailed alternative has not been forthcoming (Canadian Bar Association 1988:18-19).

American Law

In the United States, Aboriginal title was recognised as early as 1823, with the case of Johnson v McIntosh (1823) 8 Wheat 543, where the court held that:

> ...Indian tribes continued to possess a right of occupancy (variously called Indian title, aboriginal title, and original title) in their aboriginal lands after discovery by the European nations. This right of occupancy, a unique real property interest previously recognized in the New World by Great Britain and tracing to the writings of sixteenth-century philosophers, is a compromise between tribal rights and prerogatives of the discovering nations. The Indian right of occupancy is well short of complete fee ownership - it can, for example, be extinguished by the United States without compensation [although this is not the current practice; author's interpolation]. On the other hand, original Indian title is a valid interest in land under American real property law, good against all but the Federal Government, allowing the tribes to reside on their lands and to exclude outsiders. Under both British law and the federal Non-intercourse Acts, first enacted in 1790, a transfer of the tribal right of possession is void unless sanctioned by the United States. Since the first year of the Republic, these statutes.... have provided protection to Indians against an unfamiliar system and those who would abuse it and brought order to the potential chaos of frontier land transactions (Wilkinson 1987:39-40).

This is not to say that the situation in the United States is by any means satisfactory: a great proportion of Indian lands was in fact confiscated by express federal actions or was

> The Nishgas do not claim to be able to sell or alienate their right to possession except to the Crown. They claim the right to remain in possession themselves and to enjoy the fruits of that possession. They do not deny the right of the Crown to dispossess them but say the Crown has not done so (at 174).

Judson J recognised the concept of Aboriginal or Indian title, although he put it a little differently. (In the result he was one of the judges who refused to issue a declaration that Aboriginal title had never been lawfully extinguished or that the Aboriginal interest constituted a burden on the Crown's ownership). Judson J stated:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763 [which acknowledged that some undefined portions of central and western Canada were "Indian territory" at the time of the Proclamation; author's interpolation], the fact is that when the settlers came, the Indians were there, organised in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the sovereign" (at 156).

In his judgment, Hall J criticizes the Gove decision and in particular the two propositions accepted by Blackburn J (see above, p 13):

> The essence of his concurrence with the Court of Appeal [of the Supreme Court of British Columbia] judgment lies in his acceptance of the proposition that after conquest or discovery the native people have no rights at all except those subsequently granted or recognised by the conqueror or discoverer. That proposition is wholly wrong as the mass of authorities ... establishes. (Ibid 218; for further comment, see Bartlett 1983:300).

In Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development (1980) 107 Dominion Law Reports (3d) 513, Mahoney J stated in relation to Milirrpum and Calder:

> ....Milirrpum v Nabalco Pty Ltd is most useful in its exhaustive compilation and analysis of pertinent authorities from numerous common law jurisdictions. It is, however clear in the portion of the judgment

> dealing with Australian authorities... that Blackburn J found himself bound to conclude that the doctrine of communal native title had never, from Australia's inception, formed part of its law. If I am correct in my appreciation of the Calder decision, that is not the law of Canada. The Calder decision renders untenable, insofar as Canada is concerned, the defendant's arguments that no aboriginal title exists in a settled, as distinguished from a conquered or ceded, colony and that there is no aboriginal title unless it has been recognised by statute or prerogative act of the Crown or by treaty having statutory effect (at 544).

Tom Berger, counsel in the Calder case and subsequently a judge of the Supreme Court of British Columbia, visited Australia in 1987 and attended the Kununurra conference on "Aborigines and Development in the East Kimberley". He stated at the time:

> The one thing that has struck me is that in Australia you are having arguments that we in Canada had about ten years ago ... About ten years ago we argued [whether] Aboriginal people have land rights, and that argument has been settled. They do have land rights and those things are being negotiated ... and will continue to be negotiated. Aboriginal people in Canada also claim the right of self-government and that's been settled. We have three national political parties in Canada and all of them agree that Aboriginal people, the Indians and Eskimos are entitled to land rights and to self-government. Here in Australia ... you are still arguing about these things and it isn't by any means certain that the Aboriginal people are going to win these arguments. (Berger, The World Today ABC interview 29 May 1987).

The Canadian Bar Association recently published a report which reviewed the current state of the law in this area in Canada. The report stated:

> At a minimum, one can make the following tentative observations about the status and content of aboriginal rights in Canadian law. These rights are sui generis [of their own kind] ...rather than fitting an existing category of beneficial interest or being some sort of usufructuary right as they had been previously described. They contain rights to use and take the fruits and products of traditional land, including the right to hunt, fish, and trap thereon. The rights are collective in the sense of communal occupation, but individual in the sense that members of the aboriginal group have personal harvesting rights.... Aboriginal rights are in their nature inalienable except by a valid surrender to the Crown and can be recognised by treaties (per Hall J in Calder). Unilateral

appropriated without regard for the existence of Aboriginal title (see further Morse 1985:662).

New Zealand law

In New Zealand there is increasing recognition of Maori rights generally, and land rights in particular. In a review of New Zealand cases up to 1983, Bartlett found that there was evidence supportive of Aboriginal title at common law, although at that time there was no specific statement in the cases along these lines (see Bartlett 1983:307). A number of recent cases in the High Court of New Zealand have indicated that the doctrine of Aboriginal title is being re-established. The case of Wi Parata v Bishop of Wellington (1878) 3 NZ Jur 72 (SC) had cast out the doctrine of Aboriginal title, which had been the law governing the area since that time. The case of Te Weehi v Regional Fisheries Officer [1986] BCL 1396 is said to have effectively overruled the Wi Parata case. It was there argued that the doctrine of Aboriginal title was a defence in a prosecution under the New Zealand Fisheries Act 1983. That Act provides that nothing in the Act shall affect "Maori fishing rights". It was argued that this provision protected fishing rights derived both from the common law and from statutes other than the Fisheries Act. It was accepted by the Court that a non-territorial (i.e. for land other than that owned under the Maori Affairs Act 1953) Aboriginal title might arise over Crown-owned land subjacent to tidal or navigable water. The case of Higgins v Bird (7 Waiariki ACMB 24, 13 October 1986) is said to have implicitly applied the doctrine of Aboriginal title (see further McHugh 1987:39; and Sorrenson 1987:198).

EXTINGUISHMENT OF ABORIGINAL TITLE

It appears then that if no legislation can be found which expressly or by implication extinguishes Aboriginal title, that title continues to subsist and is subject to being claimed through legal action by the relevant traditional owners. In Calder, it is stated that there must be a clear and plain intention to extinguish the Aboriginal title. Despite what Blackburn says in Gove (see p 12 above), Aboriginal reserves declared by legislation would appear not to serve to extinguish Aboriginal title; if anything, their declaration would seem to confirm it.

Reynolds notes in relation to reserves:

> It is my argument that reserves were created in recognition of Aboriginal rights; this is the way reserves were seen by Imperial authorities; it is the way they were recognised in international law; it is the way they have been seen in overseas countries; and it is the way Aborigines in Australia in the 19th

> century saw them. They weren't a gift, they were compensation in recognition of Aboriginal rights (Reynolds 1988:8; see also Reynolds 1987:131-135).

Reynolds further states that a clause originally appeared in the 1899 constitution of Western Australia, to the effect that 1% of the State's revenues were to be set aside for Aborigines (Reynolds 1988:8). This clause, repealed in 1905, provided that the revenue generated was to be spent on the welfare, education and maintenance of Aborigines (see further Johnston 1988:15). This fact in itself seems to indicate that the Imperial authorities, who urged the measure, as Reynolds notes, recognised a right to compensation, presumably in part for dispossession of the land.

Recent Australian Cases

Given the recognition of Aboriginal title in the United States and the judicial movement towards recognition more recently in Canada and New Zealand it appears possible that the High Court of Australia will, in the not too distant future, come to a new understanding of Aboriginal title in the Australian context.

The case of Coe v The Commonwealth of Australia, (1979) 53 Australian Law Journal Reports 403), in which both Aboriginal rights to land as well as sovereignty of Australia were attempted to be claimed, several members of the court, in rejecting the action on procedural grounds, indicated that there may well be an arguable case if properly framed. For example, Gibbs J stated:

> The question of what rights the Aboriginal people of this country have or ought to have, in the lands of Australia, is one which has become a matter of heated controversy. If there are serious legal questions to be decided as to the existence or nature of such rights, no doubt the sooner they are decided the better..... (at 409)

The Mabo case (Mabo v The State of Queensland and the Commonwealth of Australia, (1989) 83 Australian Law Reports 14) relating to a claim by the Torres Strait Islanders, initiated in 1982 but argued for the first time before the High Court in March 1988, has the potential to be a significant decision in relation to the question of Aboriginal title.

In Mabo the plaintiffs seek legal recognition and protection of their traditional land, the Murray Islands in the Torres Strait. They claim that their traditional rights have existed since time immemorial and have continued in existence notwithstanding annexation by the Crown in 1879. In 1985, as a result of the initiation of the action, the Queensland Government passed the Queensland Coast Islands Declaratory Act, for the purpose of removing any doubt that may have existed as to the status of the islands in terms of them being Crown lands. By virtue of this

legislation, every disposal of those lands made in pursuance of Crown lands legislation was to be taken to be validly made. Further, it was declared that no compensation is or was payable to any person by reason of annexation, or in respect of any right, interest or claim alleged to have existed prior to annexation or by reason of any provision of the Declaratory Act. In this action, it was the validity of the Declaratory Act which was in question. This was in fact a preliminary issue (technically, it was the determination of a demurrer by the plaintiffs to Queensland's amended defence insofar as it relied on the Queensland Coast Islands Declaratory Act). The High Court by a majority of 4 to 3 held that the Act was constitutionally invalid on the basis of its inconsistency with the Racial Discrimination Act 1975 (Commonwealth) pursuant to s 109 of the Australian Constitution.

The further action, yet to be heard, will pursue the substantive question of the traditional ownership of the islands. Among other things, the plaintiffs are claiming a declaration that they are: owners by custom, holders of traditional title and holders of usufructuary rights with respect to their native lands. The court stated of this claim:

> The plaintiffs claim is not merely for a declaration that the plaintiffs rights are recognised by the native law or custom of the Murray Islands from which those rights take their origin; it is a claim for a declaration that the rights which are vested in the Miriam people - and, in particular, the plaintiffs- according to the native law and the custom of the Murray Islands are recognised by the present law of Queensland. They are alleged to be enforceable legal rights. Those rights (which we will call "traditional legal rights") are alleged to be vested in persons who are members of the Miriam people (Brennan, Toohey and Gaudron, JJ at 26).

The Court was requested not to express any view of the substantive issue at this stage. It was agreed by both parties that "the statement of claim should be assumed to have pleaded correctly that the traditional rights specified in the statement of claim are in existence unless they have been validly extinguished by the 1985 Act" (ibid 28). The question of traditional Aboriginal title has thus not yet been directly addressed in this case. However the way now appears to be open to argue that any legislation which, directly or indirectly, purports to extinguish Aboriginal title in any Australian jurisdiction could be litigated with a view to having it declared invalid on the basis of inconsistency with Commonwealth legislation such as the Racial Discrimination Act, a statute which gives effect to Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. (For further observations on Mabo, see Law Reform Commission 1986b:136.)

Effects of recognition of Aboriginal title

If the court does recognise Aboriginal title in the Mabo case, it may be possible in the next few years to establish more definite claims for Aboriginal title in other parts of Queensland and in the other States, including Western Australia, particularly where Aboriginal communities can show that they have occupied or have until recently occupied, specified land since time immemorial. In addition, they may well be able to establish compensation claims. In the Kimberley region, for example, it is not beyond the bounds of reality that the traditional owners of the areas around and under Lake Argyle, having established Aboriginal title, might claim compensation for the loss of their property rights and their rights in relation to art sites and sacred areas. Similarly, the traditional owners of the Argyle diamond mine site, having established their Aboriginal title, could begin to negotiate a more appropriate compensation package in place of the rather loose, and financially unsatisfactory, arrangements which exist at present under the so-called "Good Neighbour" agreement between the Argyle Diamond mine and the local communities affected (See further Christenson 1983:34).

In addition, if Aboriginal title is established, it may be possible, without being overbold, to then argue in those areas where the Federal Government has been directly involved in acquiring land, that section 51(xxxi) of the Constitution would apply. This section provides that the Federal Parliament has the power to make laws with respect to:

> 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.

This provision only applies in situations where the Commonwealth government has jurisdiction. When property is acquired, the compensation payable must be fair; i.e. more or less what would be payable if the property were sold on the open market. The property can be land or movable property. If the Commonwealth acts outside this provision in acquiring property, any legislation purporting to give effect to that acquisition would be held to be constitutionally invalid.

In the context of the Kimberley, the Ord River scheme effectively appropriated a large area of the traditional lands of the local Aboriginal inhabitants. However, it is unlikely that the Federal Government's enactment of legislation appropriating moneys for the Ord River scheme would be a sufficient basis on which to launch a claim for compensation for acquisition of the area from the traditional owners. The legislation involved was the Western Australian Grant (Northern Development) Act 1958, Western Australian (Northern Development) Agreement Act 1963 and the Western Australian Agreement (Ord River Irrigation) Act 1968, all

of which related to conditional grants made to the Western Australian Government under s 96 of the Constitution.

The fact that the property was not being acquired for the Commonwealth itself would not render the acquisition invalid; nor is there any constitutional requirement that a State which acquires property must do so on just terms (see Magennis v The Commonwealth (1949) 80 Commonwealth Law Reports 382; Pye v Renshaw, (1951) 84 Commonwealth Law Reports 58).

If there is any hope at all for such a compensation claim, it would lie in the comments of Justice Deane in the Franklin Dam case. He held that the enactment of the World Heritage Properties Conservation Act 1983 effects an acquisition by the Commonwealth of the World Heritage area in Tasmania known as the South West Wilderness National Parks (Commonwealth of Australia v State of Tasmania, (1983) 46 Australian Law Reports 625). He held that "property in this context can include a benefit deriving from a legislative scheme; i.e. the benefit need not be a material or financial one. Deane J likened the restriction placed on the Tasmanian government by the World Heritage Properties Conservation Act to a restrictive covenant. This could constitute a valuable asset:

> It is incorporeal but it is none the less property. There is no reason in principle why, if "property " is used in a wide sense to include "innominate and anomalous" interests, a corresponding benefit under a legislative scheme cannot, in an appropriate case, be regarded as property (at 828).

Using this analysis in the present context, it could be argued that the Commonwealth, in making grants to the State of Western Australia for the purposes, among other things, of building the Ord river dam, would be attracting a benefit to itself in the sense indicated by Deane J. In other words, the purposes of the Commonwealth, (or perhaps more accurately the government of the day in terms of the electorate benefits in Western Australia) would be served by the making of such s 96 grants.

However, Deane J was in a minority of one on this particular point, so his opinion would be regarded as of little effect from the point of view of precedent. However, if such an argument were to be accepted in the future, what would be the practical result? It ought to be remembered, in the words of Deane J, that

> ...s 51(xxxi) of the Constitution does not confer on any person an enforceable right to claim just terms in respect of an acquisition of property. The effect of the paragraph is that a law providing for an acquisition of property for the purposes of the Commonwealth otherwise than on just terms is invalid (ibid 830; see further Australia 1988a:600-601).

Thus, the only legal outcome might be that the four statutes detailed above, long after the event, might be declared invalid. It is however difficult to imagine the destruction of the Ord river scheme on the basis of the constitutional invalidity of the statutes effecting the financial grants of the scheme. However, if invalidity was the result of such an action, it may well lend the Aboriginal people who occupied the land around and under Lake Argyle an even more powerful moral argument for compensation. (It might be noted here that in preserving the heritage of the area, the only effort made was in relation to a European cultural site, the old Durack homestead, which was moved to higher ground.)

As far as action against the Western Australian government is concerned, where Aboriginal title is sought to be established, the question would seem to be, based on the North American precedents, whether there has been a legislative extinguishment of Aboriginal title, and, if there has, whether the legislation extinguishing that title was constitutionally valid. If, for example, a statute such as the Land Act 1933 and its precursors is sufficient to extinguish rights, is this legislation open to challenge as a result of the High Court's preliminary decision in Mabo? Further, if Aboriginal title is recognised as a result of such a finding, would it be possible to demand compensation from the Western Australian government in relation to that land? The legal precedents in the United States would seem to militate against such a finding. The leading authority, Tee-Hit-Ton Indians v United States 348 US 272 (1955), established that no compensation is payable for extinguishment of an "unrecognised" right of occupancy. However, despite this finding, as Leshy points out, the actual experience in the United States has largely been to the contrary:

> ....compensation has usually been paid out to the Indians when they have been deprived of the land they have traditionally occupied. Significantly, most events in the last three decades since Tee-Hit-Ton was decided have seen that long-standing policy confirmed rather than overturned. The practice of compensating Indians has, in other words, been too much a part of the landscape to be dislodged merely by the decisions of the United States Supreme Court.
>
> Even that Court itself has, since Tee-Hit-ton, sometimes displayed a greater sympathy toward Indian claims for compensation. This has been manifested, among other ways, by the ease with which the Court is willing to find congressional "recognition" of Indian title to property, an event that, under the Tee-Hit-Ton approach, converts the mere privilege of occupancy into a compensable property right. The majority in Tee-Hit-Ton acknowledged that there was "no particular form" for this recognition, but did caution that somewhere, among the "variety of ways" it could be

established, "there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation". But for a court willing to look with some care and a generous spirit, the very existence of a long-standing, generalised practice of recognising Indian sovereignty has made it very easy to find, in the myriad of federal statutes and orders dealing with Indians, a federal recognition of title (Leshy 1985:294).

ABORIGINES AND THE AUSTRALIAN CONSTITUTION

In the 1890's, when the Australian Constitution was being formulated, little thought was given to catering for the needs of the Aboriginal people at federal level; they were seen as a responsibility of the State governments. Although there were pressures, at least from 1911 onwards, for the Commonwealth to assume full responsibility for Aboriginal matters, it was not until 1967 that a constitutional referendum decided that the Australian Parliament should be able to make laws in relation to Aboriginal people. The original constitutional provision referring to Aborigines did so by way of exclusion. Until 1967, s 51(xxvi) read:

> The Parliament shall ... have power to make of the ... laws with respect to...
>
> > (xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.

As the Constitutional Commission pointed out, this power was not designed to make laws for the benefit of races other than the Aboriginal race, but rather to enable the parliament to control aliens by localising them to defined areas, restricting their migration, confining them to certain occupations or giving them special protection and securing their return to their own countries. Such a power to make special laws in relation to aliens was clearly not applicable to the original inhabitants of this country (1988a:708). However, the effect of this provision in fact had been to prohibit the Federal Government from making any laws specifically relating to Aboriginal people. Thus until 1967 it was only the States which could legislate in this respect. The 1967 amendment deleted the words "other than the aboriginal race", thus opening the way for the Commonwealth to legislate on all aspects of Aboriginal affairs. This power is concurrent, rather than exclusive, which means that both the Commonwealth and the States are able to legislate in relation to Aboriginal matters. However, where State legislation is inconsistent with Commonwealth legislation, s 109 of the Constitution provides that the Commonwealth legislation prevails over that of the State to the extent of the inconsistency. So for example, if the Commonwealth government wished to pass

comprehensive land rights legislation in relation to State land (and it so intended, between 1972 and 1975, and between 1983 and 1985) it could do so. This legislation could override any State's wishes in this respect.

It can be noted here that the Aboriginal and Torres Strait Islander Heritage Protection Act, when passed in 1984, was originally intended to be the precursor to national land rights legislation, but largely for political reasons relating primarily to the demands of development interests in Western Australia, this did not eventuate. This is dealt with further below, at p 54 (see also Boer 1984 and 1987a). Since 1967, various pieces of legislation relating to Aborigines have indeed been passed at federal level. However, one of the most important of these, the Aboriginal Land Rights (Northern Territory) Act 1976, did not need the empowerment of a referendum, as the Federal Government had at the time plenary power to deal with the Northern Territory under s 122, the "territories" power of the Constitution.

Twenty years after the referendum, the federally established Constitutional Commission considered the question of whether or not the Constitution should be further amended to give the Australian government a new power to legislate with respect to Australian Aborigines. The main considerations were that it would be important symbolically and that the nation as a whole has a responsibility for Aborigines and Torres Strait Islanders, as well as avoiding some of the uncertainty surrounding the present "races" power. The Commission recommended that the present s 51(xxvi) be repealed and be replaced by a new provision. This would be in the following form:

> The parliament shall ... have the power to make laws ... with respect to ...
>
> (xxvi.) Aborigines and Torres Strait Islanders

(see further Australia 1988a:718).

This recommendation of the Constitutional Commission was not taken up in the Constitutional amendments placed before the people in the 1988 referendum. Given the fate of the four questions in fact put in that referendum this was probably just as well, as they all failed to be passed.

The Constitutional Commission also considered the question of whether there should be provision made in the Constitution in order to recognise the prior ownership and occupation of Australia by the Aboriginal and Torres Strait Islander people. Further, it considered whether a broad power should be imported into the Constitution to allow the Federal Government to enter into a treaty or compact with Aboriginal and Torres Strait Islander people with a view to compensating them for the dispossession of land and the disruption of social and economic life caused by European colonisation. In the event, the final

report of the Constitutional Commission did not include recommendations along these lines (see generally Australia 1988a:707-731).

Recognition of traditional ownership in the Constitution

Regardless of whether Australian courts begin to recognise Aboriginal title, it appears to be appropriate for the Constitution to be amended in order to recognise that Australia was in the possession of Aboriginal people at the time of European settlement.

The Advisory Committee on Individual and Democratic Rights (Australia 1987b:74) recommended that section 51(xxvi) should be substituted with a provision in the following terms:

> 51. The Parliament shall ... have power to make laws with respect to ...
>
> > (xxvi) the benefit of the Aboriginal people and of the Torres Strait Island people and the making of compacts deemed necessary by Parliament in order to recognise ownership of Australia prior to the acquisition of sovereignty by the Crown.

Before dealing with the issue of treaties, compacts or agreements, it is necessary to comment on the Committee's suggestion that the Constitution recognise Aboriginal ownership of Australia "prior to the acquisition of sovereignty by the Crown". If historical documentation is able to prove to the satisfaction of the courts that Aboriginal title exists, and that the descendants of the original inhabitants of Australia at the time of European settlement can establish their connections with their various lands, it would appear to be presumptuous for the Constitution, once and for all, to place the ownership of Australia in the hands of the British Crown as soon as Captain Phillip planted the flag in 1788. A constitutional amendment along these lines may well be rendered meaningless by a finding by the High Court that Aboriginal title exists. However, the sentiment involved in the suggested amendment ought not to be lost. It may well be that deletion of the words "prior to the acquisition of sovereignty by the Crown" and substitution of the words, "at the commencement of European colonisation" would more adequately meet the intended purpose.

This suggestion is reinforced to an extent by the Advisory Committee on Individual and Democratic Rights. The Committee dealt with the question of whether Aboriginal people ought to be recognised in the preamble to the Constitution:

> Many submissions suggested that recognition of prior occupation and ownership of Australia is an essential first step in the reconstruction of the relationship

> between Aboriginal and non-Aboriginal Australians. They suggested the preamble to the Constitution was a logical starting point, and submitted several proposed versions of such a preamble.
>
> The Committee is concerned that the existing preamble makes no reference to Aboriginal Australians. It considers that the preamble should acknowledge the historical truth of the settlement of Australia by Europeans in 1788. It is appropriate to recognise in the preamble that prior to the arrival of the European settlers, Australia was owned by the Aboriginal people. Such recognition in the Constitution would be an act of good faith and symbolic importance in furthering a reconciliation between Aboriginal and non-Aboriginal Australians (Australia 1987b:72).

It was suggested by the Committee that the preamble to the Constitution should incorporate the fundamental sentiments which Australians of all origins would hold in common. The suggested formulation of the preamble by the Committee was:

> Whereas the people are drawn from a rich diversity of cultures yet are one in their devotion to the Australian traditions of equality, the freedom of the person and the dignity of the individual;
>
> Whereas Australia is an ancient land previously owned and occupied by Aboriginal peoples who never ceded ownership;
>
> Whereas the Australian people look to share fairly in the plenty of our Commonwealth;
>
> Whereas Australia is a continent of immense extent and unique in the world, demanding as our homeland our respect, devotion and wise management.

Leaving aside the rather saccharin flavour of sentiments found in the first, second and fourth suggested paragraphs, the formulation of the second paragraph cuts across the legal claims by some groups, (such as the Murray Islanders in the Mabo case), that ownership of the land still resides with the Aboriginal people. The word "previous" would in their view be inaccurate, because it concedes that ownership was, legally or otherwise, taken over by the European colonisers.

An alternative formulation of the preamble, which would be more historically accurate, would be:

> Whereas Australia is an ancient land traditionally owned and occupied by Aboriginal peoples from time immemorial who have never ceded that ownership;

The word "traditional" here would indicate both present and past claims to possession. Such a formulation would recognise that Aboriginal people have never acceded to the taking over of their property rights by the British Crown and subsequent Australian governments. It would once and for all cast out the notion of terra nullius as being inappropriate in the Australian context and would recast some fundamental notions of the Australian law relating to land.

In relation to private land, the broadest interpretation of such a formulation could be the basis for the negotiation of compensation packages for land which is already in private ownership and subject to development, where traditional owners can establish a genuine connection with that land. Alternatively, such a formulation could be linked to a compact making power within the Constitution, which would mean that a representative body or bodies of Aboriginal people throughout Australia could come to an agreement with the Australian government in relation to either acquisition or ceding of unalienated Crown land that they consider to be traditionally theirs.

Whilst realising that this recognition and its consequences would be anathema to a wide variety of people, it could be seen as an inevitable result of the Advisory Committee's recommendations. However, the disruption caused by these consequences need not be as great as some might fear. Whilst it may morally oblige State governments which do not already have land rights legislation to in fact introduce such legislation, or more likely, place an obligation on the Federal Government to enact comprehensive land rights legislation, it would be unlikely that the High Court would interpret such a preamble expansively in order to enable all non-Aboriginal land in Australia whether privately owned or not, to be subject to land claims. In any case, it should be noted that the recommendation by the Individual and Democratic Rights Committee was not taken up by the Constitutional Commission (see Australia 1988a:106-110 and Neate 1989).

Even if Aboriginal title is subsequently recognised by the courts, it is likely that the Australian experience will be similar to that of Canada, of which it has been said that success in establishing that Aboriginal title exists at common law and that it applies in particular circumstances:

> ... is a long, exhausting, costly and very uncertain affair. For these reasons, amongst others, Indian, Inuit and Metis organisations have tried to avoid litigating their claims in Canadian courts. Litigation is seen as a last resort, or as a stimulus to negotiation efforts - and even then, only when all other avenues have failed (Keon-Cohen and Morse 1984:81).

For the moment, it is likely that land claims will continue to be recognised only by legislation along the lines found, for example, in the Northern Territory, South Australia or New South Wales (see Aboriginal Land Rights Act (Northern Territory) Act 1976 (Comm.), Pitjantjatjara Land Rights Act 1981 (SA) and Aboriginal Land Rights Act 1983 (NSW)).

TREATIES, COMPACTS AND AGREEMENTS

Unlike former British colonies such as Canada, the United States and New Zealand, no recognised treaties have ever been entered into between Australian Aborigines and British or Australian governments (Harris 1979). This is despite the fact that treaties had been mooted from quite early in Australia's European history (see Harris 1979, Wright 1985). The more recent history of treaty discussions has been characterised by a good deal of political footballing. Progress in Australia is in stark contrast to events in New Zealand and Canada.

New Zealand - The Treaty of Waitangi

New Zealand has had its Treaty of Waitangi since 1840. The terms of the Treaty appear on the surface to be very straightforward. However, the Maori and English versions of the text of the Treaty differ in vital respects, and there is some controversy as to which is the correct one. The Maori text is summarised as follows:

1. The Maori Chiefs give to the Queen the complete government of their land.

2. The Queen agrees to protect the Maoris in the unqualified exercise of their chieftainship over their lands, villages and all their treasures but all the chiefs will sell their land to the Queen at an agreed price.

3. For this agreement the Queen will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

The English text of the three articles of the Treaty can be summarised as follows:

1. The Maori chiefs cede all rights and powers of sovereignty over their territories.

2. The Queen of England confirms and guarantees to the Maoris the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they collectively or individually possess so long as they desire to stay in possession,

but the Chiefs yield to the Queen the exclusive rights of preemption over such lands as the Maoris wish to alienate at prices agreed between the parties.

3. In consideration of the above, the Queen extends to the Maoris her royal protection and gives them all the rights and privileges of British subjects.

The most significant difference in the versions of the Treaty English and Maori language is that in the Maori version the ceding of sovereignty is not recorded.

The effect of the Treaty provisions was startlingly revived in the past decade with the passing of the Treaty of Waitangi Act 1975 which set up the Treaty of Waitangi Tribunal. The 1975 Act allowed only those grievances dating from 1975 and beyond. This legislation was subsequently amended in 1985 to extend the jurisdiction of the Treaty of Waitangi Tribunal to hear grievances back to the original signing of the Treaty by Maori chiefs in 1840 (Treaty of Waitangi Amendment Act 1985).

These grievances included any prejudicial effects on Maoris from:

(a) any ordinance either general or provincial or any Act passed after 6 February 1840;

(b) any statutory instrument made, issued or given after 6 February 1840;

(c) any policy or practice whether still in force or not adopted by or on behalf of the Crown since 6 February 1840;

(d) any act done or omitted, or proposed to be done or omitted by or on behalf of the Crown since 6 February 1840.

The effect of the provisions of the Treaty and the 1975 legislation have been affirmed in a number of Tribunal decisions and by recent cases in the New Zealand Supreme Court, in particular in relation to fishing rights and language rights (see Beacroft 1987 and Craig 1989, forthcoming).

In 1986 the New Zealand government directed that all future legislation referred to Cabinet at the policy approval stage should draw attention to any implications for recognition of the Treaty's principles, and that relevant government departments should consult with appropriate Maori people on the application of the Treaty and the financial and resource implications should be assessed wherever possible in future reports.

In the context of this paper, particularly in relation to environment protection, heritage and resource developments, it is significant to note that three New Zealand statutes, the

Environment Act 1986, the Conservation Act 1987 and the State-Owned Enterprises Act 1987 all refer to the "principles of the Treaty of Waitangi". It can also be noted that the principles are now seen to have greater status than the text of the Treaty itself; see Parliamentary Commissioner for the Environment 1988:17 (see also Royal Commission on Social Policy 1987).

It is clear from the New Zealand experience, particularly in recent years, that the Treaty has been an important instrument in defining relations between Maori and non-Maori people, particularly in the area of environmental management. However, a good number of problems relating to interpretation remain (see eg Kelsey 1989).

Many of the issues that have arisen in this area in New Zealand are similar to those in Australia. Despite the lack of formal treaty or compact arrangements in Australia, the striving for a satisfactory "partnership" in New Zealand between all concerned parties is certainly a salutary lesson.

Canadian Treaties

In Canada, a number of treaties over the years have been signed with Aboriginal peoples in various parts of the country. The Canadian Charter of Rights and Freedoms, introduced as a schedule to the Canada Act of 1982, included a provision protecting the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada from derogation by any of the enumerated rights and liberties in the Charter. Part 11 of the Constitution Act 1982 specifically recognised and affirmed the Aboriginal and treaty rights of the Indian, Inuit and Meti peoples, including their land claim agreements. Although there is some doubt as to the meaning and scope of the provision (Morse 1985:84-86), the fact that it is included is important from both a practical and symbolic viewpoint, and is rather more positive than the approach in Australia in terms of constitutional recognition of Aboriginal rights.

In addition, in recent years a number of extensive agreements have been negotiated with major Aboriginal groups, dealing in particular with social and environmental concerns of resource development. The Inuvialuit Agreement and the James Bay Northern Quebec Agreement are examples (see further Feit 1982 and Craig 1989).

The constitutional recognition of the various Aboriginal nations in Canada, comprising among others, the Inuit, Haida and Cree nations, has broad implications for the ability to bring moral pressure to bear on the government at provincial and federal level in relation to taking negotiations seriously.

The 1982 Canadian constitutional provisions required that negotiations take place between the governments of Canada and the Aboriginal peoples. This was required to take the form of First

Minister's Conferences (a rough equivalent would be Australian State Premier's Conferences). These conferences have not been successful in reaching a constitutional amendment on the question of self-government, as the range of views on the issue is apparently still very broad. Aboriginal associations have continued to argue for constitutional recognition of a free-standing right to self-government, while most provincial governments have continued to favour recognition of a right which is given content through negotiation. The Federal Government had advocated to the 1987 conference:

> strengthened recognition of the right to aboriginal self-government while continuing to insist that the detailed enforceable content of those rights be set out in negotiated agreements. The process envisaged by the Federal Government is a tripartite one, in which both orders of government [ie the federal and provincial governments] and the aboriginal peoples are committed to the principle of self-government" (Canada 1987:6).

Despite the failure to reach agreement, the Ministry of Indian Affairs and Northern Development states that the federal proposal could serve as a basis for further discussions. Thus while the process of discussion on Aboriginal self-government in Canada remains inconclusive, there is nevertheless much to learn from the materials produced from the past few years of negotiation. If anything, the Canadian experience is a pointer in terms of the complexity of the issues involved and the high stakes that are being played, which are in essence little different from the matters involved in the "treaty" negotiations in Australia.

Australia - national and regional agreements

In Australia, responding at last to calls from a variety of groups, the Prime Minister, Mr Hawke, in 1987 called for a treaty between Aboriginal Australians and the Australian government. Since that call, there has been a great deal of discussion, particularly at federal level, as to the need for and the nature of such a treaty, many preferring to refer to a compact, or an agreement (the history of the various terms is documented, inter alia, in Wright 1985 and in the Senate Standing Committee Report "Two Hundred Years Later . . ." (Australia 1981)). The Barunga Statement, relating to a treaty and other matters, has been dealt with previously (see above p 5-7).

(i) A regional treaty

It appears to be assumed that any such treaty or agreement ought to be concluded only between the Australian government and a representative Aboriginal body or collection of individuals on a national basis. However, following the Canadian examples in particular, (eg Moss 1985) there seems to be no reason why specific arrangements could not be concluded on a regional basis,

whether in addition to a more general treaty or not. Thus, for example, there seems to be no legal obstacle to the federal and Western Australian governments, either jointly or individually, concluding arrangements with the Aboriginal people of the Kimberley. Such agreement could be specifically related to the conditions of the region, and include provisions relating to land tenure and access, and control over resource development and guarantees of participation in development and tourism, both substantively and in procedural terms. Such an arrangement could be particularly keyed into any proposed plan resulting from the Kimberley Region Planning Study carried out under the auspices of the State Planning Authority.

The Kimberley Land Council would seem to be well placed to lead negotiations for such a treaty or agreement. Its constitution is drawn in such a way that there would be a high degree of representativeness and sufficient mechanisms for accountability of decision-making.

(ii) A national treaty

In the national context, the power of the Federal Government to conclude treaties agreements or compacts could arguably be based on the present s 51(xxvi) (the "races" power, as outlined in a previous section of this paper) and s 51(xxix) (the external affairs power).

It is open to debate whether the "races" power in s 51(xxvi) should be amended to allow explicitly for legislation enacted under, or a power to enter into, an agreement with Aboriginal people. In support it may be said that to amend the existing head of power may be politically more acceptable to the Australian electorate and therefore more likely to succeed in a referendum than a new, separate head of power. To introduce an agreement pursuant to s 51(xxvi) as it currently exists would perhaps be the most desirable course. By the same token, an agreement that was not in some way seen to involve the direct ratification of the non-Aboriginal electorate might be deemed to be not "legitimate".

On the other hand it could be argued that a new separate head of power would both legally and symbolically recognise the special place of Aboriginal people in Australian society, much in the same way as that has occurred in Canada. A separate head of power would also avoid the existing uncertainties in the current s 51(xxvi).

These matters were considered in some detail in the reports of two of the Advisory Committees of the Constitutional Commission in 1987. The Distribution of Powers Committee took the view that the question of entrenchment of "indigenous rights" generally lay outside its terms of reference (Australia 1987a:108). Further, it recommended that:

> It is too early to seek an amendment of the Constitution for the purpose of enabling Constitutional backing to be given to a "Makarrata" or compact between the Commonwealth and representatives of the Aboriginal people (Australia 1987a:108)

The Committee framework for the making of a compact through a constitutional amendment provided "an imaginative and attractive approach to the immensely difficult situation which exists between Australia's Aboriginal and non-Aboriginal population" (Australia 1987a:114). Had the compact concept attracted greater recognisable support it might indeed have formed an appropriate amendment to be placed before the voters at a referendum to be held in the bicentennial year of 1988. (It should be noted that the Committee prepared its report before a great deal of the recent debate on the desirability of a treaty or compact took place, later in 1987 and in 1988.)

On the other hand, the Individual and Democratic Rights Committee of the Constitutional Commission accepted that it was not possible for it or for the Commonwealth Government to prescribe what kind of contract should be entered into, but stated that it was desirable to make explicit the capacity of the government to enter into an agreement. As noted previously (p 23, above), it recommended that s 51(xxvi) should be amended to empower the government to make laws with respect to:

> The benefit of the Aboriginal people and the Torres Strait Island people and the making of compacts deemed necessary by the Parliament in order to recognise ownership of Australia prior to the acquisition of sovereignty by the Crown (Australia 1987b:74).

Leaving aside the question of prior ownership, dealt with in a previous section of this paper, this proposal would make quite explicit the power of the Federal Government to conclude one or more agreements with Aboriginal and Torres Strait Islander people over their lands. However, it is arguable that such a power is too limited if it is restricted to lands. It may well be more desirable to enact a more general provision which nevertheless mentions a specific power to make agreements along the following lines:

> The benefit of Aboriginal people and Torres Strait Island people, and the making and implementing of any agreement between the Aboriginal people and Torres Strait Island people and the Commonwealth whether relating to lands or otherwise.

It is recognised that an amendment of such a kind could in itself generate a number of legal and political difficulties. The point remains that a more general compact making power does not limit potential agreements to land issues alone.

In the final analysis, it may well be wiser to follow the reasoning of the Final Report of the Constitutional Commission, and to keep the constitutional provision for Aboriginal and Torres Strait Islanders as straightforward as possible (see above p 23, and Australia 1988a:78).

A matter which requires further exploration is the status of any such treaty or agreement in international law and the further question of sovereignty of the Aboriginal people as a separate nation (see Mansell 1989).

ABORIGINAL LAND IN WESTERN AUSTRALIA

In considering the question of Aboriginal land in Western Australia, a number of statutes must be canvassed. These include the Land Act 1933, the Aboriginal Affairs Planning Authority Act 1972, the Aboriginal Heritage Act 1972 and the Mining Act 1978.

Any discussion of Aboriginal land rights in Western Australia must include reference to the Aboriginal Land Inquiry, conducted by Paul Seaman Q.C. (as he then was), and the subsequent attempt to introduce land rights legislation in the State. This attempt foundered at the end of 1984, with the failure of the Aboriginal Land Bill in the State's Upper House.

Following this failure, and the shelving at federal level of the Preferred National Land Rights Model (Australia 1985), a "land package" was agreed on between the Federal Government and the Government of Western Australia (Western Australia, 1986). The Bill and the land package is dealt with in subsequent sections.

The Land Act 1933

In Western Australia, the allocation and reservation of land is governed by the Land Act 1933. It is administered by the Minister for Lands, whilst the Governor holds the formal power to make grants and authorise purchase or exchange of land on such terms and conditions "as to him shall seem fit" (s 7(3)).

It could be argued that a de facto recognition of Aboriginal rights to land in Western Australia has been inherent in various provisions of the Land Act since its inception. For example, section 9 reads:

> Grant or lease to Aborigines.
>
> 9. Without prejudice to the provisions of this Act relating to the right of any person descended from the original inhabitants of Australia to apply for and acquire land as a selector under the provisions of this Act, the Governor may

> if of opinion that any such person is or is liable to be at any disadvantage with respect to an application for or the acquisition of land under the provisions of this Act because of his descent -
>
> grant or lease to any such person, upon such terms and conditions as the Governor thinks fit in the best interests of any such person, any area of Crown land not exceeding the area prescribed for a selector by the provisions of section 47.

It would appear that the effect of this provision is that the Governor has a discretion to grant a lease to Aboriginal people of any land which they would otherwise have difficulty obtaining by normal processes of "selection" under s 47. In effect this is an affirmative action provision, albeit that its rationale is by no means clear. The area of land that can be granted or leased pursuant to s 9 is up to 10,000 acres: s 47(1)(a).

The words de facto were used in the paragraph above because there is a real doubt as to the actual legal effect of such a provision in terms of extinguishment of any potential Aboriginal title that might be claimed over land in Western Australia (see discussion of Aboriginal title in a previous section). However, it is argued here that this section indicates, as of 1933 at least, that Aborigines had rights to possession and control of land, on the basis of a grant or lease at least as selectors. A selector is defined in the Land Act as a person who applies for or occupies land for agricultural or grazing use: see Parts V, VI, VII and VIII. However, a selector can also be a person who applies for a special lease or licence under Part VII. This can cover a very wide range of commercial and other purposes (see s 116). It should also be noted that s 117AA allows any person who holds a lease for the range of purposes mentioned in s 116 can also apply for the land to be vested in him or her in fee simple (freehold). The point of this analysis is simply to indicate that s 9 allows the Government of Western Australia to grant leases and freehold to Aboriginal people on the basis that they are at a disadvantage in applying for land because of their descent. In other words, in theory, Aboriginal people are able to argue in Western Australia that they have some special place in the West Australian scheme of land allocation because of the fact of their Aboriginality. Whilst one might wish to make too much of this argument it could be of use in any eventual court case claiming Aboriginal title.

A further recognition of traditional rights is s 106(2), inserted by amendment in 1934:

> The Aboriginal natives may at all times enter upon any unenclosed and unimproved parts of the land the subject

of a pastoral lease to seek their sustenance in their accustomed manner.

Although on its face this provision seems to be of major significance, its terms severely limit the amount of land to which access can legally be required by traditional owners, as most pastoral leases are both fenced and have some kind of structures (ie improvements) on them. In addition, some Aboriginal groups face the difficulty of having to cross "improved" land to reach "unimproved" land. In any case, the point remains that these two provisions in the Land Act seems to be a long-standing recognition by the legislature of pre-existing possession and use of traditional lands.

This recognition is underscored by the consultation processes instituted by both the Western Australian government and by private development interests in relation to mining activities. For example, the arrangements made in relation to the Argyle Diamond Mine with some of the local communities both in cash and in kind (the so-called "Good Neighbour Agreement") can be construed at the least as compensation for loss of access to and control, if not de facto recognition of Aboriginal rights over their traditional lands, although neither the government nor the company might wish to openly admit this at the present time. The provisions of the Aboriginal Affairs Planning Authority Act further underscore this recognition.

Aboriginal Affairs Planning Authority Act 1972

Whilst the Land Act remains important in terms of reserves and pastoral leases, it is the Aboriginal Affairs Planning Authority Act (AAPA Act) which governs the majority of matters relating to Aboriginal land in Western Australia. This Act established the Aboriginal Affairs Planning Authority and covers the administration of three statutory bodies: the Aboriginal Lands Trust, the Aboriginal Advisory Council and the Aboriginal Affairs Coordinating Committee. Since 1973 the responsibility for Aboriginal matters in Western Australia has been divided between the Commonwealth and the State, by virtue of an amendment to the AAPA Act.

The Minister having responsibility for the administration of the Act is required to have regard to the recommendations of the Aboriginal Lands Trust, the Advisory Council and the Aboriginal Affairs Coordinating Committee, but is not bound to give effect to any recommendations made by them. The Commissioner for Aboriginal Planning is responsible for the administration of the Act, but is at all times subject to the direction of the Minister.

The Act refers throughout to "persons of Aboriginal descent", which it defines as

> 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 [or she (author's interpretation)] lives.

Under the Act, the duty of the Authority is to promote the well-being of people of Aboriginal descent and to take into account the views of those people as expressed by their representatives (s 12).

Briefly summarised, the functions of the Authority are to:

- provide for Aboriginal consultation,
- recognise and support traditional Aboriginal culture,
- promote involvement of Aboriginal people in community affairs, and promote involvement of all sectors of the community in the advancement of Aboriginal affairs,
- provide consultative, planning and advisory services regarding economic, social and cultural activities,
- arrange for the effective control and management of land held in trust by or for Aboriginal people and
- generally to take steps to promote economic, social and cultural advancement of Aboriginal people (s 13).

The Authority is obliged at all times to take into account the expressed views of the Aboriginal Advisory Council. The Council is set up under the Act to advise the Authority on matters relating to the interests and well-being of persons of Aboriginal descent. The Council is composed of people of Aboriginal descent; the method of choosing the members and the number of members must be approved by the Minister (s 18).

The second body set up under the Authority is the Aboriginal Affairs Coordinating Committee. It consists of the Commissioner, the Chairperson of the Aboriginal Advisory Council and public servants from the departments of Treasury, Public Health, Community Welfare, Education and the Housing Commission. The function of this Committee is to coordinate all services and assistance to Aboriginal people (s 19).

Lastly, the Aboriginal Lands Trust is established by the Act. This body is required to be composed of people of Aboriginal descent. Its functions include:

- to acquire, hold, use and manage land for the benefit of Aboriginal people,
- to ensure that the use and management of the land is in accordance with the wishes of Aboriginal inhabitants of the area,
- to generally administer as necessary or desirable the development of land under the Trust's responsibility,
- to ensure the most beneficial use of the land (ss 20-23).

Under s 25 of the Act, the Governor may reserve land for Aboriginal people, alter the boundaries of any reserved land and declare that any land cease to be reserved. These functions may not be carried out except in accordance with the Minister's directions. The Minister must obtain a report from the Authority, and then lay both the report and the recommendation to the Governor before each House of Parliament for 14 sitting days. If Parliament does not reject the recommendation, then the Minister's recommendation to the Governor in relation to the reserved land can go ahead. Thus the Governor's proclamation in relation to any reserves is subject to the approval of the Minister and ultimately the Parliament.

Interaction of the AAPA Act and the Land Act

The way in which land can be granted or leased to Aboriginal people under s 9 the Land Act has already been dealt with above. The reserving of land for Aboriginal people is a different process and is carried out under the AAPA Act and the Land Act. The scheme is as follows:

- Under s 29 of the Land Act, Crown land can be reserved or disposed of in any manner as for the public interest may seem fit. The reservation must specify the purpose.

- The land can then be declared under s 25 of the AAPA Act to be reserved for persons of Aboriginal descent, subject to Ministerial and Parliamentary approval.

- The land then becomes reserved land within the meaning of s 26 of the AAPA Act.

- The land is thereby vested in the AAPA.

- At the request of the AAPA, the Governor may place the reserved land under the control and management of the Aboriginal Lands Trust.

- The various provisions relating to rental, royalty share or profit, as well as restrictions of entry on to the reserved land then applies to all land vested in the AAPA.

It has been observed (Hunt 1982, Clarke 1983) that the reservation of land for Aboriginal people need not go through this process. It is possible simply to use s 29 of the Land Act. However, if the Governor did not proceed under both Acts, then the royalty provisions and entry permit system would not apply to the reserve. It appears that the simpler process has mostly been used, as the dual process has been regarded as too cumbersome. Clarke observes (1983:130) that as the Turkey Creek Reserve was held under the Land Act and not under the AAPA Act, the "donor" of the 44 gallon drum of port which arrived on polling day for a State election in 1977 was not prosecuted for

entering a reserve without a permit, the probable reason being that the Crown had been advised that no entry permit was required.

It should also be noted that the reserved land is vested in the Authority, and not in any specific group of traditional owners or some other independent body such as an Aboriginal Land Council.

A significant section of the AAPA Act, in relation to the argument of recognition of Aboriginal title, dealt with in a previous section, is s 32. It is as follows:

> 32 (1) The Governor, by proclamation, may declare that the right to the exclusive use and benefit of any area to which this Part of this Act applies specified in that proclamation shall be reserved for the Aboriginal inhabitants of that area, being persons who are or have been normally resident within that area, and their descendants.
>
> (2) Regulations made in relation to an area to which subsection (1) applies may provide for the compilation, maintenance, and use of documentary evidence as to the entitlement of persons to any interest in the use of, or benefit to be derived from, specific areas of land or in the enjoyment of natural resources related to customary land use.

The purpose of this section is somewhat obscure. To compound the mystery, the side-note to this section (not a part of the Act) describes the provision as "Customary tenure". The effect of the section seems to be that exclusive use can be given over particular areas already declared as reserves under the AAPA Act, such that no other interests, such as mining or other development can be permitted on that land. The wording of the section implicitly seems to recognise some kind of exclusive right to use. This can then be the subject of a proclamation and regulations to that effect, in relation to lands where Aboriginal people are or have been normally resident and are able to establish entitlement to some interest in the use or benefit of specific areas or in the enjoyment of "natural resources" related to customary land use. Out of this section seems to spring an implicit recognition of Aboriginal title, although this interpretation would probably be strongly denied by the section's drafters, and the legislators of the time. In any case, it is submitted that this section can be added to the list of elements which need to be taken into account in any particular case attempting to establish Aboriginal title.

Clarke notes that section 32 has only been used once, in relation to the Noonkanbah dispute, when the Aboriginal Lands Trust requested the Governor to make a proclamation to reserve Noonkanbah station for exclusive use and benefit of the Aborigines of the area. This was done in an attempt to prevent

the Amax company from drilling for petroleum on the station. The request was declined by the Governor on Ministerial advice (Clarke 1983:14; for further analysis of the Noonkanbah dispute see Dillon 1983 and Howitt 1983:60).

The observations made by Reynolds, in relation to the recognition of Aboriginal rights by way of reserving land, have already been referred to (see p 17 above).

The Aboriginal Land Inquiry

The Aboriginal Land Inquiry conducted by Paul Seaman Q.C. (as he then was) was a comprehensive examination of Aboriginal claims and aspirations in relation to land in terms of access, control, possession and ownership. The terms of reference were as follows:

TERMS OF REFERENCE

1. Specifically the Inquiry shall consider the most appropriate form of title over land reserved for the use and benefit of Aborigines or leased for Aboriginal Communities.

2. In addition, the Inquiry shall consider the question of what kinds of Aboriginal relationships to land should be protected and the ways in which to satisfy the reasonable aspirations of Aboriginal people to rights in relation to land.

3. The Inquiry shall make recommendations about the terms and conditions upon which such land should be granted and by which body or bodies the titles should be held.

4. The Inquiry will consider the extent to which waters adjacent to granted lands should be protected for the use of Aboriginal people.

5. The Inquiry shall consider the relationship of granted areas to resource development projects and in particular the question of compensation and royalties.

6. The Inquiry shall review the operation of the Aboriginal Heritage Act in order to make recommendations about the most appropriate way of protecting sites of significance to Aboriginal people.

7. The Inquiry is to consider the question of resource exploration and development and to make recommendations on ways of accommodating the legitimate concerns of Aboriginal people about land and the social impact of development.

> 8. The Inquiry is to examine the question of the future implementation of the Environmental Protection Authority's recommendations for Conservation Reserves to ensure that adequate safeguards exist in the consideration of possible conflicting Aboriginal interests.

On any reading of these terms of reference, it is clear that when the Western Australian government commissioned the Inquiry, it had made up its mind that the granting of land rights to its Aboriginal inhabitants would proceed without question. It was not whether land rights were to be granted but what form the process would take. The Inquiry was asked to consider the most appropriate form of title, what kinds of relationships were to be protected, the terms and conditions of grants and who should hold the titles. The way in which the report is written leaves no room for doubt that this was the government's wish. That this was the assumption was also indicated by the way in which all participants in the Inquiry responded, and in particular the Aboriginal participants.

The Inquiry canvassed in great detail the views of Aboriginal communities and individuals, pastoral groups, church groups, mining industry groups and companies and a range of Federal and State government departments.

In his report Seaman stated:

> 5.1 Aboriginal people make a straightforward case to show they have reasonable aspirations in relation to those areas. They say this land was theirs, that it was forcibly taken from them, they were used as the unpaid labour force of the pastoral industry and they still have strong ties to all of it (at 27)

Specifically in relation to land in the Kimberley, Seaman stated:

> 5.2 I accept the Kimberley Land Council's submission that if only Crown land is made available to Aboriginal people in the Kimberleys, then land rights will be an empty proposition for them because so many groups are far from and have no relationship to the areas of available Crown land. The special significance of the Kimberley area in the context of the relationship between Aboriginals and pastoralists is due to the fact that Aboriginal people can demonstrate that they still have a traditional relationship with virtually all of the region. Elsewhere traditional ties are incomplete and often based more on residential and work related experience.
>
> 5.3 There is direct competition between Aboriginal people and pastoralists for a very large area of land. It seems to me that a proper consideration of

> Aboriginal aspirations demands a recognition of [the Minister's] control over the pastoral industry because every pastoral lease may be resumed for any purpose of public utility and all pastoral leases expire in the year 2015.

The Inquiry recommended the introduction of legislation which would provide for the recognition of Aboriginal interests in traditional lands throughout Western Australia, a negotiations and claims procedure to be conducted by an Aboriginal Land Tribunal, and introduction of the concept of "modified title", which would restrict the right to sell any land granted under a claim.

These recommendations were made at a time of some controversy over the issue of land rights at a national level. The Federal Minister for Aboriginal Affairs, then Mr Clyde Holding, had made statements committing the Federal Government to the introduction of Aboriginal land rights throughout Australia. On releasing the Preferred National Land Rights Model in February 1985, Mr Holding stated in a press release:

> It will be an historic achievement if Governments throughout Australia can resolve this issue in such a way as to accommodate the hopes of Aboriginal people. I would hope that by 1988, our Bicentennial year, all Australians can point with pride to the attainment of such a settlement.

At the same time (1984-5) the Australian Mining Industry Council and related groups were engaged in an extensive campaign to counteract the land rights movement. This was done by newspaper advertisements and the dissemination of booklets and maps, which indicated, usually inaccurately, the extent to which Aboriginal land claims throughout Australia would tie up land from "productive" uses such as mining. The low point of this campaign was perhaps the "Statement of Concern from the Australian Mining Industry Council", aimed in particular at the Aboriginal and Torres Strait Islander (Interim Protection) Act 1984, which was enacted at federal level in that year (see further, Boer 1984).

In response to the Inquiry's recommendations, the Western Australian Government issued a General Statement on Aboriginal Land Claims, which was, in general, an endorsement of the Inquiry's findings. In its preamble it was stated:

> The Government is committed to the special needs of policy, legislation and governmental support for the legitimate and genuine aspirations of Aboriginal people to land. This stance is predicated on a course of moderation and equity. It will have special regard for the cultural, economic and social position of Aboriginal people within Western Australia, while retaining a Statewide concern for the economic and

> social well-being of the broader community. The Government will seek to establish a method to assess genuine and realistic claims to certain categories of Crown land. This process cannot turn back the clock any more than it could hope to dispossess those in the community who privately own or hold land. The objective of enhancing the equity of Aboriginal people in the community will require a considered and rational approach from all if the cycle of disadvantage under which many Aboriginal people live is to be constructively addressed. Aboriginal land matters will not be seen in isolation or as an issue to be dealt with simplistically. The Government believes that Aboriginal aspirations for land should be viewed in the context of overall land management planning procedures (Western Australia 1984).

In its "Statement of Principles", in the same document, it was stated:

> The Government will provide for the conciliatory resolution of conflicts over land by a process of negotiation and agreement. This process will be inclined towards selective and rational land access, management and control. The system will rely on locally based regional organisations to ensure that the aspirations are those of the Aboriginal people actually concerned (Western Australia 1984).

Importantly, this statement recognised the need for negotiation to be carried on through locally-based regional organisations. Such a system would have been and still is well-suited to the Kimberley region, given the existence of the Kimberley Land Council, and, in the East Kimberley, organisations such as the Waringarri Association, the Balanggarri Association and Ngoonjuwah Council and other relevant bodies.

Of course, neither the general statement, nor the other "principles" was carried through, because of the subsequent fate of the Aboriginal Land Bill in the Western Australian Upper House. Needless to say, given the initial promise of the terms of reference and the optimistic tone of the statements subsequent to the submission of the Inquiry's report, there has been a feeling of great bitterness on the part of Aboriginal people in Western Australia since the about-face by the Federal and State Governments on the question of land rights. The eventual "land package" referred to above was put together as a result of negotiations between the Western Australian and Federal Governments, embodied in a pamphlet entitled Aboriginal Land, in March 1986. This statement was subtitled: "A briefing paper to Aboriginal organisations concerning the arrangements between the Western Australian government and the Commonwealth government relating to Aboriginal land issues". This was some arrangement! The Aboriginal organisations were "briefed" about the new regime,

but were apparently not otherwise consulted. This stands in stark contrast to the meticulous efforts in relation to consultation with and information distribution to Aboriginal communities on the part of Commissioner Seaman and his deputies, particularly given the time-frame of the Inquiry and the resources available to it.

The Federal/State Land Package

The land package did not involve changing any Western Australian laws, which meant that the government did not have to negotiate the passage of any more controversial legislation through the State's Upper House. The measures indicated in Aboriginal Land would seem thus to represent the maximum that the then government could apparently achieve at the time from a political point of view.

In the package, long term leases of a minimum of 99 years will be granted to Aboriginal communities over Aboriginal reserves, to be determined by the Aboriginal Lands Trust established under the Aboriginal Affairs Planning Authority. This move did not change the situation to any great extent, except to give somewhat more security to Aboriginal communities over their land.

The processing of excisions from pastoral leases for Aboriginal living areas was to be speeded up and the transfer of church (mission) lands to Aboriginal groups was to be progressively carried out.

The package also introduced new procedures for exploration and mining on Aboriginal land. A Committee was established to hear disputes and make recommendations to the Western Australian Minister for Aboriginal Affairs. This committee consists of three persons, the chairperson being a lawyer, the others being an Aboriginal representative and a mining/petroleum company representative.

Reserves under the jurisdiction of the Department of Community Services which are used exclusively for the benefit of Aboriginal people are being transferred to Aboriginal groups. Community Services reserves which are not being used are to be immediately vested in the Aboriginal Land Trust, which will lease this land to Aboriginal groups.

Part of the package is intended to include compensation for disruption to Aboriginal communities, which would be negotiated by the parties, or be the subject of recommendations by the Committee, and be made a condition of entry to the Aboriginal land in question. Mining royalty equivalents and fees are to be paid to the Aboriginal Land Trust established under the Aboriginal Affairs Planning Authority Act, according to the following scale:

Annual collection of royalties and fees	Amount payable to the Aboriginal Lands Trust
Up to $100,000	100%
$100,000-$250,000	$100,000 plus 50% of the excess over $100,000
$250,000-$500,000	$162,000 plus 30% of the excess over $250,000
$500,000-$1 million	$240,000 plus 15% the excess over $500,000
$1 million and over	$320,000 plus 5% of the excess over $1 million.

This scale is simply an updated version of the scheme of payments operating before this land package was put in place. Commissioner Seaman described those payments as "minimal". He notes that in the financial year 1983 the total amount paid to the Aboriginal Lands Trust was $30,016 (Seaman 1984:para 9.58). These payments do not appear in any sense to be legally enforceable.

Excisions from Pastoral Leases

For Aborigines in the Kimberley, the matter of excisions is a vital one, as many people who formerly worked in the pastoral industry and were then in touch on a continuing basis with their traditional country, are anxious to get back to it. Until the introduction of the land package, excision applications were being processed at a very slow rate, for reasons relating primarily to local opposition, both from pastoralists and from local government bodies. At present (May 1989) 38 excisions have actually been concluded, 18 on pastoral leases and 20 on Crown reserves and other Crown lands. Some two-thirds of the concluded excisions relate to land in the Kimberley. Around 64 excision applications are still in the process of negotiation around the State.

However, it ought not to be thought that excisions from pastoral leases are anything more than a compromise on the part of the government. In his Report, Seaman stated:

> 5.26 Throughout the pastoral areas of the State, Aboriginal people have expressed the desire to have substantial areas of land and not small living areas. Excisions are clearly not the real wish of the Aboriginal people but are an expression of a much broader desire for the return of their lands. In traditional areas the desire is for the return of land which is significant as well as capable of creating employment within the community and of supporting some

> form of economic opportunity. In less traditional areas of the State Aboriginal people wish to acquire whole pastoral leases with which they have long association or particular links, and otherwise for the same reasons as traditionally orientated Aboriginals.
>
> 5.27 In summary it can be said that neither the pastoralist nor the Aboriginal people living in the pastoral areas saw much satisfaction in excisions as a satisfactory long-term solution. I regard them as an immediate need on the part of Aboriginal people and I do not consider that any of their reasonable aspirations are satisfied if they are confined in village areas.

In short, for many Aboriginal people, excisions are a crumb from what should be a whole loaf of bread.

The initiatives contained in the land package have gone some way to substituting for the Aboriginal land legislation. If fully implemented, they may ameliorate the conditions of some Aboriginal communities. However, as presently negotiated, the land package should only be regarded as a step along the way to recognition of traditional Aboriginal ownership and the introduction of a comprehensive land rights scheme in Western Australia.

RECOMMENDATIONS ON ABORIGINAL LAND

Amendments to Land Act 1933

Given the continuing demand for more secure title to land by Aboriginal people in Western Australia, the Western Australian Government should, as a minimum action, attempt to resurrect certain elements of the Aboriginal Land Bill of 1985, in order to better achieve the aims of the land package developed between the Federal and Western Australian Governments. The present scheme has no specific statutory basis, which means that it can be withdrawn or modified at any time, presumably after consultation with the Federal Government. It will be seen from the following suggestions that a statutory scheme can be introduced without having to introduce a comprehensive Aboriginal Land Act (the most desirable course), but by amendments to the existing Land Act 1933. Related amendments to the Mining Act 1978 are dealt with in a subsequent section.

Aboriginal Land Tribunal

It is suggested that amendments be made to the Land Act 1933 in order to establish an Aboriginal Land Tribunal to deal with:

- applications made in relation to existing

provisions for freehold title to reserves pursuant to Part III of the Land Act 1933;

- long term leases of Aboriginal reserves, pursuant to the intention of the Western Australian Government to negotiate leases with a minimum span of 99 years;

- applications for pastoral lease excisions for Aboriginal living areas, and access over leasehold lands to those living areas;

- applications for exploration, resource development on Aboriginal land, and claims for compensation by Aborigines (in this respect the Tribunal would take over the function of a Committee suggested to be set up for the purpose of determining these applications) (see Western Australia 1986).

- applications under an amended Aboriginal Heritage Act to deal with resource development issues in areas where the provisions of that Act apply.

- access to pastoral leases, whether or not enclosed or improved, for the purposes of hunting, fishing, foraging and for the exercise of traditional obligations relating to that land.

The Tribunal could be constituted in two layers: the first layer would be comprised of a panel of "assessors" with expertise in Aboriginal land and cultural matters. Such a panel would normally comprise at least three persons, a majority of whom should be Aboriginal people. The panel would determine all questions of "merit", in relation to the applications, and sit in an informal way. Hearings would be based in or near relevant communities, in order to facilitate Aboriginal participation in the panel's deliberations.

The second layer would be comprised of a Supreme Court judge, sitting with or without assessors. The judge would have the power to determine all legal questions referred to him or her by the assessors, as well as being able to make determinations on merit issues, with appropriate input by panel members.

The advantages of such a Tribunal would be that, from the point of view of Aboriginal people, a proper set of procedures would be followed in all cases, but carried out with the informality appropriate to Aboriginal negotiating styles. From the point of view of the Western Australian Government, the negotiation and determination process would be kept at arm's length from political processes. From the point of view of pastoral and development interests, proper procedures would introduce a degree of certainty and finality into what is at present a rather ad hoc system.

The Tribunal would need to be able to appoint independent consultants on specific issues arising out of various claims as they arise, as envisaged in the Government's Statement of Principles (see above p 43).

Grants of Land for Living Areas

To place the present excision process on a more adequate legal footing, the Land Act should be amended to incorporate the effect of clauses 19 to 26 of the Aboriginal Land Bill 1985 (WA) relating to the excision of land from pastoral leases with a subsequent grant of that land to Aboriginal groups for use as living areas.

A "living area" was defined in the Aboriginal Land Bill as "an area of land for the use of members of an Aboriginal land corporation and their families to meet their residential and domestic requirements, including appropriate social or community needs". These clauses provided that applications for such excisions could be made only by an Aboriginal land corporation. The corporation was required to have a "prescribed association with that part of the land". An Aboriginal land corporation was to be regarded as having a prescribed association with land, according to clause 3(2), if a majority of the members of the Aboriginal land corporation had entitlements in respect of the land in accordance with local Aboriginal tradition, or associations with the land because they lived on or used the land for substantial portions of their lives. Their residence did not have to be continuous. Local Aboriginal tradition was defined in the Bill as meaning "the body of traditional observances, customs and beliefs of a community or group of Aboriginals relating to that area". The Bill provided for the title of such land to be in fee simple, subject to any conditions thought fit to be imposed. In the case of excisions from pastoral leases, the Bill specifically provided for compensation to be payable by the government to the lessee.

Access to Specified Land

(i) Pastoral Leases

As recommended by the Seaman Inquiry, Aborigines should be able to seek access to pastoral leases (as well as on public lands), to hunt fish and forage according to their traditional practices. As noted above, section 106(2) of the Land Act 1933 presently provides:

> The Aboriginal natives may at all times enter upon any unenclosed and unimproved parts of the land the subject of a pastoral lease to seek their sustenance in their accustomed manner.

It is suggested that this section be amended in order to enable Aborigines to have access to pastoral leases, whether or not enclosed or improved, pursuant to traditional association by residence on or use of that land, as recommended by the Seaman Inquiry (Seaman 1984:77-78 paras 11.1-11.14). The words "in their accustomed manner" should be deleted, given that hunting and fishing practices ought not to be restricted to traditional methods (Seaman 1984:78 para 11.9 and see p 50, below).

In the alternative, the Land Act 1933 should be amended to incorporate into all current and future pastoral leases a reservation in favour of Aboriginal people in Western Australia who have a traditional association or current use of lands the subject of a pastoral lease, permitting those Aboriginal people to:

> (a) enter and be on the leased land;
>
> (b) to take and use the natural waters and springs of the leased land;
>
> (c) subject to any other law in force in Western Australia to take or kill for food or for ceremonial purposes wild animals on the leased land; and
>
> (d) subject to any other law in force in Western Australia, to take for food or for ceremonial purposes any vegetable matter growing naturally on the leased land.
>
> (See Crown Land Act 1979 (Northern Territory), s 24(2)).

The Northern Territory Crown Land Act also provides that where a lease contains such a reservation, anyone who interferes with the full and free exercise of these rights without just cause is subject to a $2,000 penalty.

As Seaman notes, all Northern Territory pastoral leases contain such a reservation, which is as follows:

> giving to all Aboriginal inhabitants of North Australia and their descendants full and free rights of ingress, egress and regress into, upon and over the leased land and every part thereof and in and to the springs and natural surface water thereon, and to make and erect thereon such wurlies and other dwellings as those Aborigines are, from time to time, accustomed to make and erect and to take and use for food, birds and animals ferae naturae [of wild nature] in such manner as they would have been entitled if the lease had not been made.

Seaman notes in his Report that the provisions in the Northern

Territory have caused little concern among pastoralists. He recommended that the Western Australian government:

> ...legislate in relation to Aboriginal aspirations which affect pastoralists upon the basis that the quite unalarming Northern Territory experience will be repeated in Western Australia (Seaman 1984:31 para 5.25).

These rights could be restricted so as not to apply within a reasonable distance from a pastoral property homestead, as found in s 26(2) Crown Lands Act 1979 (Northern Territory) (see Seaman 1984:30 para 5.20).

To facilitate the passing of such legislation, a special review of traditional uses by Aboriginal people of land the subject of pastoral leases could be undertaken by the Western Australian Government, as indicated by the Final Report on Pastoral Land Tenure in February 1986.

(ii) Access to land other than pastoral leases

The matter of access to land other than pastoral leases, for hunting, fishing and gathering was addressed by the Australian Law Reform Commission in its report, The Recognition of Aboriginal Customary Laws. It noted that Commonwealth and Northern Territory legislation has exemptions in their national parks and wildlife legislation in relation to Aboriginal people engaged in traditional hunting, fishing and gathering, unless the laws are expressly stated to apply to them. In Western Australia, there are exemptions from these laws when hunting for food on land that has not been set aside as a native or conservation reserve or wildlife sanctuary, and that the Governor can suspend the exemption if the provision are being abused or the species become depleted, Wildlife Conservation Act 1950 s 23 (Law Reform Commission 1986b). Exemptions are also applied under the Fisheries Act 1905 (ibid:174). The Law Reform Commission also goes into an important discussion as to what can be regarded as "traditional" in this context (see ibid:180-182).

In relation to access to land for the purposes of hunting, fishing and foraging, the Seaman Report stated that it was more appropriate to consider this in terms of what land may be available for these purposes rather than to concentrate on the protection of traditional interests, on the basis that restricting the rights to traditional interests would exclude large numbers of people where links with the pastoral land are by long association and no longer by tradition.

> 11.8 Aspirations to hunt, fish and forage should, in my view, be accommodated to the extent to which they do not reasonably interfere with the rights of existing private freehold landowners and are not incompatible with the public use of public land. I consider the

policy considerations to be different when Aboriginal people aspire to hunt, fish and forage over public land and pastoral leases, as opposed to private freehold land.

11.9 If the right were confined narrowly by reference to traditional methods of hunting, fishing and foraging it would be meaningless to almost every Aboriginal person in Western Australia. The argument says that Aboriginal people should only enjoy such a right if they confine themselves to pre-settlement methods of hunting, fishing and foraging. In my view it is really an argument that they should not have rights of access for these purposes at all. I recommend that they should have those rights in certain circumstances, and that they should not be denied the use of modern technology such as vehicles, nylon lines, steel fish hooks or rifles (Seaman 1984:78).

The question of access to public lands for the purposes of hunting, fishing and gathering for domestic purposes was provided for in the Aboriginal Land Bill 1985. In the Bill, the land to which this access provision would apply included all unalienated Crown land, a variety of reserves vested in or under the control of or leased by a public authority, land reserved or dedicated under s 29 of the Land Act 1933 and land to which the Conservation and Land Management Act 1984 applied (see Aboriginal Land Bill, cl 69). This latter category includes state forest, timber reserves, national parks, nature reserves marine parks and marine nature reserves (Conservation and Land Management Act s 5). There was no definition in the Bill as to the meaning of "domestic purposes"; however, the uses of this phrase seems intended to overcome the restrictions of the word "traditional" to which Seaman alluded. In any case, it would clearly limit these activities to non-commercial pursuits. There was no restriction in the Bill on the methods that could be used.

After the failure of the Aboriginal Land Bill, no further action was taken by the Western Australian government to guarantee access for traditional hunting, fishing and gathering. It is recommended that legislation amending the Land Act and the Conservation and Land Management Act be introduced to replicate as far as possible the provisions found in clauses 69-81 of the Aboriginal Land Bill 1985.

Further, it is suggested that Part III of the Land Act relating to reserves should be amended to include a provision similar to cl 71(1) and (2) of the Aboriginal Land Bill 1985:

(1) The Governor may by order grant to specified Aboriginals or members of specified Aboriginal groups a right to enter any specified land to hunt or fish or

gather food for domestic purposes or to gain access to land for that purpose.

(2) The enjoyment of rights under an order made under sub-section (1) may be subjected to such conditions as are specified, including a condition as to the giving of notice of intention to exercise those rights to a public authority.

Appropriate amendments should also be made to the Conservation and Land Management Act 1984 and other relevant legislation in relation to uses of the seas, following Part V of the Aboriginal Land Bill 1985.

ABORIGINAL HERITAGE AT FEDERAL LEVEL

The concept of heritage has broadened considerably in recent years. It generally encompasses the physical environment, both natural and built, as well as the intangible heritage as "folklore"; see eg Report on Aboriginal Folklife (Australia 1981; not a widely circulated report) and the Folklife report (which excluded Aboriginal folklife; Australia 1987c).

Aboriginal heritage can be said to encompass every aspect of Aboriginal culture, including ritual, initiation practices, language, songs, skills, education and art, as well as hunting, fishing, food gathering, and other economic endeavours. The protection and control of this heritage is fundamentally linked to issues of access and control of Aboriginal land in general and in particular to specific areas and sites to which responsibility is owed. In this context, concepts of European cultural and natural heritage have a much more limited meaning than that found in or derived from the Aboriginal cosmology. In Aboriginal terms, the distinction between cultural and natural heritage seems to be much less meaningful because of a more holistic, integrated conceptualisation of human life, whereas in European traditions heritage concepts are much more atomised. Thus it is that specific legislative and administrative structures put in place by governments and agencies to protect Aboriginal heritage can only have a limited impact. What is required in addition is an effective political voice, access to and control of significant sites and participation in planning, environmental impact assessment and broad vetoes on development control. These may in the final analysis make the difference between protecting the outward, physical manifestations of the Aboriginal heritage and the spiritual, non-tangible aspects of an entire culture and way of life.

Every Australian jurisdiction has enacted legislation of some kind to protect, conserve and enhance both the non-Aboriginal and Aboriginal heritage. Australia is a signatory to the World Heritage Convention, which places a range of specific obligations on the Federal Government in terms of setting up agencies,

identifying heritage items and taking steps to protect its heritage.

Australian Heritage Commission Act 1975

In 1975 the Federal Government enacted the Australian Heritage Commission Act, which established the Australian Heritage Commission, with a view to protecting places which could be classed as items of the National Estate. The term "National Estate" is defined in the Act as consisting of

> those places, being components of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historic, scientific or social significance or other special value for future generations, as well as for the present community (s 4(1)).

Because of constitutional limitations, this Act can only affect the actions of the Federal Government and its agencies in relation to National Estate items. Listing does not give automatic protection to items, but places obligations on federal Ministers to consider all "prudent and feasible alternatives" to the taking of any action in relation to an item on the National Estate list (see s 30).

The Commission has placed Aboriginal sites into four categories: scientific sites, art sites, contact sites, relating to the history of contact between Aborigines and Europeans, and traditional sites significant to Aborigines but not necessarily to non-Aborigines. In relation to traditional sites, the Commission considers:

> .... that these sites of significance only to Aborigines do form part of the National Estate, even if they are of local importance to a small group. However, such traditional sites will only be accepted for the Register of the National Estate if (1) they are nominated by, or with the approval of local Aborigines; (2) their significance is verified and appropriate boundaries recommended by a professional anthropologist/archaeologist; (3) their nomination is recommended by the State or Territory authority responsible for Aboriginal sites or the Australian Institute of Aboriginal Studies or another body approved under section 23(5) of the Act, or they are specially protected under State law (Yencken 1985:100).

It should be noted that s 23(5) of the Australian Heritage Commission Act provides that items of the Aboriginal heritage will only be listed on the National Estate list if they are already protected under State legislation, or if the item is ordered to be listed by the Minister. This section was inserted in 1976 in order to try to prevent the identification of the sacred sites to the public in situations where publication could

result in damage to those sites. However, the section places the Commission under constraints that it is not under in relation to non-Aboriginal sites, and there has been some debate and recommendations relating to the repeal of the provision; (see Yencken 1985:105-106; Australia 1986a:89; Boer 1987b:70; see also Boer 1989). In any case, the Department of Aboriginal Sites of the Western Australian museum, in common with similar agencies in other States, liaises with the Australian Heritage Commission on a regular basis.

World Heritage Properties Conservation Act 1983

In 1983 the Federal Government enacted the World Heritage Properties Conservation Act, as part of a successful campaign to stop the building of the Franklin dam in South West Tasmania. Of the eight Australian items currently on the World Heritage List, the majority are recognised as having at least significance in terms of the Aboriginal heritage. In relation to the East Kimberley region it is of interest to note that the Wandjina art region, an area of mythological significance to Aboriginal people is on the tentative list for future consideration as a nomination to the World Heritage List (Yencken 1985:102; Australia 1988d).

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

In 1984 the Federal Government passed the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act. This legislation was originally intended to be the precursor to comprehensive land rights legislation at federal level and the Act was meant to expire in 1986 with that expectation in mind. As comprehensive legislation was not enacted, the legislation was amended in 1986 in order to allow it to continue (see Boer 1984 and 1987a). This Act remains the only federal legislation applying nationally to provide for direct protection of Aboriginal heritage items. It gives the Minister for Aboriginal Affairs the power to make declarations for the protection of sites, areas and objects "of particular significance to Aboriginals in accordance with Aboriginal tradition", as well as in relation to Aboriginal remains. The Minister cannot make a declaration in relation to an area or object unless he or she has consulted with the appropriate Minister of the relevant State or Territory as to whether there is effective legislation in that jurisdiction in relation to the area or object. If the Minister is satisfied that effective legislation is in place to protect the area or object, he or she is under an obligation to revoke the declaration. The legislation is intended to be used as a last resort. The Act has been used a number of times in relation to both areas and objects (Australia 1986b:71-72).

Protection of Movable Cultural Heritage Act 1986

The Protection of Movable Cultural Heritage Act 1986 is potentially of great significance in terms of ensuring that

Aboriginal cultural material, including paintings, are controlled in terms of export to other countries. This Act replaces a much more limited scheme under the federal customs legislation. It operates on the basis of a National Cultural Heritage Control List, which has the effect of categorising a wide range of cultural objects of both the non-Aboriginal and Aboriginal heritage into either a Class A or a Class B division. Objects under Class A cannot be exported except with a certificate from the Minister, and in the case of Class B objects, except with a permit to export or a certificate of exemption. The basic scheme is to ensure that objects on the Class A list will be very difficult to export, whereas Class B objects will be able to be exported, either temporarily or permanently, with somewhat less difficulty. In considering applications for permits to export Class B objects, the Minister must refuse to allow export, or permanent export, as the case maybe, if he or she is satisfied that the object is of such importance to Australia, or a part of Australia for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons, that its loss to Australia "would significantly diminish the cultural heritage of Australia (see sections 7(1) and 10(5)).

Clearly the reasons that the Minister is obliged to take into account have direct application to a wide range of objects of significance to Aboriginal people around Australia. The National Heritage Control List for a wide range of cultural objects, including Aboriginal objects is being drawn up, with input from relevant organisations and individuals (see further Boer 1987c and 1987d; for a more detailed examination of the federal scheme of heritage protection, see Boer 1989).

The Aboriginal and Torres Strait Islander Commission Bill

The Aboriginal and Torres Strait Islander Commission Bill, before Parliament at the time of writing, has the potential to further enhance the Federal Government's ability to protect the Aboriginal heritage. One of the functions given to the Commission by the Bill is:

> to take such reasonable action as it thinks necessary to protect Aboriginal and Torres Strait Islander cultural material and information, being material or information that is considered sacred or otherwise significant by Aboriginal persons or Torres Strait Islanders (s 7(h)).

Whilst it is unclear at this stage how this provision would operate in practice, the effect of it would seem to be that the Commission would be able to take action directly to set up schemes of protection in the States and Territories, over and above the power of the Minister to grant declarations over specific areas and objects as is at present possible under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.

ABORIGINAL HERITAGE IN WESTERN AUSTRALIA

The Western Australian provisions dealing with Aboriginal heritage sites and objects are found in two pieces of legislation: the Aboriginal Heritage Act 1972 and the Museum Act 1969. In order to comprehend the scheme of protection the two Acts must to an extent be read in conjunction with each other.

The Western Australian Museum has been for many years the chief governmental agency charged with the protection and preservation of the Aboriginal heritage. At least since the early sixties Aboriginal people have been involved directly with the museum in fieldwork in relation to the collection and preservation of Aboriginal artefacts and the recording of art sites. The Museum Act 1969 includes specific provisions for protection of Aboriginal culture (see s 9(d)). Given this involvement it is unsurprising that the administration of the Aboriginal Heritage Act, enacted in 1972, came under the jurisdiction of the museum (see Clarke 1983:37-39 for more detail on these aspects). The Act was introduced primarily as a result of a conflict over the application for a mining tenement at an important Aboriginal site. As Crawford notes (1979:473), until the passing of the Act, there was no land-controlling legislation specifically applicable to Aboriginal sites.

The Aboriginal Heritage Act has as its object "to make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants." The duty of the Minister is to ensure as far as is reasonably practicable:

> all places that are of traditional or current sacred, ritual or ceremonial significance to persons of Aboriginal descent should be recorded on behalf of the community and their relative importance evaluated so that resources available from time to time for the preservation and protection of such places may be coordinated and made effective (s 10(1)).

The duty of the Minister extends to Aboriginal cultural objects whether of traditional or current sacred or ceremonial significance.

Section 5 of the Act further indicates its scope:

> This Act applies to -
>
> (a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose

connected with the traditional cultural life of the Aboriginal people, past or present;

(b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;

(c) any place which, in the opinion of the Trustees, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;

(d) any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.

It can be noted that as a result of the Noonkanbah dispute and the controversy arising out of the exploration of the Argyle diamond prospect at Barramundi Gap, section 5 (a) was altered. The original section 5 stated:

This Act applies to -

(a) any place where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;

(b) any place, including any sacred, ritual or ceremonial site, which is of importance of special significance to persons of Aboriginal descent;

(c) any place which, in the opinion of the Trustees, is or was associated with the Aboriginal people and which may be of historical, anthropological, archaeological or ethnographical interest;

(d) any place where objects to which this Act applies are stored, or to which such objects have been taken or removed under the provisions of this Act,

The changes, particularly to s 5(a), place an emphasis on places of "importance and significance", rather than "any place" where objects related to traditional cultural life are found. This new section, along with other changes to the Act placed more power directly into the hands of the Minister and the Trustees, and to took away significant functions of the Aboriginal Cultural Material Committee (see further Dillon 1983).

In relation to these amendments, Seaman stated:

> 8.16 Following the 1980 amendments the Aboriginal Heritage Act has a simple operation in relation to sites. The government of the day can decide in the interests of the broader community what Aboriginal sites should be destroyed or damaged, no matter how sacred or important or special their significance to Aboriginal people may be. Aboriginal people have no right to be heard on the topic, although private property owners may appeal to the Supreme Court if the Minister will not authorise a disturbance (Seaman 1984:53).

The Aboriginal Heritage Act, conceived in the 1960's, takes a largely museological, static approach to Aboriginal heritage matters, with an ethnocentric emphasis on registration of sites. In practice, the participation of Aboriginal representatives on the Aboriginal Cultural Resources Committee (established under the Aboriginal Heritage Act) and the enlightened approach of the Registrar's office has ameliorated the formality imposed by the legislation's regime of registration and protection mechanisms.

In addition, Aboriginal communities have in a number of instances negotiated directly with companies involved in exploration, in order to ensure avoidance of significant sites on their land.

The Registrar stated in 1985:

> There are obvious advantages to having legislation of such broad concern, but the experience of the past thirteen years has also highlighted some difficulties. In the first place there is the potential for conflict between what Aboriginal people seek to protect and what may be decided, under the legislation, as the best measures to be taken "on behalf of the community". Secondly, it is now clear that it is quite unrealistic to expect a documentation and assessment of all sites of Aboriginal significance in the State, as required of the Minister under Section 10. The definition of sites also casts a very wide net which may stretch the capacity of the Museum and resource developers to meet the Act's requirements. And, finally, the provisions dealing with the protection of Aboriginal cultural material have proved to be difficult to implement.
>
> In practice, the last decade has seen a narrowing of the Act's operation to meet some of these difficulties. There has also been a trend towards greater involvement by Aboriginal people themselves in site protection and negotiation with developers. The Museum's Department of Aboriginal Sites initially embarked on an ambitious programme to document the State's Aboriginal sites. This programme has now been abandoned in favour of a

> greater concentration of effort on areas likely to be affected by development and on measures designed to minimise the impact of such development on the Aboriginal heritage (Robinson 1985).

The Registrar has stated that he considers that it is better to expend effort on ensuring that sites and traditions are "registered" in the minds of Aboriginal children rather than on a register in an office (personal communication 1986).

The Seaman Inquiry was given three Terms of Reference in relation to Aboriginal heritage. They were:

> (2)... The Inquiry shall consider the question of what kinds of aboriginal relationships to land should be protected and the ways in which to satisfy the reasonable aspirations of Aboriginal people to rights in relation to land.
>
> (4) The Inquiry will consider the extent to which waters adjacent to granted lands should be protected for the use of Aboriginal people.
>
> (6) The Inquiry will review the operation of the Aboriginal Heritage Act in order to make recommendations about the most appropriate way of protecting sites of significance to Aboriginal people.

Seaman considered that a traditional interest in a site on land involved a relationship to the land itself, that relationship being something to be protected under Term of Reference 2. Further he found that a claim to protect a site for historical or traditional reasons was an aspiration to rights in relation to land. He also considered that Term of Reference 4 also concerned sites in the sense that waters might be protected for a use which was connected with a site. Finally, the phrase "sites of significance" in Term of Reference 6 he found to embrace "an almost indefinite range of places and attachments to them. They may have significance to Aboriginal people because they are part of traditional life and traditional land relationships. They may be significant because of past residence or use of land or for historical reasons and finally their sole significance may be archaeological" (Seaman 1984; paras. 8.1-8.3).

Recommendations on Aboriginal Heritage

In the light of developments in the area of Aboriginal protection in other States and at federal level, the scheme of protection for Aboriginal heritage for Western Australia, particularly in view of the retrograde 1980 amendments, seems ripe for change. The following scheme sets out two options.

The first assumes a completely revised act and the establishment of a new Aboriginal heritage authority for Western Australia.

The second option retains the scheme of the present act but makes specific suggestions for reform.

The establishment of a new, independent Aboriginal heritage authority was suggested in a number of submissions to the Seaman Inquiry (Western Australian Museum 1984:1-2; Dillon 1983:3). It is a suggestion which is adopted by this paper. Such a body should be controlled by a Board of Directors which, at a minimum, incorporates a clear majority of Aboriginal members. The Authority should have as its major function the identification and recording of sites in areas of potential land use conflict to enable effective protection of the Aboriginal heritage to be built into development proposals in the earliest stages.

This new body could be named the Western Australian Aboriginal Heritage Commission, constituted by a range of Aboriginal representatives and appropriate representatives from the Western Australian Museum and relevant experts. The composition of the Commission should be the subject of consultation with Aboriginal communities. Following the South Australian model in its Aboriginal Heritage Committee under the Aboriginal Heritage Act 1988, referred to below, the appointment of equal numbers of men and women should be considered.

Regional advisory committees should be entrenched in the legislation, the function of which would be to advise the Commission regarding the protection of areas, sites, objects and human remains, on specific requirements as to secrecy, preservation, keeping, and presentation where appropriate, as well as other aspects of Aboriginal cultural concerns.

It would be appropriate to transfer the powers presently held by the Western Australian Museum under the current Aboriginal Heritage Act to the Commission.

In the alternative, the Aboriginal Heritage Act could essentially retain its present form, but place it under (say) the administration of the Environmental Protection Authority and incorporate a number of amendments to bring it more into line with current thinking in other States. Whatever course is followed the principles and definitions detailed below, based on the South Australia Aboriginal Heritage Act 1988 could be looked to as a basis for discussion of new legislation. It is recognised that the Western Australian scheme, either in its Act or in its implementation, already reflects some of these principles and definitions.

1. Aboriginal people must determine for themselves what their heritage is.

2. "Aboriginal object" should be defined in the Act to mean an object

of significance according to Aboriginal tradition:

or

of significance to Aboriginal archaeology, anthropology or history,

and includes an object or a class of object declared by regulation to be an Aboriginal object.

3. "Aboriginal site" should be defined in the Act, to mean

an area of land-

that is of significance according to Aboriginal tradition

or

that is of significance to Aboriginal archaeology, anthropology or history, and includes an area or an area of a class declared by regulation to be an Aboriginal site (SA Act).

4. "Aboriginal record" means a record of information that must, in accordance with Aboriginal tradition, be kept secret from a person or group of persons (SA Act).

5. "Aboriginal remains" should be defined in the Act, to mean:

the whole or any part of the skeletal remains of an Aboriginal person but does not include remains that have been buried in accordance with State law (SA Act) (the latter category being already protected from desecration by State law).

6. "Aboriginal tradition" should be defined in the Act, as follows:

traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs or beliefs that have evolved or developed from that tradition since European colonisation (SA Act; see also federal Aboriginal and Torres Strait Islander Act, and Seaman 1984:11 para 3.6).

7. "Traditional owner of an Aboriginal site or object" should be defined in the Act, as follows:

an Aboriginal person who, in accordance with Aboriginal tradition, has social, economic or spiritual affiliations with, and responsibilities for, the site or object (SA Act).

8. The Minister must be obliged, in accordance with point one above, to delegate certain functions to the traditional owners when requested to do so by them. This delegation should be for decisions relating to the following:

- excavation for the purpose of uncovering any Aboriginal site, object or remains (SA Act s 21)
- damage, disturbance or interference with any Aboriginal site, Aboriginal object or remains, or the removal of any such object or remains (SA Act s 23)
- sale or disposal of an Aboriginal object, or removal of an Aboriginal object from the State (SA Act s 29)
- divulging of information relating to an Aboriginal site, object or remains, or of Aboriginal traditions (SA Act s 35).

9. An Aboriginal heritage committee should be established, consisting of Aboriginal people appointed as far as is practicable, from all parts of the State to represent the interests of Aboriginal people throughout the State in the protection and preservation of the Aboriginal heritage. Equal numbers of women and men should be appointed as far as practicable (SA Act s 7). There should be no fixed number of members on the committee; it should be flexible in order to cope with varying demands, particularly in relation to men's sites and women's sites (see South Australia 1988).

10. Regional and local heritage committees should be set up under the Act, to advise on regional and local Aboriginal heritage issues. The same considerations for appointment of men and women should apply as above.

11. Inspectors, who must be obliged under the Act to defer to the wishes of relevant traditional owners, should be appointed to aid enforcement of provisions of the Act. Inspectors should be drawn from government agencies such as the Department of Conservation and Land Management, the Aboriginal Affairs Planning Authority or be a representative of a local Aboriginal heritage committee, or be a traditional owner, as appropriate (SA Act s 25-26).

12. Specific provision should be made in the Act for the protection of information relating to sites, objects, remains or relating to Aboriginal tradition (SA Act s 35).

13. Access to land , including private land, should be able to be authorised by the Minister, for the purpose of gaining access

to an Aboriginal site, object or remains, subject to appropriate safeguards for landowners (SA Act s 36).

14. A general provision should be imported into the Act to preserve the rights of Aboriginal people in relation to Aboriginal sites, objects or remains in terms of acting in accordance with Aboriginal tradition (SA Act s 37).

15. Disputes arising under such a scheme, particularly relating to resource development conflicts, could be resolved by the Aboriginal Land Tribunal (also referred to above in the suggested amendments to the Land Act). However, any provisions relating to resolution of such disputes would need to be drafted so as not to conflict with the principle of the paramountcy of the wishes of traditional owners.

In suggesting the adoption in broad principle of the South Australian Aboriginal heritage scheme, it is realised that a number of conceptual hurdles would have to be straddled in Western Australia. These relate in particular to the idea of final control by the Aboriginal traditional owners of their heritage. The simple rationale of the adoption of the South Australian scheme is that if it has been possible for the South Australian government to negotiate with all the relevant parties, including development interests in order to gain agreement or at least support, there seems to be little reason why this cannot be attempted in Western Australia. After all, those who might oppose such a scheme most vigourously in Western Australia are the mining, petroleum and pastoral interests. Yet a number of the companies operating in these areas in Western Australia have similar interests in South Australia. The only real difference would seem to be the political climate, and climates can change.

ABORIGINES AND ENVIRONMENTAL IMPACT ASSESSMENT

One continuing theme of this paper is the participation of Aboriginal people in decisions which affect them. A major aspect of this relates to development projects. This participation can include the involvement in the planning, assessment and management of a wide variety of activities. The opportunities for involvement under the heritage scheme have already been canvassed in the previous section. Here, the framework for involvement by Aboriginal people in the environmental impact assessment (EIA) process of development proposals is canvassed.

Federal EIA Provisions

Under the federal Environmental Protection (Impact of Proposals) Act 1974, an EIA may be required for any proposal over which the Federal Government has jurisdiction. It applies where proposals are made by or on behalf of the Federal Government or where it is involved in the negotiation, operation and enforcement of agreements and arrangements. The Act includes a broad definition

of "environment", which determines the scope of the proposals to which the Act applies:

> "environment" includes all aspects of the surroundings of human beings, whether affecting them as individuals or in their social groupings, and "environmental" has a corresponding meaning (s 4).

Administrative Procedures under the Act set out those matters which any federal department administering the Act must take into account. These are:

> an adverse effect upon an area or structure, that has an aesthetic, anthropologic, archaeologic, architectural, cultural, historical, scientific or social significance or other special value for the present or future generations (cl. 3.1.2 (a)(v)).

It is clear from the definition of environment itself, as well as from the above clause that the Environment Protection (Impact of Proposals) Act has a very broad application, and can include a broad range of impacts on Aboriginal people, their surroundings and their culture.

Western Australian EIA Provisions

In Western Australia, a new Environmental Protection Act, which included EIA provisions for the first time, was passed in 1986. Before the passing of the Act, EIA was informally required under a policy known as the Environmental Review and Management Program. The Act applies to both private and public sector development proposals. The word "proposals" is defined in the Act to mean:

> project, plan, programme, policy, operation, undertaking or development or change in land use, or amendment to any of the foregoing (s 3 (1)).

All proposals which appear likely, if implemented, to have a significant effect on the environment must be referred to the Environment Protection Authority by the relevant government department. In addition, the proponent or any other person is able to refer the proposal to the authority. In other words, if any member of the public was of the view that a particular proposal was likely to have a significant impact on the environment, the proposal could be referred to the Authority. In addition, if the Minister is of the opinion that there is public concern about the likely effect of a proposal on the environment, the Minister may refer it to the Authority as well. Further, the Authority itself may require that a proposal be referred to it.

The Authority then decides what level of action should be taken. It can decide that no assessment needs to take place, but can give advice and make recommendations on the environmental aspects of the proposal. If it decides that the proposal should be assessed, it can, for the purposes of the assessment, require relevant information to be provided, require that the proponent undertake and prepare a report for the Authority on that assessment. Further, it can conduct a public inquiry on the proposal. The Authority then prepares a report relating to the environmental factors relevant to the proposal, including any conditions and procedures to which the proposal should be subject and makes any recommendations to the Minister as it sees fit. The Minister has the final say on whether the proposal should be implemented, including the decision on any appeal which any party might bring in relation to the proposal. There is no process of appeal to a court or other body under the Act in relation to environmental impact assessment. However, it would be possible to bring a legal action on administrative law grounds in relation to any procedural anomaly in the decision making process.

The definition of the word "environment" in this legislation is rather more narrow than that found in the federal legislation:

> "environment", subject to subsection (2), means living things, their physical, biological and social surroundings, and interactions between all of these (s 3 (1));

A limitation on this definition is found in subsection (2):

> For the purposes of the definition of "environment" in subsection (1), the social surroundings of man are his aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by his physical or biological surroundings.

On its face, subsection (2) restricts severely the scope of the assessment process, because any "significant effect" of a development proposal is limited to a "direct effect". The immediate question that arises is what is the meaning of "directly" in this context. The Act gives no guidance on this matter, but it is arguable that impacts can have a very far-reaching direct effect in certain situations, particularly when considering the effect of a proposal on the human social environment.

Recommendations on EIA

It is submitted that the definition of environment ought not to be qualified by the present wording of s 3(2) of the Act. Rather, in order to ensure that the assessment process is as broad as possible as far as Aboriginal people are concerned, the definition in s 3(1) ought to be recast as follows:

> For the purposes of the definition of "environment" in subsection (1), the social surroundings of human beings are their aesthetic, cultural, spiritual, psychological, and economic surroundings and include both direct and indirect effects.

A reformulation along these lines, particularly including the spiritual and psychological factors, would place an obligation on environmental impact assessment practitioners and decision makers to consult with Aboriginal people on the widest possible range of concerns. By making explicit the inclusion of indirect effects, the subtle and unsuspected effects of development proposals would need to be investigated more thoroughly than they are presently required to be.

Another, and in some ways more desirable option, in terms of consistency between the processes of EIA required in the States, Territories and at federal level would be the adoption of the federal definition found in the Environment Protection (Impact of Proposals) Act 1974, together with the provisions found in the Administrative Procedures under that Act (see further, James and Boer 1988:19-20, 43-44).

Further aspects of the Environmental Protection Act which need attention in the light of the concerns of this paper are dealt with below in point form. For a comprehensive understanding of these matters, they should ideally be read with a copy of the relevant sections of the Environmental Protection Act on hand.

1. In order to ensure that all proposals in relation to the traditional lands of Aboriginal people, regardless of who owns or controls that land, are seriously considered, a regulation should be made under s 123(1) of the Act to provide that all such proposals be dealt with as a prescribed class, as allowed for in s 38(3)(b). This would ensure that a decision making authority or a proponent would be required to refer the proposal to the Authority for the purpose of determining whether environmental impact assessment should be carried out pursuant to s 40. Although, as indicated above, any person may refer a proposal to the Authority if the proposal is considered to have a significant effect on the environment, there is no guarantee that an EIA would be carried out in relation to Aboriginal lands where there may be a significant effect on the environment, because of the remoteness of many development proposals, and the general lack of communication by development interests and government with Aboriginal people.

2. Where such a proposal is referred to the Authority, notice should be required to be given to all persons likely to be affected by the proposal. At present, no such notice appears to be required unless a public inquiry is carried out pursuant to s 40 (2)(c) and s 42. This provision would guarantee that notice is given to any Aboriginal community potentially affected.

3. The Environmental Protection Act should be amended to provide that the Authority shall cause any information or report referred to in s 40(4) which relates to a proposal affecting any person or group (whether Aboriginal or not) to be made available to that person or group. At present, it is within the discretion of the Authority to provide this information.

4. A regulation should be made to ensure that any environmental review which is required to be carried out under s 40 (2)(b) which relates to Aboriginal land, will include a detailed social impact assessment in relation to any Aboriginal community, group or individual potentially affected by the proposal. The regulation should specifically provide that any anthropological or survey work relating to Aboriginal heritage sites and areas should be funded by the developer.

5. The Act should be amended to require that in any environmental or social impact assessment carried out under the Act, the Trustees of the Museum (or the Aboriginal Heritage Commission suggested in a previous section of the paper) be notified of and consulted in relation to the assessment.

6. In any environmental or social impact assessment or public inquiry to be carried out for proposals affecting Aboriginal land, the relevant Aboriginal organisations, groups or individuals should be funded to the extent necessary to enable them to take part in the assessment process or inquiry, (as now more regularly occurs in Canada) and that the Environmental Assessment Act be amended accordingly. Such a provision could well be made to apply to affected people generally, such as has occurred in Ontario, where "intervenor funding" has been introduced on a legislative basis (see Jeffery 1985).

8. Provisions should be introduced into the Environmental Protection Act for the assessment of cumulative environmental and social impacts. This is particularly important in relation to social impact assessment, where the social, political, economic and psychological effects of developments in a particular area over a period of time can be highly significant. Such an observation applies equally to non-Aboriginal people.

9. The Environmental Protection Act and the State Planning Commission Act, together with related planning legislation should undergo a comprehensive review in order to more closely integrate the processes of planning, environmental impact assessment and development control for both public and private sector projects. The process of cumulative impact assessment can only be adequately carried out when such integration takes place.

10. Provisions should be introduced into the Environmental Protection Act or regulations thereunder to spell precisely the scope of what an environmental review should be. In addition, provisions should be included in relation to the contents and

form of such a review, along the lines found for example in the federal and New South Wales environmental impact assessment legislation.

11. Section 40(6) of the Act should be amended, or a suitable regulation should be introduced to provide that, in cases where a proposal relates to Aboriginal land, the information or report referred to should be made available to the relevant Aboriginal organisation, group or individual, free of charge. Such a provision could be made generally applicable.

12. Where major developments are proposed to be provided for by indenture or franchise legislation outside the Environmental Protection Act (generally an undesirable procedure given the experience in this and other States), such legislation and any regulations under it should include provisions similar to and consistent with the above.

Further observations in relation to environmental and social impact assessment and regional planning in the East Kimberley and more generally can be found in the EKIAP papers by Ross (1989) and Craig (1989) and in the EKIAP Final Report (Coombs et al 1989).

ABORIGINES AND NATIONAL PARKS

The creation of national parks on Aboriginal lands has long been a source of contention, in Western Australia as well as in other jurisdictions. The issues include people being moved off their land, having their hunting and gathering rights restricted, being cut off from their traditional sources of food and water and from their sacred sites (see Seaman 1984:22-25).

In the light of the concerns of this paper and of the Project as a whole relating to involvement of Aboriginal people in access to and management of Aboriginal land, it is argued that it would be appropriate to introduce provisions into the Conservation and Land Management Act 1984 (the CALM Act) to ensure that relevant Aboriginal people are involved in all discussions relating to the establishment of national parks and nature reserves, and be involved in joint planning, operation and management processes. Experience in the Northern Territory, particularly with the joint management plan at Uluru should be looked to.

It appears that some officers of the Department of Conservation and Land Management (CALM) are sympathetic to such suggestions. The Purnululu Aboriginal Corporation, representing the traditional owners of the area have been seeking and advocating joint management for the Purnululu National Park for a number of years. A draft management plan has recently been released, recommending that three areas be set aside in the park to provide security and privacy for three local Aboriginal families. The draft plan is regarded as "experimental" and if successful could

be adopted in other Western Australian parks ("Plans to give Blacks part of the Bungles" Western Australian 16 May 1989).

A further matter that needs to be addressed is the relationship between the Aboriginal Heritage Act and the CALM Act. There is as at present no mention in s 4 of the CALM Act of its relation to the Aboriginal Heritage Act. It is certainly clear from the Aboriginal Heritage Act that the trustees of the Western Australian Museum have jurisdiction over any place or object irrespective of where found or situated in the State. Section 12 of the Aboriginal Heritage Act allows the Trustees to make agreements with a person in control of any place or object in order to take action for the proper care and protection, or exhibition of the place or object. Such agreements could certainly be concluded between CALM and the Trustees for the care, protection and, where appropriate, exhibition of Aboriginal places and objects within national parks. Further, in those sections of the CALM Act dealing with the design of management plans within State forests and timber reserves, national parks, nature reserves and marine parks, the protection of areas and objects of significance to Aboriginal people according to Aboriginal tradition could be incorporated.

Recommendations on National Parks

The following strategies and suggestions for amendment of the Conservation and Land Management Act 1984 are put forward for consideration. They include only those matters that are seen to be the most urgent. There is no attempt to be exhaustive in terms of the reforms required in order to introduce the Aboriginal interest more directly into this area. Further amendments and strategies will need to be put in place as a result of those listed below.

1. For national parks and other areas already reserved for nature conservation, which Aboriginal people regard as Aboriginal land, inalienable freehold title should be passed to the appropriate Aboriginal corporation or group, with arrangements for leaseback of that land to the Western Australian Government. (See WA Government 1984:10).

2. Section 22(4) of the CALM Act should be amended to include any relevant Aboriginal Land Council or organisation having an interest in the establishment or management of land as a national park or nature reserve pursuant to s 22(5).

3. Section 54 of the CALM Act 1984 should be amended to specifically require that management plans for national parks and proposed national parks on Aboriginal land be prepared by the "controlling body" in consultation with a "park council". This council should be comprised of relevant Aboriginal representatives and an equal number of representatives from the Department of Conservation and Land Management, with a chairperson drawn from the Council. The chairperson's position

should be rotated annually between CALM and Aboriginal representatives.

4. In the alternative, that s 59 of the CALM Act 1984 should be amended to specifically require that management plans for national parks and proposed national parks on Aboriginal land be submitted to relevant Aboriginal organisations and individuals in the region where that park is to be established or is already established for the purpose of securing agreement to those management plans.

5. Section 56 of the CALM Act should be amended to expand the scope of management plans for State forests, timber reserves, national parks, marine parks, nature reserves and marine park reserves, as well as other land referred to in s 56 (e), in order to include the interests of Aboriginal people in the area.

Section 56(c) is used as an example, which can be followed in the other subsections dealing with management plans for the other land uses referred to above; the suggested new wording is underlined:

> ... management plans shall be designed
>
> (c) in the case of national parks and marine parks, to fulfill so much of the demand for recreation by members of the public as is consistent with the proper maintenance and restoration of the natural environment, the protection of indigenous flora and fauna and the preservation of any Aboriginal area or object of particular significance to Aboriginal people in accordance with Aboriginal tradition, or any feature of anthropological, archaeological, ethnographic, cultural, historic or scientific interest.

6. For national parks on Aboriginal land, joint management arrangements for ongoing operations should be concluded between CALM and relevant Aboriginal representatives. To this end, park councils should be utilised, as mentioned in point 3 above (see also Western Australia 1984:10).

7. It is further suggested that specific areas of the Kimberley be designated under s 62(1)(g) of the CALM Act as areas which are available for traditional uses of hunting, foraging and fishing. Such a provision should be drafted so as not to apply to town areas, privately owned lands or lands subject to leases other than pastoral leases. (Access to pastoral leases for these purposes is covered by recommendations relating to the amendment of s 106 of the Lands Act 1933, see p 48 above.)

8. The Trustees of the Western Australian Museum and their delegates, or the suggested Aboriginal Heritage Commission, should work closely with the National Parks and Nature Conservation Authority in relation to areas of significance to

Aboriginal people, and Aboriginal rangers, both salaried and honorary as appropriate, should be appointed under the CALM Act to act as links between traditional owners and Government authorities (see further Smythe et al, 1986).

RESOURCE DEVELOPMENT ON ABORIGINAL LAND

A good deal of the above discussion on land rights, heritage, environmental impact assessment and national parks has been necessitated by the issue of resource development of one kind or another in Western Australia. The area of resource development that has produced the most controversy is that of mining on Aboriginal land. We have already seen how the various statutes make no special provision for the fact that there are real and continuing demands for access, control and involvement in decision making in relation to development (Seaman 1984:59). In his report, Seaman made a number of strong statements in relation to Aboriginal aspirations for control of mining on their land, and some equally strong criticisms of sections of the mining industry in terms of attitude to resource development:

> 9.1 The Aboriginal written submissions reflected a strong anxiety to say whether or not granted land should be explored, or be mined or have oil extracted from it. Equally they did not oppose exploration and ultimate mining or oil extraction away from land which was of great traditional significance to them, provided that they could control the impact on their lives and lands should they decide to give permission. Virtually all those written submissions were to the effect that Aboriginal people should be compensated if their use of the land was affected by mining, and benefit if there was mining or oil extraction.

Seaman went on to say:

> 9.3 I invite you to give weight to the following considerations which relate to the claims of Aboriginal people when you consider my recommendations about control over mining and oil activities on Aboriginal land:
>
> (a) Aboriginal people have been moved off their lands continuously since 1826 to the present time.
>
> (b) Their society may completely disintegrate unless the process of using their land at our will is not altered.
>
> (c) They have a pressing need to be secure on whatever land they are granted.

(d) Unless they are given the maximum control on their own land, the benefit of that security will not be achieved.

9.6 I have no doubt that from an Aboriginal viewpoint an aspiration to control mining and oil activities on Aboriginal land is reasonable. [The Minister has it in his power] without taking away the vested rights of any other persons, to give the Aboriginal people of Western Australia rights of great importance to them socially and culturally, and of potential financial value. In those circumstances I believe there has to be a compelling interest in the public interest for not doing so.

Seaman came to the view that the aspirations of the major mining and petroleum industry groups were in direct conflict with the land aspirations of the Aboriginal people of Western Australia:

9.12 The mining industry submissions about what they refer to as the principle of Crown ownership reveal only one principle to me: that the mining industry wishes the Government to exercise its power over its minerals so as to give mining interests paramountcy over Aboriginal interests in land, and for that matter most other interests in land.

This attitude on the part of the mining industry, as identified by Seaman, is by no means confined to that sector. Indeed, a reading of the resource development columns of the major newspapers and business magazines in Australia espouses this attitude over the development of both land and sea resources almost without any qualification. It is consistently the line taken by most industry lobby groups, which see the land and sea as nothing more or less than a resource from which to create "wealth" and employment, with little regard for other less quantifiable but arguably more important values (see Boer 1984).

This is not to say that the mining industry has not made significant attempts to come to grips with Aboriginal aspirations and to understand the Aboriginal perspective. However the spirit of economic rationalism largely pervades most of the statements of bodies such as the Australian Mining Industry Council on the question of mining on Aboriginal land. Although the paper delivered to the conference "Aborigines and Development in the East Kimberley" on behalf of AMIC contains some conciliatory statements, in the final analysis the thrust of the message is that there should be no veto on exploration or mining activities:

Let me conclude by returning to the title of my paper and say there is no crock of gold at the end of the Aboriginal rainbow. It is a waste of time looking for it. What is needed is removal of the veto and serious negotiations between the miners and the traditional

> owners. Forget about up-front payments, carried interests and private royalties. If you want a share of the equity, then "go in" on the same basis as other investors (Hohnen 1987).

The tenor of this paper was tempered somewhat by comments made after its delivery:

> I had come to the Kimberleys to listen to the Aboriginal people and to find out what their concerns were. In the short time that I have been here I have heard that they aren't opposed to mining; they are interested in mining. They want their sacred sites protected and they want a fair share of the prosperity that was likely to come from any mining development so that they could develop their other lands and support their people.
>
> They want the miners to fix up the land after mining had gone through, and they want jobs and careers for their children and grandchildren. They want plenty of talk about all the things that were going to happen before anything happened. There was some expression of concern about secret agreements and not all the facts being on the table.
>
> I'll take those comments back to my Council and will see what we can do with them (statement by Murray Hohnen to John Dash, in Centre for Continuing Education 1987).

Recommendations on Resource Development

In the Seaman Report, a range of recommendations was made in relation to the amendment of the Mining Act 1978, in anticipation of the introduction of Aboriginal land rights in Western Australia (see Seaman 1984:137). Without land rights legislation, many of those amendments would be of little use. However, in terms of the possibility of land grants being made under s 29 of the Land Act 1933, discussed in a previous section, one Seaman Report recommendation stands out over the others. This relates to the question of the Minister for Mines having the power to effectively veto any form of Aboriginal land grant, by virtue of s 16(3) of the Mining Act. That section reads:

> No Crown land that is in a mineral field shall be leased, granted or disposed of under the provisions of the Land Act 1933, without the approval of the Minister.

Seaman stated in relation to this section:

> 9.20 The sophisticated elements of the mining industry and the petroleum industry have not suggested

> that they are qualified to be the determinants of important questions of social policy in relation to Aboriginal people. I consider it important to guard against the possibility that the immediate concerns of those industries should become decisive about such important social policies. In my view it is equally important that the Mines Department should not determine land policy in relation to Aboriginal people. I recommend the repeal of s 16(3) of the Mining Act 1978, in so far as it gives the Minister for Mines power to refuse to approve any form of Aboriginal land grant.

The recommendation contained in the above paragraph is endorsed as one of the recommendations of this paper.

In the absence of land rights legislation, the further reforms that can be introduced in order to ensure Aboriginal involvement in development decisions relating to mining and petroleum development can perhaps best be achieved by the amendment of the Environmental Protection Act 1986 and reforms in the area of Aboriginal heritage protection, as detailed earlier in this paper. In the meantime, mining interests would do well to learn from the problems engendered by lack of, or lack of adequate, consultation and negotiation with and involvement of Aboriginal people in the issue of exploration and development in the Kimberley and elsewhere.

CONCLUSIONS

As was indicated in the introduction, legislative reform is not the only means of achieving social change. The legal framework can have a direct impact on the way in which decision-making processes are structured, both in terms of limiting and allowing access to those processes. By its very nature, legislation which sets up these decision making processes is never neutral. It generally reflects the value system of the dominant culture, tending to ignore or to insufficiently take into account those values which are difficult to measure or to understand. It is clear in the context of the Aboriginal debate in Australia that the non-Aboriginal law has dominated the extant Aboriginal law and the values that the Aboriginal legal system represents. The East Kimberley Impact Assessment Project as a whole, as well as this particular paper, demonstrates this dominance. Nevertheless, it should be recognised that despite this dominance, the Aboriginal law survives and that Aboriginal communities and groups have, over the years, developed strategies to cope with the non-Aboriginal decision making processes in order to achieve their goals.

One of the main thrusts of this paper is that there are very strong Aboriginal aspirations in relation to their land, in terms of ownership and control as well as access for hunting, fishing,

foraging, ceremonial and spiritual purposes. These aspirations can and often do conflict with the aspirations of development interests. The conflict between Aboriginal aspirations to land and the aspirations of development interests to that same land, will continue in Western Australia until such time as adequate mechanisms are put in place to rationalise the situation relating to land rights, environmental concerns and Aboriginal heritage protection. In order to rationalise these various aspirations, there is a clear need not only for reforming legislation, but also for a more sophisticated framework for the achievement of agreements between government and Aboriginal communities and between Aboriginal communities and development interests.

It will be obvious from this paper that Australia is generally far behind countries such as Canada, the United States and New Zealand in respect of the question of self-determination, recognition of Aboriginal title, introduction of land rights legislation and compensation as well as cultural heritage protection generally. This is not to say that all is well in these respects in those countries. Nor is it to say that all is gloomy in Western Australia. The actual practice of the various bureaucracies is generally more sophisticated and enlightened than the legislation governing these bodies actually indicates. It is certainly clear, however, that the land rights debate in Western Australia has probably gone as far as it can at present, in terms of the Federal/Western Australian land rights package. There are still a good many things to be worked out, particularly in relation to the processing of excisions, access across pastoral leases to those excisions, the maintenance of roads in order to gain access to traditional country, including excisions, as well as the question of hunting, gathering and fishing rights over traditional lands which are "enclosed" and "improved" pursuant to Section 106(2) of the Land Act. The analysis and recommendations of the Seaman Inquiry should continue to be looked to in order to assist in finding the way ahead in these matters.

In addition, there are significant precedents in this area in Canada, particularly for the negotiation of regimes which meet social and environmental protection objectives as well as the objectives of development interests. The James Bay and Northern Quebec Agreement and similar arrangements on resource development, environmental protection and land settlements need to be looked to in terms of the concerns of this paper (see Moss 1985 and Cumming 1985).

A good deal more work needs to be done in relation to the legal framework relating to self-determination and self-government in Western Australia particularly in terms of the potential of the federal Aboriginal Councils and Associations Act 1976 (see eg Dalrymple 1988), as well as the Western Australian Aboriginal Communities Act 1979 and the provision for self-regulation of Aboriginal communities made thereunder.

Finally, the possibilities for constitutional change in relation to giving the Federal Government more direct power to make laws in respect of Aboriginal and Torres Strait Islander people, the recognition of prior and continuing ownership of the Australian continent by the Aboriginal and Torres Strait Islander people and the specific power to make a treaty, compact or agreement with the Australian government and State governments will need to be kept on the agenda. The question of Aboriginal sovereignty also needs to be further addressed (see eg Mansell 1989). The various developments relating to the United Nations Working Group on Indigenous Peoples (Simpson 1988) and the redrafting of the International Labour Organisation Convention 107 (Nettheim 1988) will hopefully ensure that these matters remain in the mind of the Australian electorate over the coming years.

REFERENCES

Books, articles and reports

Australia 1981
Report of the Working Party on the Protection of Aboriginal Folklore,
Canberra: Department of Home Affairs and Environment.

Australia 1981
Two Hundred Years Later
Report by the Senate Standing Committee Constitutional and Legal Affairs on the feasibility of a Compact or "Makarrata" between the Commonwealth and Aboriginal People,
Canberra: AGPS.

Australia 1985
Preferred National Land Rights Model,
distributed by the Commonwealth Government for discussion, February 1985.

Australia 1986a
Report of the Review of the Commonwealth's Role in the Conservation of the National Estate
Canberra: Department of Arts, Heritage and Environment.

Australia 1986b
Annual Report 1985-86
Department of Aboriginal Affairs.

Australia 1987a
Distribution of Powers,
Report of the Advisory Committee to the Constitutional Commission,
Canberra: Canberra Publishing and Printing.

Australia 1987b
Individual and Democratic Rights,
Report of the Advisory Committee to the Constitutional Commission,
Canberra: Canberra Publishing and Printing.

Australia 1987c
Folklife: Our Living Heritage
Report of the Committee of Inquiry into Folklife in Australia,
Canberra: AGPS.

Australia 1988a
Final Report of the Constitutional Commission Vol 1
Canberra: AGPS.

Australia 1988b
Final Report of the Constitutional Commission Vol 2
Canberra: AGPS.

Canberra: AGPS.

Australia 1988c
Parliamentary Debates,
House of Representatives, 24 August 1988

Australia 1988d
Australia and the World Heritage Convention; existing World Heritage areas -- proposed additions,
Canberra: Department of Arts, Sport, the Environment, Tourism and Territories, monograph.

Australian Council of Churches, 1981
Justice for Aboriginal Australians,
Sydney: Superprint.

Australian Mining Industry Council 1984
Statement of Concern from the Australian Mining Industry Council,
Canberra: Monograph.

Australian National University 1987
Aborigines and Development in the East Kimberley,
A report of the ANU Public Affairs Conference,
ANU: Centre for Continuing Education, May 1987 (monograph).

Barsh, R. 1988
"Indigenous Peoples and Self-determination in International Law", in Hocking B (ed) International Law and Aboriginal Human Rights,
Sydney: Law Book Co.

Bartlett, R. 1983
"Aboriginal Land Claims at Common Law"
15 University of Western Australia Law Review 293.

Beacroft, L. 1987
"The Treaty of Waitangi-A Century Ahead",
28 Aboriginal Law Bulletin 6.

Boer, B.W. 1984
"The Aboriginal and Torres Strait Islander Heritage (Interim Protection) Bill 1984"
1 Environmental and Planning Law Journal 285-290.

Boer, B.W. 1984
"Social Ecology and Environmental Law"
1 Environmental and Planning Law Journal 233.

Boer, B.W. 1987a
"Aboriginal and Torres Strait Islander Heritage (Interim Protection) Amendment Act 1986"
4 Environmental and Planning Law Journal 66.

Boer, B.W. 1987b
"The Commonwealth's Role in the National Estate"
4 Environmental and Planning Law Journal 67.

Boer B.W. 1987c
"Protection of Movable Cultural Heritage Act"
4 Environmental and Planning Law Journal 63.

Boer B.W. 1987d
"The Protection of Movable Heritage Act"
4 Environmental and Planning Law Journal 161.

Boer, B.W. 1988
"Australian Law, Aboriginal Culture",
paper to International Impact Assessment Conference,
Brisbane: unpublished.

Boer, B.W. 1989
"The Legal Framework of Heritage, Conservation" in Sullivan, S., Cultural Conservation Special Australian Heritage Commission Publication Series No 9;
Canberra: AGPS.

Canada 1987
"A Record of Aboriginal Constitutional Reform,"
Information,
Ottawa : Indian and Northern Affairs.

Canadian Bar Association, 1988
Aboriginal Rights in Canada: An Agenda for Action,
Ottawa: Canadian Bar Association Communications.

Centre for Continuing Education, ANU 1987
Aborigines and Development in the East Kimberley
Canberra: (monograph)

Coombs, H.C., McCann, H., Ross, H. and Williams, N.M. (eds) 1989
Land of Promises,
Canberra: Aboriginal Studies Press.

Christenson, W. 1985
"Aborigines and the Argyle Diamond Project", East Kimberley Working Paper No 3,
Canberra: Centre for Resource and Environmental Studies, ANU.

Clarke, K. 1983
Aboriginal Heritage, Renewable Resource and Environmental Management in Western Australia, Report No. 1
Perth: University of Western Australia.

Craig, D.C. 1989
The Development of Social Impact Assessment in Australia and Overseas and the Role of Indigenous Peoples, East Kimberley Working Paper,
Canberra: ANU.

Crawford, I.M. 1980
"Aboriginal Studies at The Western Australian Museum" in Berndt, R.M. and C., Aborigines of the West Their Past and Their Present
Perth: University of Western Australia Press.

Cumming, P. 1985
"Canada's North and Native Rights", in Morse, B.W. Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada
Ottawa: Carleton University Press.

Dalrymple, D. 1988
"The Forgotten Option: Part III of the Aboriginal Councils and Associations Act" 1976 Vol 2,
Aboriginal Law Bulletin, No 32 p 11.

Dillon, M. 1983
"A Terrible Hiding..." Western Australia's Heritage Policy
Submission to Seaman Inquiry (unpublished).

Feit, H.A. 1982
"Protecting Indigenous Hunters: The Social and Environmental Protection Regime in the James Bay and Northern Quebec Land Claims Agreement",
in Giesler, C. et al (eds.) Indian SIA: The Social Impact of Rapid Resource Development on Native Peoples
Michigan: University of Michigan.

Harris, S. 1979
"It's coming Yet . . ." An Aboriginal Treaty Within Australia Between Australians,
Canberra: Griffin Press.

Hocking, B. (ed.) 1988
International Law and Aboriginal Human Rights,
Sydney: Law Book Co.

Hohnen, M. 1987
"The Rainbow and the Crock of Gold", paper to the Australian National University Public Affairs Conference on Aborigines and Development in the East Kimberley,
Kununurra: unpublished.

Howitt, R. 1983
Aborigines and Mining Companies in Northern Australia
Sydney: Alternative Publishing Cooperative.

Hunt, M.W. 1982
"The legislation relating to Aboriginal Land Rights in Western Australia with particular reference to mining and petroleum exploration" paper to Conference on Aboriginal Land Rights, Australian Mining and Petroleum Law Association
Adelaide: (unpublished).

James, D.E. and Boer, B.W. 1988
Application of Economic Techniques in Environmental Impact Assessment, Preliminary Report,
Canberra: Australian Environment Council.

Jeffery, M. 1985
"Intervenor Funding - Ontario"
2 Environmental and Planning Law Journal, 355.

Johnston, P. 1988
"Repeal of Section 70 of the Constitution Act 1899 (WA)"
30 Aboriginal Law Bulletin, 15.

Kelsey, J. 1989
"The Labour Government and the Treaty of Waitangi"
2 (37) Aboriginal Law Bulletin 7.

Keon-Cohen, B. and Morse, B.W. 1984
"Indigenous Land Rights in Australia and Canada",
in Hanks P., and Keon-Cohen, B. (eds.) Aborigines and the Law,
Sydney: Allen and Unwin.

King, R.J. 1986
"Terra Australis: Terra Australis aut Terra Aboriginum?",
72 (2) Journal of the Royal Australian Historical Society, 75.

Law Reform Commission 1986a
The Recognition of Aboriginal Customary Laws, Vol. 1
Canberra: AGPS.

Law Reform Commission 1986b
The Recognition of Aboriginal Customary Laws, Vol. 2
Canberra: AGPS.

Leshy, J. 1985
"Indigenous peoples, land claims and control of mineral development: Australian and US legal systems compared"
8 UNSW Law Journal 271.

Mansell, M. 1989
"Treaty Proposal: Aboriginal Sovereignty"
2 (37) Aboriginal Law Bulletin 4.

McHugh, P.G. 1987
"Aboriginal title returns to the New Zealand Courts"
New Zealand Law Journal February 1987 p 39.

Morse, B.W. (ed.) 1985
Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada,
Ottawa: Carleton University Press.

Moss, W. 1985
"The Implementation of the James Bay and Northern Quebec Agreement" in Morse, B.W. (ed.) Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada,
Ottawa: Carleton University Press.

Neate, G. 1987
"Aborigines and Constitutional Reform",
paper to Aboriginal Law Centre Seminar, University of NSW Recognising Aboriginal Rights: Yesterday, Today and Tomorrow,
Sydney: Aboriginal Law Centre, UNSW.

Neate, G. 1988
Aboriginal Land Rights Law in the Northern Territory, vol. 1
Sydney: Alternative Publishing Co-operative.

Neate, G. 1989
"Aborigines and Torres Strait Islanders and the Australian Constitution"
2 (37) Aboriginal Law Bulletin 10.

Nettheim, G. 1983
Human Rights for Aboriginal People in the 80's,
Sydney: Legal Books.

Nettheim, G. 1988
"Geneva: Revision of the Convention No 107 1988"
2 (34) Aboriginal Law Bulletin 12.

Parliamentary Commissioner for the Environment, 1988
Environmental Management and the Principles of the Treaty of Waitangi
Report on the Crown Response to the Recommendations of the Waitangi Tribunal 1983-1988
Wellington: Parliamentary Commissioner for the Environment.

Reynolds, H. 1987
The Law of the Land,
Melbourne: Penguin.

Reynolds, H. 1988
"A Just Settlement between Black and White Australians"
2 (33) Aboriginal Law Bulletin, 7.

Robinson, M.V. 1985
"Meeting the requirements of the Aboriginal Heritage Act 1972",
paper to Western Australian Chamber of Mines Seminar, The Role of Government in the Development of our Mineral Resources;
Perth.

Royal Commission on Social Policy 1987
The Treaty of Waitangi and Social Policy
Discussion Booklet No 1
Wellington: Royal Commission on Social Policy.

Schaffer, R. 1988
"International Law and Sovereign rights of Indigenous Peoples" in Hocking B. (ed) International Law and Aboriginal Human Rights,
Sydney: Law Book Co.

Seaman, P. 1984
The Aboriginal Land Inquiry,
Perth: Ministry of Aboriginal Affairs, WA.

Simpson, T. 1988
"Geneva - Indigenous Rights in International Forums"
2 (34) Aboriginal Law Bulletin 10.

Smythe, D., Taylor, P. and Willis, A. (eds.) 1986
Aboriginal Ranger Training and Employment in Australia,
Proceedings of the First National Workshop, July 1985.
Canberra: Australian National Parks and Wildlife Service

Sorrenson, M.P.K. 1987
"Towards a Radical Reinterpretation of New Zealand History: The Role of the Waitangi Tribunal",
21 (2) New Zealand Journal of History, 173.

South Australia 1988
Parliamentary Debates, 17 February 1988, Mr Cornwell.

Sutton, J.D. 1981
"The Treaty of Waitangi Today",
11 Victoria University of Wellington Law Review 17.

United Nations 1988
Report of the United Nations Working Group on Indigenous Populations (chaired by Professor Erica Daes).
Geneva: United Nations.

Western Australia Museum 1984
Submission to the Aboriginal Land Inquiry
(unpublished

Western Australia 1984
General Statement on Aboriginal Land Claims.
Perth: (Mimeo).

Western Australia 1986a
Aboriginal Land.
Perth: Ministry of Aboriginal Affairs.

Western Australia 1986b
Final Report on Pastoral Land Tenure, Department of Premier and Cabinet.
Perth: Pastoral Tenure Study Group.

Wilkinson, C. F. 1987
American Indians, Time and the Law,
New Haven: Yale University Press.

Williams, N.M. 1987
Two Laws: Managing disputes in a Contemporary Aboriginal Community,
Canberra: Australian Institute of Aboriginal Studies.

Wright, J. 1985
We Call for a Treaty.
Sydney: Fontana.

Woodward, A.E. 1973
Aboriginal Land Rights Commission: First Report,
Canberra: AGPS.

Woodward, A.E. 1974
Aboriginal Land Rights Commission: Second Report
Canberra: AGPS.

Yencken, D. 1985
Australia's National Estate; The Role of the Commonwealth
Special Australian Heritage Publication Series No. 1
Canberra: AGPS.

Yunupingu, G. 1988
"An Aboriginal Treaty: Constitutional Guarantees"
Social Alternatives Vol 7 No 1.

Cases

Calder v Attorney-General of British Columbia (1973) 34 Dominion Law Reports 146.

Coe v Commonwealth of Australia (1979) 53 ALJR 403.

Commonwealth of Australia v State of Tasmania (1983) 46 ALR 625.

Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development (1980) 107 Dominion Law Reports (3rd) 513.

Higgins v Bird (1986) 7 Waiariki ACMB 24.

Johnson v McIntosh (1983)

Mabo v The State of Queensland and the Commonwealth of Australia (1989) 83 ALR 14.

Magennis v The Commonwealth (1949) 80 CLR 382.

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141.

Pye v Renshaw (1951) 84 CLR 58.

Te Weehi v Regional Fisheries Officer [1986] BCL 1396.

Tee-Hit-Ton Indians v United States (1955) 348 US 272.

Wi Parata v Bishop of Wellington (1878) 3 NZ Jur 72.

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