

*Mà ikhe selges*

# LAND RIGHTS NOW

The Aboriginal fight for land in Australia

IWGIA Documents

Australia



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Copenhagen October 1985

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## INTRODUCTION

Aborigines have a special connection with everything that is natural. Aborigines see themselves as part of nature. We see all things natural as part of us. All things on earth we see as part human. This is told through the idea of dreaming. By dreaming we mean the belief that long ago, these creatures started human society; they made all natural things and put them in a special place. These dreaming creatures were connected to special places and special roads or tracks or paths. In many cases the great creatures changed themselves into sites where their spirits stayed.

My people believe this and I believe this. Nothing anybody says to me will change my belief in this. This is my story as it is the story of every true Aborigine.

These creatures, these great creatures, are just as much alive today as they were in the beginning. They are everlasting and will never die. They are always part of the land and nature as we are. We cannot change nor can they. Our connection to all things natural is spiritual. We worship spiritual sites today. We have songs and dances for those sites and we never approach without preparing ourselves properly. When the great creatures moved across the land, they made small groups of people like me in each area. These people were given jobs to do but I cannot go any further than that here.

It is true that people who belong to a particular area are really part of that area and if that area is destroyed they are also destroyed. In my travels throughout Australia, I have met many Aborigines from other parts who have lost their culture. They have always lost their land and by losing their land they have lost part of themselves.

I think of land as the history of my nation. It tells of how we came into being and what system we must live. My great ancestors who lived in the times of history planned everything that we practise now. The law of history says that we must not take land, fight over land, steal land, give land and so on. My land is mine only because I came in spirit from that land, and so did my ancestors of the same land...

My land is my foundation. I stand, live and perform as long as I have something firm and hard to stand on. Without land...we will be the lowest people in the world, because you have broken down our backbone, took away my arts, history and foundation. You have left me with nothing.

These statements were made in 1976 by the first two chairmen of the Northern Land Council (Roberts 1981:2-3). They show clearly how land is the crucial aspect of aboriginal identity and survival. The importance of land covers many aspects of life which non-indigenous peoples are accustomed to separate. Land is important economically, politically, culturally and spiritually. The right to land for indigenous peoples is a human right.

In Australia the land belonged entirely to the Aboriginal peoples until much was taken away following the British invasion. Aborigines still consider their title to be inalienable and are seeking recognition of this from successive governments. This document is about that process. It traces recent attempts by the Australian government to formulate a model for land rights which would apply to all Aboriginal peoples. This is difficult because whereas some Aboriginal peoples in Australia can claim title to reservations and Crown land, some peoples, particularly in the southeast states have had their lands taken from them by violence and live in cities or places away from their traditional dwellings. In this case the title has not been transferred but the possession has. For this reason the Aboriginal people are seeking compensation for this possession of their lands.

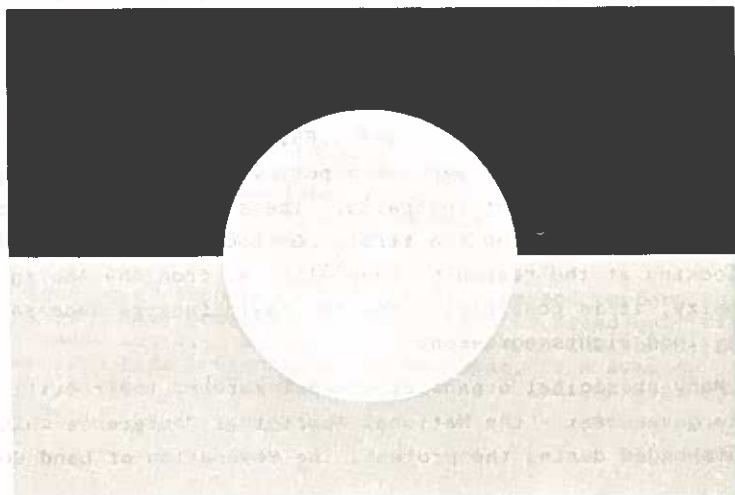
These issues are very pertinent in the two models presented by the Government in 1984 and 1985. The first model is forward looking and was part of a policy recognising Aborigines as the first peoples of Australia. The second model was criticised as contradicting the first. By looking at these models and looking at the responses they elicited from the Aboriginal community, it is possible to see the basic factors necessary in any land rights agreement.

Many Aboriginal organisations put forward their criticisms of the government - the National Aboriginal Conference which was disbanded during the protest, the Federation of Land Councils

the Aboriginal and Islander Legal Services and the National Aboriginal and Islandic Health Organisation. While recognising the work of all these organisations, this document has for reasons of space concentrated on the availability of documentation from the first two organisations.

In addition to the rights of the Aboriginal peoples of Australia, the federal government has been facing extremely hard lobbying and propaganda from pastoral and mining interests. The document looks at how these two groups have been working against any form of land rights agreement with Aborigines. The fight for land rights is not simply a matter of combatting a recalcitrant government, but analysing the forces which are making the government swerve from its original platform.

The final part of the document looks at indigenous proposals and contains an article which brings together the major principles of land rights and self-determination. This reiterates the point that land rights are not just plots of land put aside for Aboriginal peoples, they are rights to control over indigenous law and rights to political self-determination.



Australian Aboriginal Flag

Aboriginal peoples have been living in Australia for at least 40,000 years and now archaeological evidence is pointing to a time scale of over 100,000 years. Before the British invasion there were some 600 Australian nations and as many languages. The population by 1788 was at least 300,000 people. Although on the northern coast there was some contact with Macassan traders from Asia, there were no threats to Aboriginal lands or cultures.

Each nation or "tribe" was made up of a number of clans which held land. Marital ties and complex prescriptive relations constituted for many peoples a framework for inter-relations which worked both nationally and internationally. Aboriginal peoples always had a defined territory and references to their "nomadic" life style must be seen in the context of their circuits of hunting and ceremonial grounds within an area.

In the central desert areas hunting and gathering necessitates a wider catchment area than the more fertile coastal areas and it is there where settlements were more fixed. Aborigines and their environment were and are all part of a system of belief which finds expression in oral literature, songs, dances, religion and social relationships. All living things share a common life-principle stemming from their creation by the great creatures - the heroes of the Dreamtime. Each person has a spirit which derives from one of the sites associated with the Dreamtime heroes. In this way the site is the source of a person's life force. Land is life.

Whereas the northern peoples of Australia managed to keep the Dutch at bay through the 17th century, others were less successful with the British. Ignoring instructions from the British Admiralty that he would take possession of land "with the consent of the natives", Cook, in 1770 took the eastern coast of Australia for the British Crown. The first colonies were set up in 1788 as penal settlements after the British had lost their North American colonies in 1776.

The history of indigenous Australia is of invasion, resistance and forced relocation on reservations. From one part of Australia to another there were some differences in how this was achieved. Some Aborigines tried to come to terms with white society, others fought for many years. The net result was a drop of population from over 300,000 in 1788 to a total in 1945 of 90,000. Official figures today talk in terms of 160,000 although some Aboriginal organisations give the total as being much as it was at the time of the invasion.

Many aspects of Aboriginal history can be seen in other parts of the world today. The main conflict was over land. White settlers, whether sheep farming in the south or cattle ranching in the north, simply pushed the Aboriginal people off their traditional lands and fought back any resistance. There was warfare in New South Wales in the 1820s, Victoria and South Australia in the 1830s and 1840s, in Queensland in the 1860s, in Western Australia in the 1890s and Northern Territory into this century. There are numerous examples of settlers poisoning communities and massacres of Aborigines took place from Tasmania to Northern Territory.

The process of destruction of Aboriginal peoples consisted of first being swamped and forced into submission by the colonial frontier and after that more specific government control took over. The government was pressed by the settlers to get them off all the land they wanted and by philanthropic groups who wanted them "protected". This is how the reserves were established. Where Aborigines did not wish to be resettled, they were forcibly relocated. As settlers demands increased the reserved areas decreased.

There were two main forms of reserve. The larger ones in the north and centre of Australia were established in Queensland, Northern Territory and Western Australia to settle Aborigines who were fighting for their lands and keep them under control in areas not wanted by the white settlers. The



Aboriginal Rock Drawing. (Photo; Aboriginals in Australia Today)

smaller ones in the south and east were set up to please the humanitarian lobby who thought Aborigines could be "civilised". They have been likened to concentration camps (Roberts op.cit: 28) and were on unwanted lands. As soon as any settler put in a claim the reserves were usually closed.

In 1929, the Bleakley report supported the racist notion that "full-blooded" Aborigines should constitute Aboriginal society and all others should be assimilated. There was no question of Aborigines doing anything other than follow the dictates of Anglo-Australian ethno-centrism. They had no choice or right to live differently. Even though in the late 60s and 1970s the government was officially shifting its policy from assimilation to "integration" where Aborigines could choose to live in their own communities according to their own culture but as Australian citizens, assimilation remained in practice. While land is not in Aboriginal hands assimilation policy continues. In the 1960s legislation was brought in to give Aborigines rights pertaining to other Australian citizens such as the vote and access to Social Security benefits. However this did not alleviate the problems of housing, poverty, malnutrition and disease. Of all the causes of Aboriginal peoples decimation through history, infectious diseases have been the deadliest.

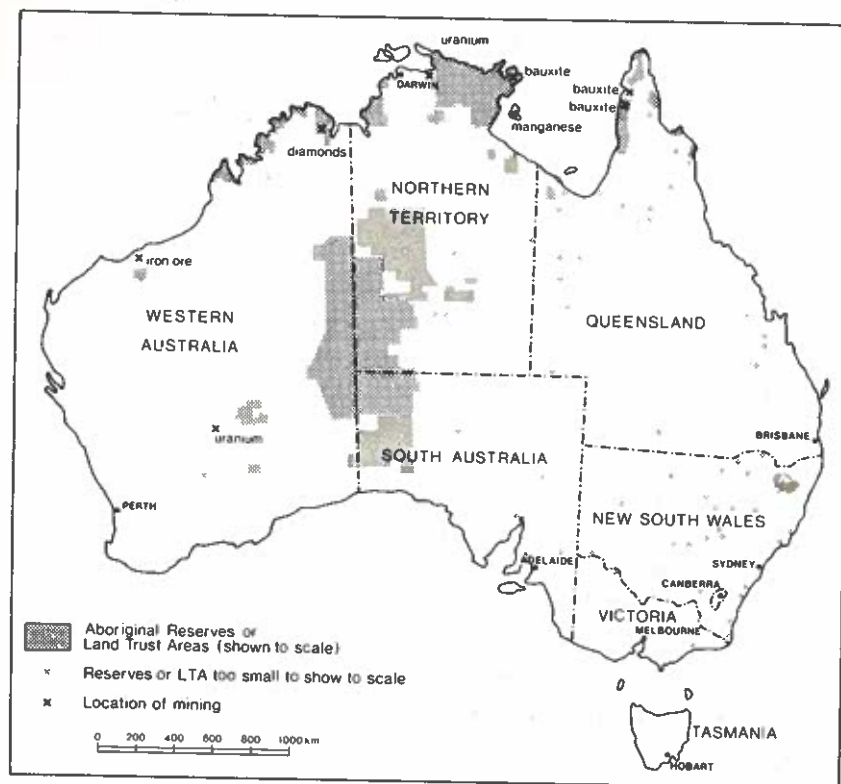
In 1967 there was a national referendum which enabled the Commonwealth government to legislate with respect to Aborigines throughout Australia thereby setting national standards for legislation. Australia has a federal system and so the conflict of interests between the federal government and the state governments has, and still is, a bone of contention when it comes to Aboriginal rights. Some regions have passed laws which are more progressive than those of the present government (see for example the fears that the New Preferred Model for land rights would amend the positive aspects of the Northern Territory Act) while others, such as Victoria, Queensland and Western Australia are doing what they can to frustrate Aboriginal land rights legislation.

Aborigines comprise more than 1% of Australia's population. They own, lease or occupy reserves on nearly 12% of Australia. This ranges from about 450,000 square kilometres in the Northern Territory to 34,000 sq kms in Queensland, 19 sq. kms in Victoria and just one square kilometre in Tasmania. Most (614,000 sq km) is held as freehold (mainly in the Northern Territory), 210,000 sq km. is mission reserve (mainly in Western Australia) and 74,000 sq km is leasehold (also mainly in WA). Most of this land is barren or arid wasteland. Aborigines cannot claim private land but can claim vacant Crown Land which comprises 32% of Australia. However in practice this only applies to unreserved and unalienated Crown land which is a much smaller percentage.

There have been several government reports on land rights. The most important was the 1974 Woodward report which not only provided the basis for the Northern Territory Land Rights Act of 1976 (see discussion of this Act later in the document) but also set the scene for the 5 principles which the government presented in 1984 (see the statement of Clyde Holding in Geneva). Another important point in this statement was the recognition of the prior occupation of Australia by Aborigines. This goes against the notion usually accepted in Australian law that before the invasion Australia was "terra nullius" - empty and unoccupied.

The most secure form of land title is inalienable freehold. Land held in this manner cannot be sold or mortgaged. It is given to the community and not to individuals and should be given in perpetuity. The Preferred Model mentioned here is defended by the government on the grounds that inalienability is secure (see government proposed Preferred Model of Land Rights). However critics see the exceptions as legal loopholes.

Two of the strongest lobbies against land rights are the mining and pastoral companies. In Western Australia, in spite of the Seaman report which recommends that Aborigines should



(Map by Jørgen Ulrich.)

have a veto over mining in their territory, the State government has gone ahead with a bill denying any control or compensation for Aborigines. Similarly the pastoralist lobby is very active to ensure Aboriginal land rights do not affect its interests (the article on the Northern Territory discusses this factor).

Last year a regional guide to progress in land rights claims was published (reprinted in IWGIA Newsletter No. 39). The following survey covers the main areas in Australia:

#### Northern Territory

Nearly 24% of the Northern Territory population is Aboriginal (29,088 people). They have been granted about 32% of the Territory in land rights. A further 13% has yet to be decided. Under the 1976 act, claimable land was limited to former reserves (19% of the Territory) and unalienated Crown Land which was generally unsuitable for pastoral and agricultural purposes. The NT government has tried to defy the act by alienating land already under claim - in one case by expanding the boundaries of Darwin by 4000 sq. kms. This was over-ruled by the High Court. The Aboriginal right to veto mining is subject to state or national interest and has not been used. Traditional owners receive compensation from mining companies and royalty equivalents from the Commonwealth has 30% going to the aboriginal land councils and 30% for a trust account for all territory Aborigines. However this in itself has brought up an issue as to whether a body such as the Northern Land Council which is negotiating mining claims on behalf of the traditional owners should be benefitting from mining exploration agreements (see IWGIA Newsletter Nos.34,35 & 36).

#### Queensland

Queensland has the largest Aboriginal population (nearly 45,000 people) but they own only 5 sq. km. of freehold title. Nearly 20,000 sq. km. is reserve missions and 14,000 sq. km. is leasehold. The state passed legislation in 1984 to install Aboriginal management on reserves or give grants of deed in

trust to Aboriginals. This is not land rights legislation and the legislation had the effect of disenfranchising Aboriginals from local government elections.

#### Victoria

Victoria was the first state to grant Aboriginal communities freehold title to their land. In 1970 freehold title was granted to residents in two reserves - Lake Tyers and Framlingham - amounting to 19 sq. km. or 0.01% of Victorian land. There are an estimated 6057 Aboriginals in Victoria (0.16 of the population). In 1984 the government introduced a Land Claims Bill which would provide for claims on Crown land over a third of the state most of which is unsuitable for agricultural use. Fears of reduction of aboriginal autonomy if the bill is passed is one reservation and as yet government delays have as yet not led to its enactment.

#### South Australia

South Australia was the first state to introduce land rights legislation but there has been a watering-down of land rights principles between the 1981 Pitjantjantara Land Rights Act and the Maralinga Land Rights Bill which dropped the rights for compensation for disturbance caused by mining exploration. 0.8% of the South Australian population is Aboriginal (9800) and they have been granted 19% of the State in the barren north-west

#### Tasmania

The Tasmanian government has shown no inclination to introduce land rights legislation for its 2688 Aboriginals who only own one square kilometre of land. Even so a state poll in 1984 revealed a majority of Tasmanians supported Aboriginal land rights.

#### Western Australia

The state's 31,000 Aboriginals (2.5% of the population) own 36 sq. km. of freehold land. Another 190,654 sq. km. is in the form of reserve missions and 40,000 sq.km. is leasehold.

In spite of the fact that the recent Seaman report advocated a mining veto for Aborigines, prospective land rights legislation could mean mining interests taking Aboriginal reserve land without compensation. The bill offers mining and pastoral interests enormous protection.

#### New South Wales

There are about 36,000 Aboriginals in NSW comprising about 0.68% of the population. The state has introduced land rights tailored to suit the needs of dispossessed Aboriginals with limited access to unalienated Crown land. The state's Aboriginal Land Rights Act, passed in 1983 amid Aboriginal protests, set aside 7.5% of the state's land tax for 15 years for Aborigines to buy land on the open market. However Aboriginal groups say that the bill does not give adequate compensation and that the land is in "rubbish" areas. There has only been one successful land claim on vacant Crown land so far under the act and Aborigines presently own 180 sq. km. (0.02%) of the state's land.

The issues facing the federal government over land rights legislation which will apply to all states and territories in Australia is whether to introduce uniform principles which will lower the Northern Territory criteria or set a series of standards which will raise the states with a poor land rights record - such as Western Australia, Victoria and Queensland. In this way the government faces political pressure not only from economic interests but also from state governments.

This document looks at the national perspective on land rights from several points of view. On the one hand there are two government land rights models set out and discussion as to the relationship between them. From the Aboriginal side there are papers from the National Aboriginal Conference and the Federation of Land Councils who have been negotiating and criticising the government's position. The disbanding of the NAC at the end of June was considered by many to be aimed at



Aboriginal woman on a bush tucker expedition near Darwin (Photo: Diana Vinding)

stifling Aboriginal protest. The government deny this in their reply to IWGIA's protest letter about the land rights issue.

Behind land rights lie several other important factors. One should understand that land rights and self-determination on their own cannot be realised to their full extent without infrastructural support. This lack of support is obvious not just in economic provisions for helping Aboriginals who wish to use their land in the way they wish, but also in providing for meaningful opportunities whereby Aboriginal people can meet and formulate their demands.

Another issue which the government will not discuss is sovereignty. According to how it is defined, sovereignty can mean several things. Nevertheless there is no doubt that many Aboriginal peoples do wish to discuss sovereignty issues and to some extent it is the subject which gets to the heart of the land rights question.

Sovereignty is a legal and philosophical concept derived in western Europe from the feudal monarchs or "sovereigns" who were the supreme powers over the inhabitants of a certain territory or country. Sovereignty is a power to make and enforce laws over people in a certain area (see Pittock 1981). As many Aboriginal peoples see it this can only rise from inalienable title to land. In this way from a land rights perspective, sovereignty is control over a certain area by virtue of rights to the land.

If that land has been taken away the possessor of the land has changed but the inalienable title has not. In this way possessors of land should compensate those from whom they took the land. This is the argument which encompasses the problems facing Aboriginal peoples in all parts of Australia who have had their control over their land base destroyed by different methods. The federal government wont discuss sovereignty and so the debate somewhat moves around the issue. However, for many Aborigines it is the lack of discussion on this key factor from which all the other differences flow.

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CHAPTER I  
Federal Government Land Rights Models

Note: The "Commonwealth of Australia" consists of a federation of New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania which are states and Northern and Australian Capital which are Territories. Under the Australian Constitution the federal parliament has legislative power and consists of the Queen, represented by a Governor-General, a Senate and a House of Representatives. The government is called the federal or Commonwealth government. Each of the states has its own government similar to that of the federal government. The Northern Territory is a self-governing area and administered much as a state. The Australian Capital Territory (Canberra) has an Assembly but is administered by a department of the federal government.

CLYDE HOLDING - MINISTER OF ABORIGINAL AFFAIRS - "AUSTRALIAN GOVERNMENT RECOGNISES PRIOR OCCUPATION AND OWNERSHIP OF AUSTRALIA BY ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE"

Speech to the United Nations Working Group on Indigenous Populations, Geneva, 30 July, 1984

"The Rights of Indigenous Peoples"

*In this speech to the UN Working Group, Clyde Holding outlines the five principles according to which the Australian government recognises Aboriginal rights to land. The recognition of prior ownership was also considered an important landmark in Government/Aborigine relations. The preamble to the speech which discusses Working Group matters and not land rights has been omitted. This speech is similar to one Holding gave to the Federal Parliament on 8th December, 1983. Extracts from that speech have been published in IWGIA Newsletter No. 37, May, 1984.*

Definition

An important item on the agenda for this session of the Working Group is the question of definition of indigenous populations. Clearly the criteria by which such populations are identified are for indigenous people to state.

I will do no more than summarise the position in Australia where we have legislative and administrative definitions.

The Australian Constitution makes reference to "the people of any race" and that is the basis of the Government's legislative power.

The working definition adopted for the administration of Government programs has three key elements. A person must:

- be of Aboriginal descent; and
- identify as an Aboriginal; and
- be accepted as an Aboriginal by the community with which the person associates.

By taking this approach we have avoided other more limiting, and potentially offensive, criteria such as degrees of descent. These criteria apply to individuals. They may, however, have some relevance to the definition of indigenous populations.

Land Rights

The other major item that this Working Group is giving special attention to is land rights. The fact that it is being considered at such an early stage in its work underlines the importance attached to this issue by indigenous people.

In Australia the Aboriginal and Torres Strait Islander people have suffered the disadvantage of being dispersed and dispossessed of their land.

The Australian Government recognises the prior occupation and ownership of Australia by Aboriginal and Torres Strait Islander people.

It recognises the spiritual affinity Aboriginal people have with the land that the land is life in the spiritual as well as the physical sense for Aboriginal people.

#### Disadvantaged

Acknowledging the disadvantaged position of Aboriginal people as a group in Australian society and respecting the spiritual affinity Aboriginal people have with the land, the Australian Government recognises their rights to land in accordance with five basic principles. Those principles are:

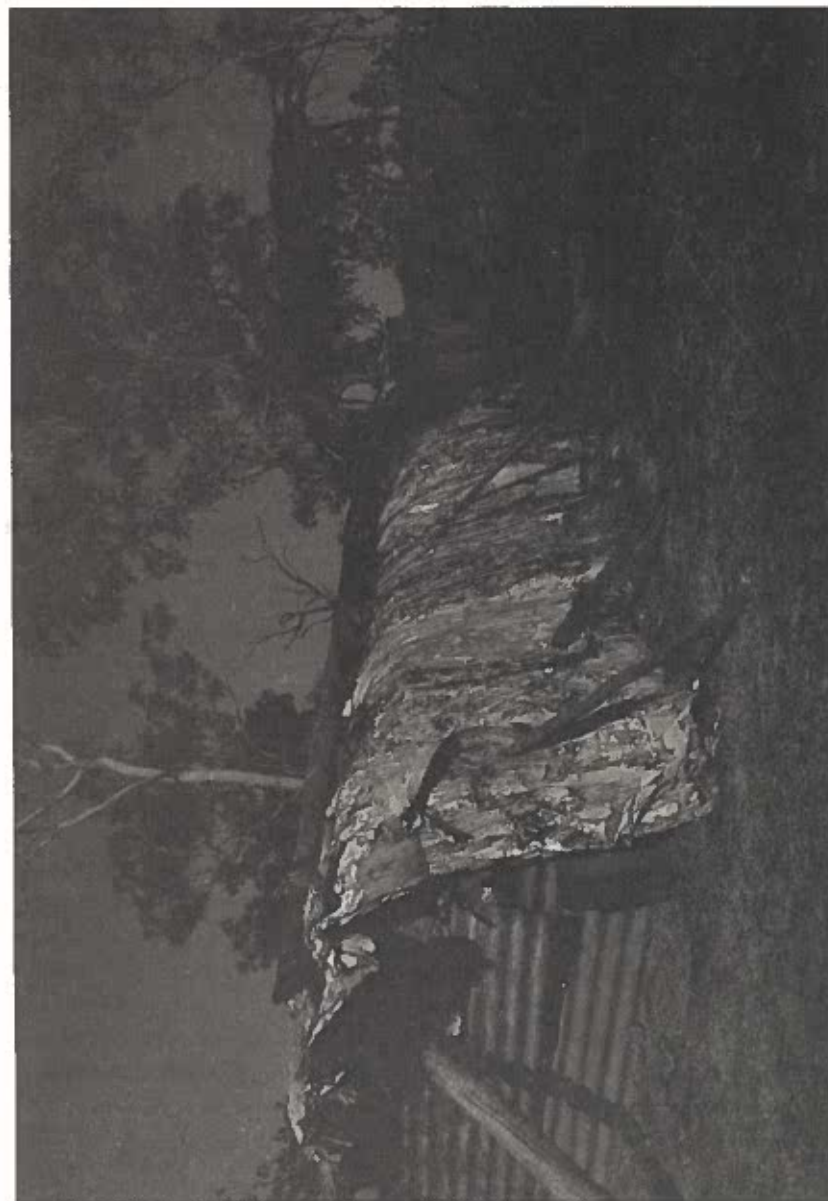
- Aboriginal land to be held under inalienable freehold title;
- protection of Aboriginal sites;
- Aboriginal control in relation to mining on Aboriginal land;
- access to mining royalty equivalents; and
- compensation for lost land to be negotiated.

#### Consistent

There is already some Federal and State legislation which goes towards meeting these principles. But legal rights vary in different States and Territories in Australia.

The Australian Government is committed to ensure a consistent national approach to land rights for Aboriginal people in terms of these five principles.

To implement this policy, an Aboriginal Steering Committee has been formed to provide advice on the development of proposals for model Federal land rights legislation. The Australian Government recognises that the differing legislative and administrative arrangements which apply in the States and Territories of Australia, are factors which need consideration when



Summer settlement at Beswick reserve, Northern Territory (Photo: Diana Vinding)

negotiating towards this end.

It is not an easy task, but it is one to which the Australian Government is committed.

#### Legal Title

Land has already been returned to Aboriginal people in most States and Territories in Australia. The 160,000 Aboriginal people, representing about one per cent of the Australian population, have or will soon have various forms of legal title to about 11.5 per cent or 900,000 square kilometres of land.

Of this 614,000 square kilometres, or 8 per cent of the total land mass of Australia is Aboriginal freehold title land or is in the process of being granted as such.

In 1969, the Federal Government established the Aboriginal Development Commission and with the establishment of its capital fund for Aboriginal enterprises, pastoral and farming properties have been purchased for Aboriginals by the Government.

In June 1984 these properties covered approximately 60,000 square kilometres. Also State land rights legislation, particularly in New South Wales, provides limited funds for further open market purchases.

In some places, particularly urban areas, land cannot be returned to Aboriginal people. The Federal Government will be looking closely at forms of compensation, including land purchases, for Aboriginal communities whose land has been lost and cannot be returned.

#### Sovereignty

As the Minister for Aboriginal Affairs, I have made it clear to Aboriginal people, in public forums and in Parliament, that neither the granting of land rights, nor the recognition of prior Aboriginal occupation and ownership in any way puts Australian sovereignty in question. Given the opportunity, Aboriginal people will make their own future as citizens of the Australian nation. Sovereignty is vested in the Crown and Parliaments for one nation of people.

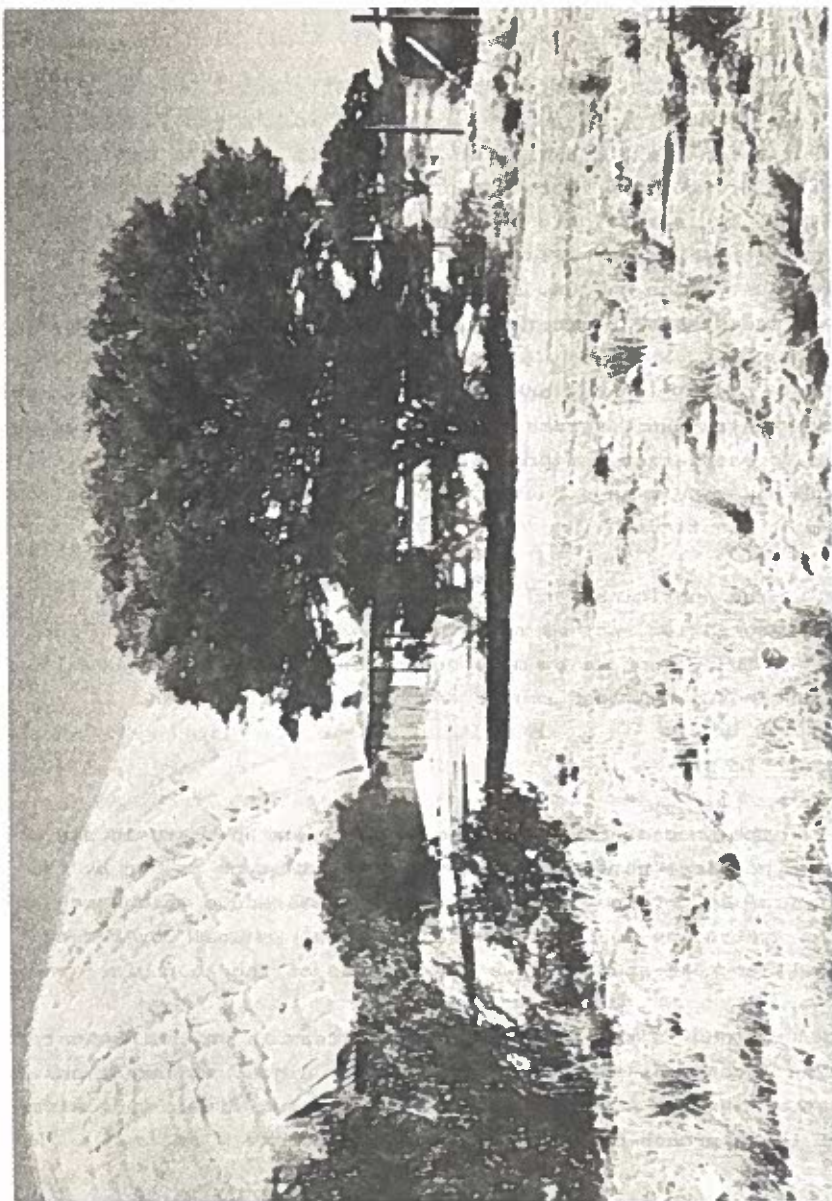
In addition to working towards legislation for land rights, the Australian Government legislated in June this year for the preservation and protection of significant Aboriginal sites and objects in an effort to promote and protect Aboriginal cultural identity.

The Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act is an interim measure which will be replaced in due course by more comprehensive legislation dealing with Aboriginal land rights and heritage protection.

#### Historic Step

The enactment of this legislation was an historic step. It was the first national legislation of its type passed by the Australian Government since the 1967 referendum which amended the Australian Constitution and gave the Federal Government power to make special laws for members of the Aboriginal race.

Of course there are many other areas in which the Australian Government is working to assist indigenous Australians. Let me mention a number, by no means exclusive but indicative of the approach of my government:



Uluru or Ayers Rock - see Policy issue 5 - (Photo: Nana Jørgensen)

### Policy Issues

- (1) The Australian Government has looked to the National Aboriginal Conference (NAC) to be its principal adviser on a range of policy issues. We fund the Conference and last year doubled its budget. The Conference has its own nominee attached to the Minister's office with access to all material that crosses the Minister's desk. Aboriginal people have long asserted that the NAC needs restructuring to make it a more effective voice for Aboriginal people and that review and restructuring is now under way.
- (2) The appointment of Charles Perkins as Secretary of the Department and Eric Willmot as Deputy Secretary has meant that the leadership of the Department and its portfolio organisations is now held by Aboriginal people. Mr Perkins is the first Aboriginal to head any Federal Government Department in Australia's history.
- (3) The funding of independently controlled Aboriginal structures in health, legal aid, community development and more recently in the area of child care and fostering through nationally established structures of Aboriginal groups underline our commitment to self-determination. These structures have established new patterns within the Australian political process that will not be easily reversed.
- (4) New programs of training, including a special Task Force for Women, will accelerate the role of Aboriginal women within Australian society.
- (5) The return of Uluru or as it is otherwise known, Ayers Rock. The terms and conditions are currently being negotiated with its traditional owners and we hope to have the title issued and arrangements for its ongoing use and management finalised before the end of this year.
- (6) The excision of land from large pastoral properties in the Northern Territory to guarantee Aboriginal people security of title and appropriate living conditions is currently

being negotiated with Northern Territory Government following the Australian Government's indication last year unless this situation was put right the Australian Government would use its legislative power to do so.

- (7) An Aboriginal Broadcasting Task Force, headed by the Deputy Secretary, Eric Willmot, has been established and is to report to me soon on the complex issues of remote area broadcasting; the effect of satellite communication and the role of Aboriginal broadcasting organisations.
- (8) Apart from general funding support for education, my government recognises, and now funds, Aboriginal education initiatives such as Yipirinya in the Northern Territory and Worowa College in Victoria.
- (9) The Aboriginal Arts Board was restructured last year and for the first time Aboriginal people themselves, through their national organisations, nominated the membership of the Board. The Government accepted those nominees completely and that has led to the direct participation of Aboriginal artists in the retailing of their art, which is now recognised internationally for its unique and dynamic nature.
- (10) At the request of Aboriginal organisations and ex-service-men bodies, the Australian Government has established a judicial inquiry into the British atomic tests at Maralinga in South Australia. An Aboriginal Australian is one of the three members of this tribunal which will conduct the inquiry.

I mention these facts not in order to diminish in any way the tasks which lie ahead but in evidence of a determination by the Australian Government to meet the legitimate aspirations of Aboriginal people in terms of their heritage, culture and the enlargement of their socio-economic base within the broader Australian community.

### Social Models

Australia, by virtue of its size, natural resources, agriculture capacity and importantly its evolution as a multi-cultural society, can develop social models and legislative patterns which are potentially immensely relevant in the struggle of indigenous people throughout the world.

The development of those models is a responsibility that the Aboriginal people and the Government of Australia will not avoid.

The issues which face the Australian Government in this area are complex and sensitive. No less complex and sensitive are matters before this Working Group. My government wishes you well in your work and thanks you for the opportunity to be heard today.



Minister for Aboriginal Affairs, Mr. Clyde Holding (Aboriginal Newsletter)

## COMMONWEALTH'S PREFERRED NATIONAL ABORIGINAL LAND RIGHTS MODEL

Paper proposing the Aboriginal land rights legislation model issued on 20 February 1985 by Minister for Aboriginal Affairs Clyde Holding.

Source: Aboriginal Newsletter, No. 140, February 1985.

*This paper outlining the Federal government's position on land rights at the beginning of 1985 has been reproduced here because it has been the subject of detailed scrutiny and debate which follows. Comments on the February paper were to have been made by March 31st, 1985. In the press statement accompanying the paper, Mr. Holding described the proposals as "A balanced approach, having regard to the aspirations of Aboriginal people and the concerns of other interest groups". He said that consultation would begin without delay and that the proposals were not to be regarded as final. The extent to which the government has taken the response of the Aboriginal community into consideration can be seen later in this document. Although there have been reports that the Federal government has been considering dropping these proposals, they are still very much the basis of Federal policy (see Conclusion). To preface the document there is a quote from Mr. Holding:*

"Land rights is a matter of fundamental importance which often gives rise to emotional and often passionately held views, and I am most anxious to ensure that there is an equitable and responsible balance of interests in the Commonwealth's proposals. I believe that the approach now being realised achieves that balance and, if adopted would provide the basis for enduring land rights justice in Australia.. I would hope that by 1988, our Bicentennial year, all Australians can point with pride to the attainment of such a settlement."

COMMONWEALTH'S PREFERRED NATIONAL ABORIGINAL LAND RIGHTS MODEL.1. General Principles

## 1.1 Commonwealth legislation to:

- be capable of operating concurrently with compatible State legislation;
- be capable of embracing proposed as well as existing State laws;
- add rights to those accorded under State laws where necessary.

## 1.2 The Aboriginal Land Rights (Northern Territory) Act 1976 to be amended consistent with the Commonwealth preferred model.

## 1.3 The Commonwealth not to seek to override State land rights legislation which is consistent with the Commonwealth's preferred model.

- The application of Commonwealth legislation to depend ultimately on the action of the States to implement land rights legislation.

## 1.4 Aboriginal land to be subject to normal Commonwealth laws and to State laws to the extent they are consistent with the principles in Commonwealth legislation.

2. Title to Aboriginal Land

## 2.1 Title to Aboriginal land to be vested in local, or as appropriate regional, Aboriginal bodies established for this purpose.

- These bodies to be supported by regional and local organisations to represent community interests, facilitate land claims and to administer matters in respect of Aboriginal land.

## 2.2 Land vested in these Aboriginal bodies as a general rule to be held under inalienable freehold title

- and not to be sold, mortgaged or otherwise disposed of by the holders of this title.



Bush tucker expedition in Northern Territory - finding a crab (Photo: Diana Vinding)

2.3 Alternative forms of title( including partially alienable title) to be permitted in limited circumstances

- to ensure consistency with surrounding title such as in non-tribal or urban areas;
- where Aboriginal people so require and land is granted as a result of direct negotiation with the relevant Government.

2.4 Grants of inalienable freehold title should be made in respect of

- Aboriginal reserves and mission land currently occupied by Aborigines: and
- land granted as a consequence of succesful land claims.

### 3. Claiming and Vesting of Lands

3.1 All Aboriginal reserves and mission land currently occupied by Aborigines to be available for direct grant to relevant Aboriginal bodies.

3.2 Land to be available for claim by Aborigines:

- former Aboriginal reserves and mission land which are currently vacant Crown land, unoccupied and unallocated
- vacant Crown land which is subject to a mining interest or tenement (Subject to considerations set out in Section 10)
- all other vacant Crown land which is unused and unallocated for other purposes
- Commonwealth National Parks, where applicants can establish that they have a traditional entitlement or historical association with the land and are willing to accept a grant of land conditional upon its continued use as a National Park.

3.3 Land not available for claim:

- all private land
- land set aside for public purposes, including stock routes and stock reserves
- existing public roads

- any other alienated land, including land such as pastoral leases in which all interests are held by or on behalf of Aborigines

#### 4. Land Claim Procedures

- 4.1 Aboriginal claims for land grants to be on the basis of:
- traditional entitlement;
  - historical association;
  - long term occupation or use; and/or
  - specified purposes (for example, the needs of town campers)
- 4.2 Applications for land grants to be made within 10 years of the proclamation of the legislation.

#### 5. Assesment of Claims

- 5.1 Provision to be made for respective parties to resolve claims to vacant Crown land through a process of negotiation and agreement.
- 5.2 An independent Tribunal or other appropriate authority to be available in each State and Territory to consider and recommend on applications for land grants where
- there is a dispute with respect to an application
  - competing claims are made over the same area
  - issues of detriment (or other issues) arise.
- 5.3 All parties with an interest in the claim to have an opportunity to put their case to the Tribunal.
- Government to ensure that all parties have equal rights in presenting their case in respect of land claims, including access to legal aid.
- 5.4 The Tribunal to assess the merits or otherwise of each application and to make appropriate recommendations to Government concerning the granting of the land as Aboriginal land.
- The Tribunal to determine the compensation to be payable in respect of property, improvements and other interests in the land which is subject to a successful

land claim or site protection.

- 5.5 Where the Government does not accept in part or full the recommendations of the Tribunal on the granting of the land claim, relevant parties to be advised of the reasons for that decision.

#### 6. Protection of Prior Interests

- 6.1 All legitimate prior interests in land the subject of claim or grant to be protected, including
- existing recreation and mining interests (See Section 10)
  - existing rights to use of water courses through and other bodies of water within claimed areas.
  - right of access to travel over public roads.
- 6.2 New roads constructed over Aboriginal land, not being land previously set aside for that purpose, to be the subject of negotiation with affected Aboriginal communities including as to terms and conditions of use
- if necessary with reference to an independent Tribunal for recommendation to Government.

#### 7. Community Living Areas

- 7.1 Provision to be made in each State and Territory for Aborigines to apply for excision of community living areas from pastoral properties within five years of the proclamation of the legislation.
- This procedure to apply primarily, if not exclusively, in the Northern Territory and Western Australia where legislative proposals are currently under consideration.
- 7.2 Applications for such excisions to be on the basis of long term residence on or use of the land by the applicants or their parents.
- Such excision to relate to living area needs only and not form the basis of land claims.

- 7.3 Aboriginal people to be permitted access to pastoral properties for the purposes of preparing a claim for excision, subject to appropriate safeguards to
- protect the privacy of the pastoralist and other residents on the property.
  - avoid disruption to the pastoral operation.
- 7.4 An independent Tribunal or other appropriate authority to assess applications and make recommendations to Government on the granting or otherwise of the excision, having regard to relevant criteria including
- the continued viability of the pastoral property
  - the privacy of other residents
- 7.5 Secure title to be granted to community living areas excised from pastoral properties. Title to rest with the Aboriginal community concerned
- In the event of long term abandonment (but not less than three years), the pastoralist on the property from which it was excised may apply for return of the area.
- 7.6 Compensation to be payable to the pastoralist in respect of property, improvements and other interests in the land excised.
- 7.7. Commercial activities on the excision, such as the running of cattle, to be undertaken only with the agreement of the pastoralist and to be subject to any statutory approval.
- 7.8 Living areas to be subject to normal Commonwealth laws and State laws to the extent they are consistent with Commonwealth law.

#### 8. Access to Aboriginal Land

- 8.1 Access to Aboriginal land generally to be subject to the consent of the Aboriginal land holder.
- 8.2 Appropriate recourse to the law to be available to Aboriginal land holders in respect of a breach of conditions applicable to entry to and use of Aboriginal land, with



School on Beswick Reserve Northern Territory (Photo: Diana Vinding)

appropriate penalties to be provided.

- A breach of conditions under the permit of entry for general prospecting purposes to result in a penalty, suspension or revocation of the permit for that area, as appropriate.

8.3 Right of access for Commonwealth and State officials on duty to be preserved.

#### 9. Mineral Exploration and Development on Aboriginal Land

9.1 Aborigines are to be able to exercise substantial rights over exploration and mining on their land and be given an opportunity to seek a negotiated settlement or to raise objections and argue their case before an appropriate Tribunal if they do not wish activity to proceed.

9.2 There is to be no veto over exploration or mining on Aboriginal land

- the final decision on whether exploration or mining is to proceed on Aboriginal land to rest with Government.

9.3 Mechanisms to resolve disputes over access to Aboriginal land not to constitute a de facto veto.

9.4 Aborigines to be entitled to appropriate compensation for actual damage or disturbance to their land, such compensation not to take into account the value of minerals likely to be discovered or mined (ie no private royalty to be payable).

9.5 Aborigines to have access to payments in the nature of mining royalty equivalents, ie a payment made by Government which represent a proportion of the ordinary royalties received by Government in respect of mining on Aboriginal land. The relevant Government to determine the proportion to be so paid and the distribution of such payments to the Aboriginal people, including those affected by mining operations.

##### a. General Prospecting (Pre-title)

9.6 Entry to Aboriginal land for general prospecting purposes

(ie pre title) to require an appropriate permit of entry issued under relevant State or Territory mining legislation.

##### b. Exploration Title

9.7 Title to prospect or explore for minerals or petroleum on Aboriginal land not to be granted except

- with the prior consent of the Aboriginal land holder and agreement as to the terms and conditions on which such exploration is to take place; or
- on such terms and conditions as are approved by the Government

9.8 In the event that either

- consent of the Aboriginal land holder is withheld; or
- consent is granted subject to terms and conditions which are unacceptable to the applicant; or
- the land holder fails to decide on an application for exploration within six months

the matter to be referred to an independent Tribunal or other appropriate authority for consideration and recommendation within a specified time to Government.

9.9 In considering its recommendations on whether exploration should take place on Aboriginal land, the Tribunal/authority to have regard to specified criteria including:

- the nature and extent of the benefit flowing to the economy as a whole from exploration and any subsequent mining activity;
- the size, location and type of activity to be carried out;
- the wishes or objections of the Aboriginal land holder to exploration and any subsequent mining activity taking place on their land;
- proposals by the applicant to minimise any disruptive activity.

9.10 After considering the Tribunal's recommendations, Government to determine within a specified time whether and on

what terms and conditions exploration is to take place on Aboriginal land, having regard to:

- the views of the land holder and the applicant;
- the recommendations of the Tribunal/authority;
- terms and conditions set out in legislation for exploration on Aboriginal land, including protection of declared sacred sites and compensation for damage or disturbance to the land.

- 9.11 Consent by the Aboriginal land holder or approval by Government to exploration on Aboriginal land to include the applicant's right to apply for renewal of that title, subject only to the terms and conditions agreed with the land holder or determined by the Minister remaining appropriate.
- 9.12 Consent by the aboriginal land holder or approval by Government to exploration to include the applicant's right to apply for a mining or production lease on that land.
- c. Mining or Development Title.
- 9.13 Title to mine for minerals or petroleum on Aboriginal land to be granted subject to an agreement with the relevant Aboriginal land holders on the terms and conditions under which development is to take place
- if agreement cannot be reached within a specified time, either party to apply to the Tribunal/Authority to conciliate the dispute.
- 9.14 If agreement cannot be reached within a further specified period, the Tribunal/authority to determine the compensation to be payable for such mining on Aboriginal land and to recommend to Government such other terms and conditions it considers should be acceptable to both parties.
- 9.15 In determining compensation for actual damage payable to Aboriginal people under a mining agreement, the Tribunal to have regard to any special sensitivity involved in the relationship of the land for the Community and to loss or



Kakadu Park, Northern Territory (Photo Diana Vinding)

damage (social or spiritual) suffered or likely to be suffered by the Aborigines affected and to take into account:

- proposals by the applicant to minimise or rectify such loss or damage;
  - the wishes of the Aborigines as to the form of compensation that would best suit their requirements;
- but not to have regard to the value of minerals proposed to be mined.

9.16 In making recommendations on other terms and conditions to Government, the Tribunal/authority to have regard to:

- the nature and extent of the benefits flowing to the economy as a whole from mining activity;
- the size, location and type of activity to be carried out;
- the requirement for general purpose leases and ancillary leases for housing and other facilities and services and the needs of the applicant for access to the mining area;
- the need to minimise the impact on the way of life and Aboriginal tradition of the land holders and of any Aboriginal community or group which may be affected by the proposed mining activity;
- objections raised by the land holders or groups with regard to any interference and proposals made by the applicant to accommodate these;
- the impact of the proposed terms and conditions, including compensation on the economic viability of the project.

9.17 After considering the Tribunal's recommendations, Government to decide on what terms and conditions mining is to take place on Aboriginal land

- The determination of the Tribunal as to compensation to be definitive

9.18 If the applicant is unable to proceed with the mining proposal on the basis of the compensation determined by

the Tribunal and other terms and conditions determined by the government, continuation of its interests in that land to be subject to the relevant provisions of State or Territory mining legislation.

9.19 Where because of changed circumstances implementation of the mining plan departs significantly from that originally approved. Government to retain the right to determine whether the terms and conditions determined remain appropriate.

- the matter to be referred to the Tribunal for consideration as appropriate.

9.20 Approval to mine to include the right to apply for renewal of that title and any ancillary leases.

#### 10. Existing Mining Interests

10.1 Where a claim is made in respect of land that is subject to an existing exploration licence or mining lease (or ancillary leases), that claim, if successful under the provisions of Section 5, to be granted subject to the continuation of that interest and any renewal of that interest or related interests.

- Grant of Aboriginal title to overlay the existing interest which is to remain fully protected at law and not subject to an agreement on terms and conditions or compensation with the Aboriginal land holders.

10.2 A new mining or production lease taken out as a consequence of an existing tenement (eg an exploration or prospecting licence) to be granted subject to an agreement with the relevant Aboriginal land holders as to the terms and conditions under which such development is to take place.

10.3 Where agreement cannot be reached within a specified period, the matter to be referred to a Tribunal/authority for consideration.

- The Tribunal to determine whether compensation is to be

payable in respect of the proposed activity and to recommend to the Minister such other terms and conditions it considers should be acceptable to both parties (based on the criteria set out in para 9.14).

10.4 After considering the Tribunal's recommendations, Government to decide on what terms and conditions such activity is to take place on Aboriginal land.

#### 11. Sites of Significance

11.1 Mechanisms to be available in each State and Territory for the identification and declaration of sites of significance to the Aboriginal people.

11.2 Primary responsibility for protection of sites of significance to Aborigines to rest with the States. Sites declared under State law as having a special and sacred significance to Aborigines not to be disturbed by activities such as exploration or mining and their continued protection not to be open to negotiation.

11.3 A separate independent Commonwealth Authority to be established to conduct hearings and to evaluate claims in respect of heritage protection

- in particular, to examine claims and to evaluate the merits of declaring sites to be of such special and sacred significance as to warrant protection, including from exploration and mining activities.

11.4 The Commonwealth Authority to operate in the first instance only where States lack legislation protecting sites.

- The Authority to act in the nature of an appeal in the States only where protection is not granted under existing State laws.

11.5 On the basis of the findings and recommendations of the Commonwealth Authority, Government to decide whether or not to declare the site and the nature of protection to

be accorded to it

- sites so declared as having a special and sacred significance to be given the full protection of the law and not to be subject to negotiation in respect of mining, exploration or other activity, save only in the national interest.

11.6 In the event that Government does not accept in full the recommendations of the Authority, a statement of reasons to be tabled in the Parliament.



Art as a Celebration of Life (from Aborigines in Australia Today)

CHAPTER II  
Aboriginal Response

LEGAL OPINION ON THE PREFERRED LAND RIGHTS MODEL

*When the Preferred Land Rights model was published on February 20th, 1985, the Queensland membership of the National Aboriginal Conference (referred to as Querist in the reply) sent a brief to a legal expert to review the model in the light of the five principles outlined in Geneva (see Chapter 1). The legal opinion should be read in conjunction with the tabulated outline of the Preferred Land Rights Model immediately preceding this paper. Following the release of the opinion the lawyer was asked to comment further on two statements, one on sacred sites and the other on inalienable freehold. In both matters he confirms his earlier views published here.*

Re: The Preferred National Land Rights Model ex Parte: National Aboriginal Conference (Queensland)

(On Brief Delivered to Advise Generally - Brief Delivered 28 February, 1985)

I have been asked to review the preferred National Land Rights Model which was promulgated by the Minister for Aboriginal Affairs (Cth.) on the 20th February, 1985, in light of the five points propounded by the present Commonwealth Government in relation to Aboriginal Land Rights in 1983.

The five points were:

1. Aboriginal land be held under inalienable freehold title;
2. Protection of Aboriginal sites;
3. Control in relation to mining on aboriginal land;
4. Access to mining royalty equivalents;
5. Compensation for loss of land to be negotiated.

In propounding those points it is understood that the responsible minister indicated that they represented principles of a committed National approach.

The National Land Rights Model is a document of some 15 pages covering 11 paragraphs. It can be said at the threshold of this opinion that Principal 2, namely protection of Aboriginal Sites has not been dealt with at all in the model save for a reference to the requirement that a tribunal when considering exploration on aboriginal land is to have regard to terms and conditions set out in legislation for exploration of aboriginal land including protection of declared sacred sites.

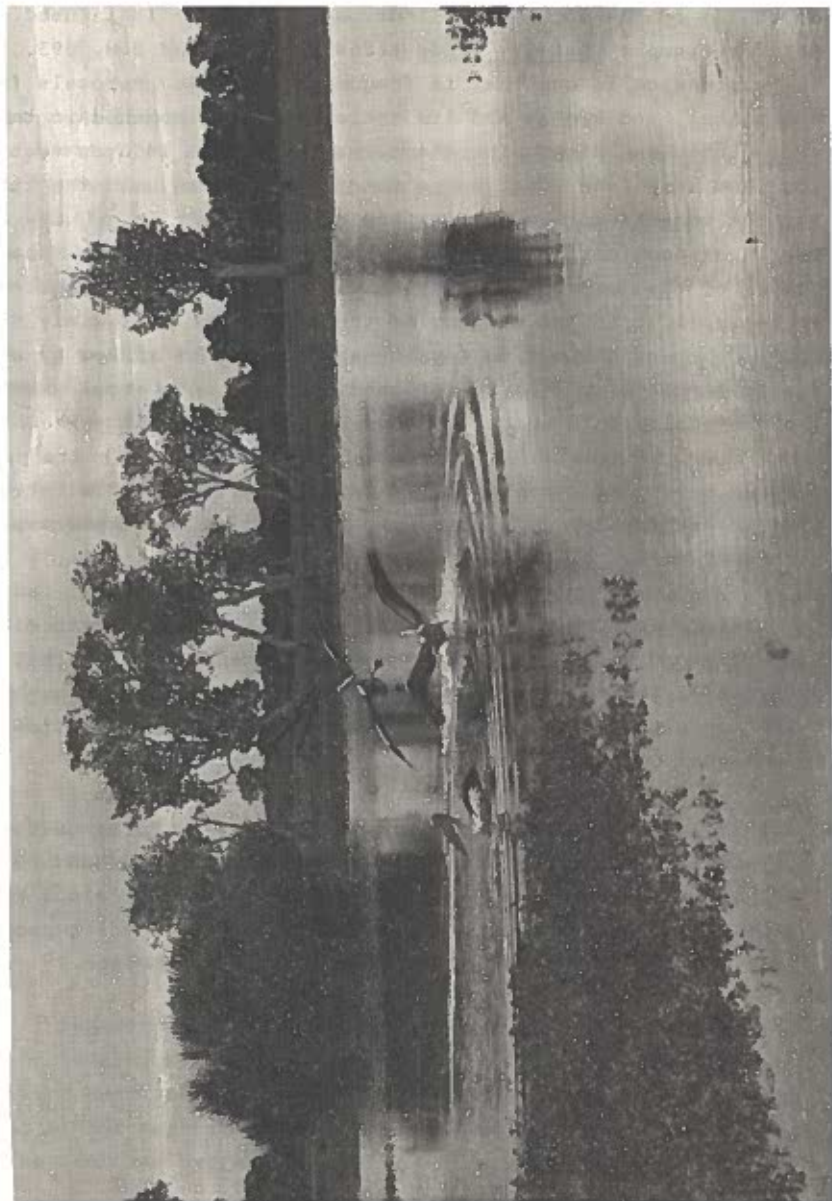
Thus it would appear that there will be no national legislation dealing with the protection of aboriginal sites. Aboriginal peoples will thus be required to rely on existing state legislation.

Insofar as Principal 1 is concerned, it would be conceded I believe by Querist that the expression "inalienable freehold title" does suffer from a lack of precision. The common meaning is not transferrable but there is legal authority to indicate that the expression can be interpreted in different ways

depending on the document or instrument in which it is used. See for example Spring v Pride (1864) De G.J. and S.M. 395. The expression is one that is frequently used in proposals for Aboriginal Land Rights and its achievement was reached in the Aboriginal Land Rights (Northern Territory) Act 1976 by vesting land in a land trust whose functions were to hold the title for the benefit of the aboriginals concerned. It is my view that that does not go far enough to prevent any transfer whatsoever of the land but Querist should set down what it believes to be implicit in the meaning of the expression. Certainly the model does not set out in any way whatsoever the scheme by which any inalienability will be obtained. In fact, the model uses the expression in a number of areas e.g. 2.2 and 2.3. To confront the Commonwealth on its inability to comply with its previously expressed commitment, it is my view that Querist should have the expression defined before confronting the Commonwealth with complaint.

Before turning to principles 3 and 4 which deal with mining, it would be inappropriate to make comments on the other portions of the model generally and in particular as to any affiliation with the principle. I will deal with the individually numbered paragraphs seriatim.

- 2.3 This refers to the permitting of alternative forms of title including partially alienable title. There would need to be inbuilt protection so as to ensure that the Aboriginal people who "required" such alienable title did so after proper advice and had not been the subject of any pressure.



Kakadu National Park - Northern Territory - (Photo Diana Vinding)

3.2 This paragraph sets out the land which is available for claim. It could be called the Key-stone of the model. The reference to unoccupied and unallocated Crown land raises the hardy perennial of attempting to define what is unoccupied Crown land. An attempt was made in the Northern Territory Act to define alienated Crown land. That definition has led to much litigation and argument before the Aboriginal Land Rights Commissioner. See for example Re Toohey; Ex Parte Meneling Station Pty. Ltd. (1982) 44 A.L.R. 63. It is more than obvious that in this critical paragraph the definition of Crown land "unoccupied" and "allocated" needs to be more exhaustively defined.

The reservation of Commonwealth National Parks from an unfettered grant is in defiance of Principal No. 1. As I understand it, there is also only one National Park and that is the Takadu National Park. A particular reservation to only one park would appear to take away any significance of this section of the paragraph.

3.3 In the second section of this paragraph, it is described that land set aside for public purposes is not available for claim. Here again is a fertile area for litigation. There needs to be a comprehensive outline of what constitutes land set aside for public purposes i.e. has there to be a formal promulgation by proclamation Order in Council or Regulation.

4.1 This paragraph is termed as "land claim procedures", yet it is in effect and will in practice be one of the most important provisions. It tentatively puts forward that land grants are to be on the basis of traditional entitlement, historical association, long term occupation or use and/or specified purposes. It is well known, of course, that trad-

itional entitlement is one of the factors considered by a Land Claim Commissioner acting within his jurisdiction under Section 50 of the Northern Territory Act. The definition of a traditional aboriginal owner having as it does a further reference to a local dissent group of aboriginals has been the subject of much contentious debate in land claim hearings in the Northern Territory. Reference is made to a particular definition by Toohey J. in his report "7 years on" (December 1983) at p.38 where he says:

"266. There is a good cause for the broadening of the definition. But as the land councils have pointed out, the act has been on foot for nearly 7 years and they and others concerned with its administration have learned to live with it. The definition has been interpreted in a way that allows flexibility and, at the same time, it has the advantage of identifying with some precision those who answer the description...

267. I do not recommend any change in the definition of traditional aboriginal owners at this stage.... When the hearing of land claims has substantially concluded a fresh look might be taken of the definition, having regard to such other definitions as there may then be in state of Commonwealth legislation."

It would be conceded by the Commonwealth that the application of such a conceptual definition is one thing in the Northern Territory where "traditional" aboriginals will be in higher proportion than anywhere else in Australia. Thus it has not been too difficult for anthropologists to seek out and assist in the presentation of evidence to support one or more local dissent grounds as being traditional aboriginal owners. If this model is to serve as a basis of legislation for the rest of the Commonwealth then, in my view, the legitimate aspirations of aboriginals living outside the Territory will be dashed on the contentious rock of the growing difficulty of interpreting what will be traditional entitlement. The other criteria set out in 4.1

will cause problems of a "demarcation" type. There may well be two or more groups of aboriginals who have an historical association rather than a "traditional entitlement": by what criteria would a tribunal assess who has the better claim?

It will thus be seen that for Querist to give any thoughtful consideration to a model, this particular paragraph will need considerable expansion and greater particularity.

- 4.2 Whilst it might be conceded that there should be a cut-off period to allow for some stability in public administration, nevertheless a period of 10 years to allow for proper research in areas outside the Northern Territory must be considered as being far too short.
- 5.2 This is a passing reference to the matters relating to an application which can be dealt with by an independent tribunal or other appropriate authority. It appears to be different from the procedure in the Northern Territory, for there the Land Commissioner was obliged to hear an application and decide upon it whether or not there is a dispute. As is well known there, the aspect of detriment is placed on a lesser plane than the recommendation as to entitlement by the applicants. As 5.2 is drafted, it would appear that issues of detriment are on the same plane of consideration as the actual entitlement of the applicants. This is a far-reaching intrusion into the principles which has been coyly tucked into the provision dealing with assessment of claims.
- 5.5 The government need not accept the recommendation of the Tribunal as to an application. There is no mention, however, of the situation where the Tribunal may refuse to grant a land claim. Can the Government still proceed to



Looking for Mangrove worms on a bush tucker expedition (Northern Territory) - Diana Vinding

make a grant. Clarification is required at this point.

- 6.1 Reference is made to all legitimate prior interests being protected. What is a "legitimate prior interest"? The author of the model should be requested to define that expression so as to permit Querist to give it proper consideration.
- 7.0 This section of the model deals with community living areas. There has been considerable contention and debate in the Northern Territory on this subject. I do not know Querist's concerns on the subject and thus am unable to make a comment; it might be noted, however, that there is no provision for access to a community living area. There is provision for access by aboriginal people to a pastoral property for the purpose of preparing a claim that if and when the claim is granted they may not have any means of travelling from a public road to the community living area which will thus be a landlocked area of land.
- 8.10 This deals with mining. As is to be expected from the continuing unfinished debate on the subject of mining on aboriginal lands, this section does at least have the pretense of descending to particularity in dealing with the subject in writing.

There can only be one comment on the comparison between the Principles 3 and 4 and the model and that is that mining on aboriginal land without the consent of the land owners or those entitled to make a claim to the land, flies in the face of the principles as a whole. See in particular paragraph 9.10.

In passing it might be noted that paragraph 9.5 is an open-ended one. The Government can determine what proportion of royalty is to be paid to Aboriginal people.

9.15 This provision sets out some criteria by which the Tribunal must regard the assessment of compensation for damage to Aboriginal people under a mining agreement. What is "special sensitivity"? It could be said that to use the expression "sensitivity" with respect to the relationship of an aboriginal to land is offensive and should be omitted altogether from the subject matter. There needs to be also thought given as to what constitutes damage - that has not been spelt out.

11.3 There is here noted the establishment of an independent Commonwealth authority to conduct hearings in relation to heritage protection. I do not see the significance of heritage protection in an Aboriginal land rights statute. Does it mean that there can be competing claims between aboriginals and white people who have a concern in relation to the history of the area? If that be so, then there will be major difficulties for the authority in seeking to make and draw a distinction between "aboriginal heritage" on the one part and "white heritage" on the other.

The short review of the principles in the model above can lead to only one conclusion and that is that the model has been prepared with very little regard to the 5 principles. Indeed, there is absolutely no reference in the model to principle 5, i.e. compensation for lost land. Indeed, the model and the principles, if put side to side, would lead an unbiased reader to the conclusion that the model has been prepared quite separately and independently of the principles.

In conclusion it might be said that the Aboriginal Land Rights (Northern Territory) Act with all its imbedded drafting difficulties nevertheless does work in a way which has assisted aborigines in making proper and rightful claims; the model, however, raises more problems than it seeks to solve and thus

will be a fertile area for litigation if it were to proceed as the basis of legislation. That fertile area of litigation would not, however, in my view lead to any viable determination of aboriginal's rightful and just expectations in land rights.

With compliments,  
W.T. McMillan  
 Chambers,  
 1st March, 1985.



Traditional Aboriginal Design

ROB RILEY (CHAIRMAN OF THE NATIONAL ABORIGINAL CONFERENCE)  
 "IT IS OUR LIVES AND FUTURES WHICH ARE MOST AT STAKE HERE!"

National Aboriginal Conference Response to Federal Government's Preferred Position on National Land Rights Legislation, 21st February, 1985.

*This statement was put out by Rob Riley, Chairman of the NAC in immediate response to the Preferred Model. The NAC had been negotiating with the Government on land rights issues and this document refers to some of the minimum expectations the Aboriginal community demanded from the federal government. When in opposition, the Australian Labor Party had been very supportive of Aboriginal Land Rights. In the document, Rob Riley takes the Labor government to task for not living up to its platform. Another complaint was that the Federation of Land Councils (FLC) and the NAC who had been making advisory statements for the government, had been completely overlooked when Clyde Holding produced the preferred model and for this reason refused to discuss a fait accompli with the government.*

On behalf of the National Aboriginal Conference I congratulate the Federal Government on its decision to release details on the proposed Land Rights law. The NAC has for some time insisted that the Government end the "closed-door" development of Land Rights and to bring Aboriginal and Torres Strait Islander people in on the negotiations.

Although I expect that the mining lobby has been more influential in bringing about the Government's declaration at least it may give the Aboriginal and Torres Strait Islander community an opportunity to influence legislation.

The NAC reiterates its belief that Land Rights is the right of Aborigines and Torres Strait Islanders, not of the privileged mining industry or the incumbent "land barons". In fact, the mining industry is not, and should never be, a component of Australian Government - it is not people, and it has no votes nor any part in democracy, it has absolutely no right to be represented in Aboriginal Land Rights laws.

The ALP Government has been remiss in its handling of the Land Rights issue. As the Government closes its doors on negotiation with Aborigines and Torres Strait Islanders, specifically its own Aboriginal "Steering Committee", it has given every opportunity to the mining lobby and large landholders to determine our fate.

The NAC realises that the national Land Rights law is intended by the ALP Government to redress the wrongful dispossession of Aborigines and Torres Strait Islanders of land in 1788. We refer to the Government's resolution, tabled in Parliament on 8 December, 1983, which states that:

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

In speaking to the motion, the Minister for Aboriginal Affairs, Clyde Holding, reminded the parliament that:



Demonstration in Sydney, 1981 (Photo: Nana Jørgensen)

"The Aboriginal people dare not forget the past nor allow their children to forget it - for people who have survived a holocaust will teach their children the hard lessons of that survival.

Now we are concerned that they might not be inclined to join in our Bicentennial Celebrations in 1988 and we entertain, even with some resentment, the thought that we could stand therefore to be embarrassed in the eyes of the world.

We would, of course, feel it most unreasonable of them not to come to the party when we have, for so long allowed them to see only the worst of us. The European vision of Australia's future had no place in it for the Aboriginal people, for their values, their traditions. So we have allowed them to have only a small share of the wealth of their own country and so few rights and privileges.

It is now clear that we must make some amendments, we must allow them some redress - albeit at some cost to the rest of us and with some sacrifice. We must understand the past, which we cannot change, in order to build the future.

But we must not repeat the hypocrisy. We must not make only cosmetic changes merely for the sake of the bicentennial celebrations. The principles of reconciliation can and must be clearly established by 1988."

The ALP Government had taken care, when in opposition, to develop a clear and conscientious approach to Aboriginal rights by actively participating in open protests for true Land Rights and by taking time to develop a clear platform on Aboriginal affairs.

Its policy in 1982 states that a Labour Government will:

"Ensure that Aboriginal and Islander people in each state or territory have access to land grants held under secure title in accordance with The Woodward principles by seeking complementary state or territory legislation and where this is not introduced use Commonwealth constitutional powers and legislation to achieve these objectives.

Allocate funds to allow the acquisition of land for Aboriginal and Islander communities throughout Australia. Incorporate in its land rights legislation the following principles:

Aboriginal and Islander people shall have the right to refuse permission for mining on their land or to impose conditions under which mining may proceed. To set aside a refusal, or conditions imposed, shall require an Act of Parliament; and royalties from mining on Aboriginals' or Islanders' land shall be paid to Trusts administered by Aboriginal and Islander people to be for the use and benefit of the Aboriginal and Islander people in the particular state or territory after meeting the needs of the Aboriginal people created by that mining."

In 1984, when the ALP was in government, it had the opportunity to weaken its policy at the ALP National Conference but, instead, the policy was endorsed unanimously.

The Government has repeatedly held up its "five principles" as the basis for national Land Rights legislation, never once indicating that it would not honour its policy or that mining companies and large landholders were to have the final say.

The NAC reminds the Government that it has given commitment in the international arena to adhere to the "five principles". In July 1984, the Minister for Aboriginal Affairs, in addressing the United Nations Working Group on Indigenous Populations, said that the Australian Government was "committed to a national approach to land rights for Aboriginal people in terms of these five principles. ( See Chapter I).

Last week, the NAC and the Federation of Land Councils decided to boycott a meeting with the Minister for Aboriginal Affairs to discuss the Land Rights proposals before the papers were presented to Cabinet. In a joint statement with Pat Dodson

of the F.L.C., I said that our roles as advisors to the Government had been seriously and continuously undermined by the Minister who chose to finalise and distribute his paper to the departments and State Governments before seeking our endorsement of the principles endorsed in the paper. I remind you that the Minister had promised in 1983 to include our organisations in discussions with the State Governments.

Our decision to boycott the meeting has been vindicated by the contents of the Governments "preferred model" for Land Rights.

The "model" does not meet four out of the "five principles". The only principle that is observed is the first principle to vest all Aboriginal land in the form of inalienable freehold title, although I believe that Paragraph 2.3 of the model is so vague that we cannot be certain that this principle will stand.

Para 2.3 "Alternative forms of title (including partially alienable title) to be permitted in limited circumstances.

- to ensure consistency with surrounding title such as in non-tribal or urban areas
- where Aboriginal people so require and land is granted as a result of direct negotiation with the relevant Government.

The NAC issued to the Government in December 1984, a list of our minimum expectations for Land Rights. We find that the Government's "model" meets only one of the twelve criteria listed, that is that national Land Rights legislation "must return land to Aboriginal and Torres Strait Islander communities in inalienable title". Again, we cannot be certain that this criteria is entirely fulfilled.



Kakadu Park (Photo Diana Vinding)

In our initial study of the Government "model", we have identified four major areas of contention. They are:

- A. Land available for claim;
- B. 10 year limit on land claims;
- C. Concessions to the Mining Industry;
- D. State Government powers.

A. Land Available for Claim ( Paras. 3.1, 3.2, 3.3)

The NAC has determined, in its minimum expectations that "the national Land Rights legislation must confront the fact that legislative protection of Aboriginal and Torres Strait Islander interests will sometimes cause inconvenience to white, and especially commercial, interests. It must provide for the return of land to Aboriginal and Islander communities in some circumstances where the land is desired by white interests" and that it "must restore land to Aboriginal and Islander ownership in recognition of the fact that the land was wrongfully taken from the original owners. Accordingly, imposed conditional grants are unacceptable".

The Government "model" restricts land claims to vacant Crown land and, under specified conditions, national parks. In the Eastern States (Queensland, New South Wales, Victoria and Tasmania), vacant Crown land is negligible, almost non-existent. It is estimated that 80% of the Aborigines and Torres Strait Islanders in the Eastern States will not be able to lodge claims for land under this proposal.

I reiterate that the Government had virtually promised some sacrifice of existing white interests in land to provide meaningful Land Rights for Aborigines and Torres Strait Islanders.

#### B. 10 Year Limit on Land Claims (Para 4.2)

The NAC's minimum expectations express that "The national land rights legislation must reflect an acknowledgement that the injustices perpetrated upon the Aboriginal and Islander people since European colonization will take very many years to redress. A cut-off period for land claims and a limited duration of compensation payments are incompatible with this principle and cannot be accepted".

We cannot understand the reason for the Government imposing a 10-year cut-off period when claimable land is restricted to unused vacant Crown land and national parks. This provision in the "model" gives an impression of negative Government attitudes to Land Rights and a desire to suppress Aboriginal benefits under the law.

#### C. Concessions to the Mining Industries (Paras 8,9 and 10)

The NAC's minimum expectations in relation to Aboriginal control over mining endorse the Australian Labor Party's own policy platform reaffirmed in July last year:

"The national Land Rights legislation must empower Aboriginal and Torres Strait Islander communities to refuse permission for mining on their land or to impose conditions under which mining may proceed. To set aside a refusal or conditions imposed, shall require an Act of Parliament".

You will see that we are not asserting Aboriginal veto over mining activity as the scaremongers would have you believe. We are prepared to accept the over-riding power of Parliament, but anything less than this just does not fit the description of "control over mining".

This present Labor government, which likes to pride itself in giving people a fair go, and working for reconciliation has produced a draft model for National Land Rights Legislation which could lead to a sell out of Aboriginal people.

The National Federation of Land Councils of which I am the National Co-ordinator, represents Aboriginal people from every State and the Northern Territory. This Federation held a three day meeting in Canberra last week. Our unanimous view was that the Government's Draft Model:

1. Discriminates against Aboriginal people and has as its hidden agenda, assimilation and the continuation of cultural genocide.
2. Legitimises the anti-Land Rights policies of vested interest groups and conservative state governments.
3. Completely ignores Aboriginal needs, interests, aspirations and demands.

The point is, there is an ideological conflict between how we Aboriginal people perceive our rights and the way in which governments continue to perceive their role in handing out what they believe are civil rights to us as Aboriginal Australians.

#### Mr. Holding's Misleading Comments.

But before I go into this, I want to put the record straight regarding comments made by the Minister, Mr. Holding, at his press conference yesterday.

He implied that we have called for more than the retention of the current right to control mining on land we have been able to claim. We have not. We are fighting against the removal of this right.

#### D. State Government's Powers

The NAC's minimum expectations of national Land Rights legislation express a clear view on the need for the Federal Government to exercise its constitutional powers in relation to Aboriginal Land Rights. We say,

"The national Land Rights legislation must clearly indicate that it is the Commonwealth which is primarily responsible for ensuring that land is returned to Aboriginal and Islander ownership".

The Federal Government has blatantly ignored the consistent demands of Aboriginal groups for a uniform national approach to Land Rights by allowing the States to have a major role under the proposed legislation. A clear example is their preferred position of assigning primary responsibility for protection of sites of significance to Aborigines and Torres Strait Islanders to State Governments. It is precisely because the States have not enacted adequate Land Rights and Sites Legislation that Aborigines and Torres Strait Islanders have been demanding national legislation since the Tent Embassy in 1972.

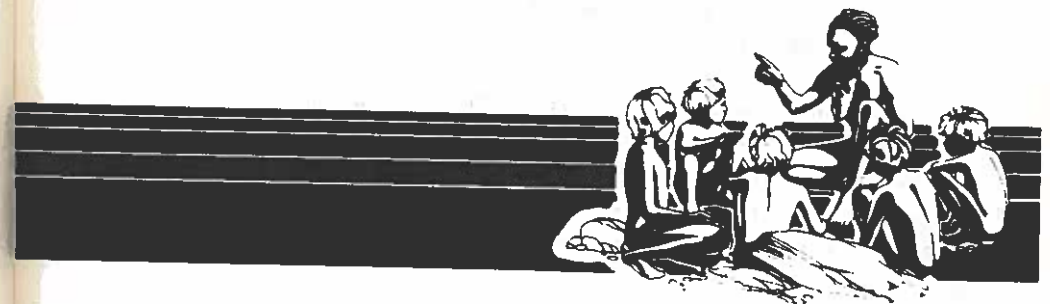
The NAC upholds its Land Rights policies and the release of the Government's preferred position on national legislation has done nothing to encourage us to retreat from our Land Rights principles.

The course we will adopt will be to take very seriously our obligation to provide the Government with Aboriginal and Torres Strait Islander views and advice on this major policy issue. We undertake to go back to our communities with the Government's preferred position paper and to ensure that our people have the opportunity to express their views on the

Government's position. This will be a major undertaking to be completed in a very short time but we are determined that Aboriginal and Torres Strait Islanders views will be clearly and forcefully presented to Government.

As part of that process, the NAC intends to convene a full-scale national Land Rights summit so that there can be no doubt about Aboriginal views on these matters.

Aboriginal people remain determined to have Aboriginal and Torres Strait Islander voices heard on Land Rights matters. We accept that others have an interest in the determination of the very complex questions involved, but it is our lives and futures which are most at stake here.

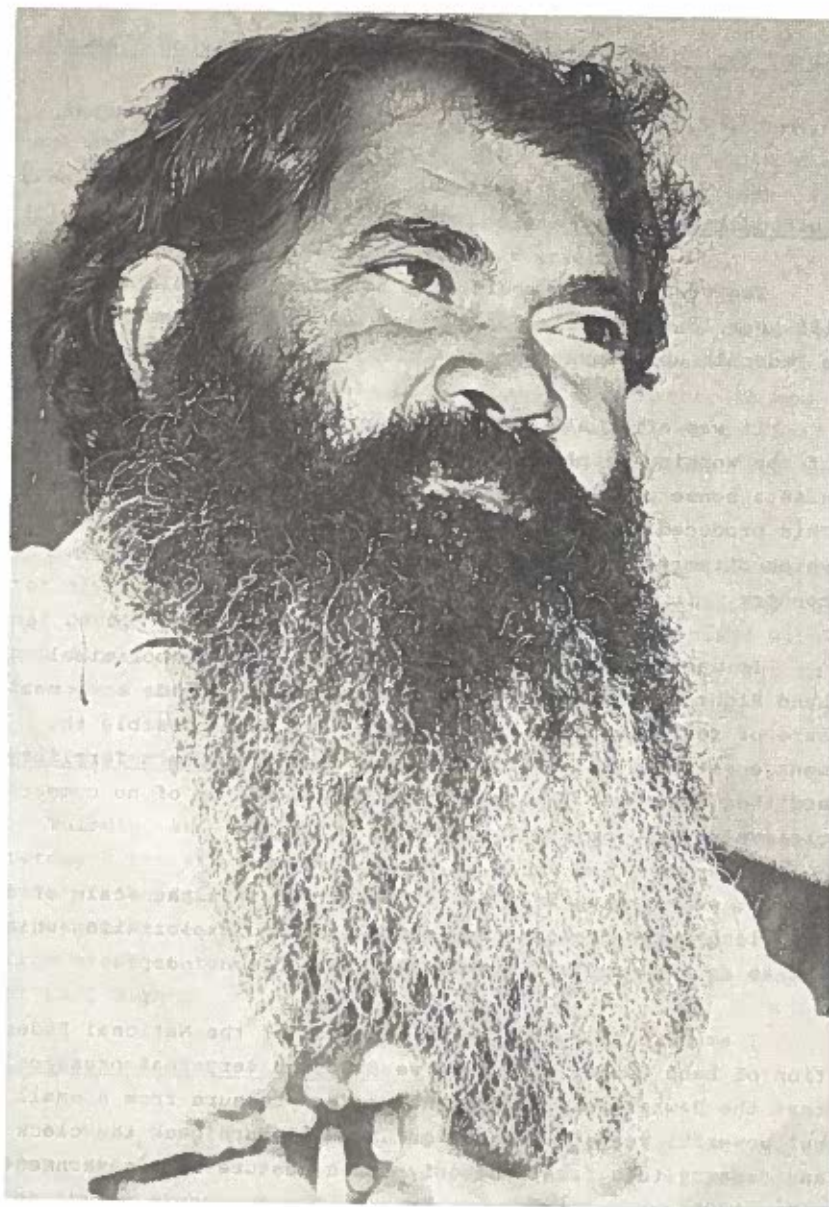


National Aboriginal Conference Motif

PAT DODSON: "WE WILL NOT GIVE UP OUR STRUGGLE FOR RECOGNITION,  
INDEPENDENCE AND DIGNITY"

Address to the National Press Club by Pat Dodson (National  
Co-ordinator of the National Federation of Land Councils)  
May 14th, 1985

*This speech came at the climax of a week of action in Canberra when Aboriginal peoples from all over Australia centred on the capital to demonstrate their protest at the Preferred Model for Land Rights Legislation. The speech crystallised the feelings of those Aborigines who had stormed the Parliament and sat in at the Department of Aboriginal Affairs during that week. The National Federation of Land Councils comprises 15 organisations throughout Australia working for Aboriginal land rights.*



Pat Dodson, National Co-ordinator, Federation of Land Councils  
(Photo: Errington)

### Introduction.

Ten years ago it would have been inconceivable that our 196 year long struggle for justice would lead to petitioning a Federal Labor Government.

It was after all a Labor Government, the political party of the working people, which joined forces with us to galvanise a sense of basic human justice and to demand land rights. This produced the first European law during those 196 years which attempted to recognise Aboriginal ownership of this country.

It was a long time in coming, but the 1976 Aboriginal Land Rights Northern Territory Act began to provide some measure of real control over our lives, and make possible the management of some traditional land in the Northern Territory, and then only over land which was thought to be of no commercial value.

It was nothing when we weighed it against the scale of so many long years of legalised oppression and exploitation which led to so much suffering and death amongst our people.

I am here today to speak on behalf of the National Federation of Land Councils because we face the very real prospect that the Hawke Labor Government, under pressure from a small but powerful vested interest group, will turn back the clock and destroy this first and only token gesture by a government since 1788.

### Uranium - and the right to decide, the right to be informed.

Secondly, on uranium policy. Mr. Holding and his government seem to conveniently forget the circumstances under which uranium mining began. Aboriginal traditional owners were cajoled, bullied, bulldozed by the Frazer Government into a decision on an issue which is a complex scientific one.

As a result of this initial decision, Aboriginal owners have since been encouraged to follow-up with more agreements. The present government, in this case a Labor government, is now doing the bullying. Governments change regularly as do their policies and they expect Aboriginal people to accommodate the vicarious nature of their administration.

In all this morass of in-fighting, the most significant factor of all is lost. Proper Land Rights must mean that Aboriginal people have the right to determine what takes place without duress and under circumstances where all the relevant information and implications are fully understood.

### United Aboriginal Voice.

Thirdly, and lastly, Mr. Holding also suggested that yesterday's protest outside parliament house was unrepresentative of Aboriginal opinion. The fact is that in the last week, representatives from all major Aboriginal organisations and from every state and territory have met to discuss the issue of Land Rights

### The National Land Rights Summit

As well people have travelled from every part of Australia. Many came in buses from remote desert areas, travelling down the Stuart Highway's 500 kilometres of jarring dirt roads and

all these people endorse the following resolutions of the Fourth National Land Rights Summit of Aboriginal Organisations.

Among the resolutions of the summit were that:

1. We reject completely the Federal Government's Preferred Position Paper and any legislation based on it.
2. Any National Legislation must be the product of authoritative negotiation between Aboriginal people and any colonising government.
3. We demand that the Federal Government's minimum negotiating position be that espoused in the ALP Platform and the original 5 principles of the Federal Labor Government.  
This meeting further demands that the Federal Government does not proceed with the introduction of any National Land Rights Legislation until a comprehensive negotiating process between Aboriginal people and the Federal Government is completed to our satisfaction.
4. We reject any moves by any government in Australia to remove any rights or powers currently enjoyed by Aboriginal people under existing Land Rights Legislation. We insist no currently existing Land Rights Legislation be amended without the negotiation with the Aboriginal Land owners, their representative organisations and only with their consent.

As you can see from this, Aboriginal people have not even been considered as worthy of consideration.

The process adopted by the Hawke Government in formulating its Preferred National Land Rights Model is equivalent to the Government producing a Draft Accord without consulting the ACTU (Australian Council of Trade Unions) and then having the temerity to claim it is acting in the interest of trade unionists.

The minister for Aboriginal Affairs, Mr. Holding, continues to ignore our calls, to listen to us and to heed our views and convene a National Aboriginal Forum to discuss the



National Demonstration in Sydney, 1981 (Photo: Nana Jørgensen)

best way the Government can approach National Land Rights Law. It would not surprise us at all if cabinet had already given preliminary considerations to a Draft Bill - such is the nature of consultation.

#### Reconciliation or Confrontation?

We believe that if our demands are ignored, and our existing rights dumped, the Government will be responsible for fanning a conflict which could undo the small steps which have been taken towards reconciliation between Aboriginal people and the rest of Australia.

The Aboriginal Land Rights law is the second time a Commonwealth law was passed on behalf of the Aboriginal people.

The first took until the mid 60's to happen. It was a law to end the practice we knew as dog tags. It declared some of us eligible for citizenship. Before then, our rights were invisible and were considered of no concern unless a government official gave us, or some of us, a citizenship tag for good behaviour.

Then, and only then, like our present day brothers and sisters in South Africa, were we able to get a passport into the world of our colonial masters.

If the Government's draft National Land Rights Model is indeed the basis of a new law, then it will put us back to where we were, displaced refugees in our own country.

Such a reactionary policy initiative is counter-productive and against the best interests of all decent Australians.

It is noteworthy that in relation to recognising the

rights of Aboriginal people, Australia remains the only former British colony which has not yet negotiated a proper settlement with the indigenous people of that country.

However, like the hundreds of other Aboriginal people who travelled thousands of kilometres to this cold and inhospitable national capital, I am here today to defend the basic rights that accorded to a minority of us and to demand that the administration of these rights be broadened and developed so they benefit all Aboriginal Australians.

If this nation is to even attempt to wear the mantle of maturity, to have any sense of pride and independence, to claim it is a just and fair society, you must first negotiate with us, the Traditional Owners of this country.

The people whom you have sought to conquer.

Non-Aboriginal Australians have an obligation to negotiate with us, not simply on the basis of imposing preconceived interpretations of what rights we can have from you, through governments, but on the basis of justice and equity.

The necessity of reconciling our indigenous rights cannot be pushed to one side.

We Aborigines have proved our resilience, and survived acts of deliberate annihilation the destabilisation of our communities, the occupation of our lands, assimilationist policies aimed at cultural genocide and policies which took our children from us.

We have prevailed in the face of transmigration, dislocation and massacres.

We continue to follow the spirit of the people who have gone before us, who have handed down to us the laws for the land and the right way to establish human relationships for the maintenance of our religion and culture.

Despite what people from mining companies and others might like to think, our country still makes sense to us through sacred sites which criss-cross the continent.

We continue to love our land, the country that gives us life, our social, political and family institutions.

The question that we must ask is that do we, like our Kanaky brothers and sisters, have to go to Libya or some other country before the Australian Government comes to terms with our prior rights?

The fact is that the Government's Preferred National Land Rights Model is just another obstacle in a long struggle.

We will not continue to sit at the foot of your table and watch you grow fat off our land.

We will not continue to accept the scraps which you choose to throw down to us, and threaten to take away.

We will not give up our struggle for recognition, independence and dignity.

Like our forebears, we will not die, we will not go away, our particular cultural genius has roots which reach back into time, beyond your recorded history, and continue to sustain us.

### Mining Industry Campaign

I would like to be here today to talk about constructive steps, steps that could be taken down the road for better relationships by, say, your bicentennial anniversary.

Instead, Aboriginal people from around Australia have had to come to Canberra to defend the meagre legislative rights established in the Commonwealth's Northern Territory Land Rights Act and to fight to establish them as the basis for justice for all Aboriginal Australians.

These basic rights are threatened by the current proposal put forward by the Minister for Aboriginal Affairs, Mr. Holding, in his Preferred National Land Rights Model.

This obstacle has been put before us by a battle front deliberately created by vested interests, principally the mining industry lobby and the pastoral industry.

They have put this nation at the barricades of a major moral and political cross road. They have set the terms for an ideological battle that the likes of Mr. Hugh Morgan would make the holy war.

The target is the Federal Government's moral and constitutional responsibility to act on behalf of all Aboriginal Australians and intervene where state governments fall short of nationally established standards.

Their target is the right of Aboriginal people to control mining on their land, the right to say yes or no, and the right to negotiate terms and conditions.

This particular anti-Aboriginal campaign, can no longer employ those more directly murderous methods used by earlier

developers that made it unnecessary to acknowledge the rights of Aboriginal people.

Instead the mining industry has used its riches to buy time and space on the media, and have manipulated all major outlets to promote baseless propaganda about Aboriginal Land Rights.

In addition they have pursued a lobbying campaign to sway State governments in this country.

Despite what propaganda may have been produced, the truth is that existing Aboriginal Land Rights Laws:

1. Do not threaten 1 cm of privately owned, or government designated land - none of this can be claimed under any land rights law in Australia. It means simply, that Aboriginal people have been returned land that non-Aboriginal Australians have rejected as worthless;
2. Have not had any significant negative effect on the mining industry or any other section of the Northern Territory community.

But truth or facts have never got in the way of the propaganda campaigns by wealthy vested interest groups.

In the face of this, and in spite of the West Australian Government sponsored independent inquiry, by Mr. Paul Seaman QC, conducted last year, which asserted the right for Aboriginal control over mining activity on their land, the Labor Government of Brian Burke caved in to the extent of allowing the Western Australian Chamber of Mines to draft the mining provision of his Government's Land Rights package, denying Aboriginal people this right to control mining activity on their land. In doing so, Burke hypocritically used states' rights as his excuse!

The Hawke Government was the next to buckle under the



Summer camp in Beswick Reserve, Northern Territory (Photo Diana Vinding)

pressure.

On October 18 last year, the Prime Minister announced that our right to control mining on any of our land given back to us had to go.

#### ALP Policy Ignored

His minister for Aboriginal Affairs, Mr. Clyde Holding, then obediently proceeded without proper consultation with Aboriginal people, to develop the Preferred National Land Rights Model.

It is clear that the Prime Minister and his Minister stand prepared to sell us and his party supporters down the drain to placate the opportunist premier of Western Australia and the influential pastoral and mining industry lobbies.

Last year's federal ALP conference unanimously endorsed a policy that "Aboriginal and Islander people shall have the right to refuse permission for mining on their land or to impose conditions under which mining may proceed".

It will also betray the five principles Mr. Holding set out at the UN at a Geneva meeting of the indigenous populations working group last year.

Here he said Australia's principles are:

1. Aboriginal Land to be held under inalienable freehold title.
2. Protection of Aboriginal sites
3. Aboriginal control in relation to mining on Aboriginal Land
4. Access to mining royalty equivalents: and

5. Compensation for lost land to be negotiated.

None of these principles have been honoured in the current Government Model for National Land Rights.

Mr. Holding has since followed up with a campaign to try and gain Aboriginal endorsement for his perverse position.

He has not got it, and will not get it.

#### Manipulation - Not Consultation.

But this has not prevented the Minister from attempting to manipulate representatives of Aboriginal organisations, the rank and file of the Labor Party and the Australian public.

The fact is that at no stage have Aboriginal people or their representatives had any chance to make any meaningful contribution to the development of the Government's Preferred National Land Rights Model.

The Minister's supposed consultations with the now defunct Land Rights Steering Committee demonstrates clearly the shallowness of his undertakings about consultation and negotiation.

In October of last year, the Minister agreed to fund a task force to be chosen by and to be responsible to, the Aboriginal members of the steering committee, to research and advise that group on the question of land rights.

The Minister did absolutely nothing about this undertaking and instead Aboriginal people were advised, on February 24 of this year, of the Government's Preferred National Land Rights Model. There had been no prior consultation with Aboriginal

people or organisations about this model before it was released.

Just as there had been no discussions, let alone consultations or negotiations, with Aboriginal people prior to October 18 last year when the Prime Minister quite unceremoniously turned ALP Policy on its head and reneged on his Government's obligations to Aboriginal people.

And yet the minister continues to talk about wanting negotiations and consultations.

But what does he mean by this?

Does he mean, as has been the case in the past, that he and his department will tell Aboriginal people what they will get and call that consultation?

If so, he can forget it.

We are not interested in being patronised and told what is good for us.

We the Aboriginal people, are the most able to decide what is good for us. But we must have adequate resources to enable us to undertake appropriate consultations among our people.

Aboriginal organisations, and their representatives, have made it clear that something as important as National Land Rights needs proper consultation with thousands of people throughout Australia that we represent.

We have consistently requested funds and time.

Aboriginal organisations represent people who speak many different Aboriginal languages, and who live in urban centres as well as the most remote part of Australia.

But every request we have made for assistance with translation, interpreter services, assistance with travel and other requirements have been met with consistent rejection.

If the Prime Minister, Mr. Holding and their caucus colleagues continue to ignore our call for an Aboriginal Forum on Land Rights, and the need to establish a proper relationship between Aboriginal Australians and all governments, they will be guilty of a deviousness which will rival the worst excesses of all previous conservative governments in this country.

#### The Damage the Draft Model Could Do.

The draft model in its present form would, if passed into law, not only betray policy and principle, but in practical terms:

1. Amend the Aboriginal Land Rights (Northern Territory) Act 1976 so that it is consistent with the Preferred National Position: and as a consequence remove the right, which Aborigines in the NT have, to refuse permission for mining and other developments upon their land or to impose conditions under which development takes place.
2. Where Aborigines refuse permission or impose conditions which are unacceptable to developers, it would impose a system of compulsory arbitration by tribunal: the emphasis in the tribunal being on the commercial interests of developers rather than the interests and wishes of Aboriginal land Owners.
3. Allow a government minister the power to override tribunal recommendation, so that the question of whether or not mining or any other development takes place and the terms on which it will take place become a political decision.
4. Withdraw the right of Aborigines in the Northern Territory to negotiate royalties as compensation:

5. Remove the statutory guarantee that Aboriginal Benefits Trust Account will be funded to the full amount of monies equal to royalties for mining on Aboriginal Land, and making the funding available to ABTA a local political prerogative:
6. Remove the right of Aboriginal people who own pastoral properties to convert the land to inalienable freehold title, through the normal land claim process:
7. Give State/Territory Governments power to deal with the question of community living areas by administrative arrangements without any overriding federal legislation: Thus allowing decisions over community living areas to become a political prerogative:
8. Undermine the ability of the Northern Territory Land Councils to act effectively on behalf of Aborigines in the Northern Territory, by creating regional Aboriginal organisations with no guarantee of adequate funding and by attacking the Land Councils' source of funding, the Aboriginal Benefits Trust Account.

#### The People the Model Ignores.

In addition the Hawke Government's Preferred National Land Rights Model fails to address the needs of Aboriginal people who live in urban communities.

People who have in the past been crowded out and had their land forcibly appropriated.

People whose traditional law has been subject to the worst excesses of the initial invasion and subsequent occupation of this continent by non-Aboriginal people.

The model also ignores completely the question of restitution for lands lost and for the cultural and social destruction that has been the trademark of the white invasion of this continent.

The views that I represent here were put at a recent

meeting of Aboriginal groups from throughout Australia.

The Pitjantjatjara Council representative at that meeting said that if the Preferred National Land Rights Model formed the basis of the Commonwealth legislation, then that legislation would provide the excuse for the South Australian Government to amend and weaken the Pitjantjatjara Land Rights Act to make it consistent with the Federal Government's Preferred Position.

And representatives from other states, including those with no land rights at all, rejected the Hawke Government's proposals.

The implications of the Draft Model and the extent of the casualty list shows just how Mr. Holding has capitulated not only to the mining industry lobby, but also to pressure from the Country Party and the pastoralists it represents.

Nowhere has this been more clearly demonstrated than in the outstation movement. ( See Chapter IV).

Aboriginal people living on their tribal lands in the small communities known as outstations find their very survival is threatened by the Draft Model.

In 1984 about 8,000 Aboriginal people were living on nearly 300 outstations in the NT. Many are in Canberra this week. These communities represent a rejection of policies which aimed to force the most remote and traditionally-minded Aborigines to forsake their culture and traditions. The movement to outstations represents Aboriginal determination to repair the damage done to their culture by unconsidered previous government policies.



School at Beswick Reserve, Northern Territory (Photo: Diana Vinding)

The Government's Preferred Model would return these people to the worst days of assimilationist policies of the well-fare era.

#### Pastoral Industry

Mr. Holding has also abdicated his responsibilities for people on pastoral property. In fact he has done nothing for them.

This abdication has led to the abysmal situation in the Northern Territory where Aboriginal people who require living areas on pastoral properties are now to remain subject to the beneficence of land lords and petty bureaucrats.

These land lords are nothing more than pastoral parasites who in the past have denied Aboriginal people fundamental and basic human rights, exploiting their labour, raping their women, and killing their children.

These Aboriginal people who live on pastoral properties have been the backbone, indeed, the life-blood of the cattle industry in Northern Australia.

Their land was taken from them and when they were of no further use as cheap, almost slave labour, they were forcibly removed from their own country.

Mr. Holding's Model affords these people no rights.

Instead, he has taken the course of throwing them to the whim and fancies of Country Party sponsored bureaucrats in the Northern Territory Administration.

And of course, it is not only the Territory that Aborigi-

nes on pastoral properties will be denied their rights under Mr. Holding's proposals.

In Western Australia sheep and cattle were regarded as having more rights by Mr. Burke than his Aboriginal Constituents.

The situation of these Aboriginal people will not be received by the Preferred Model.

The Government is, it appears, intent on perpetuating the colonial practices of the last two hundred years to satisfy the interest of pastoralists, who sustain the most marginal of economic activities in this country.

And it should not be forgotten that the vast majority of pastoral properties in Northern Australia are owned by absentee land lords.

Some of these land lords reside in overseas countries, for example, King Ranch which has its headquarters in Texas and is responsible for denying Aboriginal people at Lake Nash in the Northern Territory the most basic of their needs.

Other members of this proprietorial class include the Sultan of Brunei, and closer to home, media magnate, and a benefactor of some you present, Kerry Packer, who resides in Vaucluse in Sydney.

What right do these people have to alienate Aboriginal people from their land. Is it the right to a huge bank balance?

### Conclusion

In the face of all of these clearly demonstrable facts, how can we possibly deign to accept Mr. Holding's Preferred National Land Rights Model.

The Preferred Model, dressed up as it is, in the guise of granting something (namely National Land Rights) is designed only to destroy, to take away, and to diminish Aboriginal Rights in this country.

The Government adopts this stance in full knowledge that it has the final say over any mineral development on Aboriginal land, that only the Government has a veto.

Mr. Hawke and Mr. Holding know that under the existing Commonwealth legislation there are provisions for:

- \* a national interest override;
- \* arbitration procedures where negotiations with developers are deadlocked;
- \* administrative veto over any mining agreements.

The Government knows that it has control over national land rights.

### The Myth of the veto

Mr. Hawke and Mr. Holding have been deliberately misleading about the so called veto which we all know is a myth.

What we are saying is that the principles contained in the existing Northern Territory Land Rights Act are regarded by Aboriginal people from throughout Australia as a minimum basic standard.

And that much more has to be achieved before even that law satisfies our just requirements.

One thing that is regarded by Aboriginal people as non-negotiable, is, the right of Aboriginal people to withhold permission for mining and other development on those lands that are returned to them, and to impose conditions under which mining or development takes place.

This view has been endorsed time and time again by Government sponsored independent inquiries such as those by Messrs. Justice Woodward and Toohey and Mr. Paul Seaman QC.

Yet this Government is saying that it is not concerned by the findings of these inquiries, and that despite them and the feelings of Aboriginal people, the Hawke Government will not allow them the right to say no to mining or other development.

#### The Way Forward

This means the Government is proposing is to deny Aboriginal people real and effective land rights.

It is also a failure by the Hawke Government to recognise the Aboriginal peoples prior ownership of this continent.

The way forward is not to destroy rights, to deny rights but to build on them.

There are aspects of the land claim process in the Northern Territory for instance which currently put Aboriginal people through agonisingly personal processes where they are required to publicly bare their souls in a way which most people would find offensive and indeed an invasion of privacy.

Our relationship with our land is so dear to us that we tolerate and try to live with this process that is forced upon us. We want to improve this process, build on it, broaden it, and find a way to develop a stronger, proper relationship between Aboriginal people and non-Aboriginal Australia.

Our week in Canberra is just beginning. It marks the start of a campaign to try to redress an unequal struggle in the public forum.

We will make every attempt to balance recent media campaigns that are notable only for their disgraceful bias.

The anti-Aboriginal campaign has been such that it perverts claims to free press.

The next step cannot be to undermine the small gain won by Aboriginal people. It must be a move forward towards a treaty for instance, that finally acknowledges our prior ownership.

Unless there is an act of political courage by the present government of Prime Minister Bob Hawke, the 1988 Bicentennial could set us further than ever from National Reconciliation.

We call on Mr. Hawke and on Mr. Holding to answer our demand to be heard. To uphold their own party policy platform. To respond to the vital issue with justice and wisdom and not with crude expediency. We also call on the Prime Minister to use his leadership qualities and his public credibility to turn the tide against racist anti-Aboriginal propaganda.

We call on Mr. Hawke to display those same qualities he mustered to speak out against similar racist campaigns against

Asian Immigration and the same public leadership that led the electorate to overwhelmingly support his 1983 call for national reconciliation.

#### Six Basic Demands

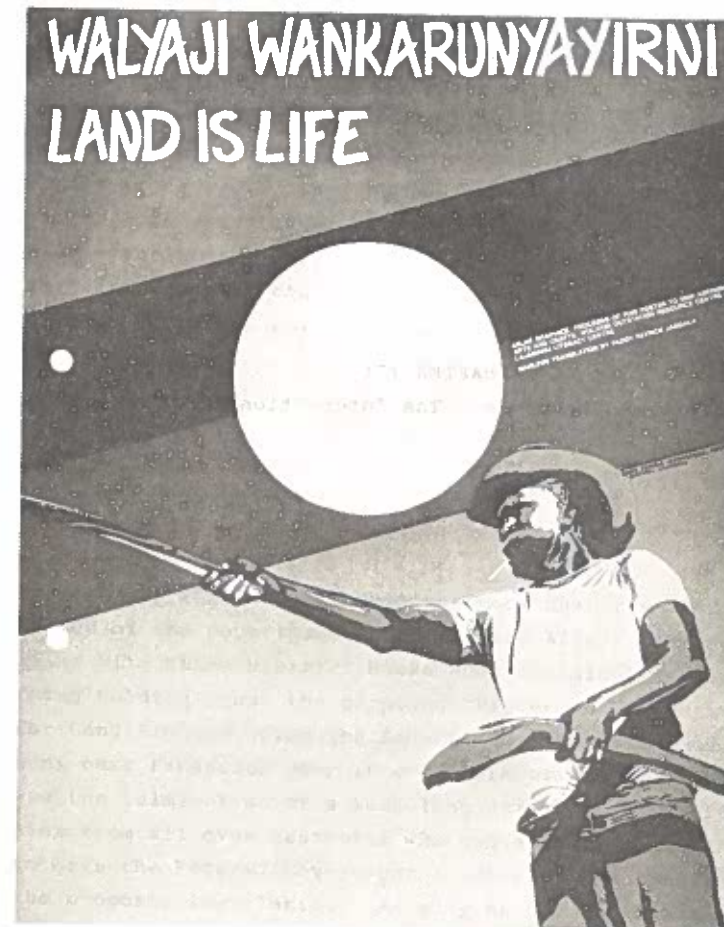
We would point out that the Prime Minister could start to do this by responding to our 6 basic demands.

1. Guarantee not to proceed to legislate for National Land Rights on the basis of the Preferred National Land Rights Model.
2. Provide funds and other resources to Aboriginal people in order that we may pursue the discussions among Aboriginal people about the question of National Land Rights including funding of, a National Land Rights Conference to be convened by Aboriginal people.
3. Not proceed with the proposals to amend the Aboriginal Land Rights (NT) Act 1976.
4. Provide a guarantee that Government will actively pursue meaningful negotiations with Aboriginal people over the question of Land Rights.
5. Guarantee that it will take immediate action to develop a means by which Aboriginal and Torres Strait Islander people can develop acceptable national principles for a proper legally recognised, relationship with the Government of Australia.
6. That the Federal Government honour the commitment by Minister Holding on October 4 1984, to establish a task force to work with and be responsible to Aboriginal people and to provide them with research and advice on the question of Land Rights Legislation.

Let me conclude with the words contained in the 1972 Policy Speech of a former Labor Prime Minister, Mr. Gough Whitlam. At that time he promised that a Labor Government would "Legislate to give Aboriginal people Land Rights, not just because their case is beyond argument, but because all of us Australians are diminished while the Aborigines are denied

their rightful place".

I am here today to speak on behalf of Aboriginal people and to say that we will continue to fight for our rightful place, and resist any government attempt to block us.



**SUPPORT LAND RIGHTS FOR ALL ABORIGINAL AUSTRALIANS**

The National Land Rights Campaign needs your donations.

Please send them to the Federation of Land Councils,  
P.O. Box 5620, Alice Springs NT 5750.

National Land Rights Poster

## CHAPTER III

## Protest and Response - The International Forum

## IWGIA - INFORMATION ACTION REPORT - AUSTRALIA 24/5/85

*In response to the events in Australia and the proposed Preferred model of the federal government, there was an international protest from several organisations. IWGIA's protest took place at the time of the general demonstration by Aborigines in Canberra. The response from the government is printed afterwards. The section in the reply which deals with the preferred model itself has been removed here because it is exactly the same as the central part of Charles Perkins' statement to the United Nations Working Group on Indigenous Populations which follows.*

On May 15th 4-500 Aborigines took over the 16th floor office of the Department of Aboriginal Affairs demanding talks with Prime Minister Hawke and Aboriginal Affairs Minister Holding about the proposed "Preferred National Model for Land Rights" which the Federal Government intend to present next financial year in some form or another. The protest was the culmination of a week-long action by Aboriginal peoples from all over Australia who had assembled in Canberra to give the Federal Government a sense of the opposition to the proposed legislation. As many as 600 Aborigines travelled from all parts of Australia to make their views felt.

The current protest concerns the new "Preferred Model", the consequent amending of the Northern Territories 1976 Act and the disbanding of the National Aboriginal Conference which was actively fighting against the introduction of the Bill. All Aboriginal organisations have been united in their condemnation of the way the Federal Government has handled the Land Rights issue. The "Preferred Model" is the total rejection of three of the five main principles the Minister has stated nationally and internationally would provide the basis for any Nationwide Land Rights legislation.

As a result of the protest the "Preferred Model" has been suspended. Aboriginal peoples have been asked to form state by state fora to formulate in a national forum in the summer a position on Land Rights. However, the Government have as yet not provided means for these fora to take place nor has it guaranteed that it will take any notice of what emerges from these consultations. The present state of affairs is more a delay of existing Government intentions rather than any commitment from the Government to take into consideration the desires and aspirations of the Aboriginal people.

The following pages contain an extract of a letter of protest IWGIA sent to the Australian Government which outlines the issues in more detail.

Last year there was a climate of hope regarding Aboriginal Affairs. The speech by the Minister of Aboriginal Affairs, Hon. Clyde Holding, in December 1983, had set out a path which could have been a landmark in Australia's history. The five principles on land rights which emerged from the speech were reiterated by the Minister at the Working Group for Indigenous Populations in Geneva in August 1984. These principles were:

- 1) Aboriginal land to be held under inalienable freehold title;
- 2) Aboriginal control in relation to mining on Aboriginal land;
- 3) Protection of Aboriginal sacred sites;
- 4) Access to mining royalty equivalents;
- 5) Compensation for lost land to be negotiated.

The first issue which greatly concerns us here in IWGIA has been the proposed code called the "Preferred National Land Rights Model" which was put forward in February and is to be presented in some form next financial year. The "Preferred Model", in one stroke, breaks the first three of these five principles and counters what the Minister himself has stated both nationally and internationally. IWGIA, after consultation with Aboriginal representatives from the full range of indigenous organisations in Australia has no other choice but to accept that the "Preferred Model" or anything similar which should replace it, would be disastrous to the future of Aboriginal land rights and cast a cloud over Australia's human rights stand as a whole.

The second issue is one of the effects of the "Preferred

Model" which is to amend the Northern Territories Act of 1976. Even though this land claim was by no means perfect, especially in the areas where traditional Aboriginal land is occupied by Europeans under pastoral leases, in national parks or in town, it was certainly a step forward in other areas. It allowed for existing Aboriginal reserves to be handed over and held under Aboriginal title and allowed some Crown land to be claimed. Gains in the Act on the issues of mining and land titles stand threatened under the "Preferred Model" or any similar successor.

The third issue of great concern to IWGIA has been the news of the disbanding of the National Aboriginal Conference which will take place at the earliest at the end of June. The NAC has been a member of the World Council of Indigenous Peoples (WCIP) and has been putting forward a strong case for Australian Aboriginal peoples both nationally and internationally in recent years. The claims by the Federal Government are that it failed to keep its accounts in order, it is over-bureaucratized and that it is unrepresentative. There are several points of concern here. The accounts which were checked stretch back almost two financial years and it is surprising that irregularities, if they do exist, should be revealed at the very time when the NAC has been most vocal against the Federal Government. Secondly the structure of the NAC was itself financially supported and made use of by the Federal Government, yet this very structure, which many Aborigines felt was imposed by the Government for its own convenience, was one of the reasons for its disbanding. Thirdly there remains the most important issue which is the right of any Government to unilaterally disband an indigenous organisation or interfere in its internal affairs, particularly when that organisation is part of an attack on a grossly unjust piece of legislation.

The conclusion which IWGIA has been forced to form from

these three issues is that the Federal Government of Australia is not only backing away from its progressive past intentions, but is actually undermining those very principles which had given the indigenous world some hope. In addition, at a time when Aboriginal organisations have become united in condemnation of the proposed code for land rights, the Federal Government has disbanded a major voice of protest. The effect is to stifle Aboriginal opposition and confound its unity at a most opportune moment for the Government.

We are aware that on May 21st an agreement was made between Aboriginal leaders and Prime Minister Bob Hawke that the "Preferred Model" will be suspended for the time being while the Aboriginal organisations conduct State by State fora on the issue of land rights which could be put forward to a national forum later in the summer. This will be a welcome opportunity for the Aboriginal people to make their case provided they are given the means to do so. In addition, it is hoped that these fora will provide the starting point for genuine negotiations to take place including Aborigines fully at all stages. As yet we are not aware that the Federal Government has made any such guarantee to take note of the indigenous perspective or to take into consideration the views and aspirations of the Aboriginal peoples of Australia. This perspective clearly includes issues such as Sovereignty and compensation for land claims as well as buying back land for the traditional owners.

We very much hope for a time when the Federal Government of Australia will match its clear and upright stance on the human rights of Black peoples in South Africa and the indigenous peoples of Kanaky (New Caledonia) with a similar regard for the just claims of those indigenous peoples living in its own country. We also hope fervently that any future land rights proposals by the Government will live up to the

standards set out in the five principles and also that freedom of expression and organisation will be recognised for the Aboriginal Peoples within the Australian Commonwealth.

The following telegame was sent: "Aboriginal Land Rights National Support Group: International Work Group for Indigenous Affairs (IWGIA) strongly supports justified a-  
boriginal protest of Australian Federal Government actions STOP disbanding of National Aboriginal Conference designed to stifle and confound indigenous protest at outrageous proposed legal code to force unjust model for land settlements on aboriginal peoples including amending the NT Act 1976 STOP IWGIA sends aboriginal people greetings of solidarity at this difficult time STOP Please inform your constituent organisations and send them our greetings STOP



May, 1985. Aboriginal People in National Protest, Canberra (Photo I. Graham)

AUSTRALIAN GOVERNMENT RESPONSE

The Australian Government's Preferred National Land Rights Model was drawn up taking into account the outcome of consultations with Aboriginal people and other interested groups. Discussions with these groups are continuing.

The proposals are consistent with and would give effect to four of the five principles on land rights to which IWGIA refers. They have been outlined by the Minister for Aboriginal Affairs (see following paper).

On the question of land rights already enjoyed by Aborigines in the Northern Territory, we would wish to emphasise that it is not the Government's intention to amend the Northern Territory Act in any way which would seriously diminish Aboriginal rights to claim land or to control land granted. You may be aware that the Government has before it the recommendations of Mr. Justice Toohey, in his report "Seven Years On", for amending the Aboriginal Land Rights (Northern Territory Act 1976 to overcome problems which have been encountered in its operation. These recommendations and the overall scheme of the Act will need to be considered against the proposals for national legislation which are eventually adopted by the Government, to ensure that the Northern Territory Act is compatible with the national approach.

As you note in your letter, the question of land rights is still being discussed with Aboriginal organisations. There has never been any intention of stifling Aboriginal opposition to the preferred model, or of confounding Aboriginal unity, as you suggest.

The National Aboriginal Conference (NAC) was not uni-

laterally disbanded. The decision was only made after consultation with the Aboriginal community. The Government remains committed to Aboriginal Australians having a national independent representative structure capable of advising the Government and putting forward a national perspective on Aboriginal issues.

The NAC was set up in 1977 to do just that. In the view of most Aboriginal Australians, however, it has failed effectively to carry out these tasks. Accordingly, as you are aware, the Minister for Aboriginal Affairs announced on 2 April 1985 that he did not intend to extend beyond 30 June the term of office of present members of the NAC. This decision was taken on the basis of a report on the NAC commissioned by the Government and prepared by Dr H.C. Coombs.

Dr. Coombs found almost unanimous agreement among Aborigines that the NAC in its present form was ineffective as an instrument of Aboriginal political influence or action. He concluded that any organisation designed to give Aborigines an effective voice on Government policy must be more firmly based on, derive its Aboriginal authority from, and be accountable to local Aboriginal groups and communities and their organisations. He recommended further discussion with Aboriginal communities and organisations and negotiation between them and the Government on a replacement organisation.

Since the report there have been a number of steps taken by the Government towards devising and setting up a more representative body. These have included:

- Requesting a joint NAC/Department of Aboriginal Affairs Task Force to consider options for a replacement organisation. The Task Force Report has already been the subject of discussion by Aboriginal communities.
- Seeking independent advice from an eminent Aboriginal

Australian, Miss Lois O'Donoghue. On the basis of consultations with national Aboriginal organisations and communities, Miss O'Donoghue has outlined in her report to the Minister for Aboriginal Affairs how a new national consultative organisation might be structured and developed. She has also advised that the consensus of opinion among Aboriginal leaders was in favour of a further period of consultation to ensure in particular that the new organisation is one with which Aboriginals would identify.

The Government is considering the various proposals before it and broadly-based consultants are continuing.

CHARLES PERKINS "THE AUSTRALIAN GOVERNMENT HAS DONE MUCH TO RECOGNISE AND MEET THE NEEDS OF ITS ABORIGINAL CITIZENS"

Statement to the Working Group on Indigenous Populations on August 2nd, 1985 in Geneva.

*Charles Perkins is the first Aboriginal to head the Department of Aboriginal Affairs. In Geneva he led a delegation of mainly Aboriginal people to represent the Federal government. The statement covers the main points of the Preferred Model and addresses itself to the main criticisms it has received.*

Australia and Aboriginal Land Rights

"Madam Chair, distinguished members of the Working Group, ladies and gentlemen, I welcome this opportunity to address the Working Group on behalf of the Australian Government.

The Australian Government has made many advances in relation to Aboriginal affairs and is open and forthright in dealing with issues arising in the Aboriginal affairs.

The present Australian Government, and previous Governments recognise that Aboriginals and Torres Strait Islanders



Charles Perkins

are generally worse off than other Australians in such fields as health, education, employment and housing.

It is because of this disparity that, since the late 1960s, successive Australian Governments have allocated extensive funds for Aboriginal advancement.

Over the past three years alone, the Australian Government has spent over \$1,000 Million on special programs for Aborigines - an annual average expenditure of over \$2000 for each Aboriginal in Australia.

These allocations are in addition to normal benefits available to all Australians, including Aborigines, such as social security payments and unemployment benefits.

Despite this expenditure, and the introduction of self management programs resulting in the establishment of approximately 1000 funded Aboriginal organisations, much is still to be done.

It cannot be denied that much has been achieved - to deny progress is to deny the competence of the Aboriginal men and women actively involved in the formulation and implementation of advancement programs.

Before I talk to those concerns it would be beneficial if I set down a few points in relation to a preferred land rights model issued on 20 February 1985 by the Minister for Aboriginal Affairs, the Honourable Clyde Holding M.P.

The Model:

- was issued after extensive consultation with Aborigines, church groups, state governments and industry re-

representatives;

- is not and has never been presented as a final position or as a basis for final legislation;
- was drawn up based on Government Land Rights Policies and attempted to achieve an equitable balance of competing interests in Australia;
- was distributed widely in Australia and public response was sought so that the Government could assess views;
- was produced to stimulate discussion and further comment, and all Aboriginal organisations have had the opportunity to present their views.

Some concerns have been expressed and these include the view that:

- (a) the Australian Government's approach to land rights is inconsistent with previous undertakings;
- (b) the Australian Government does not recognise Aboriginal sovereignty;
- (c) the Australian Government proposes amendments to an existing piece of legislation applying in the Northern Territory.

On the first area of concern- that the model is inconsistent with previous undertakings - I can respond as follows:

The Australian Government, since coming to office, has sought to achieve a consistent national approach to land rights throughout Australian States and Territories. The

desired approach has been based on five principles:

- Inalienable Freehold Title;
- Protection of Aboriginal sites;
- Aboriginal control in relation to mining on Aboriginal land;
- Access to mining royalty equivalents; and
- Compensation for lost land.

In response to requests from Aboriginal leaders priority was given to the development and passage of legislation to protect Aboriginal sites and objects. This addressed the second principle.

The Aboriginal and Torres Strait Islander heritage (Interim Protection) Act has now been law since mid-1984 and has been instrumental in resolving issues relating to potential damage to sites or the sale of significant Aboriginal objects.

The Government then turned its attention to the development of an overall package culminating in the issue of the Land Rights discussion paper.

The contents of the paper issued by the Minister addressed four of the principles.

The question of compensation for lost land, the fifth principle, is to be considered once the extent of the application of the first four principles is known.

In very broad terms, the model proposes:

- a form of title to land (inalienable freehold title)

which recognises the very special attachment which Aboriginal and Islander people have to the land;

- all Aboriginal and Islander reserves and missions being granted to Aboriginal and Islander owners;
- all vacant crown land which is unused and unallocated would be available for claim;
- that land claims could be made on the basis of traditional entitlement, historical association, long term occupation or use and for certain other specified purposes;
- that all legitimate prior interests in land the subject of a grant would be protected;
- that there would be special provisions for the granting of excisions from pastoral properties for community living areas, urgently needed by many Aboriginal people in the Northern Territory and Western Australia;
- that Aboriginal land holders would have substantial rights over mineral exploration and development on their land;
- they could argue before a special independent tribunal against mineral exploration activity proceeding, or for particular terms and conditions to apply to exploration and mining on their land;
- that Aboriginals would be entitled to compensation for damage or disturbance to their land;
- that there would be access to payments in the nature of mining royalty equivalents, with Government determining the proportion to be paid and its distribution;
- that while primary responsibility for the protection of sites of special significance would rest with



Bush tucker expedition in Northern Territory (Photo: Diana Vinding)

the State Governments, a separate independent federal authority is envisaged which, in the first instance, would operate only where States lack laws protecting sites or fail to grant appropriate protection under those laws;

- that the protection of sites declared to be sacred and significant would not be open to negotiation for mining or other purposes.

The contents of the paper attracted widespread and generally critical comment.

Mining industry and certain other interest groups criticised it on the basis of making too many concessions to Aboriginal interests as well as on many other grounds.

Many Aboriginal and church groups responded by saying it failed to meet Aboriginal expectations and aspirations, especially in regard to control over mining on Aboriginal land, and that it was not consistent with Government policy.

The Government believes that the proposals, which provide a reasonable balance of interests, are consistent with Government policy and represent a genuine effort to achieve meaningful and durable Land Rights justice for Aboriginal Australians.

Let us now consider the principles the Government established for Land Rights justice and compare those principles to the model.

The Government's first principle stated that Aboriginal land is to be held under inalienable freehold title.

The Government has maintained the philosophy that, as a general rule, all lands vested in Aboriginal bodies should be

under inalienable freehold title.

However the Government is prepared to recognise that, in limited exceptional circumstances, other forms of title might be appropriate - but these circumstances are not seen to extend to land which might be regarded as traditionally claimable lands, such as reserves and missions, and land granted as a consequence of successful land claims.

In recognition of the need to move quickly the Government has already taken steps to protect sites through the passage of the Aboriginal and Torres, Strait Islander Heritage (Interim Protection) Act 1984.

The proposals announced on 20 February 1985 envisage that mechanisms would be available in each State and Territory for the identification and declaration of sites of significance to Aboriginal people.

The Federal Government would expect that State and Territory Governments have their own legislation in place, but in any case the proposals provide for the establishment of an independent Federal authority to conduct hearings where State legislation does not provide adequate protection.

With the proposed legislation, protection of sites declared as being of special and sacred significance to Aborigines will be of paramount importance and there will be no question of allowing mining and exploration activity that would disturb these sites.

Aboriginals will be able to exercise substantial rights over exploration and mining on their land and they will be given the opportunity to seek negotiated settlements or to raise objections and argue their case before a tribunal if

they do not wish an activity to proceed.

In the event of a dispute, the tribunal will make recommendations to the Federal Government on whether exploration should take place and if so, on what terms and conditions.

The tribunal will take into account such matters as:

- wishes and objections of Aboriginal landholders;
- proposals to minimise any disruption;
- size, location, and type of activity;
- appropriate compensation arrangements; and
- nature, extent and benefit which might flow to the economy as a whole.

Similarly, in regard to mining, if agreement could not be reached between the parties, the tribunal would recommend on terms and conditions.

The Government's view is that the veto mechanism is not the only way to achieve effective, fair and efficient Land Rights protection.

The Government believes that ultimate power in this matter must rest with Governments.

The principle of Aborigines having control over mining and exploration on Aboriginal land is still inherent in Federal policy and is indicative of the Government's recognition of the special relationship between Aborigines and their land.

These controls will be exercised through the application of conditions to mining and exploration, appropriate compensat-

ion arrangements, and protection of sites.

The Government has made clear its continued view that Aborigines should have access to payments in the nature of mining royalty equivalents.

These would be payments by the Government which would represent a proportion of the royalties received by Governments in respect of mining on Aboriginal land.

The relevant Government would determine the distribution and proportion to be paid.

In the Northern Territory alone, some seventeen million dollars per annum is paid to and then managed by Aboriginal organisations.

On the question of Aboriginal sovereign ownership of Australia, Australian law has ruled that there are no such rights.

This position is reflected in the Minister's speech to the Australian Parliament, "Aboriginal past: Australia's Future" on 8 December 1983, in which he made the point that sovereignty was not negotiable.

While the concept of Aboriginal sovereignty over Australia is not supported, the Federal Government's policies are firmly based on the acknowledgement of the facts of Aboriginal prior possession of Australia and of their dispossession.

It is within this background, and with a firm commitment to achieving Land Rights justice, that the Government has developed its preferred model for national Aboriginal Land Rights.

Overall it can be clearly seen that the Australian Govern-

ment has done much to recognise and meet the needs of its Aboriginal citizens.

While Land Rights are vital for Aborigines the Government's programs and policies in the whole area of Aboriginal affairs are many faceted.

Within the Federal constitutional structure of Australia, it is a difficult and complex process that must be gone through to achieve Land Rights justice.

The Federal Government has made it clear on numerous occasions that it would prefer individual State Government within Australia to provide Land Rights to their Aboriginal citizens, with Federal Government intervention only if and when appropriate.

The Government has also stated on numerous occasions that for Land Rights legislation to be durable, it must be accepted by the majority of Australians.

It is also timely to consider two other matters.

First, the performance by the Australian States and the Northern Territory themselves and secondly, responses to the Government's discussion paper on Land Rights.

When the present Government came to office in 1983, Land Rights were only in place for Aborigines in the Northern Territory and in the Pitjantjatjara lands of South Australia. The Government felt that Aborigines in all parts of Australia should enjoy the same rights and protections.

Since coming to office the Federal Government has also encouraged the introduction of Land Rights legislation by the

State Governments.

It is clear that the continuing development and introduction of Land Rights packages by the individual States will have a significant impact upon any overall national approach.

The developments in the individual States have also led to a variety of responses from Aborigines to any potential application of national law.

Within this background of differing State and Territory approaches, and with the diverse views of Aboriginal and non-Aboriginal people, the Government has clear underlying aims for Land Rights.

The Australian Government recognises that while there may not be consensus over Land Rights it has a responsibility to ensure the provision of legislative rights for Aboriginal and Islander people, throughout the nation.

FEDERATION OF LAND COUNCILS: "AUSTRALIAN GOVERNMENT IS MERELY PERPETUATING PAST COLONIAL PRACTICES".

Submission by the National Federation of Land Councils to the Working Group on Indigenous Populations, Geneva, August, 1985.

*The delegation from the National Federation of Land Councils raised support for going to Geneva to make their presentation to the Working Group. The four representatives were Pat Dodson, Peter Yu, Bob Weatherall and Geoffrey Clark. Their statement was also submitted through Survival International.*

#### Introduction

This submission from the National Federation of Land Councils to the Working Group on Indigenous Populations of the Subcommittee on the Prevention of Discrimination and Protection of Minorities of the United Nations Commission on Human Rights is being made in order to bring to the attention of the Working Group, the Commission and to the United Nations in general, the concerns of Australia's Aboriginal and Islander population about the Australian Government's policies on Aboriginal affairs.

Recognising the agenda agreed to at the meeting of the Working Group held in Geneva in August 1983, the Federation is aware that the Working Group has a special interest in the matter of land rights for indigenous peoples and ways of recognising such rights both internationally and domestic-



Federation of Land Councils Delegation in Geneva 1985 (Bob Weatherall, Pat Dodson and Peter Yu - left to right - (Photo Teresa Aparicio)

ally.

This submission therefore focuses its attention on some problems of the Australian Government's current position and intention to undermine recognition of Aboriginal land rights and the subsequent implications for indigenous peoples living in the seven different Australian States and Territories, where in some cases basic rights are neither recognised nor guaranteed.

Australia was first invaded by the British in 1788. The colonisation and oppression of Aboriginal and Islander people in Australia has been continuous since that date.

A British colonial administration, controlled from London imposed its rule over the continent until 1901 when Australia was given its own constitution and became a Federation. This Federation now comprises six States and two Territories, which come within the general control of a Federal Government based in Canberra.

The powers of this Government are specified within the Constitution.

In 1967 the Constitution was amended to give power to the Federal Government to make laws for Aboriginal and Islander people throughout Australia.

It was not until 1976, that the Federal Government legislated to address the question of Land Rights for Aboriginal and Islander Australians. This legislation, the Aboriginal Land rights (Northern Territory) Act 1976, restricted to Aborigines who live within the Northern Territory (N.T.).

This legislation which provides Aboriginal people in the N.T. with some basic rights including a limited power,

subject to the will of the Government, to control access to and developments on their land, remains the only piece of Federal legislation dealing with the Land Rights of Aboriginal and Islander people.

The majority of our people in Australia have few if any basic rights to their land, which is of fundamental and primary importance to the maintenance of our culture and heritage which has been in existence for in excess of 40,000 years.

In making this submission the Federation is conscious of the fact that the Australian Government's Minister for Aboriginal Affairs, the Honourable Clyde Holding MP, addressed the Working Group in Geneva, on July 30, 1984. In this address the Minister dealt at length with the Australian Government's policy on Land Rights for Aboriginal and Islander people.

Australian Aboriginal and Islander people regard the following principles as fundamental to the resolution of the Land Rights question in Australia:

recognition of Aboriginal sovereign rights and prior ownership of Australia;

the right to claim all unalienated land, including public purpose lands;

the right to control access to Aboriginal land;

the right to refuse permission for mining and other developments on Aboriginal land;

the right to negotiate terms and conditions under which developments take place;

the right to compensation for lands lost and for social and cultural disruption;

the right to convert Aboriginal properties to inalienable freehold title;

the right to excisions on pastoral leases.

Recognition of these rights is regarded by Aboriginal and Islander people as intrinsic to resolving the question of our self-determination.

Australia remains the only former British colony that has not negotiated any proper settlement with the indigenous population. The indigenous people of other countries, subjected to British invasion and colonisation, shared our fate of being subject to acts of genocide, dispossession, alienation from land and culture, and marginalisation into a minority group, but unlike them, we are yet to achieve proper recognition as the original owners of our continent. No Australian administration during the colonial period prior to Federation in 1901, or since, has sought to formally recognise and come to terms with the rights of Aboriginal and Islander people through a treaty or other recognised constitutional or judicial means.

In the past 196 years Aboriginal and Islander people in Australia have never ceded their sovereign rights.

Aboriginal and Islander people continue to demand the Australian Government give recognition to these rights when framing its Land Rights Legislation.

Our Land has been, and continues to be appropriated from us, without our consent or agreement and without any compensation being paid to us.

Our people live in the most oppressed conditions, similar to those of many third world communities where among other things:

morbidity rates are excessive, gastro-intestinal and

respiratory diseases and trachome are highly endemic and diabetes and hyper tension are increasing at any alarming rate;

infant mortality rates are four times the Australian average; adult mortality rates are also alarming; life expectancy is low at about 50 years.

housing is inadequate and many people are without the basic essential services of water and power;

education services provided to our people are inadequate with only an extremely small minority completing formal education;

unemployment rates are excessive in some places higher than 75%;

Aboriginal people are proportionately dramatically over represented in Australia's gaols; in 1981 Aborigines had the world's highest recorded imprisonment rate.

#### Australian Government's Obligations

On February 20, 1985 the Australian Government released a paper which outlined its proposals for National Land Rights legislation. This paper was called the Government's Preferred National Land Rights Model (PNLRM).

Aboriginal people from throughout Australia, have expressed unanimous opposition to these proposals which are in direct conflict with:

the national and international obligations of the Australian Government to recognise Aboriginal Sovereign rights;

the platform on which the Australian Government was given its mandate in 1983 and 1984;

the undertakings given by Minister Clyde Holding in his address to the Working Group in 1984;

previous undertakings given by the Australian Government to Aboriginal people in Australia.

The public undertakings made by the Australian Government during the 1984 general election included the undertaking that the following key principle would be incorporated by the Government in any Land Rights Legislation:

"Aboriginal and Islander people should have the right to refuse permission for mining on their land or to impose conditions under which mining may proceed. To set aside a refusal, or conditions imposed shall require an Act of Parliament."

Aboriginal people regard this as an important recognition of the basic right of Aboriginal people to have control over access to and what takes place on their land.

It was also regarded as an unequivocal commitment by the present Australian Government. It was an understanding which was endorsed publicly before an international forum when Mr. Holding told the Working Group on Indigenous Populations on July 30, 1984 that:

"Acknowledging the disadvantaged position of Aboriginal people as a group in Australian society and respecting the spiritual affinity Aboriginal people have with the land, the Australian Government recognises their rights to land in accordance with five basic principles. Those principles are:

- (1) Aboriginal land to be held under inalienable freehold title;



Northern Territory Aboriginal woman (Photo Diana Vinding)

- (2) Protection of Aboriginal sites;
- (3) Aboriginal control in relation to mining on Aboriginal land;
- (4) Access to mining royalty equivalents;
- (5) Compensation for lost land to be negotiated."

The Government's P.N.L.R.M. is a dramatic departure from this, and dishonours the undertakings made to us, the Australian people in general and to the international community.

#### The Present Position

Some existing Federal and State legislation in Australia goes towards meeting the requirements of principled restitution. But these legal rights vary in different states and Territories.

The Australian Government's previous commitment was to ensure a consistent national approach to Land Rights for Aboriginal people in terms of the five principles, Mr. Holding outlined to the Working Group.

Recent events have shattered the Aboriginal and Islander people's belief that the Australian Government was sincere in its intention to pursue a meaningful reconciliation between Aborigines and Islanders and those who sought to conquer them.

Aboriginal and Islander people will not be satisfied with less than already established basic principles, minimal as they are. We are putting our case before you to help prevent the retrograde step of indigenous rights being taken away or diminished. It is especially urgent as so much more needs to be achieved, than to go backwards at this stage, is unthinkable.

The Aboriginal and Islander people of Australia are appalled

at the prospect of a new national Land Rights Law which would deny existing and future rights. It would mean the Australian Government is actively ignoring its obligations to the international community.

#### The Preferred National Land Rights Model

The Government's PNLRM is completely unsatisfactory to Aboriginal and Islander Australians because:

It fails to recognise prior Aboriginal ownership and sovereignty over Australia before the invasion of the continent by non-Aborigines;

it seeks to amend the existing Australian Government legislation dealing with Land Rights, the Aboriginal Land Rights (Northern Territory) Act 1976, so that it is consistent with the PNLRM; this means removing the right, which Aborigines in the Northern Territory (N.T.) have to refuse permission for mining and other developments on their land, or to impose conditions under which developments take place, as well as their general ability to control access to these lands;

where Aborigines refuse permission or impose conditions which are unacceptable to developers it seeks to impose a system of compulsory arbitration by tribunal; the emphasis in the tribunal being on the commercial interests of developers rather than the interests and wishes of Aboriginal landowners;

it provides a Government Minister the power to override tribunal recommendations, so that the question of whether or not mining or other developments take place and the terms under which they have take place become a political prerogative;

it removes the right of Aborigines in the N.T., and denies the right of Aborigines elsewhere in Australia, to negotiate royalties as compensation for developments on their land;

it denies the right of Aboriginal Australians to compensation for lands lost and for the destruction of their society and culture;

it allows the decisions over Aboriginal community living areas (excisions) on pastoral leases to become a political prerogative, by giving State/Territory Government's in Australia power to deal with this question by Administrative arrangement without any overriding Federal legislation;

it makes no provision for the needs of these Aboriginal people who have been dispossessed and alienated from their traditional lands and now live in urban communities.

The draft model foreshadows changes to existing Land Rights law. The changes if implemented will diminish and take away rights that Aboriginal and Islander people have fought hard to obtain, rather than improve upon these meagre gains of the past.

The proposed changes will accommodate the vested interests of powerful mining consortiums and the pastoral industry who over the last twelve months have waged a concerted racist attack against the rights of Aboriginal and Islander people.

State Governments in Australia have co-operated with these vested interests, who have waged a million dollar media campaign, in their attempts to dispossess Aboriginal and Islander people of the small areas of land over which they have achieved

some semblance of control.

Many of the companies involved are international corporations among them some who have been at the forefront of the dispossession of indigenous peoples elsewhere in the world. there are also those who as hosts to similar development proposals in their home countries would regard them as unconscionable.

Yet when dealing with Aboriginal and Islander people in Australia these same companies refuse to recognise, and use every means to deny us, our basic rights.

In the face of this onslaught upon the fundamental human rights of Aboriginal and Islander people the Australian Government should be taking action, for which it has been given a constitutional responsibility, to safeguard and protect these fundamental rights.

Instead, concerned with increasing non-Aboriginal opposition to Land Rights, and aware of the implications of this opposition for their own mandate it has found it easier to put forward proposals which will assist developers in their pursuit of the wealth from Aboriginal land rather than to safeguard the rights of Aboriginal and Islander people and live up to their moral and legal obligations to us.

The Government's PNLRM seeks to further qualify the right and ability of Aboriginal people to safeguard their basic sovereign rights. It is seeking to diminish further the rights of Aboriginal people that are enshrined in the existing Federal Legislation, where the ability to Aboriginal people to control what takes place on their land is limited by the political and administrative discretion of the Government of the day.

The Government's intention to change the Northern Territory Land Rights Act in this way has met with universal opposition from Aboriginal people throughout Australia.

#### Conclusion

Australian Aboriginal and Islander people regard the Australian Government's proposals for Land Rights as an abrogation of its responsibilities and obligations to them. The Government appears intent on removing what limited rights are available to a minority of Aborigines in Australia, in the N.T., on the basis that it is not prepared to provide these limited rights to all Aboriginal and Islander Australians.

Instead of using the existing rights as a basis on which to build and to legislate to provide Aboriginal and Islander people throughout Australia with justice and equity the Australian Government has given in to mining companies, pastoralists and other vested interests.

The Australian Government's PNLRM if it were to form a basis of any Land Rights legislation would result in the further alienation and exploitation of Aboriginal and Islander people and lead inevitably to the destruction of our society and culture.

The Australian Government promotes itself as a champion of the rights of oppressed peoples elsewhere in the world.

The Government's supportive attitude to our oppressed brothers and sister in Azania and the comments on colonialism within the Pacific region are but two examples.

It is essential that if Aboriginal and Islander people are to achieve justice and equity that the Australian Govern-

ment accepts its primary responsibility to ensure that the principles that Aboriginal and Islander people believe are fundamental to adequate Land Rights are enshrined in legislation.

To do less this will condemn Aboriginal and Islander people to further exploitation and oppression.

We believe it is not acceptable for the Australian Government to argue that to give in to Aboriginal and Islander demands will thwart economic development and Australia's long term economic and trade prospects.

It is of crucial importance that the Australian Government recognise its responsibility towards Aboriginal and Islander people and act accordingly.

We believe that it is very important that the world community be made aware of the essential contradiction that exists between the public posturing that the Australian Government demonstrates at an international level and its lack of integrity when dealing with the concerns of the Aboriginal and Islander people of Australia.

In this way the Australian Government is merely perpetuating past colonial practices the aims of which have been to deny to Aboriginal and Islander people of most fundamental and basic rights, and to alienate and appropriate their land.

We have minimal political influence with an Australian Government prepared to divest itself of moral leadership and adopt a pragmatism which allows policy to be determined by media campaigns sponsored by vested interests and subsequent opinion polls.

We urge the Working Group on Indigenous Populations, the

United Nations Human Rights Commission and all nations represented at the United Nations to support the legitimate demands of Aboriginal Australians for justice and equity.

We urge you to express this demand to the Australian Government.



Kakadu Park (Photo Diana Vinding)

CHAPTER IV  
Pastoral and Mining Interests

The three articles in this chapter look at the two most powerful lobbies influencing the federal government against Aboriginal land rights. The pastoralists and the mining companies. The first article which was published in Australian Society in June 1985 introduces these two powerful sets of interests and shows how they relate to the formation of the Preferred Model of Land Rights Legislation in relation to the government's earlier statements (see Chapter 1).

The second article moves away from the Preferred Model in order to give an example of how pastoral interests have much sway in the Northern Territory. The article discusses the weak points of the Northern Territory Act particularly in relation to enabling Aboriginal communities gain rights to their traditional lands which are held by cattle raisers. The excision of land which they demand would enable Aboriginal communities to hold self-supporting areas and also enable them to enjoy benefits they are not eligible for now. The Cattlemen's Association has worked to weaken any benefits which might have accrued from the Community Living Areas Bill which was proposed by the government.

The third article is written by the Director of Legal Services of the Central Land Council. It was a paper originally presented to the Australian Mining and Petroleum Law Association (AMPLA) conference in June 1985. Among other things, Bruce Donald points out the enormous effort which the mining companies have put into advertising and putting out propaganda against Aboriginal land rights. The major part of the paper sets out conditions whereby mining companies and Aborigines and meet and negotiate as equal partners in the future.

#### LAND RIGHTS. WHY HAWKE'S MODEL HAS NO BACKING.

By: John Altman and Michael Dillon

In February, the federal government released for discussion its preferred national land rights model to be introduced into Parliament in the Budget session this year. Although preferred by the federal government, it appears to be opposed by everyone else: the mining industry, the Burke Labor Government in Western Australia, the opposition parties both nationally and in the states, and not least by the Aboriginal interests it purports to benefit.

National Aboriginal land rights have been a Labor Party concern since 1972 when the Whitlam government came to power with a policy commitment to Aboriginal land rights. The Woodward Aboriginal land rights commission of 1973 and 1974 prepared a blueprint for vesting Aboriginal land rights in the then federally administered Northern Territory, but there was no doubt that the model was intended for wider application.

The Whitlam government lost office before its Aboriginal Land (Northern Territory) Bill, 1975 was passed, but the extent of bipartisan support for the legislation resulted in the Fraser government introducing and passing the Aboriginal Land Rights (Northern Territory) Act, 1976. This Act incorporated the vital recommendations of the Woodward inquiry - Aboriginal land trusts were vested with inalienable freehold title to all former Aboriginal reserves; unalienated crown land could be claimed (though only by traditional owners, and not on the basis of need); Aborigines were given a limited right to veto mineral exploration on Aboriginal land except when mining titles pre-dated the Act (called "prior interests") or if the national interest required that mining proceed.

The Act also provided for the transfer to Aborigines of

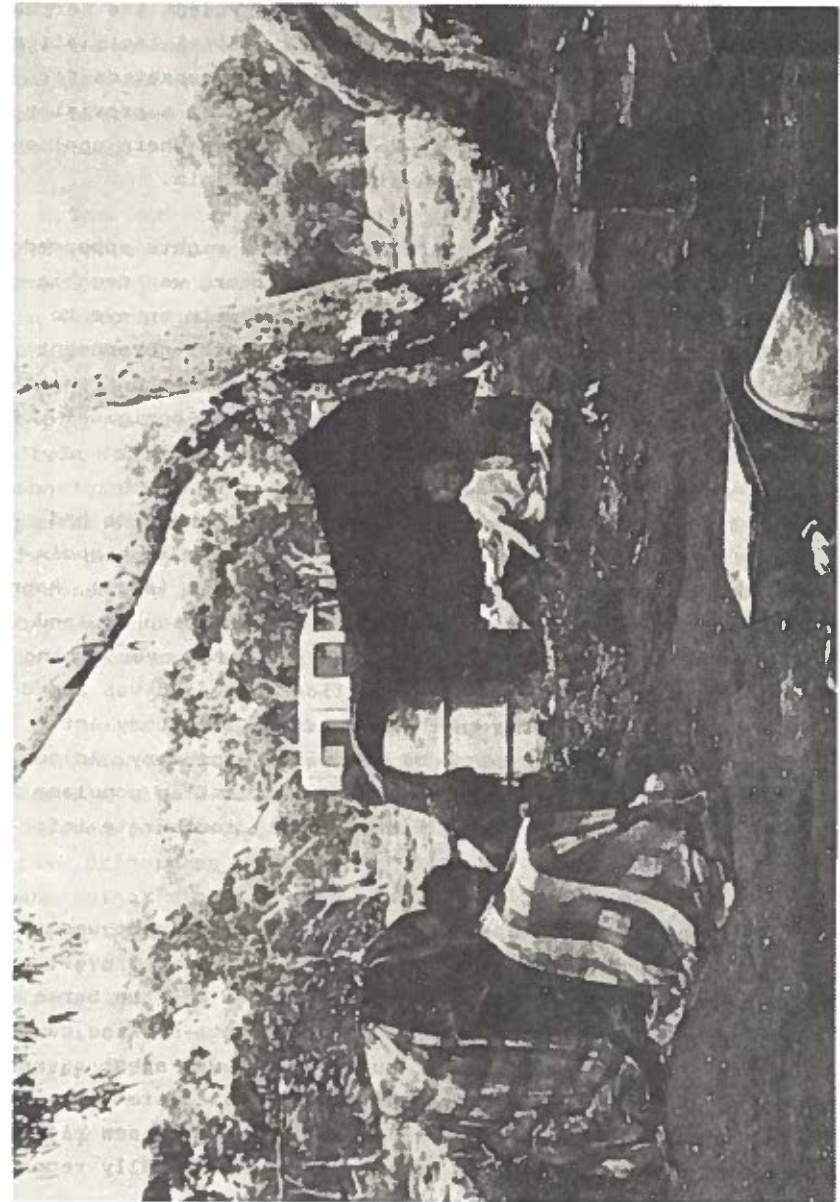
all statutory royalties levied on Aboriginal land (called "royalty equivalents"), a provision that in any case had been a statutory right since 1952. Traditional owners were also granted the right to negotiate commercial terms and conditions as part of any consent agreement.

The Fraser coalition government made no attempt to extend the Northern Territory Act to the states, nor to encourage the states to legislate comprehensively themselves. Nevertheless, the Tonkin Liberal government in South Australia passed the Pitjantjatjara Land Rights Act in 1981, which was limited geographically to the north-west portion of the state. The emergence of Labor governments across Australia saw the enactment of the New South Wales Land Rights Act in 1983, and the South Australian Maralinga Land Rights Act in 1984.

The Hawke government made a commitment to uniform land rights legislation when elected to office in 1983. After all the Franklin Dam issue was closely associated with Hawke's electoral victory; if the federal government could overrule the states on matters of environmental significance, then it could do the same over Aboriginal affairs. The constitutional amendment of 1967 empowered the federal government to legislate on Aboriginal affairs in the States.

The ALP national conferences of 1982 and 1984 endorsed the party's commitment to the principle of national Aboriginal land rights, and established five basic principles; one, Aboriginal land was to be held under inalienable freehold title; two, protection of Aboriginal sites; three, Aboriginal control over mining on Aboriginal land; four, access to mining royalty equivalents; and, five, compensation for lost land to be negotiated.

This policy was acceptable to Aboriginal organisations and



Poverty in Central Australia (Photo from Ingkerreke Outstation Resource Service Publication)

people throughout Australia. It appeared to accept the northern Territory Act as a minimum benchmark for national legislation. The additional fifth broad principle, that compensation for lost land would be negotiated, was recognised as a provision for Aboriginal people living in settled regions where unalienated crown land might not be available for claim.

In 1983, the outlook for Aboriginal land rights appeared promising. Clyde Holding, the federal Minister, was negotiating with national Aboriginal organisations with an eye to introducing national legislation; the Cain Labor government circulated a draft land rights Bill in Victoria; and Premier Burke appointed Paul Seaman QC to undertake an Aboriginal land inquiry in Western Australia.

By 1984, however, it became apparent that the tide had turned. The Western Australian Chamber of Mines, in association with the Australian Mining Industry Council (AMIC), launched a major campaign to prevent the implementation of land rights legislation that gave Aboriginals control over mining on their land. A massive public relations campaign was aimed at policymakers, arguing that the Northern Territory Act threatened the very existence of the mining industry. An advertising campaign immersed the Western Australian populace in emotive, distorted, and at times clearly inaccurate information.

The response of both federal and state government was to remain silent. At a time when the mining lobby spent over \$ 2m on advertising the anti-land rights case and the Burke Labor government spent \$ 1.6 million on an anti-smoking campaign, no significant amount of public money was spent on accurately informing the Western Australian electorate about Seaman's land rights proposals. In short, the pro-land rights case went unheard. In August 1984, when Seaman finally repor-

ted to the Burke government, the government indicated that his recommendations were unacceptable. The reason appears to be that Seaman's recommendations were inconsistent with the pro-business stance the Burke government was increasingly adopting.

The real turning point came with the long run-up to the federal election. Convinced by Brian Burke that a Labor Party commitment to land rights could cost up to eight Labor seats in Western Australia, the Prime Minister on 17 October 1984 unilaterally reversed his government's commitment to effective Aboriginal land rights - the Aboriginal right to veto exploration was to go. The Minister for Aboriginal Affairs, Clyde Holding, fought a rearguard action to maintain the ALP's Aboriginal affairs policy. After all, it was only some ten months since Parliament had endorsed the commitment to the five principles, and three months since this policy was re-endorsed by the ALP national conference. Holding had also addressed the United Nations working group on indigenous People in Geneva and repeated the policy commitment.

The full extent of the Hawke government's about-face on land rights became evident in February this year when the Commonwealth's preferred national land rights model was circulated for discussion. The model breaks with three of the five principles of the ALP's policy platform: there is no Aboriginal right to veto mineral exploration on Aboriginal land; there is no guarantee of access to mining royalty equivalents, and there is no mention of compensation for lost lands. The preferred model does provide for inalienable Aboriginal title to claimable land (that is, vacant crown land), although in cases of pastoral excisions, this land is not inalienable. It also provides for protection of sacred Aboriginal sites.

The crucial issue in the preferred model, and in existing land rights legislation, is the right to veto mining. Since the early 1970s, mining interests and AMIC have lobbied relentlessly for a dilution of the limited Aboriginal control over resource development on Aboriginal land and reserves. Woodward's terms of reference envisaged the transfer of mineral rights from the crown to Aborigines. However, after considering the submissions of mining interests, Woodward recommended that Aborigines be granted a limited right to control resource development on their land - a right limited by a national interest provision, by the protection of prior interests, and restricted to control of exploration (for once permission to explore was granted, Aborigines would have no power to prevent mining). Similarly in South Australia, the Aboriginal veto right is limited by statutory provision for independent arbitration in cases where Aboriginal and mining interests disagree. This meant that the Aboriginal veto right can be negated where state or national interests want mining. In short, Aborigines have never enjoyed an absolute mining veto - the veto has always been conditional on independent arbitration or limited by wider considerations.

The mining lobby has argued on equity grounds against any Aboriginal rights to control resource development: the law should not provide Aborigines with rights other Australians do not enjoy. But most Australians (85 per cent) live in urban areas where mineral exploration does not take place. Urban Australians don't need special rights because mining activity does not affect them. Pastoral lands throughout most of Australia are open to mineral exploration, but there are important differences between pastoralists and Aborigines.

First, while pastoralists may have historical associations with a property, they do not have spiritual and religious associations with specific sites on that property.

Second, it is increasingly common for Aborigines residing on Aboriginal land to physically distance themselves from the wider society; most Aborigines on the land live at Aboriginal outstations or remote communities. Pastoralists by contrast are not on the land to isolate themselves but primarily for commercial reasons.

Third, white population concentrations near Aboriginal communities invariably have serious negative effects on these communities - this is one of the clear lessons learnt from Gove, the Alligator Rivers region, and Groote Eyland. In contrast, pastoralists would regard a nearby white township as a gain from mining activity. Even though Aborigines receive compensation for surface disturbance and social disruption from mining, this is a group right and reflects the communal ownership of the land. The distribution of the compensation often leads to intensive political activity within Aboriginal groups with accompanying social pressures and tensions. Pastoralists, however, have individual title to the land and any compensation they receive is individually owned.

Another possibility rarely acknowledged is that mineral exploration and development may impinge more directly on Aboriginal land use patterns. Most Aborigines living on outstations use the land for hunting, fishing and gathering activities. Non-Aboriginals concentrated at remote mining town can rapidly deplete and even exhaust the renewable resources that Aborigines still draw on for their livelihood. Commercial farmers on the other hand use the land in a more intense and controlled manner - if an area is mined, farmers and pastoralists can always move stock elsewhere. Wildlife resources cannot be controlled in this way.

The fact that Australians who live in rural areas cannot control mineral exploration on the land is not in itself a

compelling argument against the Aboriginal veto right. This is demonstrated most clearly in Western Australia, where under sub-section 29 (2) of the Mining Act, 1972-81 farmers and pastoralists do enjoy a limited veto right. It is interesting to note that the Upper House of the Western Australian Parliament that recently rejected the Western Australian Aboriginal Land Bill, 1985, deferred making a decision to amend sub-section 29(2). The Liberal/National Party opposition that controls the Upper House (and has campaigned stridently against the Aboriginal mining veto) somewhat hypocritically refused to deny the same rights to farmers and pastoralists.

The Aboriginal right to mining royalties raised on Aboriginal land has existed in the Northern Territory since 1952 - this statutory right was included in the Northern Territory (Administration) Act and later incorporated in the Land Rights Act. The reasons for this right are complex and appear to be due to three factors.

First, they are intended to be compensatory - a payment to Aborigines for loss of access to the land and the negative impacts of mining on Aboriginal communities.

Second, they are meant to provide Aboriginal interests with some access to mineral rent raised on Aboriginal land. Mineral resources are finite and non-renewable and if they are to be developed by non-Aboriginal interests, then it is felt that Aborigines should enjoy some economic benefit. This sharing of mineral rent with Aboriginal interests recognises that the normal spin-offs from mining activity, like employment and increased business opportunities, benefit urban centres much more than remote areas and are thus rarely available to Aborigines.

Third, royalties are paid to Aboriginal interests in re-



Fringe Camp in Alice Springs (Photo Ingkerreke Outstation Resource Service publication)

cognition that not all Aborigines benefit from the Northern Territory land rights legislation (since only land not already held by non-Aboriginals is available for claim) and are intended to provide funds for Aboriginal economic advancement. Woodward noted in his report that payments arising from mining on Aboriginal land are extremely important because they provide a source of funds independent of annual government appropriations. Implicit in this point is the notion that Aborigines should automatically share in benefits derived from the development of non-renewable resources on their land. Over the past eight years in the Northern Territory, mining royalty equivalent payments have provided funding for the operations of land councils, the preparation of land claims, business enterprises, and community development initiatives. No royalty equivalents are paid to individual Aborigines. A proportion (30 per cent) of them are allocated to communities in "areas affected" by mining.

The preferred model does not provide for maintaining the present guaranteed rights to royalties that are incorporated in the Northern Territory Act, and in all other state Acts. Instead, it provides that state governments will decide how much of statutory royalties from Aboriginal land that Aboriginal interests will receive. It is conceivable that some State governments could reduce the amount to zero without acting outside the preferred model.

The question of compensation for lost land is hardly mentioned in the preferred model. Aboriginal people living in settled and urban regions would receive a right to claim unalienated crown land on the basis of traditional ownership, historical association or a needs criterion. However, as is evident with the New South Wales Land Rights Act, 1983, there is little unalienated crown land available in the more settled states like New South Wales. In recognition of this, the

NSW Act allows compensatory payments (at the rate of 7.5 per cent of the state's land tax) for a period of 15 years. This money can be used to buy land for Aboriginal groups on the open market; for example, Weinteriga station was bought by the Wilcannia Aboriginal Land Council for \$ 825,000. The land bought is often not freehold and not inalienable, but it is land.

The preferred model is rejected by Aboriginal interests, heard most effectively through the Federation of Land Councils, because it is at odds with the principles of social justice and distributional equity inherent in the ALP's policies. The major objections are:

First, the preferred model proposes to take away the existing limited Aboriginal rights to control development on Aboriginal land. The benchmark Northern Territory Act, being federal legislation, is singled out for amendment. This means that rights established by law and enjoyed by Aborigines in the Northern Territory for almost a decade are under threat. Existing land rights legislation in States such as NSW and South Australia would inevitably come under intense pressure to be altered.

Second, Aboriginal royalty rights are also to be withdrawn. In the Northern Territory, Aboriginal interests now receive 100 per cent of statutory royalties raised on Aboriginal land. Similarly, in South Australia, under the Aboriginal Land Trust Act, 1966-73, 100 per cent is guaranteed, but under the Pitjantjatjara and Maralinga Acts, only 67 per cent of royalties is payable to Aboriginal interests. To date, no resource development projects have been undertaken on Aboriginal land in South Australia. In NSW, Aboriginal interests own all minerals on Aboriginal land except gold, silver, coal and oil. The preferred model intends to give royalty rights

to Aboriginal interests. The independence that Woodward envisaged from guaranteed royalty rights will disappear; Aboriginal interests will have to lobby state governments for royalties. In a number of states, such as Queensland, Western Australia and the Northern Territory, it is difficult to see governments paying over royalty equivalents to Aboriginal interests. Again, the preferred model intends to take away established rights - this time, rights in property.

Third, while the Commonwealth intends to take away rights now enjoyed by almost half of Australia's Aboriginal population (those in the Northern Territory, South Australia and NSW), it provides no guarantee that even the limited provisions in its model will be introduced if state governments do not accept them. In short, rather than enforce land rights legislation in the states that make up the benchmark established in the Northern Territory, the federal government seems committed to lower that mark dramatically. But there is no guarantee that any benchmark will be accepted by the states. The preferred model seems a gamble on federal/state diplomacy. The inevitable losers will be Aboriginal people throughout Australia.

The mining industry arguments against the model, as put by the AMIC's James Strong last month, are surprising. AMIC argues that setting up independent (presumably judicial) tribunals to make recommendations to government over disagreements between mining and Aboriginal interests will result in unacceptable delays and constitutes a de facto veto. What is particularly odd is that the preferred model appears to move very close to the land rights model canvassed by AMIC in 1984. There is a certain mobility about the mining industry's position; as the federal government's position becomes less progressive, AMIC's bargaining position appears to become more extreme. Clearly, what the mining industry really wants is the

unimpeded right to explore and develop any Aboriginal land. This position has been rejected by the 1974 Woodward Commission, the 1983 review of the Northern Territory Act by Justice Toohey and the 1984 Seaman inquiry in Western Australia. After considering the mining industry submissions, Paul Seaman said:

My assessment is that there is no compelling economic reason why, in the interests of the broader community, Aboriginal communities should not be afforded control over mining or petroleum activity on Aboriginal land.

Seaman was obviously unimpressed with the mining industry's attempt to equate mining wellbeing with national economic health. Mining interests in the final analysis are only sectional interests - something exposed by Fitzgerald in his report to the Whitlam government in 1974. Particularly in remote areas (where most Aboriginal land is), there are doubts about the regional (or national) multiplier effects from mining. These effects occur in secondary, rather than primary, sectors of the economy. Australia gets few indirect benefits from mining because most mineral processing occurs overseas. Interestingly, the opposite extreme position, an unconditional Aboriginal right of veto, is no longer put forward by Aboriginal interests. Aborigines appear willing to accept conditional (as in South Australia) or limited (as in Northern Territory) rights.

The accommodation of interests struck in 1976 has clearly never been accepted by the mining industry. In many ways, given the unpopularity with Aboriginal people of the preferred model, AMIC's opposition to it on the grounds that it is too progressive seems somewhat cynical. After all, the preferred model basically provides concessions to the mining industry: mining companies do not require Aboriginal permission for general prospecting (pre-title), they only require the government's permission for exploration titles. And the in-

dependent tribunal can only make recommendations to government in cases of disagreement over mining activity or terms and conditions - recommendations governments can ignore.

The rejection of the preferred model by both Aboriginal and mining interests, albeit for very different reasons, may assist Aboriginal interests in their determination to stop the enactment of the preferred model. If the model is seen to be universally unpopular, both electoral and caucus pressure could force the Hawke ministry to abandon it. Groups like the Federation of Land Councils and the recently launched Aboriginal Land Rights National Support Group are lobbying Labor Party members to oppose the preferred model in its present form, and pose the question: is it asking too much to expect the Hawke government to comply with its ALP's endorsed policies?

But what if the unpopularity of the preferred model results in its abandonment, and that the call to leave the Northern Territory Act undiluted is accepted? The Hawke government's approach to national land right is patently unproductive; where do we go from here? A first step may be to recognise that the principle of effective land rights throughout Australia need not be synonymous with uniform land rights. In short, the ideal of horizontal equity between all Aborigines may be unattainable. Vested interests aside, the very concept of a national model may need to be abandoned in recognition of the fact that the needs of Aboriginal people vary greatly.

It may be better to look for a land rights formula that both incorporates the minimum benchmark of the Northern Territory Act and vertical equity criteria that recognise the socio-cultural and economic differences between Aboriginal people.

One possibility is a South Australian- style system, where regional differences are recognised and incorporated in different Acts. This strategy need not abandon the five broad principles of the ALP's Aboriginal policy. However, it would require a more determined Commonwealth commitment to comprehensive and national land rights, a commitment that may require the federal government to use its constitutional powers to override policies in states opposed to the principle of land rights.

Perhaps the crux of the preferred model is that it does accept the principle of Aboriginal access to some inalienable freehold land throughout Australia. Given that the preferred model appears destined to become the deferred model, the challenge for Australian society will be to find a way to introduce effective Aboriginal land rights across the nation without taking away the limited rights already established by law.

THE PEOPLE THE LAND RIGHTS ACT FORGOT

From: The Ingkerreke Outstation Resource Service

Many people believe that the Land Rights legislation in the Northern Territory is a pioneering example of a European colonial society compensating for the injustices and destruction done to indigenous peoples and their culture as a result of colonisation.

Indeed, by world standards it is.

But few are aware of how limited the legislation is, and how partial and selective the compensation it offers.

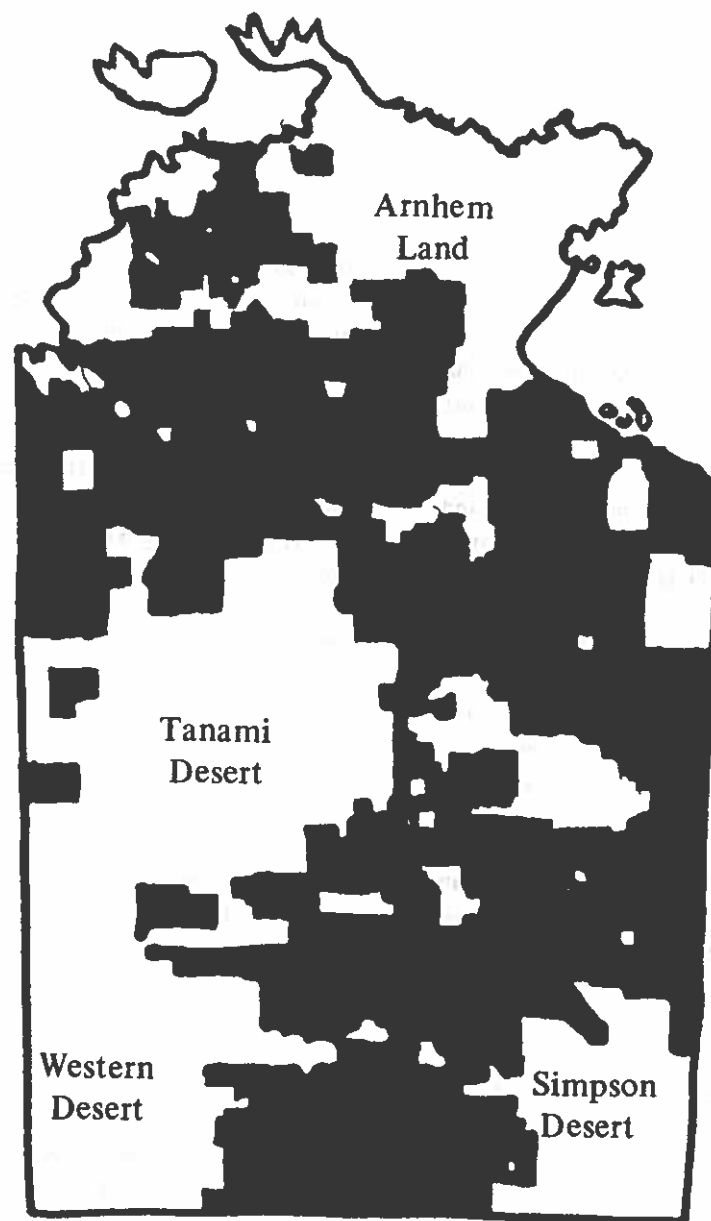
Fully 52% of the Territory is occupied by Europeans under pastoral leases, and this most productive land in the NT is unavailable for claim by Aborigines. Thus half the Aboriginal people in the NT, whose traditional land lies within this pastoral area, are without land rights and have not benefited at all from Land Rights legislation.

The Land Rights Act.

The Aboriginal Land Rights Act (Northern Territory) was enacted by the Fraser Liberal government in 1976, shortly before the NT attained self-government.

The Act enabled then existing Aboriginal Reserves to be handed over and held under Aboriginal control. Former Reserves account for over 60% of Aboriginal held land in the NT.

The Act also enabled some large areas of vacant crown land to be claimed, by proving traditional ownership in a European court of law. This accounts for a further 30% of Aboriginal held land in the NT, although some claims have yet



*Areas marked in black are the most productive 52% of the NT under pastoral lease, which cannot be claimed by Aborigines.*

Map of Northern Territory under pastoral lease which cannot be claimed by Aborigines (in Black) - Ingkerreke Outstation.

to be heard.

Only 6% of land currently held by Aborigines in the NT is pastoral or productive land. This consists of pastoral leases placed on the market by white pastoralists who had in many cases rendered the land uneconomic by overstocking and degrading the land. These leases were bought for Aboriginal communities by the then Aboriginal Land Fund Commission, now replaced by the Aboriginal Development Commission.

The remaining 94% of Aboriginal held land is either arid desert or tropical wetland, both unsuitable for pastoral purposes, and of little interest to Europeans until the minerals and energy boom of the last two decades.

Thus only those Aborigines lucky enough to escape the first century of colonisation, because they lived in remote or arid country, now own large areas of land. The remainder of the Aboriginal people of the NT own little or no land at all, and most are effectively barred from access to their traditional country.

Even the NT Land Rights Act is under threat as State and Federal Labor governments are moving to establish uniform Land Rights Legislation which will abolish the veto Aboriginal people in the NT currently have over mining on Aboriginal freehold land.

#### What the Land Rights Act did not do.

It was never contemplated that Aboriginal people would be able to claim large areas of pastoral land. They were free to purchase pastoral leases, but in very few cases have they had the financial resources to do this.

Instead, the Gibb Committee in 1971, Justice Woodward in 1974, Justice Toohey in his 1983 'Report Seven Years On', all recommended that the Land Rights Act include provision for the excision of suitable living areas within pastoral leases for Aboriginal communities having traditional ties with that land.

While not adopting strict guidelines, all recommended that the size of such excisions should be sufficient for the development of self-sufficient farming ventures and possibly the running of killer herds of cattle.

However, powerful vested interests, such as the NT pastoral industry, ensured that the final version of the Act did not include any provision for these communities.

Under pressure to provide a means for these groups to acquire living areas, the current Federal Labor Government has adopted the policy of its Liberal-National predecessors, which is to leave the fate of these people to the Territory CLP government and the pastoralists. Rather than use its mandate, given in the 1967 Referendum, to legislate for Aborigines in the states, it has been content to let the Territory government, which is controlled by pastoral interests, draft the proposed Community Living Areas Bill, and to request pastoralists to co-operate with its implementation.

#### Reaction from the Pastoral Industry

The reaction from the pastoral industry and the NT government has been predictable. In recent months the NT Cattlemen's Association has conducted a national media and political campaign to weaken the proposed Community Living Areas Bill in such a way as will prevent many legitimate claimants from obtaining living areas, and confine successful claimants to

such pitifully small parcels of land, normally of 1 square kilometre, which will lead to the creation of rural ghettos.

The Cattlemen's Association has also pressured pastoralists to cease all private excision negotiations and to offer only short-term subleases, often with very onerous conditions.

Pastoralists who are related to Aboriginal communities living on their properties often know local customs and speak local languages fluently. Under pressure to grant excisions or subleases, they tend to favour family groups to which they are related, and over which they have a strong influence, thus disadvantaging legitimate claimants under tribal law.

Until recently a relationship of mutual dependency existed between the pastoral industry and the Aboriginal communities upon whose labour it was built. This inter-dependence has been broken by the advent of equal pay for Aboriginal stockmen, technological innovations such as helicopter mustering and road transport of stock, and the shift of Aboriginal dependence from pastoralist to the welfare system.

As a consequence, there is a fear among pastoralists of an Aboriginal presence in their midst that they cannot control or dominate. They fear the larger Aboriginal population will exert a political and economic influence that will outweigh their own.

For these reasons, the Cattlemen's Association is campaigning to prevent excision legislation being based on traditional ownership, even for small parcels of land, as it would have been under the Land Rights Act. They are demanding: the Community Living Areas Bill be based on welfare and residential needs only (thus denying traditional association with the land).



Camping on a Stock Route where pastoralist refuses access to traditional land (IORS)

only Aboriginals living on pastoral leases over the last 10 years be eligible to apply for excisions (thus excluding traditional owners forced off their land since the Second World War),

tenure only for those currently resident on pastoral leases, with the permission of the pastoralists (thus freezing the existing situation where many groups are forced to live away from their land or in town, and allowing pastoralists to favour selected family groups),

the area of excisions be limited to half an acre per family unit (thus creating rural ghettos),

all applications to be received and processed within a period of two years (thus making it impossible for Aboriginal organisations to effectively research and support excision claims), and

the land to revert the pastoralist if it is unoccupied at any stage for three years (which assumes a lease situation rather than freehold title).

The reaction of the NT government has been to launch an all-out campaign against Aboriginal rights, especially in the lead-up to the December Federal Election. In his last days as Chief Minister of the NT, Mr. Paul Everingham attacked the Sacred Sites Authority and shelved the proposed Community Living Areas Bill.

Pastoral area communities have again been forced to wait indefinitely for a resolution to their land needs problems. Without access to adequate housing, water or essential services from the NT government, which depend upon secure tenure to land, they continue to endure the poorest living condi-

tions found anywhere in Australia, comparable to anything found in the so-called "Third World".

#### Strategy for Survival - The Outstation Movement

Under the old assimilation policy, the government rounded up all remaining Aboriginals living in the Central and Western Desert regions in the 1950's. They were herded into government controlled settlements for involuntary adaptation to European life. Some were hastily moved from the north of South Australia to make way for the British atomic bomb tests at Maralinga and Emu.

This disastrous policy led to the decimation of these Aboriginal communities through disease, overcrowding, institutional control and restrictions on their traditional way of life. At least half the Pintubi people brought in died. Those not caught in the Maralinga roundup were exposed to radiation and died, or still suffer from the consequences of radiation diseases.

Some 13 years ago, however, many of these groups began to choose their own solution to the problems imposed by European domination. Rejecting the progression from institutionalised settlement to permanent town life, they began to move back to their traditional country in family groups, taking with them the few European technological innovations upon which they had come to depend. Thus began the so-called "outstation movement".

But the outstation movement has not been confined to those groups whose country Europeans could find no use for. A second wave of the outstation movement has been under way for several years in pastoral areas of the NT and WA.

Many of these communities were moved from pastoral properties to government or mission controlled settlements during the Second World War, for alleged security reasons. Since then, many have had only intermittent contact with their land through seasonal pastoral work. While some groups have re-established permanent but underserviced camps on pastoral properties, many still live in the old settlements or in the overcrowded Town Camps around Alice Springs. There they are exposed to all the social problems connected to chronic unemployment, exposure to alcohol, communal tension and lack of freedom to practice their traditional way of life.

There is therefore a degree of urgency being expressed by Aboriginal community leaders to move back to their land and to obtain secure excisions. They want to pass on traditional stories, customs and responsibilities to their children and grandchildren before they die. They want to get their families away from the destructive influence of the town environment before they are destroyed by alcohol, violence or dispersion. They want to secure an inheritance for their families before the strength of their traditional claims die with the passing of their generation.

#### Barriers to Pastoral Outstations

Left out of the 1976 Land Rights Act, faced with a hostile pastoral industry and CLP Territory government, and abandoned by the Federal Labor Government, pastoral area communities have grasped the only bargaining chip left to them.

Under the Land Rights Act, Aboriginal groups are entitled to claim areas of unalienated crown land. The now unused stock routes, stock reserves and quarantine areas that traverse many of the pastoral leases in the NT are still classified as unalienated crown or public purpose land.

Traditional owners from pastoral areas have therefore instructed the Central Land Council to lodge land claims to those stock route areas on their behalf, particularly where pastoralists have refused to negotiate excisions. In most cases communities have indicated that the stock route claims will be dropped once suitable living areas on preferred sites can be negotiated.

The Territory government has responded by introducing into the Legislative Assembly the Vesting of Lands Bill, which will alienate these areas of crown land, making them unavailable for claim under the Land Rights Act. It has tied the passage of the Community Living Areas Bill to this Bill, so that one cannot be passed without the other. This means that Aborigines must drop all stock route land claims and accept whatever the NT government hands out in the Community Living Areas Bill, if they are to get any land at all. So far they have refused to drop these claims.

The Federal Government has so far refused to intervene. In fact Aboriginal Affairs Minister, Clyde Holding, is now supporting the NT Cattlemen's Association by instructing the Central Land Council and the Aboriginal Development Commission to withdraw legal and financial support from communities who have made temporary camps on stock routes, or who have erected improved shelters on pastoral land.

These communities are in a catch-22 situation. Policy-makers in Aboriginal Affairs expect families wishing to establish outstations to prove their genuineness by making the move and establishing and maintaining the camp from their own resources, before the Department of Aboriginal Affairs will give them support.

But the Department will not support communities who, to

fulfil this requirement to prove the genuineness of their resolve to obtain excisions, make temporary camps on the only land available to them, the stock routes that are under claim.

Nor will the Department support Aboriginal organisations supporting or assisting these communities to establish stock route camps, even though they are legally camped on vacant crown land.

In addition, Aboriginal communities in the region almost universally lack the resources to establish outstation camps on their own. They have therefore called upon Aboriginal organisations in Alice Springs to assist them in setting up outstation camps. But these organisations are not geared to meet the specific needs of outstation communities, and have been able to help only in a very limited, ad hoc and unplanned way.

The Central Land Council is able to provide legal and political support in excision negotiations, and Tangentyere Council is able to give material support in some instances, although it is geared to meeting the needs of the Alice Spring Town Camps.

#### Ingkerreke - A New Initiative

With this objective leaders of over 30 outstation communities in the region have formed a new organisation, the INGKEREKE OUTSTATION RESOURCE SERVICE. As yet it has won only very limited and qualified support from government and DAA officials, even though they admit the need exists for a co-ordinated approach to meeting present and anticipated excision outstation community needs. Despite repeated submissions from supporting Aboriginal organisations for funding of the pilot part of the resource service proposal, and a comprehensive submission by Ingkerreke on its own behalf, funding has not been set aside to enable the organisation to function effectively in future.  
(IORS address - PO Box 2363, Alice Springs, NT 5750 Australia)

#### ABORIGINAL LAND COUNCIL ATTITUDES TO MINING NEGOTIATIONS.

By: Bruce G. Donald

How wrong can you be? In last year's AMPLA Yearbook, in his paper on land rights Michael Barker claimed;

"In the year 1984, it is fair to suggest, Aboriginal land rights is no longer a concept awaiting its day, but a present reality .... No longer, therefore, do Australians stand at the policy crossroads debating whether land rights is a good or bad thing. Rather there are now tasks at hand, tasks to produce effective and workable land rights law".

Of course before the ink was dry on his paper, Mr. Barker would have realised he had spoken far too soon. When he was writing he was not to know that the mining industry campaign was about to be unleashed, as it was in May 1984. Before looking at Land Council attitudes to mining negotiations concerning Aboriginal Australian Land, this Association of mining lawyers should be given a perspective from the Aboriginal Land Council side, of the events of the preceding year, to balance the views which are commonly put from the mining company side.

The campaign against recognizing the rights of Aboriginal Australians to their land, was launched by Hugh Morgan of Western Mining Corporation, from that familiar bunker in Australian political debate, the extremist position. He quoted St. Paul's exhortation in the letter to the Corinthians (ch. 7. v.20), "Let every man abide in the calling wherein he was called". Miraculously he derived from this an assurance that the "calling" of mining was somehow a sanctified Christian calling, to be favoured at any cost as against the unholy paganism of Aboriginal behaviour on land. Unfortunately,

Morgan did not check his context and, in fact St. Paul was exhorting his converts that, whether one is circumcised or uncircumcised, it is not important when one is called to religious teaching! What miners and lawyers are to make of that is anybody's guess.

However the campaign having been launched on a religious basis it was then carried through by the Western Australian Chamber of Mines, an organisation obviously financed by the mining industry. The mining campaign chose to exploit sophisticated media techniques and in my opinion appealed to fear in order to achieve a political victory. Accordingly the Western Australian Chamber of Mines chose to depict land rights as creating Berlin-type walls built by black hands across the state, inferring that the grant of land to Aboriginal Australians would close it off. There was no mention of the right of all Australians to close their gates and warn trespassers of their property. There was no mention that all public roads remain open across Aboriginal private land, just as those across European Australian private land. These distortions have become a major theme of anti-land rights propaganda reaching the greatest excess when the Bulletin's writer, Mr. David Barnett, dubbed land rights as the new apartheid. The Age newspaper in its editorial of 8th March, 1985 rightly described such comparisons between land rights and apartheid as an "obscenity". The campaign also depicted laws concerning land rights as overbalancing the scales of equality giving unequal favours to over privileged Aboriginal people, a depiction which any cursory observation of their qualitative state proves ridiculous.

The Western Australian Chamber of Mines had no doubt acted quickly to twist public opinion because it realized it might well fail to sustain its case before the impartial and judicially conducted inquiry into land rights in Western

Australia by Mr. Paul Seaman Q.C. And fail it did when Mr. Seaman Q.C. found in favour of the rights of the Aboriginal Australians of Western Australia. He confirmed, as Mr. Justice Woodward had found ten years before, that control of mining on Aboriginal Australian land was fundamental to the restoration of land rights.

Mr. Seaman Q.C. said at para 9.51:

"My assessment is that there is no compelling economic reason why, in the interest of the broader community, Aboriginal communities should not be afforded control over mining or petroleum activity on Aboriginal land".

At the same time, the Northern Territory Chamber of Mines was behaving in the same manner as its counterpart in the West, wrongly portraying the position under the Federal Aboriginal Land Rights (Northern Territory) Act 1976 as one of disaster. The Land Councils replied in June 1984, establishing that in the period since the introduction of the Northern Territory Land Rights Act, through 1983, exploration activity and expenditure in the Northern Territory had maintained the same proportion of national activity, as it had before the Land Rights Act was introduced and that accordingly the case could not be sustained against land rights. What the Land Councils did agree was that:

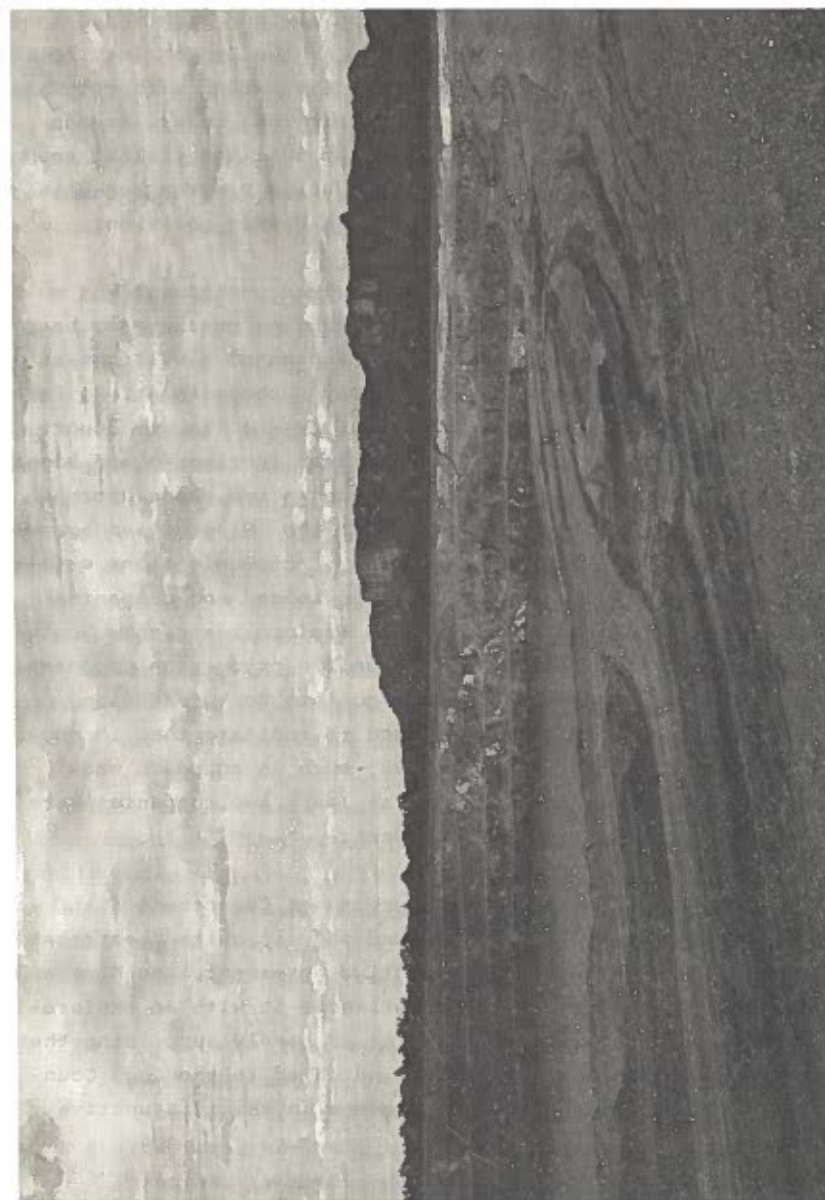
a) In the special case of Arnhem Land which makes up only about 7% of the land mass of the Northern Territory, there was a halt to exploration because of the absence of proper anthropological data and also because there was a perceived view among the constituency of the Northern Territory Land Council that intrusion into that special area should be very carefully controlled,

b) In cases outside Arnhem Land, where companies had accepted the legal rights of Aboriginal people, successful negotiations had been achieved, such success being particularly marked in the Centre with the Mereenie oil field, Palm Vally gas field and Granites goldmine, all these on Aboriginal Land. But if companies refused to negotiate with the Aboriginal owners of land, acknowledging the clear financial provisions of S. 43 of the Northern Territory Land Rights Act, then obviously there would be delays.

However the miners had waged fierce war and despite the arguments of the Land Councils, the dominoes had begun to fall. Within a week of Mr. Seaman Q.C.'s report in Western Australia in September 1984, recommending Aboriginal control of mining on their land, the Western Australian Labor Government had folded in favour of the mining lobby and had announced a land rights package denying Aboriginal Western Australians control over mining activity on their country. Shortly after this capitulation, it was obvious that the Federal ALP policy, unanimously affirmed at the July 1984 Conference of the ALP as guaranteeing to Aboriginal Australians the right to control mining on their land, would be thrown out the window. This happened a mere two months later with the Federal Government opting in favour of a compromise Land Rights system to increase the power of the industry.

This result was particularly bitter because Aboriginal Australians have, since the referendum in 1967, which gave the Federal Government power in these matters, looked to Canberra to lead, and to the ALP as providing that leadership.

In June 1984, the Prime Minister had personally assured the Director of the Northern Land Council and the Chairman and Secretary of the Central Land Council in a meeting in



Ranger Mine, Northern Territory (Photo: Diana Vinding)

Canberra that his party was committed to land rights and that it was looking to the recommendation of the Seaman Inquiry. In the same meeting the Minister for Aboriginal Affairs encouraged the Land Councils to make out their case to Mr. Seaman Q.C.. The Prime Minister's sell-out on that undertaking soon appeared when he joined western Australian Premier Burke in the package which simply discarded the Seaman position.

In the Northern Territory, the Mines Department was moving in against the Land Councils, to bring pressure to bear on those mining companies which had indicated a willingness to implement one of Mr. Justice Toohey's recommendations for facilitating agreements with Aboriginal owners. In his report, "Seven Years On", reviewing the Northern Territory Land Rights Act, Mr. Justice Toohey had recommended a two phase approach to a mining negotiation; he called it the "disjunctive agreement approach" whereby the realities of communications with Aboriginal Australians would be acknowledged and companies would first negotiate only over the exploration rights. Later when more specific details of a possible production proposal were available, they would then negotiate for production rights. The Land Councils continued to indicate that in consultations with traditional owners, such an approach made considerable sense. Accordingly, at least two companies were willing to consider such an approach.

However the Northern Territory Mines Department intervened in the commercial process and made it quite clear that if a company negotiated a disjunctive agreement, the Northern Territory Administration would not issue it with an exploration title. In the face of this, it is hardly surprising that the mining companies in question indicated to the Land Councils that they could no longer proceed in this disjunctive manner.

Despite this gathering momentum as a result of the campaign, the actual position, certainly in the Central Land Council area continued to show that where mining companies would negotiate on a financial basis, successful results would be achieved, even in those cases where the traditional owners and the Land Council together had an absolute right to control what would happen on Aboriginal land.

Accordingly the negotiations with the Mereenie Joint Venturers, first for an access road to bring oil tankers from the Mereenie oil field across Aboriginal land, were negotiated with traditional owners in the record times of three months and five months respectively, involving full consultations and negotiations. The agreement in that particular case also involved an opportunity for future commercial participation by the Central Land Council in future pipeline activities on behalf of traditional owners. In this case the companies are to be congratulated for acknowledging the legitimacy of such participation. However in another case, where the mining company continued to reject that there ought to be any financial dimension to the negotiation for new exploration titles, the negotiations indeed became stalled.

While these things were happening, the long and carefully researched Tatz report, "Aborigines and Uranium" was finally released with its stark conclusions concerning the social impact of mining and the extremely high social and cultural costs of mining activity for Aboriginal Australians. At p 305, the task force recommended:

- "3. Immediate steps should be taken to create a professionally competent national task force to help Aborigines acquire the necessary skills and techniques for their survival alongside prolonged uranium mining and or development in the Region.....

4. Any further mining or development should not take place before this task force is created and has developed guidelines and procedures which effectively attempt to mitigate the deleterious effects of mining and development on Aborigines in the Region, and reinforce the positive aspects of development".

Notwithstanding the addition of these views of the Tatz Committee to those of Mr. Justice Woodward, Mr. Paul Seaman Q.C. and many other notable Australians, the foremost of whom is of course Dr. H.C. Coombs (former Governor of the Reserve Bank and adviser to numerous Prime Ministers, Liberal and Labor), by the end of 1984, a mere six months after the campaign had been commenced, the Federal Government at the senior level had abandoned those principles which careful analysis had consistently endorsed. Is that what the mining industry is asking clear thinking Australians to do? Does the mining industry simply ask us to reject such analysis in favour of their own self interest? Is rational inquiry and research on a subject of national importance to be discarded in favour of a sectional interest which, anyway, is being accommodated by Aboriginal Australians?

The capitulation of the Federal Government became complete with the publication of its Preferred Model for National Land Rights (20 February 1985). This document proposes not only that requisite State laws need not grant control of mining to Aboriginal Australian land owners but also that there should be no right in the nature of S.43 for compensation to be negotiated in an open financial negotiation. All matters are to be open to arbitration. And the icing on the cake for miners would be that even the rights granted to Northern Territory Aboriginal Australians by the Fraser Government would be taken away; the Land Rights Act in the Territory would be amended to the preferred model. Perhaps the final evidence of the one-

eyed position of the mining industry is that even this victory is not enough; the preferred model is not acceptable to the industry.

A moment's reflection is warranted on the reasons why the mining industry attack has, to this point, been successful. First, the sheer disparity of resources is obvious. The Land Councils have no funds for prime time television, regular full page newspaper ads and highly paid advertising advisers. Secondly, the Federal Government made no attempt at any public information campaign to counter what they admitted was a very biased and misleading campaign by the industry. Thirdly, the mining campaign exploited two of the less pleasant aspects of many Australian people namely their inherent willingness to believe anything negative about Aboriginal Australians and their simplistic view that social justice is about not giving anyone different rights from anybody else.

This brief reminder of the contemporary history is the background against which the current attitude of the Central Land Council and the Northern Land Council to negotiations with miners can be stated. Simply put, the Land Councils assert firmly that the proper system both for the Northern Territory and for the rest of Australia is that contained in the Federal Aboriginal Land Rights (Northern Territory) Act 1976. The Land Councils are committed to maintaining the rights given eight years ago to their constituents. They will oppose the preferred model in so far as it requires the watering down of the Northern Territory Act.

To assist in the implementation of the present system, Central and Northern Land Councils have published guidelines for the mining industry in making an application for and negotiating that application, in relation to Aboriginal Australian Land.

In addition to these guidelines it is, in my opinion, necessary to point out to the industry some major factors about the Aboriginal Australians of the Centre, the North and the North- West of Australia which are commonly the subject of serious misconception among all Australians as well as mining executives and their lawyers. These factors cannot be ignored if the extremely negative state of affairs between the industry and Aboriginal Australians is to be improved. I will state these factors and spell out what I believe to be their implications.

1. Factor The Violent dispossession of Aboriginal Australians from their land by the European occupation is an incontrovertible fact, still denied as a matter of law but as obvious as the nose on your face to anybody who makes the slightest inquiry.

Implication Resolution of this factor will continue to be kept high on the political agenda not only by Aboriginal people but by well informed people in all sectors of Australian society.

2. Factor These Aboriginal Australians of the Centre, the North and the North-West are not going to conveniently go away, die out (their numbers are increasing), cease to aspire to political, economic and social participation, or passively allow development at the cost of their own cultural annihilation.

Implication No matter what form of land rights law exists, however watered down and even if there is no such law, mining companies will not successfully carry on business on lands where these Aboriginal Australians continue to assert their traditional association, without the companies nego-



Kakadu Park, Northern Territory - (Photo: Diana Vinding)

tiating with them. Continued to warfare against their most strongly held aspirations will only exacerbate suspicions and reduce co-operation.

3. Factor The majority of these Aboriginal Australians, children and adults, speak their local language as their first language and English as a second or third and limited language.

Implication Negotiations with these Aboriginal Australians will need to be undertaken across both a language and concept barrier which will require careful presentation of ideas and information with proper allowance for time for people to understand the issues.

4. Factor Aboriginal people are not, as the likes of Morgan would have you believe, primitive people who can be treated as unable to adapt to current economic and social reality. It is notable that Mr. Paul Seaman Q.C. at para's 2.9, 2.10 of his report said:

"I began my work in the Inquiry intending to give Aboriginal people every chance to participate. I expected that they would probably be too disorganised or inefficient to make any worthwhile input, and that some of the issues would be beyond them. Like a great many other people I had made the unconscious assessment that they were in some general way inferior to non-Aboriginal people.

The hearings with the Aboriginal people have shown me to be quite wrong. They have organised themselves effectively, and put their cases with great clarity. It has not been a case created for them or put for them by other people".

As a lawyer working for a Land Council, and having had the privilege of conducting a land claim, I can also add that the Central Australian Aboriginal groups with whom I deal

have social systems of such complexity that to deny their ability to understand the complex issues of mining and development, if those issues are explained with full recognition of the language and concept barriers referred to, is misconceived.

Implication Mining companies should approach negotiations in the same sophisticated manner that they would with any other party.

5. Factor Aboriginal Australian culture in the Centre, the North and the North-West is not dead, nor is it locked in the form it took one hundred years ago. Despite severe social problems, it remains intact throughout the Centre and North among young people as well as among older people, in a form adapting with the new social and economic reality in which these people find themselves. Because Aboriginal Australians wear trousers, drive motor cars and are no longer conveniently available to be photographed standing one legged against the sky with spears in their hands, does not mean that their culture has disappeared.

Implication Mining companies must acknowledge that they are dealing with a living culture deserving of respect and must develop ways in which their proposals will not repeat the depressing position revealed in the Tatz Report of the wholesale dislocation of the people of Oenpelli by the mining of uranium in their area. In some cases, mining companies will receive a refusal of consent which must be accepted rather than giving rise to them shifting the debate always into the political arena.

6. Factor Sites of significance and sacred places are real. They cover virtually the whole of the Centre, the North and the North-West (just as they no doubt covered the rest of the continent but in locations now lost). Sacred sites are not suddenly discovered by geiger counters nor when a drill

strikes an ore body (as is the common joke among mining companies). The fact that not all sites are listed on a public list is simply because of the inevitably secret nature of such important matters. This fact should be no more surprising to you than the fact that my father never told me the details of his Masonic Ritual; it was for him a secret matter.

Implication Mining companies will have to accept that the protection of the culture, religion and life to their fellow Aboriginal Australians may sometimes necessitate a refusal of the right to develop upon the basis of the need to protect a sacred place. The para-military operation that led to the drilling at Nookanbah will not be tolerated by sensitive Australians.

7. Factor These Aboriginal Australians live, sleep, love, bleed, laugh and cry in exactly the same way as every member of this mining law association does. There are aspects of their substantially depressed status which you or I may find as distasteful as we find many third world issues. There are aspects of Aboriginal ritual which we may personally find as questionable as we find aspects of Christian or Muslim ritual. There are parts of their social mores which we may like to see exposed to another point of view.

Implication A mining company does not have to like someone to accept that they have a right to negotiate. Dislike of cultural attributes may induce people to see this as a legitimate basis for ignoring the rights of such people, seeing them as degenerate and primitive. Mining companies will need to avoid such views as they become involved in the necessary accommodation with the interests of Aboriginal Australians.

8. Factor People from all walks of life when dealing in areas with which they are not familiar, need professional advice

or the advice of people with particular knowledge. These Aboriginal Australians like Vietnamese Australians living in Fairfield or Greek Australians living in Collingwood need advice and assistance from their advisors.

Implication The mining industry must disassociate itself from the nonsense which has great currency in the press that the whole problem with Aboriginal people can be laid at the feet of the "dreaded white adviser". My short association with the people who advise Aboriginal groups, coming as I do from over 10 years advising business generally and many mining companies in particular, is that the calibre of the people who advise Aboriginal Australians and the quality of their advice is extremely high. We are not manipulators, we are professional people who listen to our clients and then give effect to their requirements in any negotiation. We are tired of being vilified in the press as manipulative radicals who twist the minds of our clients. We act according to law and professional standards and demand to be treated as such by the mining industry. (As an aside, let me add to the lawyers in this Association, that the legal profession must continue to supply Aboriginal people with advisers of sufficient commercial experience and calibre to ensure they no longer suffer the absurd disadvantage that characterised such notable negotiations as Batman's "purchase" of Melbourne.)

9. Factor Perhaps the most significant point to be made to the mining industry is that a clear statutory right underlies the negotiation process in the Northern Territory for determining compensation. Section 43 of the Land Rights Act specifically provides that;

" A Land Council may agree with an applicant for a mining interest in respect of Aboriginal land in the area of the Land Council for the giving of consent by the Land Council to the granting of that mining interest to that ap-

plicant in consideration of the payment to the Land Council by the applicant of an amount or amounts specified in, or calculated in accordance with the agreement and of the acceptance of such other terms and conditions as are provided for in the agreement.

At the same time the Land Rights Act makes it perfectly clear that Aboriginal people will not own the minerals or hydrocarbons beneath the land all of which are retained by the Crown, S.12(2). This principle was decided by Mr. Justice Woodward and although regretted by Aboriginal people and although contrary to their perception of their land, they have accepted that decision and have never sought to question it.

Accordingly all negotiations for primary royalties in respect of mining on Aboriginal land takes place with the Government and not with Aboriginal people. At the same time the financial rights of Aboriginal people are clearly set out in S.43 and they are available notwithstanding the decision the Federal Government has taken to compensate for dispossession by paying mining royalty equivalents to Aboriginal organisations through the Aboriginal Benefit Trust Account being equal to the royalties received by the Territory Administration from mining companies. Section 43 accordingly empowers Land Councils on behalf of traditional owners to negotiate specific and overriding compensation arrangements in respect of mining ventures on Aboriginal land.

Implication There are two ways of approaching a negotiation under S. 43. One could engage in the seemingly impossible task of putting a figure on the social, cultural and physical costs to Aboriginal people of disturbance produced by mining activities. A brief reading of the Tatz report will indicate that these are incalculable and almost certainly far in excess of what the mining industry could bear.

The second approach and that which has been adopted by the Land Councils, particularly in Central Australia, is to provide mining companies with a more familiar negotiation system for determining these levels of compensation, roughly similar to the market negotiations that occur when any exploration company or production company is seeking to farm in another person to do the work under the mining title. Such an approach is seen as sensible not only because it provides a familiar basis for mining companies but also because it provides an opportunity for the Aboriginal owners of land to participate in a commercial manner in just the same way as when equivalent rights are given to other people, namely other mining companies, where they decide to trade those rights.

It is no answer to this to accuse Aboriginal people of selling their culture, or to illegitimate these negotiations by saying they are exercising a right which other people do not possess. As noted, many other people possess equivalent or similar rights to negotiate overriding royalties, free-carried interests and the like. Hastily incorporated exploration companies who have been fortunate to secure an exploration licence do it every day of the week. And in any event, there is no justification for the assertion that within the Australian economy people are treated equally in significant respects; all sorts of people are given rights by government by which they can trade, eg. the rights to import goods, the right to carry on a television station, the right to operate a foreign bank in Australia, the right to run an airline, the right for manufacturers to have tariff protection or subsidies, the right of farmers to average their tax.

The fact that Aboriginal Australians may have a right to negotiate in the context of activity on their land is simply one aspect of addressing the particular long term needs that

they have.

If mining companies accept the financial basis to these negotiations, success results, as indicated above has been important major ventures for oil, gas and gold. In no case have the negotiated financial arrangements constituted an uncommercial burden. Analysis by mining advisors retained by the Land Councils confirms that the Land Councils have made proposals quite consistent with the undiminished profitability of the ventures.

#### Conclusion

The mining industry cannot delude itself into thinking that a short term political victory in the field of land rights law will remove their continuing need, along with all Australians, to work out systems for co-existing with Aboriginal Australians. Whatever the legal system, mining companies must accept that people will always have bargaining power, that their bargaining power has been used quite consistently with the viability of mining developments on Aboriginal land. For the future, the ability of companies successfully to negotiate and in certain cases to accept a refusal, will be the hallmark of the future of mining on areas where Aboriginal people have established a continuing association.

#### CHAPTER V

#### Land Rights and Self-determination - A Comparative View

*This chapter consists of one article which addresses the issue of land rights from another angle. On the one hand it looks at land rights in relationship to customary law and demonstrates how they are inextricably connected. At the same time the author looks further afield and compares the approach towards land rights legislation in Australia with that in Canada. Australia and Canada provide a complete contrast in approaches towards land rights and customary law which are tied in with the histories of the two countries under British imperial rule.*

*We have seen in the Introduction to this document how land and life are completely bound together for Aboriginal people. This article also relates the right to self-determination with land ownership thereby bringing once again to the fore the combination of life, land and self-determination as a basic prerequisite for the rights of all indigenous peoples.*

LAND RIGHTS AND CUSTOMARY LAW: A COMPARATIVE ANALYSIS

By: Bradford W. Morse\*

1. Introduction

Indigenous peoples throughout the world are in the midst of a critical era in which their very survival is threatened. In some countries, particularly in Central and South America, the dangers stem directly from military actions. In the industrialized North and the Antipodes it tends to be well-meaning governmental policies of assimilation and integration which are causing cultural genocide. At the very same time, this is a period of great hope for indigenous populations in some countries as national and regional governments are questioning their colonial heritage out of a desire to redress past injustices. Governmental policies regarding education, child welfare, health care, criminal justice, legal aid, and culture, among others, are being re-evaluated in terms of their effects upon and applicability to the original inhabitants of those territories. This is part of a total reappraisal of the relationship between the colonizers and the indigenous peoples largely forced upon the former by the activities and pressure of the latter.

This process of reconsideration is further complicated

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\* Professor Bradford W. Morse is Vice Dean at Faculty of Law, University of Ottawa. This paper was first presented at the Conference of the International Work Group on Indigenous Affairs as part of the XIth Congress of the International Union of Anthropological and Ethnological Sciences, Vancouver, Canada, August 1983. It has been updated for the purposes of this document.

in some places by the fact that the impulses which encourage colonialism are still very much alive. Certain countries still perceive themselves as having their "untapped frontiers" filled with natural resources which are believed to be essential to their continuing prosperity. One of the motivating forces behind a governmental decision to address outstanding claims for aboriginal land rights frequently is the desire to remove a possible obstacle to large-scale resource development projects.

For example, Canada wishes to settle what it calls the "comprehensive claims" in the North so that it can open up the area for petroleum and mining. It considers the homeland of the Dene Metis and the Inuit to be basically unused at present as it largely only supports their traditional economy. Australia, too, has its eyes on the Top End and the Outback for petroleum, tourism, uranium and other mining ventures. Similar pressures could be cited concerning indigenous peoples in Scandinavia, Brazil, Nicaragua, and many other countries.

We are witnessing a situation in which ethical, political, economic and legal concerns are all at play as competing pressures for attention. The outcome of this struggle will determine the very future of the indigenous populations in each country affected.

This paper considers only two aspects of this overall human drama, namely, land rights and customary law. It further narrows its focus by concentrating attention on these issues in just two countries - Canada and Australia. It is hoped, however, that the recent experience of these two nations can serve as case studies of an international phenomena raising questions and models that can be analyzed and applied to other contexts.

## II. THE IMPORTANCE OF LAW AND LAND

It is submitted that the two most essential elements in safeguarding the survival and unique identity of indigenous peoples is respect for their land and their law. Possession of a land base permits the preservation of culture, language, values, life-style and law. It further ensures the retention of powers of self-government and the right of self-determination. It is impossible to have self-government without a defined territory and exceedingly difficult to survive as a community which decides its own fate without land. ?

Gipsies ?

A land base alone, however, is insufficient to ensure longevity as a distinct entity in the human race. In addition, the people must retain their traditional law for law is simply a three-letter word which encapsulates all of the rules most essential to the maintenance of a well-being within a community, including the protection of its very existence. Indigenous peoples developed their traditional or customary law system over many centuries as a critical component of their lives. The laws reflected the relationship to land, nature and the environment. The laws protected and respected the culture, the values and the sacred beliefs. The laws promoted harmony and social order. The laws regulated the economy and ensured survival by removing dangerous elements and fostering the sharing of food.

The importance of customary law in the survival of indigenous peoples should not be underestimated. It also should not be viewed as a static thing or a relic of a bygone age. The nature of customary law is that it evolves to meet the needs and reflect the customs of the community. This means that it must maintain the freedom to adapt to new pressures and situations. Such freedom is possible if a land base exists and the right of self-government is recognized.

### III. THE STATUS OF CUSTOMARY LAW

#### Australia

Australia is rather unique in the common law world as it historically has given very little respect to the traditional law of the Aborigines and Torres Strait Islanders. While the British Empire was recognizing the validity of indigenous law in the Caribbean,<sup>1</sup> New Zealand,<sup>2</sup> Africa,<sup>3</sup> North America,<sup>4</sup> Hong Kong,<sup>5</sup> and elsewhere in its colonies, in Australia the position was to become different.

From settlement in 1788 until the 1850s there was considerable debate as to the wisdom of, and legality of, applying the common law and colonial law in relation to criminal matters involving Aborigines (or Aboriginals) as offenders or victims.<sup>6</sup> One view was that Aborigines could not be convicted of crimes when they were completely ignorant of the fact that the event was a crime under British law. Another was that the court could not seize jurisdiction when the accused was unable to enter a plea due to a total failure to understand the judicial process of the colonizers. A third view was that Aborigines were sub-human and could not be expected to adhere to a "civilized" system of law. Only rarely was the right of Aborigines to be exempt from this foreign law on the basis of their sovereignty and the presence of their own legal system ever considered. When it was raised as a defence, the colonial courts quickly dismissed it with no authorities cited and little seriousness paid to the fundamental issues it raised.

It came to be settled law that Aboriginal sovereignty did not exist and customary law was irrelevant at best or only "lewd practices" which had to be eliminated. It should also be mentioned that one important reason behind the acceptance

of jurisdiction by the colonial courts concerning actions in relation to Aborigines was the justified fear that settlers would commit wholesale slaughter of Aboriginal communities if the latter did not receive the protection of the King's Peace.

The Australian courts, thus, chose to ignore the jurisprudence developing from the rest of the British Empire and from former English colonies. These courts were not alone in making this mistake as the Privy Council did it as well when it stated:

"There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class. In the case of such a Colony the Crown may by ordinance, and the Imperial Parliament, or its own legislature when it comes to possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits. But, when that is not done, the law of England must (subject to well-established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail until it is abrogated or modified, either by ordinance or statute."<sup>7</sup>

No evidence was before the court as to whether New South Wales was "practically unoccupied without settled inhabitants or settled law". This was merely assumed despite the fact



Aboriginal women in Northern Territory (Photo: Diana Vinding)

that 300,000 to 600,000 Aborigines and Torres Strait Islanders were residing in Australia at the time of contact who possessed very elaborate systems of law which had been in force for thousands of years. There also was no legal argument on this point beyond reliance on Blackstone. One might accept the accuracy of Blackstone's distinction between inhabited and uninhabited lands on the basis of logic or allusions to natural law. Nevertheless, that does not justify characterizing Australia as falling into the category of vacant land without a system of law when clearly neither factor was true.

Things have changed somewhat over the last decade. In the one and only major land rights case in Australia to date, which the Aborigines of the Gove Peninsula lost, a Northern Territory Supreme Court judge did acknowledge customary law "as a system of law"<sup>8</sup>. Nevertheless, Aboriginal customary law has not been recognized as having any force in its own right either by being incorporated within the common law or as a defence to the application of the general law to Aborigines or Islanders.

Customary law has, however, been accepted by numerous courts in some parts of Australia as a relevant factor in influencing adult and juvenile sentencing decisions. That is, a court solicits information concerning how the act in question is viewed by customary law when the offender still adheres to its edicts. If the act was legal, or required by traditional law in that situation, then the court will impose a lesser sentence than it otherwise would. If the event was illegal under customary law and the accused would be or already had been punished in accordance with that law, then again the court selects a lesser sentence than normal. In neither situation, however, does the court actually enforce the traditional law nor give full respect to its existence (such as, e.g., by accepting a defence of double jeopardy or

sovereign immunity).<sup>9</sup>

Customary law has also been considered as a relevant factor in deriving appropriate in tort cases. This has occurred, for example, where a plaintiff's injuries are such that he will be unable to comply with his obligations under ceremonial laws in the future resulting in a loss of status and reputation within his community.<sup>10</sup>

Finally, Aboriginal law has been expressly acknowledged in various statutes in the Northern Territory. This has particularly been done so as to minimize the negative consequences of the general law's failure to recognize tribal marriages. Rather than amending the marriage law to validate marriages celebrated in accordance with Aboriginal law, the legislature has amended most social welfare legislation so that all the benefits thereunder flow to spouses and children of tribal marriages.<sup>11</sup>

Reform proposals are actively under consideration throughout Australia as a result of the work of the Australian Law Reform Commission on its Aboriginal Customary Law Reference. The commission received its mandate for this study from the Attorney General of Australia in 1977 and expects to issue its final report in late 1985. During the last 8 years it has released two discussion papers and fifteen research papers as well as conducted investigations, held hearings, and fostered discussion on customary law in Aboriginal communities, governments, academia and the justice system. The Commission has interpreted its mandate fairly broadly so as to review not only customary law but also its interaction with the dominant law and how both might be administered by Aboriginal communities. At this stage, it appears likely that the current Commonwealth government will act promptly upon receipt of the Commission's final report. Legislation can be anticipated especially

in the family law field and some changes in the administration of criminal justice are to be expected. It should be stated, however, that the federal government has been rapidly backpedalling on its prior commitments to national Aboriginal land rights legislation. This may indicate that it will be equally reluctant to move decisively on the Commission's recommendations on customary law.

#### Canada

The experience of customary law at the hands of the dominant legal system has, in some ways, been almost the complete opposite from Australia. The only example of legislative recognition of traditional Indian law is in a subsection of the Indian Act whereby custom adoptions are regarded as legal for the purposes of inheritance and in the definition of a child.<sup>12</sup> The Department of Indian and Northern Affairs augments this somewhat in practice by accepting custom marriages and adoptions as valid for determining membership issues. The Indian Act also acknowledges another aspect of traditional law in that it permits an Indian band to select its government according to customary law if it so desires.<sup>13</sup>

The common law, on the other hand, has been far more receptive. The Canadian courts, subject to a few exceptions, have consistently recognized the validity of Indian and Inuit traditional law in the areas of marriage, divorce and adoption as well as in the impact of those events upon inheritance and criminal law.<sup>14</sup> This has been done by incorporating the customary law within the common law and applying it in the normal way. The courts have also recognized customary law as governing cases of intermarriage when the non-Aboriginal spouse acceded to and complied with the terms of the applicable tribal law. Another expansion occurred in 1982 when a B.C. court accepted the relevance of customary law for determining

appropriate damages in a personal injury case.

Customary law in action is most evident in the Northwest Territories where the Supreme Court has issued orders literally upholding the validity of hundreds and hundreds of adoptions and marriages pursuant to Inuit and Dene law over the last quarter century. It is, therefore, not surprising that the greatest interest in this topic and in its further recognition comes from the N.W.T.

The primary vehicle for discussing revisions to the general law in this area has been through land claims negotiations. Thus, the talks in the N.W.T. and in the Yukon have included discussions on customary law. The Labrador Inuit association have also made the issue of traditional law one of their main local points within their position on land rights. The James Bay and Northern Quebec Agreement included provisions authorizing the amendment of the Quebec Code of Civil Procedure, the Criminal Code, and the Canada Evidence Act so as to reflect the customs of the Cree and Inuit. Customary law has also been put forward as an important issue within the framework of amending the new Canadian Constitution through First Ministers Conferences (FMCS). Traditional law has, however, not yet received detailed attention so as to define Aboriginal and treaty rights. This process is part of the drive toward increasing the scope of self-government, which has been the subject of most discussion at the FMCS in 1984 and 1985, as well as the basis of an all-party Parliamentary Report on Indian Self-Government in November 1985. Only Indians are recognized to date as having governments and they have not exercised their legislative powers so as to strengthen customary law. The federal government views the 584 Indian bands as having limited powers solely derived from federal statute with no sovereign authority. As far as this author is aware, only the Spallumcheen Band of British Columbia has passed a by-

law which incorporates their traditional laws on child welfare and adoption. Similar attempts by other bands have been vetoed by the Minister of Indian Affairs in recent years. Other by-laws tend to be minor and similar to municipal by-laws dealing with dogs, land usage, etc., with the exception of hunting and fishing laws. This may change significantly in the coming months as bands enact membership codes to govern future decisions on band membership as a result of amendments made to the Indian Act brought into force on June 28, 1985.

#### IV. ABORIGINAL TITLE IN AUSTRALIA AND CANADA

Australia is also out of step with other common law jurisdictions when it comes to recognizing the doctrine of Aboriginal title.

Although Aboriginal demands for land rights as such has existed for decades, while Aboriginal anger over dispossession has sparked violent conflict since settlement, the issue did not truly receive judicial scrutiny until recently. It was first raised in 1968 regarding part of Arnhem Land<sup>16</sup> and was then extensively argued before Mr. Justice Blackburn, whose decision in 1971<sup>17</sup> has received such notoriety and critical comment.<sup>18</sup> He basically rejected Aboriginal title on the basis that it had never been expressly recognized by Australian law and that Aboriginal concepts of property could not fit within common law notions of property law. The latter proposition can, I believe, be challenged on legal and anthropological grounds, while the necessity of government recognition for native title to exist can also be questioned on legal and historical bases. Aboriginal claims for sovereignty were subsequently rejected by the High Court in 1979.<sup>19</sup>

it is not possible to enter into an exhaustive critique

of the decisions in this brief paper. Let me only indicate that they were out of step with the common law jurisprudence in other jurisdictions; that they can be criticized; and that they have not conclusively decided the issue for Australia. In fact, a new test case is being prepared for the High Court for argument in late 1985 or early 1986 coming from the Torres Straight Islands via an agreed statement of fact between the plaintiffs and the Queensland government (Mabo v Government of Queensland).

The Canadian jurisprudence has borrowed heavily from the U.S. Supreme Court. I think the American position can be aptly stated by quoting from Chief Justice Marshall in Worcester v State of Georgia as follows:

"This principle (discovery), acknowledged by all Europeans, because it was in the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as Aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell." (emphasis added).

As early Canadian view of the importance of American law to Canada on this point was stated by Mr. Justice Strong of the Supreme Court of Canada as follows:

"The value and importance of these authorities is not

merely that they show that the same doctrine as that already propounded regarding the title of the Indians to unsundered lands prevails in the United States, but, what is of vastly greater importance, they without exception refer its origin to a date anterior to revolution and recognize it as a continuance of the policies established by the British Government, and therefore identical with those which have also continued to be recognized and applied in British North America." 21

Some 85 years later the Supreme Court of Canada addressed the issue once again in Calder v Attorney General of British Columbia. Three of the judges rejected the continued existence of Aboriginal title regarding the Nishga Indians in North-eastern British Columbia. Nevertheless, these judges still viewed Aboriginal title as having been recognized by the common law and made the following comments:

"although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized 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'." 22

The three dissenting judges believed that the Nishgas still possessed their Aboriginal title. Their judgement was delivered by Mr. Justice Hall, who said:

"This is not a claim in fee but is in the nature of an equitable title or interest, ... a usufructuary right and a right to occupy the lands and to enjoy the fruits

of the soil, the forest and of the rivers and streams which does not in any way deny the Crown's paramount title as it is recognized by the law of nations. Nor does the Nishga claim challenge the federal Crown's right to extinguish that title. Their position is that they possess a right of occupation against the world except the Crown and that the Crown has not to date lawfully extinguished that right." 23

He later cited American, Canadian and Privy Council decisions (including those on appeal from Africa) before stating that there is a "wealth of jurisprudence affirming common law recognition of Aboriginal rights to possession of enjoyment of lands of Aborigines precisely analogous to the Nisha situation,"<sup>24</sup> and that it does not depend "on treaty, executive order or legislative enactment."<sup>25</sup> Therefore, six of the seven judges agreed in concluding that the Aboriginal title doctrine was part of the common law; their disagreement was concerning its continued existence in that particular region of Canada.

The first Canadian decision to address Inuit land rights was in the Baker Lake Case, in which Mr. Justice Mahoney, of the Federal Court Trial Division, expressly rejected the application of Mr. Justice Blackburn's view to Canada. He then went on to say:

"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 recognized by statute or prerogative act of the Crown or by treaty having statutory effect." 26

It is important to realize that this decision was in reference to the Inuit, who have been classified by Anthropologists, judges and government officials as a so-called "simple" or "primitive" people similar to the way Aborigines in Australia have been perjuriously labelled. Mahoney J. gave due regard for the Privy Council decision, which had such a large impact upon Mr. Justice Blackburn regarding the common law's required degree of 'sophistication' or an organized society before recognizing Aboriginal title. He described the law this way:

"The elements which the plaintiffs must prove to establish an Aboriginal title cognizable at common law are:

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the Aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
3. That the occupation was an established fact at the time sovereignty was asserted by England.

It is apparent that the relative sophistication of the organization of any society will be a function of the needs of its members, the demands they make of it. While the existence of an organized society is a prerequisite to the existence of an Aboriginal title, there appears no valid reason to demand proof of the existence of a society more elaborate structured than is necessary to demonstrate that there existed among the Aborigines a recognition of the claimed rights,

sufficiently defined to permit their recognition by the common law upon its advent in the territory. The thrust of all the authorities is not that the common law necessarily deprives Aborigines of their enjoyment of the land in any particular but, rather, that it can give effect only to those incidents of that enjoyment that were, themselves, given effect by the regime that prevailed before: Amodu Tijani v Secretary, Southern Nigeria, (1921) 2 A.C. 399." 27

#### V. LAND CLAIMS IN AUSTRALIA AND CANADA

Because the law and governmental policy has been different, (along with a few other critical distinctions), the process of asserting indigenous land rights, the nature of negotiations, and the subjects for discussion, have naturally been dissimilar in some ways. The presence of treaties not only helps to justify Aboriginal title claims, but it also generates a new variety of claim concerning breaches of treaty terms. Support from the law strengthens the bargaining power of Indian and Inuit peoples seeking Aboriginal rights while helping Indian bands in their complaints concerning the maladministration of their assets. The Metis of Canada are in a more analogous position to the original peoples of Australia as they have generally not benefited from favourable court decisions or governmental policies over the years.

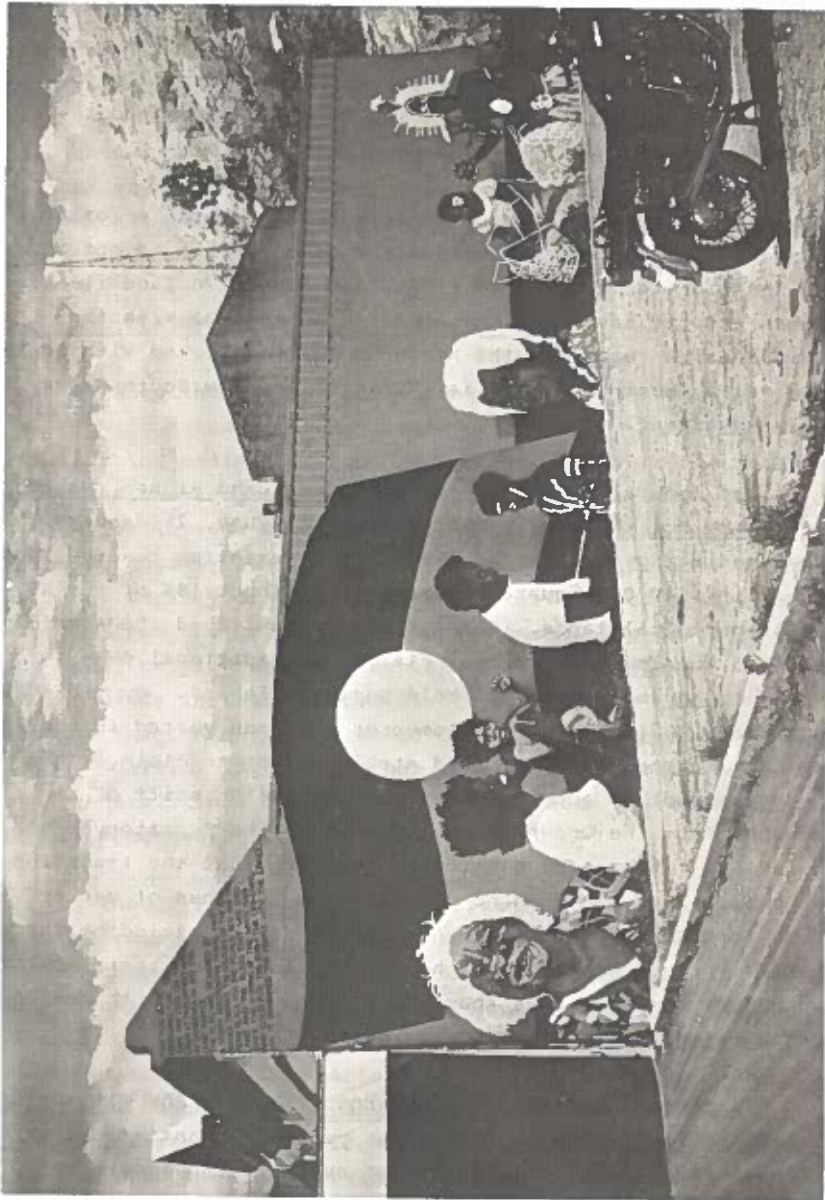
Although Indian and Inuit claimants have had markedly more success than Aboriginal Australians in pursuing their claims through litigation, all of these indigenous peoples are choosing to settle their grievances outside the courts. Aborigines have believed that they have little choice in this regard due to the decisions in Coe v Commonwealth of Australia<sup>28</sup> and the Gove Land Rights case,<sup>29</sup> even though the latter decision is only from a single judge of the Supreme Court of the Northern Territory and the former can be res-

tricted to the issue of sovereignty. Therefore, the political route has been chosen out of necessity. It is worth noting, however, that this may change depending on the outcome of the Mabo Case, which is only being brought due to the intransigence of the Queensland government.

Aborigines have conducted intensive lobbying efforts over the last decade at federal and state levels to obtain recognition for their land rights and to obtain land itself. These efforts have been occasionally successful with the Commonwealth regarding the Northern Territory, and with South Australia, Western Australia, Victoria and New South Wales to some extent.<sup>30</sup>

The federal government's Aboriginal Land Rights (Northern Territory Act) was proclaimed on Australia Day, 26 January 1977. It immediately transferred ownership of existing reserve land totalling 249,013 square kilometres, or about 18% of the NT, into Aboriginal lands. The Act also established the Aboriginal Land Commissioner to hear claims by traditional owners to vacant land and Aboriginal held pastoral leases. By mid 1982, a further 157,535 square kilometres had been vested in Aboriginal Land Trusts with more land still subject to claim. This is an incredible accomplishment and a massive shift of resources from the Crown to one quarter of the Territory's population. It must be mentioned, however, that the traditional owners have received no compensation for loss of use of this land during the intervening years or for excluding their claims to the remainder of the NT. Furthermore, their ability to govern their land as they see fit and to deal with development projects on their lands is quite limited.

In South Australia, the government passed the Pitjantjatjara Land Rights Act in 1981 after years of negotiations which transferred freehold title to just over 100,000 square kilometres in the far north west, or approximately 10% of the



Aboriginal Health Service, Townsville Queensland (Beate Zimmerman photo)

state, to the Pitjantjatjara people. The Maralinga people also settled their claim and received title to their large traditional territory by State Statute in 1983. Once again, this is a stunning achievement by white society in the struggle to deliver justice to the original inhabitants. These people did not, however, receive any compensation for their losses. In addition, none of the other Aboriginal tribes in South Australia have received anything and are still restricted to 506 square kilometres of reserve land.

Victoria and Tasmania have drafted legislation, which has not yet been introduced, based on some discussions with Aboriginal organizations in these two states. The intention appears to be to transfer ownership of existing reserves while making other Crown land available for claim. The draft Victorian bill does not address the issue of financial compensation but it does establish the most liberal definition of claimable Crown land along with a progressive claims resolution process. Victoria also has created a special parliamentary committee to investigate the question of financial compensation, which reported in mid-1985. It is not yet clear how the state government will proceed. The Tasmanian initiative appears to be dormant at present.

The Government of NSW released its Green Paper on Aboriginal Land Rights on December 22, 1982. This was followed by the passage of the Aboriginal Land Rights Act in early 1983. It also transferred existing reserve land from the Aboriginal Land Trust, which previously held title, to local Aboriginal land councils. It further makes Crown land susceptible to claim; however, the definition used in the Statute is so vague and narrow that it is unlikely to encompass much actual land. This approach does break new ground for Australia in that it includes payment of financial compensation in the form of 7.5% of the annual state land tax revenue

for a period of 15 years. This money will be used to pay all administrative costs for the local, regional and state-wide land councils, to fund the presentation of claims, to buy land in the market place, and to develop Aboriginal lands. To date, the reaction has been almost completely negative from the Aboriginal community of N.S.W. They fear that they will ultimately only obtain the reserves they already have (273 square kilometres) plus a little bit of Crown land. Much of the money, which they believe to be inadequate from the outset, will simply disappear in covering administrative costs for the bureaucratic nightmare of over 100 land councils imposed on them by the Statute. They argue that the government is merely establishing an economic development fund similar to the federal Aboriginal Development Commission rather than responding to their land rights.<sup>31</sup>

The Government of Western Australia has changed its position on Aboriginal rights after the election of a new government early in 1983. A Commission of inquiry was established to consult and report as to how lands should be transferred. The Government has rejected the if by deciding that land rights will be recognized. Unfortunately, essential parts of the Seaman Inquiry Report having to do with Aboriginal control over mining has been rejected by the Premier who succumbed to the furious lobby of the mining and pastoralists lobby. The Government has not yet enacted legislation to carry out its promises.

The Canadian approach has been very different indeed. Although the Government of Canada has issued its policy on land rights and the claims process, it is simply that - a policy. No legislation is in force to create a claims process, to limit the scope of land rights, or to impose settlements. All settlements result from direct negotiations, therefore, any agreements reached must inevitably reflect the wishes of

all sides. This entails a considerably longer process than legislatively, imposing settlement terms, but it has been selected by both sides as the best way to achieve acceptable solutions. Furthermore, it permits the items for negotiations to include whatever the parties believe is necessary. For example, the James Bay and Northern Quebec Agreement, which was later ratified by corresponding provincial and federal statutes, not only resolved land and money issues, but it also covered social services, health care, education, the administration of justice, wildlife management, environmental protection, community infrastructure, hunting and fishing rights, economic development, and income guarantees for practitioners of the traditional economy. In effect, it chartered the future of indigenous - white relations for many decades to come. This has been subsequently followed by the Naskapi Indians in the Northeastern Quebec Agreement and by the Inuit of the Western Arctic (Inuvialuit) in the COPE Agreement. Intensive negotiations are also under way in the Eastern Arctic (Tungavik Federation of Nunavut), (the Yukon Council of Yukon Indians) and the Mackenzie Valley of the N.W.T. (Dene Nation and Metis Association of N.W.T.) Negotiations are in less advanced stages in Labrador, Southern Quebec and British Columbia. A Task Force was established by the federal government in July of 1985 to review the comprehensive claims policy and process due to the many complaints made by Indian, Metis and Inuit groups. Major problems have arisen regarding reluctance of provincial governments to participate and provide land as well as the federal demand for a formal extinguishment of Aboriginal title in return for the land, money and benefits provided under the settlements.<sup>32</sup>

Personally, I recommend the Canadian approach as frustrating and tortuous as it may be for it ensures that land rights will ultimately be achieved on the basis of consensus rather than power. As such, it provides optimism both regarding

the finality of settlements and concerning the likely improvement of social and economic circumstances for indigenous peoples. Australian settlements cannot guarantee either outcome. One thing which history does clearly demonstrate is that the so-called "indigenous problem" will not disappear through assimilationist policies or unfair settlements. At most, it will go underground for a few years or decades and then resurface stronger than ever.

#### VI. CONCLUSION

In this paper I have argued that recognition of customary law and resolution of land claims are both preconditions to the survival of indigenous peoples as distinct and unique societies. The presence of customary law without land will not be enough as state law will never do an adequate job of protecting the traditional law while a landless people are always at risk. Land rights alone is insufficient as it is likely to only offer short-term protection as the dominant society will use its law to overwhelm and absorb the indigenous people.

Both must be recognized as their interrelationship is essential. Customary law supports land rights through its concepts of property and its holistic approach to life. A land base and the right of self-government is necessary to assure that traditional law has the freedom and flexibility it needs to evolve.

The happy marriage of the two permits the revitalization of societies which have so very much to offer the rest of the world to assist in the harmonious survival of us all. Neither Australia nor Canada has yet to comply in full with international standards; to meet their grand pronouncements made abroad; to fulfill their domestic promises; to jettison their

colonialist policies and mentality; to choose indigenous peoples and their rights over the demands of natural resource developers. Some positive steps have been made along with much backsliding. Far more must be done before historic injustices can be said to have been fully redressed.



Bush Tucker Expedition in Northern Territory (photo: Diana Vinding)

1. Campell v Hall (1774), 98 E.R. 848
2. Regina v Symonds (1847) N.Z.P.C.C. 387 (N.Z.S.C.)  
See also, Paul G. McHugh, Maori Land Laws of New Zealand (Saskatoon: Native Law Centre, 1983), and N.W. Smith, Maori Law (Wellington: A.H. & A.W. Reed Inc., 1960).
3. See, e.g., A. Allot, Essays in African Law (1960) and New Essays in African Law (1970).
4. See e.g., Paul Williams, "The Covenant Chain", Unpublished L.L.M. Thesis, York University, 1982.
5. See e.g., M.D. Emrys Evans, "Common Law in a Chinese Setting - the Kernel or the Nut?" (1971), 1 Hong Kong Law Journal 9.
6. See, e.g., Regina v Jack Congo Murrell (1836), 1 Legge 72 (N.S.W.S.C.).
7. Cooper v Stuart (1889), 14 A.C. 286 at 291.
8. Milirrump v Nabalco Pty Ltd. and the Commonwealth of Australia (1971), 17 F.L.R. 141 at 268.
9. See, e.g., Australian Law Reform Commission, Research Papers No. 6 and 6A.
10. See e.g., Jabanardi v AMP Fire and General Insurance Co. Ltd et al. (1981) 1 Aboriginal Law Bulletin 7.
11. For a general review of this area, see, Australian Law Reform Commission, Aboriginal Customary Law - Marriage, Children and the Distribution of Property, Discussion Paper No. 18, August 1982.
12. R.S.C. 1970, c. I-6, 3s. 48 (16) and 2 (1) as amended, S.C. 1985, C-31.
13. Ibid., S. 2 (1)
13. Bradford W. Morse, "Indian and Inuit Family Law and THE Canadian Legal System" (1980), 8 American Indian Law Review

199. See also, Douglas Sanders, Family Law and Native people. (Ottawas Law Reform Commission of Canada, 1974).
15. The James Bay and Northern Quebec Agreement. (Quebec: Editeur Officiel du Quebec, 1976) ss.18.9.19 and 20.0.20.
  16. Mathaman v Nablaco Pty Ltd. (1969), 14 F.L.R. 10(N.T.S.C.)
  17. Note 8, supra
  18. See, e.g., Barbara Hocking, "Does Aboriginal Law Now Run in Australia" (1979), 10 Fed.L.Rev. 161.
  19. Coe v Commonwealth of Australia (1978), 13 A.L.R. 592 and (1979), 24 A.L.R. 118 (H.C.)
  20. (1832) 31 U.S. (6 Pet) 515 at 543-44
  21. St. Catherines Milling and Lumber Co. v The Queen (1887) 13 S.C.R. 577 at 610
  22. (1973) 34 D.L.R. (3d) 145 (S.C.C.)
  23. Ibid., at 352
  24. Ibid., at 376
  25. Ibid., at 391
  26. Hamlet of Baker Lake et al. v Minister of Indian Affairs and Northern Development et al. (1980), 107 D.L.R. (3d) 513 at 544
  27. Ibid., at 542-544
  28. Note 19, supra

29. Note 8, supra
30. For a general review of land rights settlements, see Bryan Kean-Cohen and Bradford W. Morse, "Indigenous Land Rights in Australia and Canada: A Comparison" in Peter Hanks and Bryan Kean-Cohen, eds., Aborigines and the Law, (Sydney N.S.W.: George Allen & Unwin, 1984) and Bradford W. Morse, Aboriginal Self-Government in Australia and Canada, (Kingston, Ontario: Institute of Intergovernmental Relations, 1985).
31. For an exhaustive analysis of the new law, see, Meredith Wilkie, Aboriginal Land Rights in N.S.W. (Chippendale, N.S.W.: Alternative Publishing Co-operative Ltd., 1985)
32. For a complete review of the Canadian situation, see Bradford W. Morse, ed., Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada, (Ottawa: Carleton University Press and Oxford University Press, 1985).
33. For a review of recent Canadian constitutional developments, see, Michael Asch, Home and Native Land, (Agincourt, Ontario: Methwan, 1984); and Gary Gould, Ron Gaffrey and Alan Semple, Broken Promises, (Fredericton, New Brunswick: New Brunswick Association of Metis and Non-Status Indians, 1984).

## CONCLUSION

*In counter-balance to the proposals and principles set out by the federal government in Chapter I, this Conclusion contains the minimum demands made by two Aboriginal organisations which had been negotiating with the government prior to the release of the Preferred Model. The National Aboriginal Conference is now disbanded and will probably be replaced by another organisation in due course. The NAC demands printed here date from February but are significant in that they demonstrate what one party of negotiators had as an overall aim. The second set of principles by the Federation of Land Councils is the most contemporary statement of Aboriginal demands which the federal government will have to address now. However, in the light of the most recent information which has come from Australia, the possibilities for further consultation and negotiation look bleak.*

NAC: MINIMUM EXPECTATIONS OF LAND RIGHTS LEGISLATION - FEB 1985

The national land rights legislation must ensure no lesser Aboriginal and Torres Strait Islander rights than are contained in existing State and Federal legislation. Hence, the proposed Western Australian legislation is unacceptable and any amendments to the Northern Territory Land Rights Act must go further towards meeting Aboriginal demands and not weaken its current provision.

The national land rights legislation must confront the fact that legislative protection of Aboriginal and Torres Strait Islander interests will sometimes cause inconvenience to white, and especially commercial, interest. It must provide for the return of land to Aboriginal and Islander communities in some circumstances where the land is desired by white interests.

The national land rights legislation must restore land to Aboriginal and Islander ownership in recognition of the fact that the land was wrongfully taken from the original owners. Accordingly, imposed conditional grants are unacceptable.

The national land rights legislation must clearly indicate that it is the Commonwealth which is primarily responsible for ensuring that land is returned to Aboriginal and Islander ownership. Hence, there is no legitimate basis upon which State National parks and other public purpose lands should be exempt from claim.

The national land rights legislation must reflect an acknowledgement that the injustices perpetrated upon the Aboriginal and Islander people since European colonization will take very many years to redress. A cut-off period for land claims

and a limited duration of compensation payments are incompatible with his principle and cannot be accepted.

The national land rights legislation must provide for Aboriginal and Islander control over Aboriginal land, including the determination of who may enter the land.

The national land rights legislation must allow for the exercise of the principle of Aboriginal self-determination in relation to the use of funds generated by economic activity on Aboriginal land. To deny Aboriginal owners the income generated by any economic activity on Aboriginal land is to maintain Aborigines and Islanders as dependent peoples in their own land.

The national land rights legislation must empower Aboriginal and Torres Strait Islander communities to refuse permission for mining on their land or to impose conditions under which mining may proceed. To set aside a refusal, or conditions imposed, shall require an Act of Parliament.

The national land rights legislation must return land to Aboriginal and Torres Strait Islander communities in inalienable title.

The national land rights legislation must include a comprehensive regime for the protection of areas of significance.

The national land rights legislation must provide for Aboriginal and Torres Strait communities affected by mining operations to receive mining royalty equivalents.

The national land rights legislation must include provisions for compensation.

## NATIONAL FEDERATION OF LAND COUNCILS:

### National Aboriginal Land Rights Major Principles

The following statement of major principles is designed to establish the parameters of model legislation within key areas of concern. It is proposed as a basis for consultations with the States and relevant groups.

#### 1. Form of legislation

Since the beginning of time, the Aboriginal nation comprising of different Aboriginal language groups, has maintained the economic, social and political sovereignty of this country, now known as Australia. The British law "Terra Nullius" is considered by Aboriginal people today as nothing more than an imperialist legal fiction to justify British theft and genocide and a doctrine that could not be applied to this continent which is still occupied by Aboriginal groups with clearly defined systems of law including laws relating to land.

Aboriginal people have, since 1967, looked to the Commonwealth with the authority of the referendum carried overwhelmingly in that year. Therefore, Commonwealth law must be passed to apply in all parts of the Commonwealth.

#### 2. Land Available to Become Aboriginal Land

(a) All Aboriginal reserves currently occupied by Aboriginals to be granted by way of direct executive action (e.g. Schedule 1 land in the NT).

(b) Former Aboriginal reserves which are currently vacant Crown land. Such land to be granted by way of direct

executive action, on application from appropriate Aboriginal groups. Some may have Aboriginal inhabitants but be classified as vacant Crown land.

(c) Land which at any time since European invasion was set aside or acknowledged by Europeans, formally or informally, to be for use or occupation for or on behalf of Aboriginal people to be available for grant by direct executive action subject to consideration of current use or title.

(d) Other vacant Crown land to be available for claim on the basis of traditional ownership, historical links, occupation and/or need.

National Parks and Reserve Crown Land to be available for claim if:

- a case is established showing a basis of the above criteria for claim to the land and,
- the applications are willing to accept a grant of land conditional upon the continued use of that land as a National Park on terms agreed by the applicant and the Commonwealth, or State: Such conditions be contingent upon the Crown showing greater detriment as to why a lease should be entered into. Reserve Crown Land the Crown would have to demonstrate serious detriment to override the grant of title to the applicant.

Claims based on the above criteria may be made in respect land within a town boundary, subject to the appropriate title and notwithstanding current zoning which may need to be reconsidered.



Liquor prohibition notice in Northern Territory (Photo: Diana Vinding)

Applicants for closure of seas based upon the above criteria to be determined under Commonwealth law which should if necessary override State law in this regard.

### 3. Land Claim Procedures

The objective should be to minimise delays in processing claims, encourage the settlement of cases through conciliation and agreement, but ensure that there is appropriate opportunity for all interest to be heard.

The following land claims procedures are designed to achieve balance between those objectives:

- Title of Aboriginal reserves currently occupied by Aboriginal people to be transferred automatically by Executive Act as a direct grant or, if necessary, by way of legislative enactment.
- In respect of vacant Crown land, and other appropriate land referred to above, where there is agreement between the applicant and the relevant State or Territory Governments, land to be granted by way of executive decision without recourse to a land claim procedure.
- Where there is a dispute in respect of an application, including competing claims from Aboriginal groups over the same area, a Tribunal to be established to recommend appropriate action, which in the case of competing claims should give priority to claims based on traditional ownership.
- Claims for title to land to be submitted on the basis of:

traditional ownership  
historical association  
occupation and/or need.

- A Commonwealth tribunal to be established consisting of a single Judge of the Federal Court to consider land claims with a view to recommending to the relevant Commonwealth Minister appropriate action.
- The Minister will make the grant on the Tribunal's recommendation.
- Legislation to provide for negotiations leading to conditional grants.
- Prior legal interests in land (i.e. leasehold interests) are to be protected by the legislation for the term of the lease: renewals to be subject to negotiations with traditional owners.

### 4. Form of Title

Title to land to be granted as inalienable freehold except for grants of claims based on need where other forms of title acceptable to claimants may be allowable.

### 5. Ownership of Land

Ownership of Aboriginal land held under inalienable freehold title to be vested in local Aboriginal Land Trusts or in regional or local Land Councils as the claimants may decide.

### 6. Control of Aboriginal Land

Access to Aboriginal land will be subject to Aboriginal

consent.

Permits would be available to State officials in the performance of their duties except where inconsistent with Federal legislation.

Aboriginals shall exercise a right to grant or withhold consent to mineral exploration and mining in respect of Aboriginal land and to negotiate a commercial basis for consent.

Mining royalty equivalents are to be payable on a basis to be negotiated between the Commonwealth and the States. Such funds to be directed to the accelerated delivery of services to communities affected by mining activity, as appropriate, and investment capital for the longer term economic security of those and other Aboriginal communities. (The access of these communities to mainstream programmes and services is not to be reduced.)

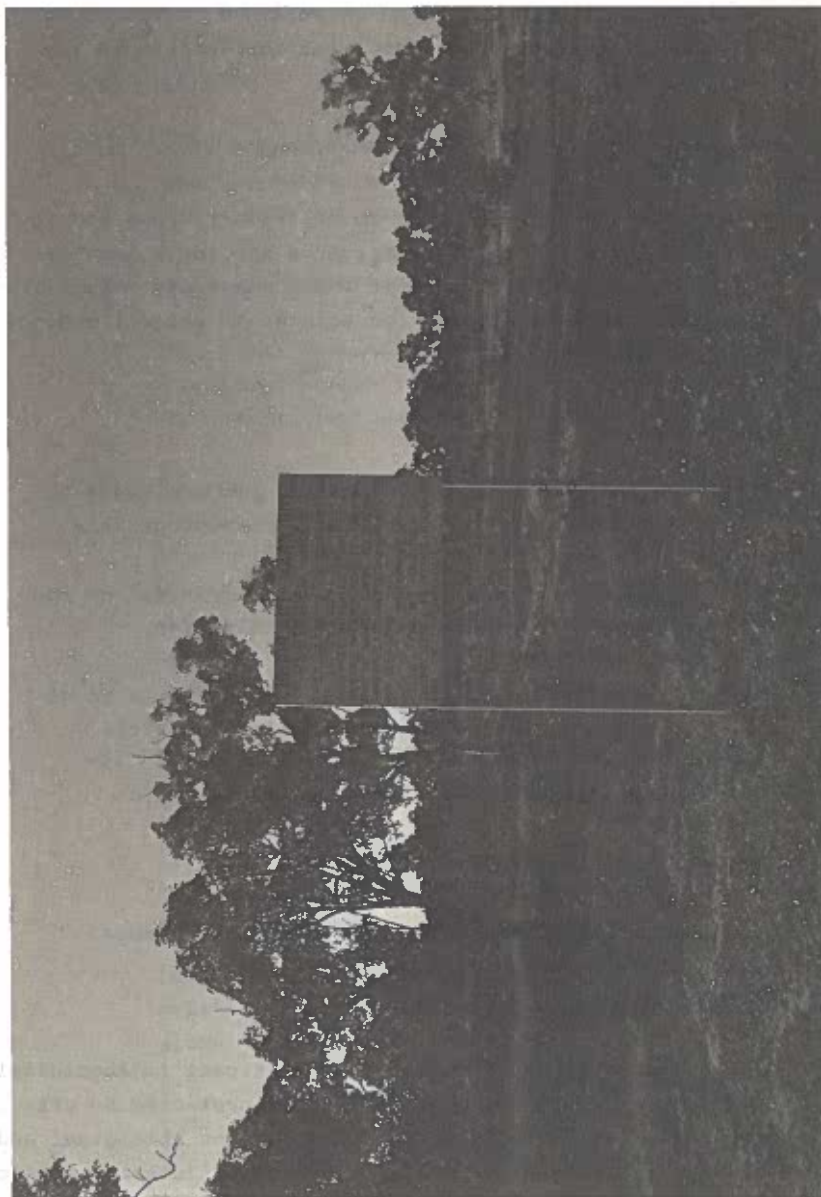
Main public roads will be excluded from Aboriginal title.

New roads constructed over Aboriginal land to be the subject of consent of the affected communities, use of such new roads to be determined by the Aboriginal community.

Appropriate penalties to be imposed for breach of conditions applicable to entry on and use of Aboriginal land:

- fines for individuals, corporations and company officer;
- seizures and forfeiture of equipment which should go to the community.

7. Administration



Woman on bush tucker expedition in Northern Territory - (Photo: Diana Vinding)

Regional Land Councils to be established to represent community interests and administer the matters in respect of Aboriginal land.

8. Fishing and Hunting

The rights to hunt and fish on all rivers, seas and internal waters and to be exempt from any local laws restricting such activity except where community enters into agreement with conservation agencies to protect endangered species.

9. Excision

- (a) The national law should provide for excisions on land held under other title, public or private.
- (b) Claims to be made to Lands Claims Tribunal on the same basis of claim as other land claims.
- (c) No arbitrary limits on area, which should be determined by reference to economic viability.
- (d) Zoning laws to be varied where necessary.
- (e) Title to be Inalienable Freehold.
- (f) Conciliation process prior to Tribunal stage.

10. Site Protection

That sites considered sacred or significant to Aboriginal and Torres Strait Islander need to be protected by effective Commonwealth legislation. The present Aboriginal and Torres Strait Islander Cultural Heritage (Interim) Protect-

ion Act is insufficient.

11. Compensation

- (1) Land, Compensation and Cultural Heritage as they refer to Aborigines are inextricably linked - a Land Rights bill must incorporate all three.
- (2) Legislate for national compensation.
- (3) Each local community should decide and establish priorities on the forms most appropriate to meet its communities needs.
- (4) Compensation could be seen as paying the rent from a negotiated percentage of the G.N.P. The administration of the compensation is to be through an Aboriginal Body set up through full consultation with the Aboriginal people. Supervision of the negotiation is to be by an internationally respected body acceptable to both parties.
- (5) That Aboriginal organisations seek an interim negotiated agreement which would provide for:
  - (a) an agreed percentage increase in present funding of Aboriginal programs - say 20 per cent per annum for the next 3-5 years;
  - (b) transfer of the control of the funding and related programs to Aboriginal organisations at regional and national level;
  - (c) establishment of an independent Commission of enquiry presided over by a Judge of the International Court to report on a continuing basis for compensat-

ion for land etc. of which Aborigines have been deprived and which cannot be restored to them without injustice to present owners.

(These last points were recommendations of Dr H.C. Coombs and should be supported)

\* \* \*

The latest news on the land rights of Aborigines in Australia is that since the Geneva Working Group of 1985, the Minister, Clyde Holding has taken the New Preferred Model to the Cabinet which has endorsed the principles. This means that the model will now be sent to the States of Australia to look at their own legislation and amend it as they see fit. A bill will eventually be drafted to make the principles into a Commonwealth law. There is now little chance of any proposed consultative procedure with Aborigines on the basis of the opposition to the principles.

When the Australian government formerly "hands back" Ayres Rock to the traditional owners on October 25th, 1985 it may not be apparent that behind the razzmatazz there is a bitter and long struggle for the rights of Aboriginal people taking place in Australia. This document has outlined the factors in that struggle in the hope that the desires and aspirations of the Aboriginal people will win through.

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