ABORIGINAL SELF-GOVERNMENT
in Australia and Canada

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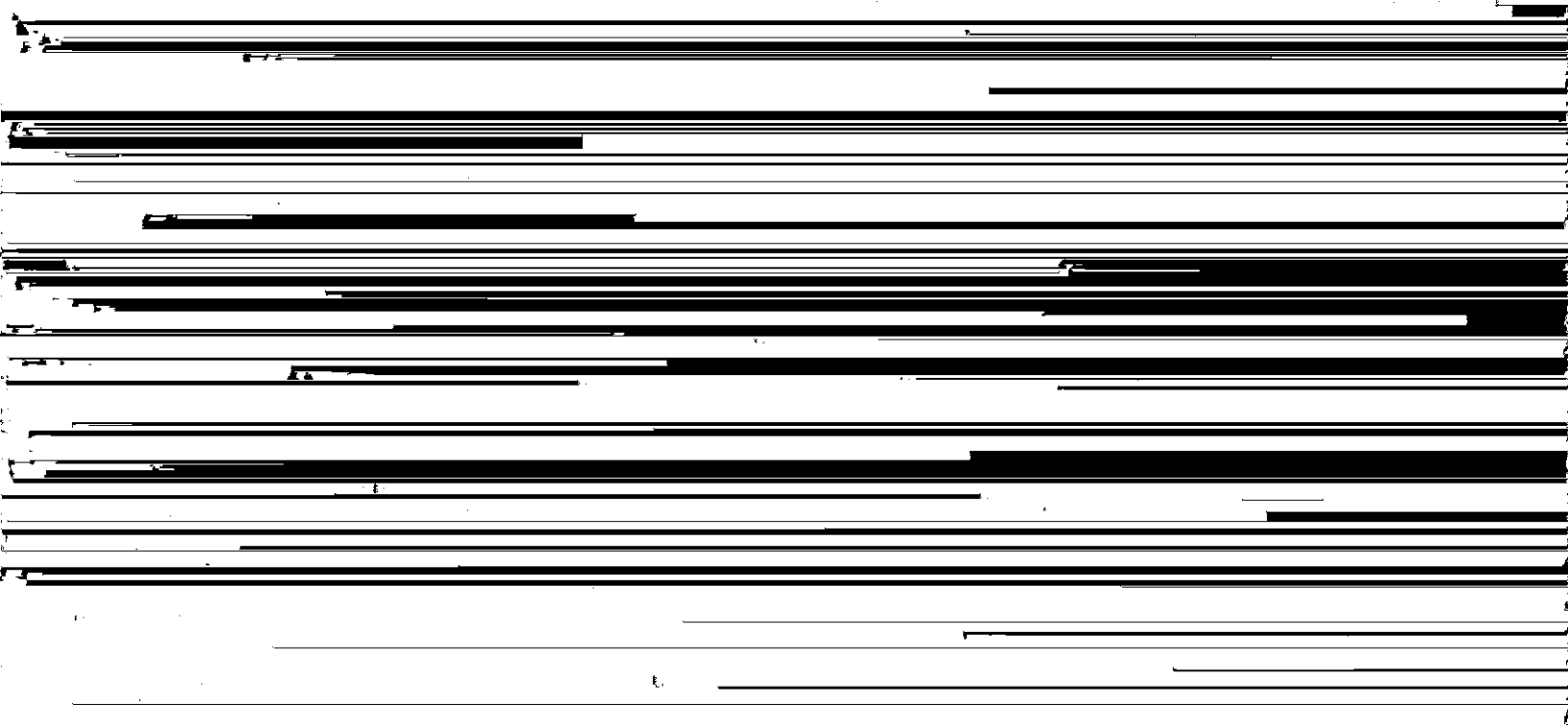

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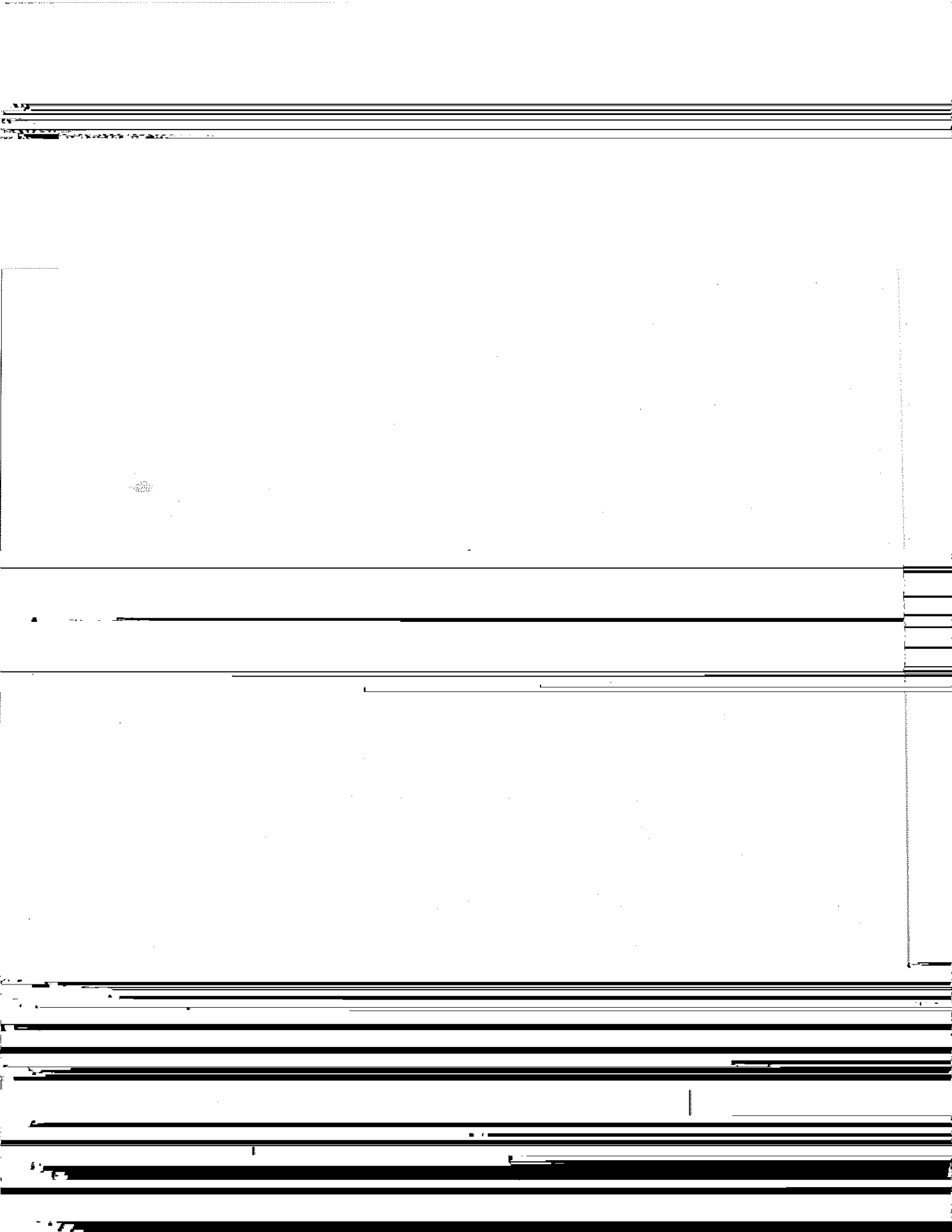
PREFACE

The constitutional reform process, as it relates to aboriginal peoples, has come to

Diverse and conceivably conflicting views cannot be accommodated without a clear understanding and shared perceptions of what is at issue. Phase One of the project, including this series of papers, is designed to help take the first step

how their "aboriginality" is defined, their land base, and the jurisdiction of



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Canada.

I would like to thank my secretary, Rachel Pi

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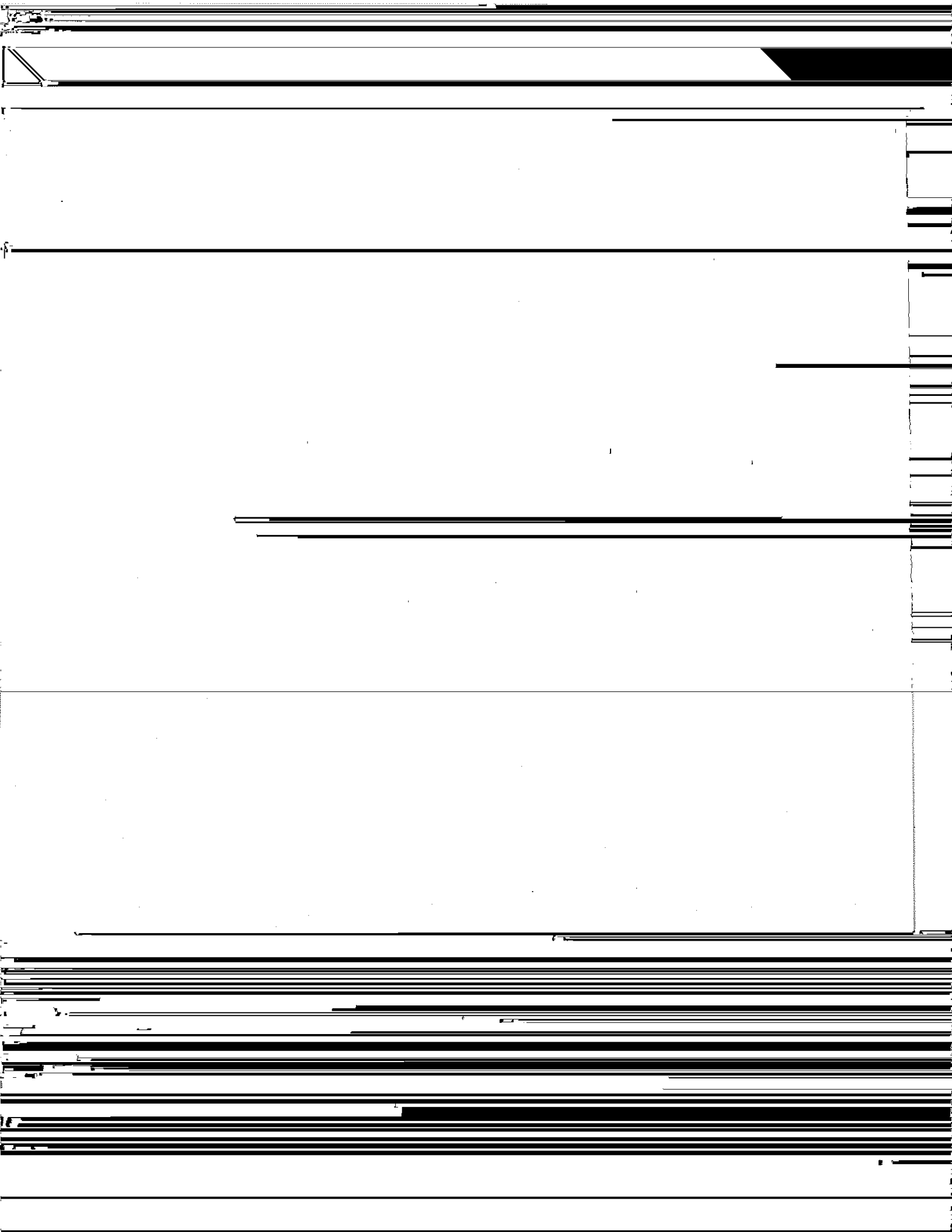
ABSTRACT

Aboriginal self-government requires a territorially defined land base under Aboriginal jurisdiction, a population which controls its own membership, natural



1 INTRODUCTION

This study will focus upon a number of aspects related to self-government of the [redacted]. The purpose of the paper is to describe the Australian situation as it exists currently and how it is likely to evolve in the near future so as to elicit possible suggestions and ideas for consideration in Canada.

Parallels will be drawn with Canadian experiences where they are applicable and [redacted] as well as positive comments will be

specific federal legislation (Bill C-46, the **Cree-Naskapi (of Québec) Act**), land claims settlements involving some degree of self-government (the James Bay and Northern Québec Agreement, the Northeastern Québec Agreement and the

- What is their land base, how has it been created and why? (i.e., an analysis of aboriginal land rights through case law and legislation);

- What are the systems and types of land tenure for Aboriginal lands? (i.e., who holds title, in what way, on what terms, and what is the source of

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

Aboriginals have lived in Australia for over 40,000 years with a

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

European colonization began in Sydney in 1788 with the arrival of the first convict-settlers. Aboriginal people underwent incredible hardship through the detrimental effects of exploitation, racism, disease and colonialist policies in

made such a different policy far easier to follow as did the fact that Aboriginals were largely non-militaristic in nature and lived in small decentralized communities which posed little concerted threat to settlement. The original inhabitants of Australia were not regarded as economically important either as trading partners or as teachers who could advise the foreigners how to survive in a different environment. There was, then, no factor present to force or prod the colonizers to treat the indigenous people fairly. The debate, as it [illegible]

centred solely on such issues as extermination versus assimilation versus segregation, while Imperial demands for adherence to aboriginal title policy were simply rejected or ignored.

Despite obvious differences between their histories, there are many parallels between the two countries. Australia has also had its periods in which

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

Professor James Crawford of the Australian Law Reform Commission summarized

times higher and the prevalence of trachoma is 15 times greater than in the

situation which confronts the [redacted]

3 DEFINING INDIGENOUSNESS IN LAW

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

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

As a result, people of Indian ancestry have been separated into those who

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

The fact that the federal government of Australia was constitutionally precluded from developing any special relationship with Aboriginal and Torres Strait Islanders until after 1967 has been an advantage. Coming late to this field, the Commonwealth (federal) government had not created a history of restrictive

1) Tasmania

Aboriginal Relics Act 1975

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

2) Victoria

Aboriginal Lands Act 1970

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

Archaeological and Aboriginal Relics Preservation Act 1972

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

3) South Australia

Community Welfare Act 1972

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

5) Western Australia

Aboriginal Heritage Act 1972

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

It should be noted, however, that all of these statutory defintions are just that -- definitions contained in ordinary statutes. As such, they can be readily

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

The Australian approach is not only flexible, but it also meets indigenous demands for a voice in deciding who their members are and ensuring that ancestry is a vital element in the judgment. In addition, this model [illegible]

from some provincial and federal government representatives that individuals should have the right to decide for themselves whether they wish to receive this special status.

During Australia's colonial period, just as in Canada prior to confederation, relations with Aboriginal and Torres Strait Islander people were officially a matter within Imperial control exercised in the name of the Crown, but were in

This was instituted indirectly by granting the Commonwealth Parliament its legislative powers in s. 51 to "make laws for the peace, order and good

fathers" from the original inhabitants such that it could happily be left to the

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

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

This position recently changed as a result of two completely unrelated developments. Firstly, the Government of Queensland [redacted]

notorious record of maintaining apartheid like conditions for Aboriginal and

Court interpreted s. 51(xxvi) to have a wide meaning. Chief Justice Gibbs, Aickin and Wilson JJ concurring, viewed this subsection as empowering legislation for a

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

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

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

a) to regulate and control the people of any race in the event that they constitute a threat or problem to the general community; and

b) to protect the people of a race in the event that there is a need to protect them.

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

A broad reading of this power is [redacted]

[redacted]

concluded that this power would support the passage of a treaty or compact with Aboriginal people and/or "laws dealing with the language and culture of Aboriginal communities; laws for the protection of Aboriginal sacred sites and artefacts;

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

5 ABORIGINAL LAND

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

ABORIGINAL TITLE

> The land is my backbone. I only stand straight, happy, proud and not ashamed about my colour because I still have land. The land is the art. I can paint, dance, create and sing as my ancestors did before me. My

... Wherever I have travelled in the Aboriginal World, there has been a common attachment to the land. This is not the land that [redacted]

[redacted] speculated, bought, sold, mortgaged, claimed by one state, surrendered [redacted]

The more popular approach of the 20th century in Australia has been the creation of Crown-owned reserves. One fundamental difference between the Australian and Canadian experience in this regard is in terms of which Crown is

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

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

For tens of thousands of years prior to the establishment of the British

Despite the indisputable importance that the land carried, no account

Supreme Court (**Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth** (1971), 17 F.L.R. 141) while the High Court dealt with it as a side issue only in another case (**Coe v. The Commonwealth** (1979), 24 A.L.R. 118). A substantive test case concerning the aboriginal title of Torres Strait Islanders is before the

[redacted]

Others v. Queensland and the Commonwealth). This action is likely to resolve the

[redacted]

Trust Act 1966 was enacted by that State and proclaimed on December 8, 1966. The purpose and effect of the statute was to convey title to the Aboriginal reserves then in existence in South Australia to a corporate body composed of Aboriginal people independent from government. The Act has been amended on several occasions over the years and additional lands have been transferred to the

[redacted]

reserves, particularly mineral rich ones, by consolidating communities and maintaining tight governmental control over life on the remaining reserves so as to prompt the indigenous peoples to leave and blend into urban and country town society.

This first step of granting land rights to the original inhabitants of Australia was clearly a very limited one. Even under the best of the schemes implemented, it still only conveyed title over a land base that was already inadequate at meeting the needs of the Aboriginal population as a whole. This is analogous to the Canadian federal proposals of the 1969 White Paper and the 1984 **Indian Self-Government** Bill. Furthermore, the land trust vehicle used the mechanism of a statewide body to hold title to all reserve lands. This defeated the objective of

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

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

This was quickly followed by the appointment of Mr. Justice Woodward as the Aboriginal Land Rights Commissioner in February of 1973. His reports of July

of that year and the following May were instrumental in changing the tenor of the

[redacted]

1981 (the Pitjantjatjara Land Rights Act) [redacted]

territorial legislation is not being fully utilized or is inadequate to guarantee their

6 ABORIGINAL LAND TENURE

The Aboriginal and Torres Strait Islander people reside upon land in Australia which is subject to a number of different regimes. The preceding chapter indicated several of these: namely, reserves, missions, Aboriginal trust lands, leaseholds from Aboriginal trusts, and areas dedicated under land rights legislation. To this list should be added lands purchased by the former Aboriginal

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

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

Reserves are owned directly by the Crown in right of the particular state. The remaining ones in Queensland and Western Australia are administered by the

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

Membership in the Trust is limited to people of Aboriginal descent. The

Governor in Council appoints the Chairman and two other members together with additional members recommended by the communities living on Trust land. These people become the trustees for three years and are eligible for reappointment

The basic activity of the Trust has evolved into being a landlord. It holds title to preserve it and offers some technical assistance, but it has leased almost

Northern Territory

The best known Australian land rights legislation in Canada is the **Aboriginal**

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

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

Claims on the basis of need, which had been permitted under the 1975 Bill and were recommended by the Woodward Commission, are excluded under the

Act. Traditional owners also cannot claim land which is part of a "T[illegible]"

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

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

s. 50(1)(a)(ii) to report his findings to the Minister and to the Administrator of the Northern Territory, and, where he finds that there are Aboriginals who are the traditional Aboriginal owners of the land, to make recommendations to the Minister for the granting of the land or any

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

(a) the number of Aboriginals with traditional attachments to the land claimed who would be advantaged, and the nature and extent of the advantage that would accrue to those Aboriginals, if the claim were acceded to either in whole or in part;

(b) the detriment to persons or communities including other Aboriginal groups that might result if the claim were acceded to either in whole or in part;

(c) the effect which acceding to the claim either in whole or in part would have on the existing or proposed patterns of land usage in the region; and

(d) where the claim relates to alienated Crown land - the cost of acquiring the interests of persons (other than the Crown) in the land concerned.

(4) In carrying out his functions the Commissioner shall have regard to the following principles: --

(a) Aboriginals who by choice are living at a place on the traditional country of the tribe or linguistic group to which they belong but do not have a right or entitlement to live at that place ought, where practicable, to be able to acquire secure occupancy of that place;

(b) Aboriginals who are not living at a place on the traditional country of the tribe or linguistic group to which they belong but desire to live at such a place ought, where practicable, to be able to acquire secure occupancy of such a place.

If the Commissioner decides after receiving extensive anthropological and oral evidence that the claimants are indeed "traditional Aboriginal owners," he

The hearings are intended to be as informal as possible, yet the Commissioner does have the power to subpoena witnesses or documents (s. 54(1)), administer oaths or affirmations (s. 54(4)), and initiate criminal charges for refusal to answer questions or produce documents (s. 54(6)) or for furnishing f[illegible]

information (s. 54B). Financial assistance to provide legal representation can be sought from the Attorney General of [illegible]

[redacted]

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

(a) in the case of a recommendation under sub-section 10(1) or section 11 - execute a deed of grant of an estate in the land in accordance with the recommendation and deliver it to the grantee; or

(b) in the case of a recommendation under sub-section

[redacted]

Not only are "traditional Aboriginal owners" the only ones who can tender a "traditional land claim" (s. 3(1)) under the Act (s. 50(1)), but they also enjoy special powers and advantages under the Act once their claim is upheld and implemented. For example, their land can "not be resumed, compulsorily acquired or forfeited under any law of the Northern Territory" (s. 67), nor can any road be

constructed over it without their consent (s. 68(2)(a)). They also have the

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

Furthermore, the Act creates the Aboriginal Benefit Trust Account (s. 62). This Account received all moneys standing to the credit of the former Aborigines Benefits Trust Fund (s. 62A) as well as "amounts equal to the amounts of any royalties received by the Commonwealth or the Northern Territory in respect of a mining interest in Aboriginal land" (s. 63). This Account also earns interest (s. 62(3)). Forty per cent of the amounts paid into the Account are redistributed to

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

Minister wishes.

As a result of this

[redacted]

station owners. Thousands and thousands of acres of land have been voluntarily

conducted by the Department of Aboriginal Affairs or the Central Land Council.

This gives security of tenure to those traditional Aboriginal owners regarding

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

lands (being a part of the lands vested in

persons;

has the permission of the State Minister of Mines and Energy (s. 21). The consent

of the body corporate is essential, subject to a right to seek a special f[illegible] of

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

A further interesting provision in both statutes is the creation of a post called a tribal assessor. This individual is appointed by the Minister with the approval of the body corporate. Any individual Aboriginal member who feels

aggrieved by a decision of the body corporate or any other members may appeal to the tribal assessor. The tribal assessor can hear the appeal at any "suitable place upon the lands" (s. 34(2)(a)) as soon as possible "without undue formality" (

New South Wales

As previously indicated, the Government of New South Wales introduced and passed the **Aboriginal Land Rights Act 1983** as an imposed settlement of Aboriginal land claims. Although the Legislative Assembly initiated a public

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

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

The LALCs can apply to the Government to obtain "claimable Crown lands" which must be Crown owned, not be "lawfully used or occupied" (s. 36(1)(b)) by anyone under any arrangement including "permissive occupancy" and "are not needed, nor likely to be needed, for an essential public purpose" (s. 36(1)(c)) at any time in the future in the opinion of the Minister of Lands. A rejection of the claim by the Government could be appealed to the Land and Environment Court. The Government admitted that very little land would be eligible for claim under these restrictions. In addition, the Act [redacted]

governments to enact land rights legislation. The Premier of Western Australia

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

DIRECT PURCHASE

A final method for obtaining a land base for Aboriginal communities is to buy available land in the market place like any other corporate or individual purchaser. Just as some Indian bands in Canada have had to use their own money to augment their reserves, or to establish a reserve in the first place, many

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

The primary vehicle created by the Commonwealth to carry out this purpose has been the Aboriginal Land Fund Commission and its successor, the Aboriginal Development Commission. Since the Commonwealth was unwilling to impose land rights legislation on the State Governments, this was seen as the way to carry out its constitutional [illegible]

conflict. The former existed from 1975 to 1980 and received annual funding to implement its statutory mandate under the **Aboriginal Land Fund Act 1974** to purchase land for Aboriginal corporate groups (s. 20) or to make grants to such groups to buy their own land (s. 19). During its five years of operation, it spent

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

The ADC has maintained the commitment of the former ALFC to acquire further suitable lands for Aboriginal organizations and communities that are available on the market as one of its primary activities. It has also been buying buildings to house the offices of Aboriginal organizations, such as legal services, medical services, housing associations, co-ops, and social centres. It now receives

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

In its first two years of operation, the ADC spent over A$4 million and acquired over 5,745 square kilometres of land and numerous buildings, as well as aided communities to improve the old ALFC holdings and these new ones. The ADC has also been intensively reviewing various options for the conveyance of

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

> That the Senate accepts the fact that the indigenous people of Australia, now known as Aborigines and Torres Strait Islanders, were in occasion of this entire nation prior to the 1788 First Fleet [illegible]

only. There is no hint in this declaration of any acceptance of the original

[redacted]

even a recognition of a restricted form of internal sovereign self-government as

[redacted]

in the United States.

The present Commonwealth Government has made considerable strides in advancing its thinking in this area such that it now fosters the protection of

[redacted]

(b) the recognition by this Parliament of Aboriginal and Torres

appealed to the High Court of Australia. The High Court dismissed the action on procedural grounds such that it did not have to address the sovereignty issue. Nevertheless, Mr. Justice Gibbs, with Aickin J. concurring, did state, as **dicta,** that the settled colony principle applied to Australia. He further stated that

could have exercised sovereignty such that they were not, in his view, ever sovereign or capable of being sovereign. Therefore, there could be no continuing sovereignty to upset the accepted legal foundations of Australia.

2. The development of self-government in each respective tribal territory to take due respect for the culture of the Aborigines and to ensure their political, economic, social and educational advancement, and by virtue of this, that they have the right to

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

One could argue, however, that they are not Aboriginal governments **per se**, but merely land companies. This writer would suggest that such a view is incorrect. If one realizes that not all governments as such are sovereign (e.g., territorial, municipal, county and regional governments), then this assertion begins to lose its force. In light of the three-part definition of Aboriginality in

mechanisms in the form of a "tribal assessor." These assessors can only be

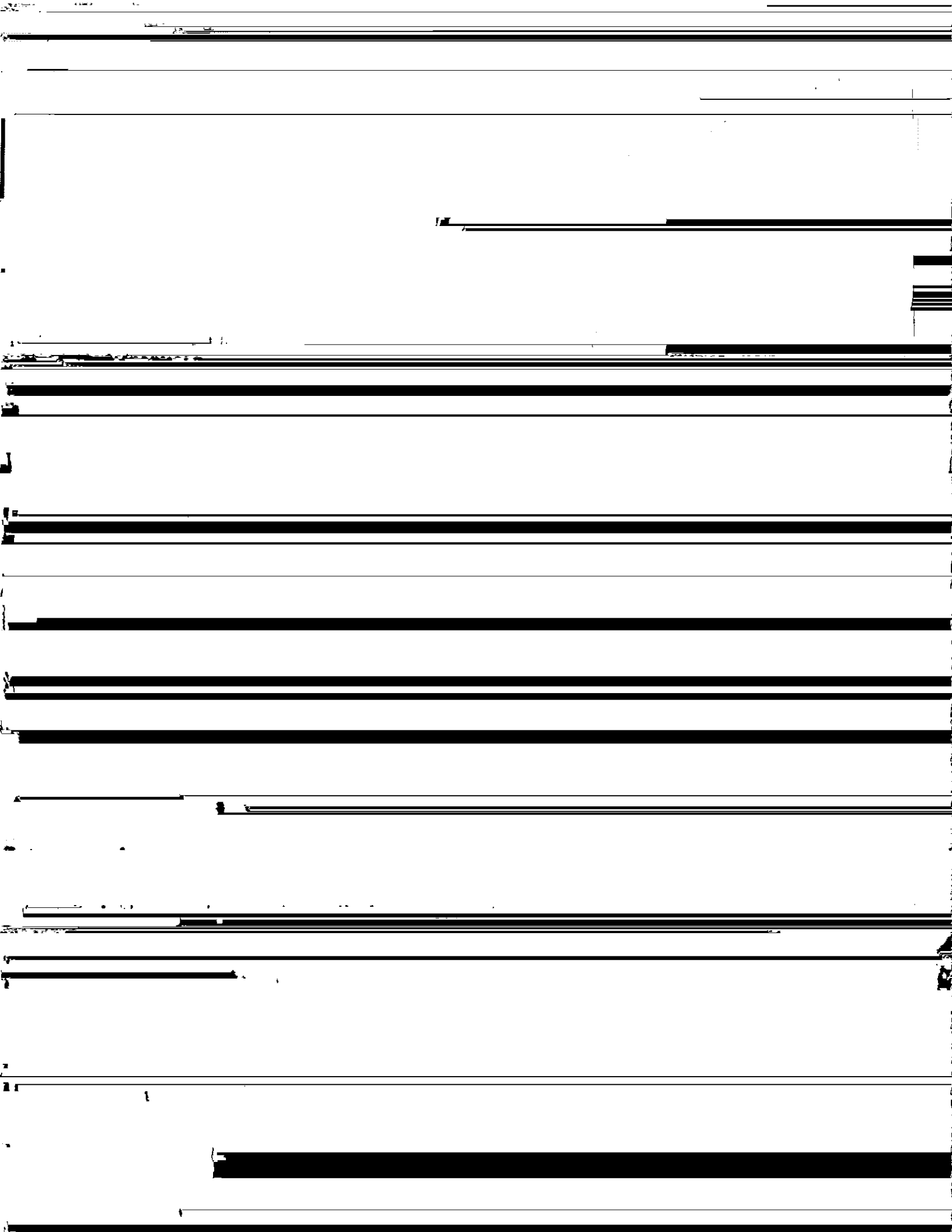
customs and traditions of the traditional owners wherever possible. Their jurisdiction is to hear complaints of any traditional owner regarding any decision

Maralinga Tjarutja do have an indirect legislative capacity. The South

those possessed by band governments under the Canadian **Indian Act.** The status and powers of the Aboriginal and Islander governments have varied significantly

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

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



its functions and powers". The Councils also can enact by-laws [illegible]

distribution and can operate the beer business if they so choose. The councillors are elected by the voters within the [illegible]

It must be mentioned, however, that the Queensland Government retains extensive control over this local government regime. The Governor in Council

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

(2) The Board may:

(a) carry on the business of banker, blacksmith, building, carpenter, commission agent, common carrier (by land or water), dealer (wholesale or retail), engineer, exporter, factor, farmer, fisherman (including the gathering of pearl-shell, trochus-shell, and Beche-de-mer), forwarding agent, freight

(e) cause investigations to be made and, from time to time, report and recommend to the Under Secretary concerning --

(i) any question touching trade, commerce or business carried on by Aborigines or in which they are interested or engaged;

Land Rights) Act 1982 in March of that year. It was to repeal the prior 1978 Act and was expressly rendered binding on the Crown in right of Queensland as well as on the Crown in right of the Commonwealth (s. 4). The scheme of the Act is

[redacted]

Aboriginal or Islander residents of the reserve, to seek to come within the terms of this Act (s. 5). It, thus, has an opt-in clause analogous to Bill C-52, the proposal of the Canadian federal government relating to Indian self-government.

[redacted]

(h) relief work for unemployed persons;

The Act then continues to direct the Minister to establish a separate Land Trust for each grant consisting of people nominated by the Council. The procedures outlined under the Act as well as the powers and functions of the Land Trusts are heavily drawn from the experience in the Northern Territory and the

present Commonwealth Government has not yet moved to seek passage of this Act in the House.

The present situation might be characterized as somewhat of a "Mexican

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

Despite the present impasse and the many flaws in both the Queensland and

[redacted]

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

(a) the prohibition or regulation of the admission of persons

[redacted]

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

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

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

Aboriginal community councils in the Northern Territory also receive very

8 ABORIGINAL CUSTOMARY LAW

One of the issues which has received major attention in Australia for over a decade is the area of Aboriginal customary law. Its treatment by the courts originally was mirrored by the attitude towards Aboriginal title. That is, it did not exist both because it was not visible to the European eye (like Aboriginal land usage) and because of the prevalence of a belief in racial supremacy which defined the original inhabitants of Australia as sub human. So long as the courts

[redacted]

Australian Law Reform Commission has regularly received submissions from urban Aboriginals concerning the continuing relevance of at least some aspects of

administer the caution against self-incrimination in terms sufficiently clear to be sure that it is understood, not engage in cross-examination through the

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

9 CONCLUSION

Although this is not truly a brief paper, the author has merely skimmed the surface of developments in Australia in aboriginal self-government. It has not been possible, given time and space constraints, to delve in greater detail into the many topics discussed. For the same reasons, the voice of individual Aboriginals and Islanders, as well as that of other commentators, has been restricted to a bare

definition of Métis, and the regulation of eligibility for entitlement under

possible negotiation of a national compact or treaty to redefine the indigenous-immigrant relationship offer much promise for further examination by Canadians.

of Australian ideas and implementing them intact on a national scale. This is, in

[redacted]

fact, one of the more valuable lessons that we can learn from our friends in the South Pacific.

NOTES

1. **Commonwealth of Australia Constitution Act, 1900.**

2. P. Hanks, "Aborigines and Government: the Developing Framework" in P.

George Allen & Unwin Australia Ltd., 1984), at 20.

3. G. Sawer, "The Australian Constitution and the Australian Aborigine" (1966), 2 **Federal Law Review** 17, at 17-18.

Aboriginal Heritage Act 1972 (Western Australia); the **Aboriginal Relics Act** 1975 (Tasmania); the **Aboriginal Land Rights (Northern Territory) Act** 1976 (Commonwealth); the **Aboriginal Sacred Sites Act** 1978 (Northern Territory); the **Aboriginal Heritage Act** 1979 (South Australia); and the **Cobourg**

21. See, e.g., K. Maddock, " 'Owners', 'Managers' & the Choice of Statutory Traditional Owners by Anthropologists and Lawyers," in N. Peterson and M. Langton, note 14, **supra**; D.J. Barnett, "Aboriginal Land Rights in the Northern Territory" (1978), 1 **Australian Mineral & Petroleum Law Journal** 399; and K. Maddock, **Anthropology, Law & the Definition of Aboriginal Rights to Land**, Nijmegen, 1980, Institute of Folk Law.

22. For an exhaustive review of the operation of the 1976 Act and its eight amendments by its first Commissioner, see, J. Toohey, **Seven Years On - [redacted]**

Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters, Canberra, 1984, Australian Government Publishing Service. An earlier review worthy of note is, B.W. Rowland, Q.C., Report to the Minister for Aboriginal Affairs, **Examination of the Aboriginal Land Rights (NT) Act**

[redacted]

Forest) Bill 1982 and Victorian Government Aboriginal Affairs Discussion Paper, Melbourne, September 1984.

30. **Land Act (Aboriginal and Islander Land Grants) Amendment Act** 1982, as later amended by the **Land Act (Aboriginal and Islander Land Grants) Amendment Act** 1984, both of which must be viewed in conjunction with the **Land Act** 1962-1984.

31. **Land Act** 1962-1984, s. 340(3).

32. See, for example, **Local Government (Aboriginal Lands) Act Amendment Act** 1978 in which Torres Strait Islander lands in Mornington Shire were vested in an Administrator.

33. See, e.g., **Aurukun Associates Agreement Act** 1975, in which bauxite mining leases were approved for the Aurukun

34. For specific criticisms on the Queensland governmental

36. See, e.g., **R. v. Jack Congo Murrell,** (1836) Legge 72. "Aboriginals within the boundaries of the Colony are subject to the laws of the Colony ...".

37. Note 5, **supra,** at 177. The full list of demands is contained at 177-178.

38. Note 5, **supra.**

39. See, e.g., The Aboriginals Protection and Restriction of the Sale of Opium

Act 1897; The Aboriginals Preservation and Protection Act of 1939; The Torres Strait Islanders Act of 1938; The Aborigines and Torres Strait Islanders' Affairs Act of 1965; Aborigines Act 1971; Torres Strait Islanders Act 1971; Local Government (Aboriginal Lands) Act 1978; Local Government (Aboriginal Lands) Act Amendment Act 1978; Aborigines and Islanders Act Amendment Act 1979 [illegible]

1965, Angus & Robertson; W.E.H. Stanner, **White Man Got No Dreaming: Essays 1938-1973**, Canberra, 1979, ANU Press; D. Bell, **Daughter of the**

Law: The Old and the New, Canberra, 1980, Aboriginal History.

42. Since 1977, the Commission has issued three Discussion Papers, 15 Research

APPENDICES

Appendix I

Australian Constitution Excerpts

51. Legislative powers of the Parliament The Parliament

(vii) Lighthouses, lightships, beacons and buoys;

(viii) Astronomical and meteorological observations;

(ix) Quarantine;

(x) Fisheries in Australian waters beyond territorial limits;

(xi) Census and statistics;

(xii) Currency, coinage, and legal tender;

(xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;

(xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;

(xv) Weights and measures;

(xvi) Bills of exchange and promissory notes;

(xvii) Bankruptcy and insolvency;

(xviii) Copyrights, patents of inventions and designs, and trade marks;

(xix) Naturalization and aliens;

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;

(xxi) Marriage;

(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;

(xxiii) Invalid and old-age pensions;

(xxiiiA) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;

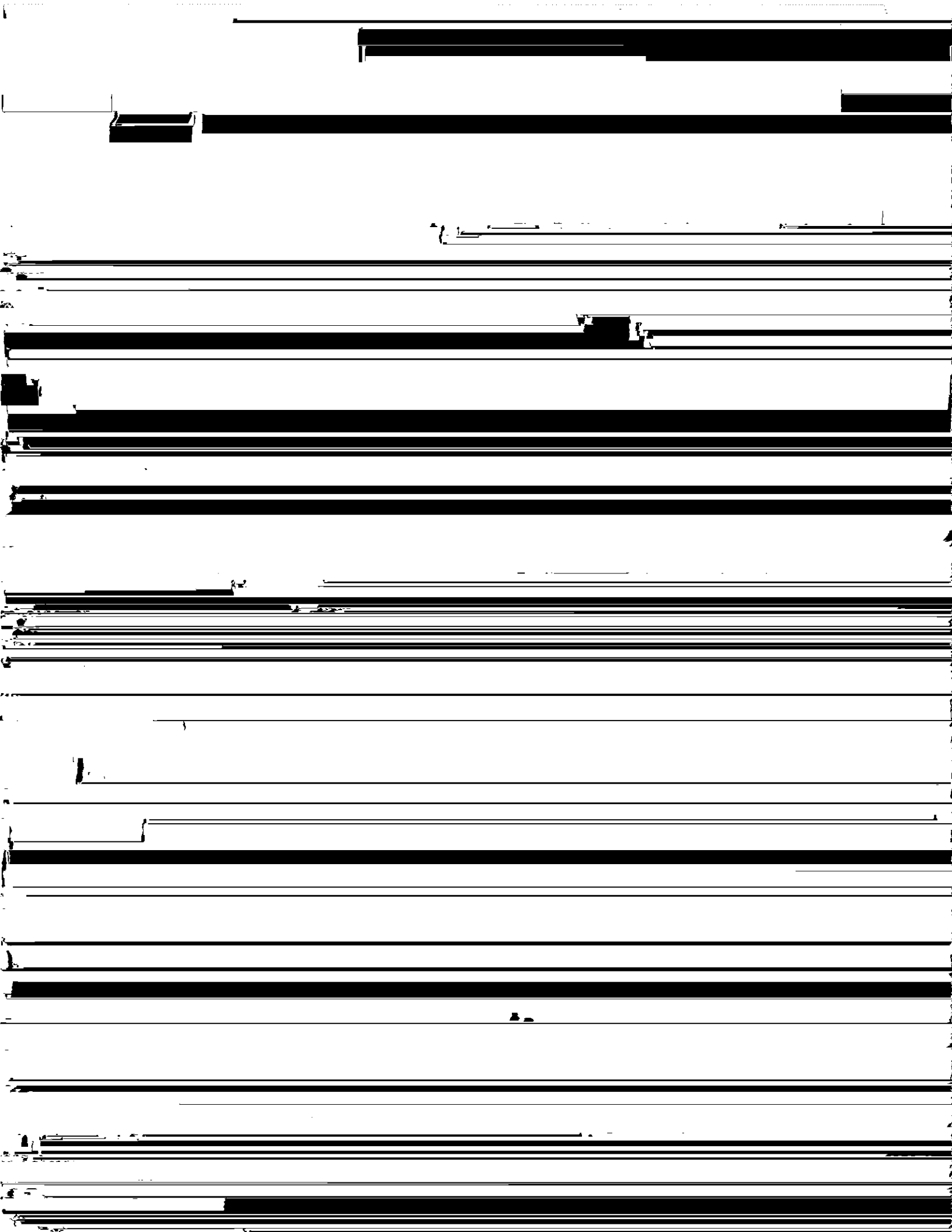
(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;

(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of

(xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the

108 Saving of State laws. Every law in force in a Colony which

116. Commonwealth not to legislate in respect of religion The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free



Appendix II

Australian Law Reform Commission

Reference on Aboriginal Customary Law

List of Consultative Papers

1. **Discussion Papers**

DP17 Aboriginal Customary Law -- Recognition? (November 1980)

DP18 Aboriginal Customary Law -- Marriage, Children and The Distribution of Property (August 1982)

[redacted]

Procedure (March 1984)

2. **Research Papers**

RP 1. Proposed Marriage in Aboriginal Society (available)

RP 2. The Recognition of Aboriginal Customary or Tribal Marriage: General Principles (available)

RP 6A. Appendix: Cases on Traditional Punishments and Sentencing (available)

RP 7. Aboriginal Customary Law: The Sentencing and Disposition of

Field Trip No. 5 **The Cape York Peninsula: Queensland** (July - August 1979)

Field Trip No. 6 **The Torres Strait Islands** (July - August 1979)

Field Trip No. 7 **Central Australia** (October 1982)

Availability of Consultative Papers: Discussion Papers are formal Commission publications freely available to interested persons on request. Research Papers are more detailed studies of particular topics [illegible]