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An Outward Sign of an Inward Struggle: The Fight for Human Rights of the Australian Aborigine

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AN OUTWARD SIGN OF AN INWARD STRUGGLE: THE FIGHT FOR HUMAN RIGHTS OF THE AUSTRALIAN ABORIGINE

I. INTRODUCTION

> You took our land by force . . . . You have almost exterminated our people, but there are enough of us remaining to expose the humbug of your claim . . . . We do not wish to be regarded with sentimental sympathy like koala bears as exhibits . . . [nor] studied as scientific or anthropological curiosities . . . . We ask you to teach our people to live in the modern age, as modern citizens. Why do you deliberately keep us backward? Is it merely to give yourselves the pleasure of feeling superior? . . . that we are a naturally backward and low race is a scientific lie . . . . At worst we are no more dirty, lazy, stupid, criminal or immoral, than white people. Also your slanders against our race are moral lies, told to throw all the blame for our troubles on us.[1]

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1. C. ROWLEY, OUTCASTS IN WHITE AUSTRALIA (1971) [hereinafter C. ROWLEY, OUTCASTS]. The racial discrimination referred to in the opening statements is most evident in the non-urbanized areas of Australia and therefore escapes the attention of the tourists. Most Australians feel the racial separation is merely a refletion of the aborigines' desire to be left alone to life as they

These damning words spoken over fifty years ago to mark one hundred and fifty years of contact between the aborigines and white Australian settlers still ring true in many areas of Australia. Racial discrimination is rampant in many parts of Australia. Census reports show the number of aborigines has dropped alarmingly since 1788, when Europeans first settled Australia.

In 1788, more than 500,000 aborigines inhabited the land. Today, the aboriginal population is estimated to be less than 160,000.[2] What caused this drastic reduction in the aboriginal population and what can be done to halt this alarming trend is the focus and concern of human rights activists. The United Nations Human Rights Movement is directing an attempt to secure federal legislation in the Australian Parliament to provide protection for the remaining aboriginal population.[3] In addition, other groups composed of educated aborigines, lawyers, concerned Australian citizens and activists from around the world have attracted worldwide attention over the last two decades to the plight of the Australian aborigine.[4]

This article examines the progress and setbacks these groups have experienced since 1970 by reviewing caselaw, Parliamentary legislation, and other determinative events affecting the human rights struggle of the aborigines. This article also attempts to predict where this movement is heading in the future.[5]

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have for centuries. The average Australian truly believes no discrimination or bias exists toward the aborigines in Australia and that the aborigines are allowed to live as they want. The hard truth is that "civilization" has pushed the aborigines from their land and forced them to fight for what is rightfully theirs. *Id.*

2. N.Y. Times, Aug. 7, 1988, § 1 (Foreign Desk), at 15, col. 1.

3. The Human Rights Movement is part of the Subcommission on the Prevention of Discrimination and the Protection of Minorities.

4. These other groups are comprised of several named groups of aboriginals and whites in Australia and around the world: the Aboriginal Councils, Land Councils, the Aborigines Progressive Association, Amnesty International, and others. These groups work in tandem, but no central group exists that represents all of the groups as an organized front.

5. N.Y. Times, Sept. 3, 1980, § A (Foreign Desk), at 4, col. 3. A group of aborigines, concerned that oil drilling would disturb the home of their lizard god, accused Australian authorities of gross violations of their rights and corrupting and degrading their race. "Faced with a total lack of government concern and continuing violations of aborigine rights, we are fast becoming a dying race," Reg Birch, a National Aboriginal Conference member, told reporters. "Our race has been corrupted and degraded and the government has proceeded with a systematic rape of our cultural heritage." *Id.* Birch was one of three aborigines who presented their case to the United Nations Human Rights Commission in Geneva. Aborigines had never before appealed to the United Nations. *Id.* One of the group's major concerns was the violation of the sacred home of the aboriginal lizard god, Great Goanna, by Amax, an American petroleum company that was under contract to the state government of Western Australia to drill. *Id.*

II. THE ABORIGINE

To put into context the plight of today's aborigine, one must examine briefly the history of the aboriginal people. The aborigines had inhabited Australia for more than 40,000 years prior to the arrival of the Europeans.[6] Aborigines had developed special survival skills in an environment that was harsh, as well as beautiful.[7] Elders of each clan oversaw tribal laws and mores that clan members obeyed without question. To disobey usually meant banishment from the clan. Banishment and death were synonymous because no other clan would admit a law-breaker and a man alone could not survive the harsh elements. The aborigines were deeply rooted in tradition and folklore and the clan as a unit gave life and strength to each member. Captain Cook,[8]

The Yunganara tribe on the Noonkanbah pastoral station believes that if Goanna is disturbed he will order the six-foot monitor lizards, a food source for the aborigines, to stop mating and thus eventually cause a food shortage. *Id.*; *see also* N.Y. Times, July 4, 1982, § 4, at 16, col. 3.

In addition to United Nations assistance, aborigines have sought the aid of African leaders. Representatives of the National Aboriginal Conference met with African governments and urged them to boycott the Commonwealth Games that were held in Brisbane. *Id.*; *see also* Reuters News Reports (Reuters Ltd. July 8, 1982).

Those same aboriginal representatives met in Geneva with the World Council of Churches to testify that their people were suffering genetic problems and bearing deformed children as a result of Australian and British atomic bomb tests in the 1950s. Michael Anderson, a member of the aboriginal delegation, told a news conference that authorities forgot to evacuate the aborigine population from the Maralinga desert where the atomic blasts occurred. *Id.*

6. N.Y. Times, Aug. 7, 1988, § 1 (Foreign Desk), at 15, col. 1.

7. C. ROWLEY, A MATTER OF JUSTICE (1978).

8. CAPTAIN JAMES COOK, CAPTAIN COOK'S FIRST NAVIGATION OF THE GLOBE, ORIGINAL NOTE BOOKS (1768-1771), *cited in* C. ROWLEY, *supra* note 7. The following excerpt from Captain Cook's 1788 journal portrays the aborigines as he first saw them:

> From what I have seen of the Natives of New Holland they may appear to some to be the most wretched people upon earth, but in reality they are far more happier than we Europeans; being wholly unacquainted with the superfluous but with necessary conveniences so much sought after in Europe. They are happy in not knowing the use of them. They live in Tranquility which is not disturb'd by the Inequality of Condition. The Earth and Sea of their own accord furnished them with all things necessary for life. They covet not Magnificant Houses, Household stuff, etc. They live in a warm and fine climate and enjoy a very wholesome Air, so they have little need of Clothing and this they seem to be fully sensible of for many to whome we gave the cloth, etc. left it carelessly upon the Sea beach and in the woods as a thing they had no manner of use for. In short, they seemed to set no value upon any thing we gave them, nor would they ever part with anything of their own for any one article we could offer them. This in my opinion argues that they think themselves provided with all the necessarys of Life and that they have no superfluities.

Id.

Rowley notes that the original sheets of Captain Cook's journals are bound and can be found in the National Library of Australia, bound sheet 125, p. 299.

and those who followed him, never fully understood the aboriginal way of life, nor did they attempt to do so. Early settlers drove the aborigines off the land, killing those who resisted. Books written about the early days of Australia's settlement chronicle "nigger hunts" and other atrocities against the aborigines.[9] European diseases completed what the settlers had begun . . . and the numbers of aborigines rapidly dwindled.[10] In addition to the physical annihilation of the aborigines, the Europeans caused spiritual disruption within the aboriginal community by depriving them of their lands.

III. ABORIGINES AND THE LAND

Land, to the aborigine, means more than mere ownership or the right to inhabit a certain region.[11] Every aspect of aboriginal culture is grounded on complex and distinct relationships to specified areas of land. Ritual ties with those lands give meaning to the aborigines' lives and they believe the lands are essential to life itself.[12] Communal land ownership is a timeless and enduring spiritual relationship consisting of rights and duties that link an area of land to a group of people. That group is composed of members long dead, members still unborn, and members which are now alive.[13] The land and the clan or tribe are an inseparable entity.

Until 1972, Australian law refused to recognize any aboriginal claim to land. White Australia saw no inequity in the governmental taking of lands without the benefit of treaties or statutes requiring compensation for those lands.[14] Aborigines were left with the choice of living on government-owned and regulated Reserves, or moving to the outskirts of white towns where they were treated as unwelcome pests.[15]

The aborigines remained silent for generations as white Australians robbed them of their land and their rights. Their silence nearly led to their extinction. However, traditional ties to the land impelled aborigines to demand legal recognition of their right to tribal lands.

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9. *See, e.g.*, C. DARWIN, JOURNAL OF RESEARCHES INTO THE NATURAL HISTORY OF THE COUNTRIES VISITED DURING THE VOYAGE OF H.M.S. BEAGLE ROUND THE WORLD (1845); E. EGGLESTON, FEAR, FAVOUR OR AFFECTION, ABORIGINES AND THE CRIMINAL LAW IN VICTORIA, SOUTH AUSTRALIA AND WESTERN AUSTRALIA (1976); C. ROWLEY, OUTCASTS, *supra* note 1; C. ROWLEY, *supra* note 7.

10. N.Y. Times, Aug. 7, 1988, § 1 (Foreign Desk) at 15, col. 1.

11. C. ROWLEY, *supra* note 7.

12. *Id.* at 82.

13. *Id.* at 24.

14. Chartrand, *The Status of Aboriginal Land Rights in Australia*, 19 ALBERTA L. REV. 436 (Summer 1981).

15. C. ROWLEY, OUTCASTS, *supra* note 1.

The aborigines suddenly were no longer the silent minority. Today, educated aborigines assume leadership roles within the movement and are demanding equal rights from the federal government. Aborigines no longer will tolerate being treated as nonentities by the people of Australia. In fact, aborigines are becoming a force to be reckoned with, often speaking and acting in ways that force the government to listen to their demands and to respond positively. For example, aboriginal protestors rocked the entire country by erecting the "Aboriginal Embassy" in Australia's capital city, Canberra.

IV. THE ABORIGINE EMBASSY

In early 1972, aboriginal groups, demanding major changes in national policies relating to aborigines, camped in large numbers on the front lawn of Parliment House.[16] The press dubbed the untidy scatter of tents, the "Aboriginal Embassy."[17] The stark contrast of dark, shabby tents outlined against the brilliant white of Parliment House illustrated the inequities of a system which housed its legislators in opulence while its native population lived in poverty. The aborigines intended to make a political statement to the Australian legislators. Instead, the legislators and most of white Australia saw the Embassy as another indication of the ignorance of the "blackfellows."[18] In fact, most Australians were horrified that such an outrage had been perpetrated upon their capital and demanded that the aborigines move their camp to another less intrusive location. However, the symbolism of the Embassy was not lost on foreign visitors to Canberra, especially those from the third world. They recognized the Embassy as a demand for justice.[19]

The aboriginal groups demanded a greater voice in decisions for their future, an end to discrimination, and recognition of their traditional claims to land. The government was willing to negotiate on the first two of these demands to accomplish the removal of the Embassy, but they steadfastly refused to give way on the issue of land rights. To the aborigine, land rights were the paramount issue. Thus, the Embassy remained in place.

V. THE FIGHT FOR LAND RIGHTS

The Embassy was an outward sign of an inward struggle. The aborigines used it successfully to demonstrate that the Australian

16. C. ROWLEY, *supra* note 7.
17. *Id.* at 1.
18. *Id.* at 2.
19. *Id.*

government had failed to solve its social and racial problems with money and public service manpower.[20] Australia, unlike the United States and South Africa, had avoided world scrutiny of its discriminatory policies. The Embassy published those policies for the world to see and forced the Australian government into land rights negotiations with aboriginal leaders. The Embassy proved to be a thorn in the side of several Prime Ministers. When the Embassy first appeared, legislators demanded the removal of the unsightly tents. The Prime Minister ordered police to dismantle the Embassy.[21] The next day, the Embassy was back in place. Several dismantlings and re-establishments occurred before the government's inability to handle the "Embassy problem" resulted in a call for a new election. The Labour Party (Labour) platform included promises to deal with the "aboriginal problem"[22] and resulted in a Labour victory.[23]

In December of 1972, shortly after the new Prime Minister's inauguration, the government began serious negotiations with the aborigines.[24] The new government's approach to aboriginal land rights showed little improvement over the approach of the former government. The new government's land policy stated that aborigines must secure land ownership under the same system that applied to the Australian community.[25] The government refused to recognize demands based on long association with particular lands as a basis for Aboriginal ownership. The Prime Minister, in January of 1972, announced general purpose leases would be granted to individual aboriginal groups, or communities, on land in the Northern Territory's aboriginal Reserve.[26] The Prime Minister cautioned that no attempt would be made to transform aboriginal affinity with land into a legal right under the Australian system.[27] In retaliation for the broken promises, the aborigine leaders rebuilt the Embassy and threatened to remain until Parliament created aboriginal land rights legislation.

In 1974, the Embassy was a rallying point for aborigines demonstrating during a visit to Australia by Queen Elizabeth.[28] The demonstration in Queen Elizabeth's presence proved to be the final straw

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20. Chartrand, *supra* note 14, at 441.
21. *Id.* at 442.
22. *Id.*
23. *Id.* at 441.
24. Dep't of Aboriginal Affairs, Report for 1972-74, at 1.
25. C. ROWLEY, *supra* note 7.
26. Chartrand, *supra* note 14, at 437.
27. C. ROWLEY, *supra* note 7, at 2.
28. *Id.* at 1.

for the government. Australians recognized the need to acknowledge the aborigines' demands to avoid further embarrassment.

In 1975, the Liberal Party and its coalition partner, the National Country Party (L/NCP), were elected to head the new government. In February of 1976, the new L/NCP government and Charles Perkins, a leading aboriginal spokesman, negotiated the successful removal of the Embassy.[29] The central condition negotiated was that the Australian government would have two months to take effective action on aboriginal land rights.[30]

A. *The 1976 Land Rights Legislation*

The new L/NCP coalition's approach to land rights was tempered by its aboriginal policies. While the government did not advocate traditional ownership concepts, it did pledge to transfer the Reserves in the Northern Territory and to acquire land off the Reserves for tribal aborigines living on or near their traditional areas.[31] In its statement,

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29. *Id.* at 446. In 1975, the repeated refusal to approve the Labour Government's Supply (Appropriations) Bill by the Opposition-dominated upper house of the federal Parliament caused Prime Minister Whitlam to demand from the Governor General the dissolution of the Senate and new federal elections. Australia has a highly unusual parliamentary system in that, in practice, the federal Prime Minister must retain the confidence of a majority of the members of both houses of the legislature to remain in office. Australia's constitution implicitly limits the power of the Senate to block enactment of House-approved appropriations bills (Act 53), but when the Senate rejects or fails to pass money bills, as occurred in 1974 and 1975, the Prime Minister has no alternative but to seek its dissolution take his appeal to the electorate. Governor General Sir John Kerr balked at dissolving only one House, and to end the deadlock that followed, Kerr fired Whitlam on November 11, dissolved both Houses of Parliament, and invited Opposition Leader Malcolm Fraser to lead a caretaker government until elections could be held on December 13. Nothing like this had ever occurred in Australia's political history. A coalition formed by the Liberal Party and the National Country Party won the election and became known as the L/NCP. *Id.*

30. Chartrand, *supra* note 14, at 442.

31. *Id.* at 443-47.

The Labour Party, the government replaced by L/NCP, had established (in early 1973) a single-member Royal Commission on Aboriginal Land Rights, consisting of Mr. Justice Albert E. Woodward. Justice Woodward had served two years as the chief counsel for the Yirrkala people in their unsuccessful fight to win judicial recognition of their land rights in the Milirrpum case. The government had already decided to turn over lands in the Northern Territory to the aborigines. In addition, the government requested that legislation be drafted to limit the grant to solely the Northern Territory. Woodward defined traditional aboriginal owners of land in words that would eventually be used verbatim in the 1976 Land Rights Act:

> In respect to an area of land, a local descent group of Aborigines who have common spiritual affiliation to a site or sites within that area of land, which affiliations place the group under a primary spiritual responsibility for that site or sites and for that land, and who are entitled by aboriginal tradition to forage as of right over that land.

Id.

the government added, "in recognizing land rights we shall ensure that the traditional aboriginal owners gain inalienable title to their lands."[32] All three major Australian political parties accepted the legitimacy of the aboriginal demands for preservation of their cultural heritage and prepared to assist aboriginal separateness, even to the extent of creating a special landholding system.[33] As a result, the 1976 Aboriginal Lands Rights Act (Land Rights Act) met with little resistance in the legislature.[34]

The Land Rights Act passed both houses on December 16, 1976.[35] However, forty-nine amendments attached to the Land Rights Act significantly weakened the Aboriginal Land Councils to represent aboriginal land claims, but withheld full aboriginal veto power over mining.[36] The government discovered that the Aboriginal Reserves in the Northern Territory contained major mineral deposits, especially uranium.[37] Therefore, the two main areas of land known to contain rich mineral deposits were removed from the licensing authority of the Aboriginal Councils.[38] The government retained licensing authority for those areas. The Aboriginal Councils received licensing power over the remaining lands. The Councils could decide to whom licenses would be granted as well as the forms and conditions of the licenses for exploration and recovery.[39] The Land Rights Act prohibited the Aboriginal Councils' refusal of any application made prior to its enactment.[40] Even where the Aboriginal Councils granted or refused a license, the grant had to be approved by the government. In addition, the Governor General of Australia by proclamation could override a refusal.[41] The loss of veto power over mining was only one of the setbacks suffered by the aborigines.

The most significant setback was that individual state governments would make all decisions regarding the extent of aboriginal land

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32. *Id.*
33. *Id.* at 447.
34. *Id.*
35. *Id.*
36. *Id.* Forty-two of the amendments were made at the request of the Minister who introduced the bill, R.I. Viner, Minister of Aboriginal Affairs. The effect of some of these amendments was to bring the L/NCP bill closer in form to the Labour Government's bill that had died on November 11, 1975. *See also* B. KEON-COHEN, LEGISLATION AND SOCIETY IN AUSTRALIA: ABORIGINAL LAND RIGHTS IN AUSTRALIA: BEYOND THE LEGISLATIVE LIMITS (1980).
37. Chartrand, *supra* note 14, at 453.
38. *Id.*
39. *Id.* at 452.
40. *Id.*
41. *Id.*

rights.[42] The aborigines had hoped for the type of federal government intervention provided by the Racial Discrimination Act of 1975.[43]

Under the Australian Constitution, the federal government exercises little control over state government action in the area of human rights.[44] The Racial Discrimination Act of 1975 was the first inroad by the federal government into the sanctity of state control over human rights issues.[45] The aboriginal leaders had hoped that the Land Rights Act would provide a second layer of protection by the federal government, however, the Land Rights Act fell short of those expectations. The provisions of the Land Rights Act were expressly limited to the Northern Territory.[46] In addition, the remaining six states were under no obligation to recognize aboriginal land claims within their territories. Thus, the Northern Territory's obligations extended only to those regions expressly mentioned in the Land Rights Act.[47]

The Land Rights Act's landholding arrangements departed significantly from the normal landholding scheme of the Australian system. Unlike the United States during the period of westward expansion where settlers were allowed to claim complete ownership of limited amounts of public land without cost, the pattern in Australia allowed settlers to acquire only a leasehold interest in land for a specific period of years, often for specified purposes.[48] The common law concept of

42. C. ROWLEY, *supra* note 7, at 178-92.

43. *Id.*

44. Forrester, *Aboriginal Land Rights: The Constitutional Basis of the Present Regime*, 15 MELBOURNE U.L. REV. 737 (1986). In 1901, when the Australian Constitution came into effect, the governmental responsibility for aboriginal affairs was regarded as a matter for the States. Section 51(26) of the Constitution, in its original form, stated that "The Parliment shall, subject to this Constitution, have power to make laws . . . with respect to . . . the people of any race, other than the aboriginal race in any state, for whom it is deemed necessary to make special laws." *Id.* As late as 1929, the Royal Commission on the Constitution acknowledged that the effect of section 51(26) was to vest control over aboriginal affairs in the States, particularly in view of the State control of "police and the land." *Id.*

45. *Id.* at 741. In *Koowarta v. Bjelke-Petersen*, a majority of the High Court held that the implementation of bona fide international treaty obligations through Commonwealth legislation was a valid exercise of the external affairs power, at least if the subject matter of the treaty was of international concern, or of concern to the relationship between Australia and the other party or parties. Thus, the Racial Discrimination Act of 1975 (Cth) was a valid exercise of § 51(29) power as it gave effect to the "International Convention on the Elimination of All Forms of Racial Discrimination" to which Australia was a party. Justice Stephen was satisfied that racial discrimination was a matter of international concern. *Id.*

46. Aboriginal Land Rights Act (Northern Territory) Act 1976 (Cth) [hereinafter Land Rights Act].

47. Chartrand, *supra* note 14, at 460.

48. *Id.* at 448. The leasing policy has given way gradually to a pattern of outright sale of land in many parts of Australia, but leasehold remains the pattern in the Northern Territory. There is little private ownership of land outside the municipalities. Rents are often nominal and leasehold periods vary from 33 years to 99 years. Approximately 70% of the Northern Territory

Crown ownership of mineral rights on all land, even that said to have been deeded in fee simple absolute, has been retained virtually throughout Australia. The official explanation of this policy is that the government sought to prevent land speculators from acquiring vast areas of the country and developing those areas irrespective of the needs or interests of the country as a whole.[49]

The Land Rights Act granted the approximately eighteen percent of the Northern Territory devoted to Aboriginal Reserves in fee simple to the aborigines.[50] That grant excluded ownership of mineral rights, and restricted land use and sales as well. However, this nearly absolute grant of land ownership to the aborigines illustrated the Australian government's commitment to ensuring the survival of the land-based culture of the aborigine.[51]

The Land Rights Act created three types of legal entities to assist implementation of the Aboriginal Land Rights Act. The three entities are the Aboriginal Land Trusts, the Aboriginal Councils, and the Aboriginal Land Commissioner.[52]

B. *Aboriginal Land Trusts*

The Aboriginal Land Trusts are composed of aborigines living in specific areas where land is to be deeded.[53] The aborigines retain title in trust to specific areas for the benefit of those aborigines entitled under aboriginal custom and law to use or occupy the land.[54] The aborigines who hold title to such lands do not regard it as aboriginal land, but as "our land."[55] The distinction is difficult to comprehend for white Australia and most of the "civilized" world. Most races regard land ownership as a personal right rather than a collective right. Local

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is comprised of enormous cattle stations and pastoral leaseholds. Each leasehold consists of hundreds of square miles of land. Approximately 18% of the land consists of federally owned Aboriginal Reserves and 10% is unusable due to its arid nature. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 449.

54. Long, *Aboriginal Land Rights and Tenure: Past, Present and Future* (paper delivered to the 20th Australian Survey Congress, Darwin 1977). Anthropologists distinguish between the members of the aboriginal clans called the "owners" of the land and those that are called the "managers." "Owners" have the right to use the products of the land and the responsibility to carry out rituals thereon. "Managers" have managerial responsibilities over the same land. Invariably members of both clans must be present before the rituals can be undertaken, and in some cases, "the permission of the 'managers'" is necessary for "owners" to visit their own important sites as well as conduct rituals associated with them. *Id.*

55. *Id.*

aboriginal elders of each Land Trust area are appointed under the Land Rights Act to hold title.[56] The elders know the beneficiaries and the beneficiaries are familiar with the holders of the Trust since both are members of the "local descent group" which comprises the traditional owners specified in the statute.[57] The Land Trusts exercise control of functions in relation to the land at the direction of the Aboriginal Council. When the Council gives such direction, it must be obeyed.[58] There is no appeal. Land Trusts have statutory authority over traditional land use. The Aboriginal Land Councils have statutory authority over all other uses of the lands.[59]

C. *Aboriginal Councils*

The Aboriginal Councils (Councils) exercise authority over non-aboriginal use of the lands granted under the Land Trusts.[60] The Councils negotiate with mining companies, as well as with government bodies wishing to use aboriginal lands for schools, hospitals, and other services.[61] The statute originally created only two councils and each is an elected representative body.[62] Each Council has numerous land-related functions such as: negotiations with non-aborigines who want to use, occupy, or obtain an interest in aboriginal lands, assisting aborigines asserting traditional land claims; pursuing those claims before the Aboriginal Land Commissioner; providing legal assistance, free if necessary, to aborigines asserting such claims; and other activities which protect aboriginal interests as they relate to land.[63]

The widely representative function makes the Aboriginal Land Councils unique. The Land Rights Act created a Western-type governmental body with authority to speak and act for the aborigines in

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56. Chartrand, *supra* note 14, at 449.

57. *Id.*

58. *Id.* The Land Trusts are entirely powerless in practice because the statute forbids them from actually exercising any function with relation to the land vested in them except with directions given by the Aboriginal Land Council when such directions are given, they must be obeyed. *Id.*

59. *Id.*

60. *Id.* The Land Councils deal not with traditional aboriginal use of land, but mainly with non-aboriginal use of the land. The Land Councils negotiate with mining companies and interact with government bodies wishing to use aboriginal land for schools, hospitals, and provision of other services. *Id.*

61. *Id.* In contrast to the Land Trusts, the Aboriginal Land Councils are intended to manage much larger areas of land.

62. *Id.* at 450.

63. *Id.*

the Northern Territory.[64] The Act also arranged for almost automatic funding of the Councils through mineral rights royalty payments, enabling the Councils to exercise independent authority.[65] Thus, the Land Rights Act created and funded an organization with open-ended authority to press claims against the authority which created it. The Land Rights Act also created a judicial position, as well as a special court system to hear those claims.

D. *The Aboriginal Land Commissioner*

The third statutory body created by the Land Rights Act is the Aboriginal Land Commissioner (Commissioner). The Commissioner is an individual that functions as the judge of the Supreme Court of the Northern Territory.[66] The Commissioner's only substantive function is to weigh traditional land claims made by aborigines, or on their behalf.[67] The Commissioner may consider only traditional land claims made against land in which all interests not held by the Crown are held by aborigines, or on their behalf and unalienated Crown lands in the Northern Territory.[68] The unalienated Crown lands are usually arid and generally unusable as pasture land. The Commissioner must weigh the detriment to other persons or communities that might result from a favorable recommendation of the aboriginal claim against the advantages that would accrue to the aboriginal claimants.[69] The balancing requirement lengthens the claim process because of the months spent in preparing legal briefs, memorandum, and gathering evidence. Following the preliminary preparation, weeks of oral arguments are heard as opposing parties present their cases to the Commissioner. The Australian government thought that limiting aboriginal land claims to unalienated Crown land in the Northern Territory would ensure that aborigines would claim only unwanted land.[70] Therefore, no one would object to aboriginal ownership and the land rights battle would

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64. *Id.* The 1976 Act empowers the Land Councils to "express the wishes" of aborigines within their area and "protect their interest" as these relate to land. These functions are political and legal. Apart from their direct authority over aboriginal lands, the wider representative function afforded the Aboriginal Land Councils makes them unique. *Id.*

65. *Id.* Because the 1976 Act provides for almost automatic funding through mining royalty payments, the Land Councils may exercise independent authority. *Id.*

66. Chartrand, *supra* note 14, at 451.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 455.

be ended. The Boroloola Land Claims,[71] however, proved even inhospitable land unsuited to agricultural or pastoral use could be kept from aboriginal ownership.[72]

In Boroloola, two hundred and fifty aboriginal claimants to unalienated Crown lands surrounding the town of Boroloola and the nearby Pellew Islands in the Gulf of Carpentaria faced opposition from a major mining corporation.[73] During oral arguments, the mining corporation, Mt. Isa Mining Corporation, admitted the Baroloola claim was not currently a feasible mining operation.[74] In addition, the corporation admitted that vast inland transportation development and port facilities would be needed before mining operations could begin. Shifting world markets for lead and zinc, the minerals involved, made mining for them a highly speculative proposition. Regardless of those facts, the Aboriginal Land Commissioner, Justice J.L. Toohey's recommendations strongly favored the mining corporation.

Of the five major islands of the Pellew group claimed by the aborigines, two were recommended for transfer to traditional ownership.[75] In addition, Justice Toohey carved a corridor from the aboriginal land which surrounded Boroloola. The corridor was to be used by Mt. Isa Mining to transport ore to a port which it would build on one of the Pellew Islands not deeded to the aborigines.[76] While Justice Toohey's report was in the government hands, but before it was released, Mt. Isa Mining bought pastoral lease to Bing Bong Station, thus securing land between the projected mine and the projected port.[77] The delayed release of Justice Toohey's report was critical because the aborigines had hoped to have the Aboriginal Land Commission acquire the Bing Bong Station lease. The Bing Bong Station had even greater traditional significance to the aborigines than Boroloola.[78] Governmental regulations had prevented aboriginal pur-

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71. Aboriginal Land Commissioner, Boroloola Land Claim, Parl. Paper No. 123 (1978). *See also* Parlimentary debate in 109 C.P.D.H. of R. 2600 (May 26, 1978).

72. *Id.*

73. Chartrand, *supra* note 14, at 456.

74. Ranger Uranium Environmental Inquiry, Second Report 273 (1977).

75. Chartrand, *supra* note 14, at 456.

76. Aboriginal Land Commissioner, Boroloola Land Claim, *supra* note 71, at 74-111. Despite the quasi-judicial nature of the Land Commissioner's inquiry, the rejection of an aboriginal claim is not final. Claimants are not prohibited by the statute from marshalling new evidence and renewing their claims. Claims have been renewed by the N.I.C. to those portions of the Boroloola area not successfully acquired in the first claim. *See* B. KEON-COHEN, *supra* note 36, at 239.

77. *Id.*

78. *Id.* Bing Bong could not be claimed under the Land Rights Act because, being under pastoral lease, it was not unalienated Crown land. *Id.*

chase until the Toohey report was released. This action eliminated the possibility of a counter-bid when Mt. Isa Mining chose to purchase Bing Bong Station.[79] This case apparently indicates that the Land Rights Act of 1976 was an imperfect solution to the problem of securing aboriginal land rights. Though limited and imperfect, the provisions of the Land Rights Act resulted, by the mid-1980s, in full aboriginal control of as much as 750,000 square miles of the Northern Territory.[80]

In 1985, the Australian government's agenda was still dominated by the escalating problem of aboriginal political demands. The Labour Party, the opposition party in the early 1980s, had championed the introduction of uniform land rights laws as essential to restoration of the dignity of the aborigines.[81] When Labour assumed power in 1983, it promised extensive reforms in the area of land rights. However, the party immediately retreated from that position in the face of strong opposition from white Australia, especially the mining industry.[82] One of the reforms proposed by Labour was the granting of veto power to the aborigines over mining leases on aboriginal lands. The mining industry in Australia is privately owned, but the land with mining potential is primarily Crown land and therefore subject to traditional land claims. Opinion polls conducted in mineral-rich Western Australia showed most people opposed not only granting veto power to the aborigines, they also opposed granting land rights to the aborigines.[83] Labour, in a calculated political move, proposed a compromise entitled "The Preferred Land Rights Model" (The Plan).[84]

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79. Chartrand, *supra* note 14, at 458. "The fact that Mt. Isa Mines purchased another adjoining pastoral lease also sought by the Aborigines the previous year . . . by doubling the Aborigines' offer of $400,000 . . . made the government's behavior in 1978 even more suspect. This fact gave considerable ammunition to those who suggested that in practice the 1976 Land Rights Act would not live up to government promises." *Id.*

80. *Id.* at 459.

81. *Id.*

82. Forrester, *supra* note 44.

83. *Id.*

84. *Id.* at 737 n.4 (quoting Statement to Parliament, Mar. 18, 1986). The Preferred Land Rights Model distributed by the Commonwealth Government for discussion in February of 1985 called for the granting of secure tenure to aboriginal groups occupying traditional land; the capacity for those groups to exercise control over mining on the land; the protection of sacred sites; the payment of royalty equivalents; and the negotiation of compensation for dispossession of land. Under the Preferred Model, Commonwealth legislation was to "be capable of operating concurrently with compatible State legislation." The Commonwealth was "not to seek to override State land rights legislation which is consistently with the Commonwealth's Preferred Model"; and the Aboriginal Land Rights (Northern Territory) Act (1976) was to be amended consistent with the Commonwealth Preferred Model. *Id.*

The Plan proposed giving aborigines the right to claim all vacant federal government land within a territory with which they could establish a historic tribal association, or for which they show a particular need.[85] The Plan excluded veto power, but established tribunals to hear disputes between the aborigines and the miners. The tribunals would report to Parliament, which would make the ultimate decision in all cases.[86] In response to the government's new Plan, aborigine leaders staged protest marches and labeled the Plan, "The Great White Hoax."[87] The government still claimed it was committed to helping the aborigines conquer poverty and insisted that the new model plan was not their final effort in achieving that goal.[88] One positive outcome of the Labour Party's new land rights model was the granting of Ayers Rock to the aborigines.[89]

Ayers Rock, a giant monolith in Central Australia, is one of the aborigines' most sacred sites,[90] as well as one of Australia's most famous landmarks and the site of a large national park.[91] Thousands of tourists visit the park each year. The land grant agreement gives title to the aborigines, while retaining the government's right to operate the national park.[92] The aborigines receive a percentage of the park revenue.[93] On September 10, 1989, the government gave the aborigines title to another of Australia's most spectacular tourist attractions, Katherine Gorge.[94]

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85. Reuters News Reports (Reuters, Ltd., Int'l News, Apr. 7, 1985).

86. *Id.*

87. *Id.*

88. *Id.* The federal government is committed to helping the aborigines conquer poverty and regain their land rights. However, the individual state governments are not in agreement. For example, Queensland's Premier Sir John Bjelke-Peterson said the proposed changes "will intrude on traditional state government's responsibilities for regulating mining, creating confusion and increased costs." *Id.* He called the Preferred Model "another Labour scheme to rip off the Australian taxpayer and drive wedges between Aborigines and the general community." *Id.* The 46,000 aborigines in Queensland have no land rights and the local government unlikely to grant them without interference from the federal government. *Id.*

89. *Id.*

90. Tatz, *Ethnic and Racial Studies*, 3 U. New England, Armidale New South Wales 3 (July 1980), at 281-302. Aborigines from across Australia have long regarded Ayers Rock as a sacred site. The monolith for centuries has been the site of puberty rites for aborigine boys. *Id.* Aborigine folklore is filled with tales of the rock and the sacred rites it stands for. The government's action in granting title back to the aborigines will further the healing of past wounds. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Gainesville Sun, Sept. 12, 1980, at B7, col. 2.

The aborigines fought for title to Katherine Gorge for more than eleven years in Australian courts. The Jawoyn tribe claimed ownership of the area based on 40,000 years of aboriginal occupation of Australia.[95] The Jawoyn tribal leaders called the granting of the title a major breakthrough in the aboriginal fight for traditional lands lost after the European settlement of 1788.[96] Under the agreement the Jawoyn received 813 square miles of wilderness in far northern Australia. Ray Fordinail, an aborigine spokesman, pledged that the aborigines would lease back some sections of the land to the government for use as a national park.[97] These two land grants would seem to indicate a new spirit of cooperation within the present Labour government. Perhaps the battle for land rights has been won and the aborigines have accomplished at least a major part of what they intended when the Embassy first appeared in Canberra. The Australian government, however, has not lived up to its promises of reform in other areas of human rights. For example, in the area of racial discrimination the federal government has not pushed the states to live under the auspices of the Racial Discrimination Act of 1975.

VI. THE FIGHT FOR RACIAL EQUALITY

A. *The Racial Discrimination Act of 1975*

The Racial Discrimination Act of 1975 (The Act), was one of the Labour Party's first attempts to pacify the aborigines.[98] The Act was touted as the first federal intervention into the realm of complete state control of human rights policies. In 1901, when the Australian Constitution (Constitution) became effective, governmental responsibility for aboriginal affairs was regarded as a matter for the states.[99] The Constitution reserved to Parliament the power to make laws with respect to people, "other than the Aboriginal race" in any state.[100] The special laws power[101] of section 51(26) of the Constitution was

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* The "generosity" of the aborigines, both in the case of Ayers Rock and Katherine Gorge, was a condition of the government's grant. However, the aborigines never have sought to keep other Australians away from these areas. The aborigines simply wanted the right to oversee what was rightfully theirs. The aborigines feel an affinity with the land that the white man understands with difficulty. The American Indian has expressed those same feelings in regard to the land white American settlers took from them. *See* Lumb, *Aboriginal Land Rights: Judicial Approaches in Perspective*, 62 AUSTRALIAN L.J. 273 (Apr. 1988).

99. C. ROWLEY, *supra* note 7, at 180.

100. Forrester, *supra* note 44, at 738.

101. *Id.* Section 51(26) of the Constitution states: "The Parliment shall, subject to this

designed to empower the Commonwealth to "deal with people of any alien race" after they entered the Commonwealth.[102] Section 51(26) was never intended to be an enabling provision through which beneficial laws would be enacted for minority groups.[103] In 1967, Prime Minister Holt introduced a bill to amend the Constitution by deleting the words "other than the Aboriginal race in any State" from the special laws power of section 51(26) and repealing section 127 prohibiting the inclusion of "Aboriginal natives" in determining the population of Australia.[104]

Prime Minister Holt stated that the constitutional amendments would give the Commonwealth "concurrent legislative power" with respect to aborigines.[105] He also announced that the federal government would seek to secure with the states "the widest measure of agreement with respect to aboriginal advancement."[106] On May 27, 1967, in the "most massive expression of general will ever known in Australia,"[107] the people of Australia approved the constitutional amendments proposed by Holt.[108] Legislative spokesmen hailed the referendum as a means to provide favorable treatment to the aborigines to overcome the handicaps the government had inflicted upon them in the past.[109]

The High Court, in *Commonwealth of Australia v. Tasmania* (*Franklin Dam*),[110] addressed the scope of the special laws power of section 51(26).[111] In *Franklin Dam*, the High Court examined sections of the World Heritage Properties Conservation Act (WHPC Act).[112] Sections 8 and 11 of the WHPC Act were enacted in express reliance on the section 51(26) power to legislate with respect to "the people

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Constitution, have power to make laws . . . with respect to . . . people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make laws." AUSTL. CONST. § 51(26) (1901).

102. J. QUICK & R. GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 622 (1901) (as cited by Forrester, *supra* note 44, at n.8).

103. Forrester, *supra* note 44, at 738.

104. *Id.*

105. *Id.* at 739.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. 46 A.L.R. 625 (High Ct. Austl. 1983). *See* S. HOTOP, PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW (6th ed. 1985).

111. E. WHITLAM, PARLIMENTARY DEBATES HOUSE OF REPRESENTATIVES 15 (Aug. 13, 1968) (cited in Forrester, *supra* note 44, at 739 n.15).

112. *Id.*

of any race for whom it is necessary to make special laws."[113] Under section 11 of the WHPC Act, certain acts normally performed in the construction of a dam were made unlawful, unless permission was given by the Prime Minister.[114] Section 8 made the provisions of section 11 applicable to areas described as "Aboriginal sites."[115] The majority of the court held that a law may be valid if it discriminates in favor of aboriginal people by its "operation upon the subject matter to which it relates."[116] The *Franklin Dam* case also addressed the scope of the Commonwealth's external affairs power under section 51(29) of the Constitution.[117] The landmark case on external affairs, however, was *Koowarta v. Bjelke-Peterson* (1982).[118]

In *Koowarta*, a majority of the High Court held that the implementation of bona fide international treaty obligations through commonwealth legislation was a valid exercise of the external affairs power, if the subject matter of the treaty was of "international concern [or] of concern to the relationship between Australia and the other party or parties."[119] *Koowarta* tested the Racial Discrimination Act of 1975. The High Court held the Act was a valid exercise of section 51(29) power as it gave effect to the International Convention on Elimination of All Forms of Racial Discrimination to which Australia was a party.[120]

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113. *Id.* Section 8(1) declared that it was necessary to enact §§ 8 and 11 as special laws for the people of aboriginal race. AUST. CONST. § 8(1) (1901).

114. *Id.*

115. *Id.* The court's opinion is difficult to read and the reasoning in the opinions leaves one wondering if each judge was looking at different documents. However, the majority opinion spells out in detail the provisions of §§ 8 and 11. The major differences in the opinions seems to be whether §§ 8 and 11 were "special" in the sense that they had a special connection with the people of a race or were "not special" because they applied equally to people of all races. Justices Gibbs, Wilson, and Dawson held that despite the declaration of § 8, the provisions of §§ 8 and 11 were not valid under the special laws power because these sections could only be applied to sites with "outstanding universal value" and members of the aboriginal race had no special rights, privileges, or obligations in relation to the protected site. *Id.* Justices Mason, Murphy, Brennan, and Deane held that §§ 8 and 11 were a valid exercise of the special laws power, in part because, "something which is of significance to a people because it forms part of their cultural heritage." *Id.* Justice Brennan said: "The protection of sites of particular significance to the Aboriginal people is a purpose which attracts the support of section 51(26), even though the law on its face does not discriminate in favour of the people of race." *Id.*

116. Forrester, *supra* note 44, at 741.

117. *Id.*

118. 39 A.L.R. 417 (High Ct. of Austl. 1982).

119. *Id.*

120. Comment, Koowarta v. Beljke *and Others:* State of Queensland v. Commonwealth of Australia, 13 FED. L. REV. 360, 361 (1983). The plaintiff, Koowarta, was a member of a group of aboriginal people situated in Queensland. On behalf of himself and others in the group, the plaintiff approached the Aboriginal Land Fund Commission and requested it to acquire the lease

Justice Stephen J. was satisfied that racial discrimination was a matter of international concern.[121] In both *Franklin Dam* and *Koowarta*, the High Court accepted that the external affairs power could be extended to legislation pertaining to "matters and things done entirely within Australia." *Koowarta* tested the perimeters of the Racial Discrimination Act and applied it to the granting of land rights to aboriginals using special legislation.[122] The larger question of whether the Racial Discrimination Act can be of use to the aboriginal rights movement in bringing about racial equality has not been satisfactorily answered.

Section 11 of the Act provides that it is unlawful for a person to refuse to allow another person access to a place that members of the public are allowed to enter or use on the ground of the second person's race or ethnic origin.[123] Section 11 appears to be highly protective of minority rights. In reality it has proven to be virtually useless due to the procedural aspects of the Act itself.[124] A person aggrieved by

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of certain land in Northern Queensland for use by plaintiff and the other members of the group for grazing purposes. In February 1976, the Commission entered into a contract with the leasees of the land for the purchase of the lease. However, the transfer was subject to the approval of the Minister of Lands of the State of Queensland as required by the contract itself and the provisions of the Queensland Land Act of 1982.

The Minister refused approval and gave the following statement of the reasons: "The Queensland government does not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation." *Id.* The plaintiff alleged that the refusal to grant approval was contrary to the Racial Discrimination Act of 1985 which sought to enforce within Australia the International Convention on Elimination of All Forms of Racial Discrimination. The plaintiff claimed that the Minister's refusal to grant approval for the reason that the plaintiff and other members of the group were aboriginals constituted an unlawful act under §§ 9 and 12 of the Act and he sought declarations, an injunction and damages under §§ 24(1) and 25. The defendants submitted that the Racial Discrimination Act of 1975 was outside the power of the Commonwealth Parliament and was, therefore, invalid. *Id.*

121. *Id.* at 371. Justice Stephens stated that human rights had become "a proper subject for international action." *Id.* He concluded that the International Convention on the Elimination of All Forms of Racial Discrimination, which had been ratified by over 80 nations, and the international post-war developments in the area of racial discrimination "is enough to show that the topic has become for Australia, in common with other nations, very much a part of the external affairs and hence a matter within the scope of section 51(29)." *Id.*

Justice Stephen added, "There is in my view much to be said . . . for the conclusion that the Convention apart, the subject or racial discrimination should be regarded as an important aspect of Australia's external affairs . . . . In the present case it is not necessary to rely upon this aspect of the external affairs power since there exists a quite precise treaty obligation . . . ." *Id.*

122. *Id.*

123. Koppen v. Commissioner for Community Relations, 67 A.L.R. 215 (Fed. Ct. of Austl. Gen. Div. 1986).

124. *Id.*

any action which the person considers unlawful under the Act may bring a civil action in an appropriate court.[125] Section 24(3) of the Act provides that such a proceeding shall not be instituted unless the aggrieved person has, prior to the institution of the action, acquired a certificate signed by a member of the Human Rights Commission or the Commissioner for Community Relations.[126] The certificate indicates that a compulsory conciliation conference was called pursuant to section 22 of the Act and that at the date of the certificate the matter has not been settled.[127] One illustration of the frustration and general ineffectiveness of such conferences is seen in the case of *Koppen v. Commissioner for Community Relations*.[128]

In *Koppen*, six individuals of aboriginal and/or islander origin had lodged complaints under the Act with the Commissioner stating that the applicant Koppen (K) engaged in an unlawful discrimination by refusing to admit them to a nightclub that K owned.[129] A compulsory conciliation conference was called pursuant to section 22 of the Act.[130] The conference was chaired by S, an appointee of the Commissioner, who was a member of the local community and a person of aboriginal or islander origin.[131] During the conference allegations were made that there existed a general ban on the entry of aboriginal and islanders to K's nightclub. K denied these allegations. In this context S commented that her daughters had been refused entry into K's nightclub. K subsequently refused to participate further in the conference on the ground that S's comments indicated that she was biased. The Commissioner was informed by S that a compulsory conciliation conference had been held and had failed to resolve the matter.[132] The Commis-

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125. *Id.*

126. *Id.* The Racial Discrimination Act of 1975 creates the Human Rights Commission and the Commissioner for Community Relations to hear and/or investigate complaints lodged under the auspices of the Act. *Id.*

127. *Id.*; *see also* Bailey, *The Human Rights Commission — Tame Cat or Wild Cat?*, 60 AUSTRALIAN L.J. 123 (Mar. 1986). If conciliation fails, and there is no agreed outcome to a complaint, the Racial Discrimination and the Sex Discrimination Acts provide that the Commissioner may refer the matter to a special Tribunal created by legislation in each State. *Id.* Under the Racial Discrimination Act of 1975, a complainant may approach a court for normal civil remedies, but only if armed with a certificate from the Commissioner of Community Relations to the effect that a compulsory conference has been held or attempted and the efforts to reach a settlement have failed. *Id.*

128. 67 A.L.R. 215 (Fed. Ct. of Austl. Gen. Div. 1986).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* *See supra* note 124.

sioner then issued the certificate required by section 24 of the Act and the complainants instituted action against K in the Supreme Court of Queensland.[133] However, the complainants were not to have their day in court due to yet another procedural aspect of the Act. Any person dissatisfied with the Commissioner's decision to grant a certificate can apply for judicial review and K applied for that review.

K lodged an application under the Administrative Decisions (Judicial Review) Act of 1977 for an order of review of the Commissioner's decision.[134] K argued that a denial of natural justice had occurred in connection with the Commisioner's decision due to the bias of S as chairperson of the conference. The Supreme Court granted K's application and declared the certificate to be of no effect.[135] The Court stated that it was permissible for a person presiding at a compulsory conference to bring her own knowledge and experience to bear in the discharge of that function.[136] However, the statements of S were such that a party or members of the public might reasonably suspect that S was prejudiced or partial and was of the opinion that there had been a general ban on the admission of aboriginal and islander people to K's nightclub and that his denials were untrue.[137]

This case would appear to be indicative of how "racial discrimination" matters are handled under the Act. If the Commissioner allows an aboriginal to sit as chairperson, the Court can find prejudice bars the granting of permission to bring action. If the Commissioner appoints a white to chair the conference, the matter quite frequently is summarily disposed of. Few aggrieved persons are allowed to file court actions in racial discrimination cases. Given the fact that Australian aborigines constitute only one percent of the total Australian population,[138] it is not surprising that their cries of racial discrimination have not been heard worldwide. However, that situation is changing. In 1988, the United Nations sent a working group into Australia to investigate the aboriginal human rights movement's claims of human rights violations by the Australian government.

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133. *Id.*

134. *Id.* The Administrative Decisions (Judicial Review) Act of 1977, sets up procedures whereby a three-member Tribunal is empaneled to hear complaints of persons aggrieved by the Racial Discrimination Act of 1975. This Tribunal has in effect "removed the teeth" of the Commissioner of Community Relation, since it is normal practice for such Tribunals to overturn the commissioner's decisions. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. N.Y. Times, Aug. 7, 1988, § 1 (Foreign Desk) at 15, col. 1.

VII. Aboriginal Human Rights

In August of 1988, the working group of the United Nations Subcommission on the Prevention of Discrimination and the Protection of Minorities reported to the United Nations Human Rights Commission in Geneva on a study of the Australian aborigine.[139] The report admonished the Australian government for neglecting the basic human rights of the aborigine. Aborigine leaders had urged the United Nations for assistance to combat the Australian government's apathy regarding the plight of the aborigines and the islanders.[140] The 1987 riots were one of the reasons the aborigines were so concerned.

VIII. The Aboriginal Riots of 1987

In 1987, as Australia prepared to celebrate her bicentennial, riots erupted in outback towns in Queensland and New South Wales.[141] The Australia Human Rights Commission was appointed by the government to investigate the background of the riots between aboriginals and white townspeople.[142] David Connolly, Opposition Aboriginal Affairs spokesman, warned that such riots were just the beginning and placed the blame squarely on the state governments.[143] Connolly was

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139. Reuters News Reports (Reuters Ltd., Int'l News, Aug. 5, 1988).

140. *Id.* The group's report stated, "The majority of Australian aborigines live in poverty, misery, and frustration and the government is violating international obligations to treat them without discrimination." *Id.* Erica Irene Daes, Greek head of the UN working group on indigenous populations, said aborigines suffered from bad housing, chronic health problems, high infant mortality, poorly equipped schools, and heavy unemployment. *Id.* Daes added, "It was disturbing to find the original inhabitants of this large and plentiful continent living in poverty, misery, and extreme frustration . . . . I found situations which when compared with the general non-indigenous living standards in the same areas, cannot but lead to the conclusion that Australia stands in violation of her international human-rights obligations relating to non discrimination and unequal treatment in general, and to the provision of certain minimum services in particular." *Id.*

141. N.Y. Times, July 4, 1972, § 4, at 16, col. 3. Representatives of the National Aborigines Conference urged the United Nations to investigate the human rights violations of the Australian government. *See also* Reuters News Reports (Reuters, Ltd., Geneva, July 8, 1982). The same delegation visited the World Council of Churches (WCC) and begged them to intervene in the battle for human rights. The WCC sent a working group into Australia and their conclusion matched those of the UN working group. The study by a five-member team of the WCC accused the government of failing to meet its constitutional duty to achieve justice for Australia's aborigines. The group's strongest criticism was reserved for the Western Australian and Queensland state governments, where most aborigines live, and where no land rights had been granted. The report concluded, "racism . . . is tied up with historical, economic, political, cultural and religious interests. The black people in Australia are a minority group and are alienated from the decisionmaking levels as well as the corridors of effective power." *Id.*

142. Reuters News Reports (Reuters Ltd., Int'l News, Aug. 10, 1987).

143. *Id.*

quoted as saying that "the federal government has done its bit, providing services and trying the improve conditions for aborigines."[144] Connolly added that "the onus was on state and local governments to take responsibility for problems in their own states."[145] Connolly's statements illustrate the "head in the sand" attitude that the federal government has taken toward the aboriginal human rights issue. The United Nations working group condemned the government for that attitude. The riots sparked an official investigation by the government of Queensland and Justice Marcus Enfeld, a High Court judge, presided over a hearing to determine the factual situation.[146] For four days Enfeld listened to testimony by local people about the events leading up to the January 1987 riot in which one hundred aboriginals crossed into Queensland and swept through the town of Goondiwindi.[147] According to the testimony, the riots were sparked by intolerable living conditions within the aboriginal settlement on the outskirts of Goondiwindi.[148]

Justice Enfeld wept openly on the bench as he listened to harrowing accounts of racism against aborigines in Goondiwindi.[149] After trudging through ankle-deep mud to inspect living conditions in Toomelah, Enfeld exclaimed, "I have been to Soweto in South Africa, to German concentration camps, but this is my own country."[150] Justice Enfeld made those statements upon viewing the forty hovels that housed five hundred aborigines.[151] The settlement was created, as were similar settlements in other outback towns, to provide the aborigines an opportunity to integrate with whites and still preserve their way of life.[152] However, the locals made the settlements into a type of concentration camp for aborigines. The aborigines in Toomelah suffered chronic overcrowding, had raw sewage collecting in open ponds, and their running water was limited to thirty minutes per day.[153] In addition, eighty

144. Reuters News Reports (Reuters, Ltd., July 31, 1987).

145. *Id.* Connolly's comments coincided with an investigation by the Australian Human Rights Commission into the background of a January 1987 riot between the aborigines and whites in a Queensland border town.

146. *Id.*

147. L.A. Times, Sept. 20, 1987, at 5, col. 1.

148. Reuters News Reports, *supra* note 139.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* The government built several settlements like Toomelah in rural areas of Australia. Their intentions were good, but the racial hatred by whites in those areas soon made the settlements little more than concentration camps for the aborigines forced to live there. *See* C. ROWLEY, *supra* note 7.

percent of the aborigines were unemployed.[154] However, the evidence of unbridled prejudice of local whites against the aborigines overshadowed the evidence of neglect.

Justice Enfeld's tears were in response to testimony about this prejudice.[155] Goondiwindi High School reserved a "blackie's" blackboard for the aborigines and the young aborigines were seated separately from the whites.[156] One former teacher told of white children who, when asked to name their favorite weekend sport responded, "nigger hunting."[157] Justice Enfeld at the end of this testimony exclaimed, "It's shameful. Other Australian people wouldn't tolerate this type of treatment."[158] In response to the charges of neglect, Justice Enfeld stated, "There may not be fences or SS guards around Toomelah, but if you live there in a house with 21 other people, cannot get out of town because the road is impassable, or cannot get work, then you live in a prison."[159] Several civil rights organizations testified during the hearings about the rash of aboriginal deaths in jails since 1983.[160]

Vanessa Forrest, a spokeswoman for the Committee to Defend Black Rights, testified that more than thirty-five aborigines had died in jail since 1983.[161] She added that "if this number of whites died in custody, there would be a major scandal."[162] The government acted quickly to dispel the mounting disquiet that Ms. Forrest's statements sparked.

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154. Reuters News Reports, *supra* note 139.

155. *Id.*

156. *Id.*

157. *Id.* This state of affairs is typical in the outback towns. *See* C. ROWLEY, *supra* note 7, at 202. Dr. Mac Kamien, a psychiatrist and general practitioner in Bouke, studied the local aboriginal community and published an account of his research findings. The aboriginal children suffered from a general feeling of insecurity and debasement. These feelings emerged as a mixture of anxiety and suspicion upon contact with what they regarded as unpredictable white people.

> They experienced racial discrimination at a very early age, and this added to their low self esteem . . . . Keeping a child in a gaol cell . . . caused much guilt and anxiety in the child's parents. It is probably that the punitive attitudes of Child Welfare Department officers, police, and magistrates helped to further alienate Aboriginal children from white society and perpetuated the anti-social behavior which these agencies were trying to eradicate.

Id. Most of the teachers, according to Kamien, adopted "the racist attitudes of most white people in the town." *Id.*

158. Reuters News Reports, *supra* note 139.

159. *Id.*

160. L.A. Times, Sept. 20, 1987, at 5, col. 1.

161. *Id.*

162. *Id.*

Three Supreme Court judges were empaneled to investigate the aboriginal deaths, especially those of fifteen young aborigines, who died within hours of incarceration during an eight-month period.[163] Justice Enfeld, who headed the Supreme Court Commission, stated that he believed the position of aborigines would be improved only by a change in the attitude of white Australians.[164] He identified the problem as the "age-old disease of racism, elitism and discrimination"[165] and stated that "Toomelah exists because of us and what we are as Australians."[166]

Justice Enfeld's sentiments echoed the finding of the United Nations working group. The group accused the Australian government of failing to uphold certain basic United Nations standards for aborigines and islanders.[167] The group noted the abnormally high number of aborigines who died in police custody and challenged the government to investigate the circumstances surrounding those deaths. The group also encouraged the government to recommend procedures to ensure that such deaths did not occur in the future.[168] The group's report noted statistical data indicating the aboriginal life expectancy was ten years less than the average white Australian and aboriginal infant mortality was two to four times higher than other Australian groups.[169] The report attributed both figures to poverty

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163. *Id.* This accusation sounds familiar to most Americans, as these same charges were made by blacks seeking recognition of their civil rights during the 1960s and black South Africans seeking political and social justice from white South African government. However, the aborigine deaths were not caused for the most part by racial violence. Instead, the young aborigines died from alcohol poisoning and general neglect of their jailers. Studies conducted on imprisoned aborigines suggest most, if not all, the aborigines die in custody from an intolerance to being locked away from their own people. *Id.*

164. *Id.* The fifteen young aborigines whose deaths the panel investigated died within hours of being incarcerated. In addition, the fifteen died within an eight-month period. The government feared an outbreak of violence by aborigines in retaliation for those deaths. Federal politicians warned that increasing aboriginal militancy would lead to a blood bath in some outback towns. David Connolly, Opposition Aboriginal Affairs spokesperson was quoted as saying, "The hatred in those places is unbelievable, and some whites already live in fear they will be based or robbed. Something must be done now or it will all simply boil over and we'll have even worse trouble on our hands." *Id.*

165. *Id.* This was the same Justice Enfeld who had cried openly on the beach as he listened to accounts of atrocities in Toomolah. *See supra* note 144.

166. *Id.* Justice Enfeld stated, "The so-called Aboriginal problem is in truth not primarily Aboriginal . . . it is the age-old disease of racism, elitism and discrimination. Before Australia takes the high moral ground on various problems of human rights, it is well that Australians, all of us, should see that Toomelah exists because of us and what we are as Australians." *Id.*

167. Reuters News Reports, *supra* note 139.

168. *Id.*

169. *Id.*

and the deprived conditions under which most aborigines were forced to live.[170]

The aboriginal leaders of the human rights movement are among the "privileged" few who have taken advantage of federal government educational programs. Education has allowed these aboriginals to escape the bonds of poverty and deprivation and driven them to demand a better life for their people. They condemn the government that has taken their lands, impoverished their people, and made the aborigines a people without a country.[171]

The leaders within the movement are aware that they must educate their own people before the final battle against extinction is won. The aborigines in the outback fear contact with the white man and that fear is justified. For over two centuries such contact has meant death to the aborigine, either from disease or killings. The aborigines in the outback want to be left alone to live on the land, as they have for centuries.[172] Those within the movement know this is no longer possible given the widening reach of the mining industry into the inner regions of Australia. Soon there will be no more wilderness in which the aborigines can hide. Traditional lands are being steadily taken over by mining settlements and other corporate concerns. The movement's leaders know the only chance the aborigine has of surviving is to learn to live in the "white man's world."

IX. CONCLUSION

The movement alerted human rights activists and others around the world to the plight of the Australian aborigine. The movement made great strides in the fight for land rights for aborigines. The movement exposed the human rights violations of the Australian government to all the world. Superficially, these accomplishments would seem to indicate the movement has been highly successful. However, like most battles for human rights, these gains represent only minor steps forward. The major battle of saving the aborigine from extinction lies ahead. The movement wants to help aborigines living in the out-

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170. *Id.*

171. Christian Science Monitor, Aug. 14, 1981, at 12. The premiers of Western Australia and Queensland blasted the report and the people who produced it. Queensland's Premier Johannes Bjelke-Peterson described the report as "worthless exercise compiled by a bunch of hypocrites." *Id.* Western Australian Premier Sir Charles Court said the report was a "shameful collection of exaggeration, distortions and self-contradictions." *Id.* Both Queensland and Western Australia had refused to cooperate with the team who compiled the report complaining of "bias" when the group was in Australia. *Id.*

172. C. ROWLEY, OUTCASTS, *supra* note 1.

back to move into the "civilized world." In order for that to be accomplished, the movement will have to initiate a widespread educational program that encompasses not only the aborigine, but white Australia as well.

Most aborigines in the outback have no desire to change their way of life. In her book *My Place*, Sally Morgan, an Australian of aboriginal descent, records the visionary lyricism of her great-uncle Arthur Corunna:

> There's so much the whitefellas don't understand. They want us to be assimilated into the white, but we don't want to be. They complain about our land rights, but they don't understand the way we want to live . . . . Most of the land the aborigines wants, no white man would touch . . . . Those Aborigines in the desert, they don't want to live like the white man, owin' this and owin' that. They just want to live their life free . . . . If they want water in the Gibson Desert, they do a rainsong and fill up the places they want. If it's cold, they can bring the warm weather like the wind . . . . They don't hunt too hard, the spirits can bring the birds to them . . . They don't kill unless they are hungry, the white man's the one who kills for sport. Aah there's so much they don't understand.[173]

Corunna's words eloquently point out the feeling of the majority of outback aborigines; they just want to be left alone. Perhaps some compromise can be reached to provide sanctuary for the traditional aborigine. Australia needs to recognize that the aborigines are a national treasure. Measures to protect this "treasure" can be implemented, but white Australia will have to awaken and acknowledge that the aborigine is facing extinction before the government can prevent that extinction. Until recently, in the official history of school textbooks and in their cultural memories, Australians have willed themselves to believe aborigines have been protected and allowed to live as they want in serenity and isolation from white intrusion. This version of history has been the "great white lie" of Australian society. Australia was forced to face the truth during its official Bicentennial celebrations last year.[174] Aborigine groups organized small and sometimes militant counter-celebrations designed to point out the eurocentric arrogance and preposterous dishonesty of dating the "founding" of Australia, and for that matter the "discovery" of Australia, from

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173. S. MORGAN, MY PLACE (1989).
174. *Id.*

the point of European contact.[175] The counter-celebrants instead chose to commemorate 40,000 years of aboriginal culture.[176] They announced their determination to make a dent in the national amnesia about the role and treatment of aborigines in Australia history.[177]

Those within the movement point out that the neglect has been more than a mere absence of aborigines from history books. The neglect has caused the erasure of race memory from the lives of people of aboriginal descent.[178] The movement must awaken that memory and force those of aboriginal descent to join the struggle to preserve their people and a way of life that has managed to survive two hundred years of persecution by white settlers. Writers like Sally Morgan can help to accomplish that goal. Ms. Morgan chronicles her own awakening in her novel and in doing so she provides a roadmap for those of aboriginal descent to discover their "roots."[179] Like Alex Haley, the black American author of *Roots*,[180] which traces Haley's family from African royalty to American slavery and their fight for freedom and equality, Morgan traces the terrible journey of her aboriginal family from peace and happiness into the world of deprivation and discrimination.[181] Perhaps Morgan's novel will impact aboriginals in the same way Haley's novel motivated blacks in America to search for their African heritage and to discover the pride of being black in a white society. The movement must rewrite history and in the process show

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175. Reuters New Reports (Reuters Ltd., Jan. 2, 1989).

176. *Id.*

177. *Id.*

178. *Id.*

179. N.Y. Times, Feb. 19, 1989, § 7, at 13, col. 1 (Book Review). Sally Morgan was born in Perth in 1951 of aboriginal descent. Morgan had no knowledge of the traumatic lives of her mother and grandmother. She recalls a moment in 1979, when she first saw the dim shapes of that trauma through the fog of official history: "I always thought Australia was different to America, Mum, but we had slavery here too. The people might not have been sold on the blocks like the American Negroes were, but they were owned, just the same." *Id.* Her mother responded tearfully that it was not safe to speak of such things. Nan, Morgan's grandmother, feared that the Government might do something to Morgan. "Government people are like that." Morgan's mother and grandmother would not talk because of their reluctance to relive the traumas of their pasts.

Of the many dislocations and alienations of the 20th century, few can be as disorientating as that which requires one to pose as a foreigner in the country of one's birth to find acceptance.

Morgan said writing *My Place* changed the course of her life. "Before, I didn't know myself and I had a very confused identity." Ms. Morgan's mother is aboriginal and her father was white. "It wasn't until I went back and met my grandmother's aboriginal relatives that I thought, this is the real me." *Id.*

180. A. HALEY, ROOTS (1976).

181. N.Y. Times, Feb. 19, 1989, § 7, at 13, col. 1 (Book Review).

Australia what white settlement has done to the aborigine. The educational focus should be on white Australia, not on the outback aborigine. If the mainstream of Australia's people can be brought face-to-face with the truth of how their ancestors, and they themselves, have treated the aborigine, perhaps they will fight to save the few that remain.

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