for public comment. One of the major concerns is to provide sufficient safeguards in EPA legislation to minimise fraud and abuse. At the same time EPAs must be as simple as possible to use. A report in the *Sydney Morning Herald* on 5 March 1987 quoted Mr Brian Porter, NSW's Protective Commissioner, as saying that the number of elderly and mentally ill people who are being exploited and their assets ripped off has risen alarmingly. Often the power of attorney is the means by which unscrupulous 'friends' or relatives are able to do this. A similar story appeared in *The Age* on 18 July 1987.

The ALRC has heard of a son being granted a power of attorney which he then used to his own advantage after having his father admitted to an old people's home. The father is apparently aware of this but does not want to bring shame on the family by resorting to the law.

These problems have prompted the ALRC to look closely at the question of safeguards. It may be that more stringent measures than have hitherto been observed in Australian legislation will be necessary. The ACT Public Trustee, Mr Jim Campbell, has been consulted and has provided the ALRC with useful information and suggestions. Copies of the discussion paper are available free of charge from the Australian Law Reform Commission. The Commission welcomes comments or suggestions.

* * *

aborigines: the beginning of the bicentennial

What is property? Property is theft.

Pierre – Joseph Proudhon, *What is Property?* 1840

royal commission into aboriginal deaths in custody. In September 1987 the federal government announced a Royal Commission inquiry into Aboriginal deaths in custody since 1980. At the time the inquiry was announced 44 deaths were to be the subject of investigation, however, by the time the Commission opened its hearings in December 1987 the number of deaths to be investigated had risen to 91. This included a number of deaths since the Royal Commission was announced by also a large number of deaths which had not previously been identified as Aboriginal deaths in custody. The Royal Commissioner, Mr James Muirhead QC, has conceded that the final number of deaths for investigation by his Commission is likely to approach 100.

The Royal Commission formally opened its inquiry on 12 November 1987. It met again in Canberra in mid December for two days to again consider preliminary issues and determine the scope of the inquiry. The range of matters to be investigated by the inquiry has been a cause of concern to many Aboriginal groups. They have expressed the view that the inquiry needed to go much further than merely conducting new coronial investigations in to each death. This view was reflected in an editorial in *The Age* newspaper on 9 December 1987.

> The Minister for Aboriginal Affairs, Mr Hand, says the present terms are wide enough to cover social, political and legal issues. However, this is by no means certain. Already evidence is accumulating to suggest that the cell deaths are a symptom of more deeply rooted problems. A picture is emerging of violent death, suicide, alcohol abuse and mental illness among Aborigines on a scale unrecognised by most Australians. In the short term, it may be desirable

> for the Commission to concentrate on the physical circumstances leading to the deaths, and on preventive measures that might help stem the tide of suicides. But this should not preclude a wider-ranging inquiry later on, particularly if, as suspected, the deaths have their origin in complex cultural, sociological and psychological factors. What we need to know is not just the reason why perhaps 100 Aborigines have died in custody, but also what can be done to improve the condition and outlook of black Australians generally so that history does not go on repeating itself.

The Royal Commisioner himself recognised the need not to interpret the terms of reference too narrowly when he allowed two Aboriginal organisations — the National Aboriginal and Islander Legal Service (NAILSS) and the Committee to Defend Black Rights (CDBR) to have a general right to appear before the enquiry wherever it sat. The two groups see themselves as independent monitors of the Inquiry (*Sydney Morning Herald* 14 November 1987).

The large number of deaths to be investigated also raised significant questions concerning the staff and resources that would be required by the Royal Commission. It seems unlikely that one Commissioner would be able to complete the inquiry by December 1988, the time specified. Mr Muirhead has pointed out that the large numbers which now need investigation by his Commission may justify the appointment of a second Commissioner. Indeed it has been of reported that the Prime Minister has written to the State Premiers and the Chief Minister of the Northern Territory pointing out that it may be necessary for an additional Commissioner or Commissioners to be appointed (*The Australian*, 10 December 1987). On 2 February 1988 it was announced that 3 additional Commissioners were likely to be appointed.

more immediate action? A major concern that has been raised by the Royal Commissioner was that immediate action needed to be taken in relation to the continuing Aboriginal deaths in custody and that governments in Australia should not wait for the report of the Royal Commission, interim or not, before they acted. In a speech to the Australia Academy of Forensic Sciences in Sydney on 19 November 1987 Mr Muihead said he originally had a glimmer of hope that the announcement of the Royal Commission might ease the rate of cell deaths. This did not seem to have ocurred. He urged that governments:

> MUST ACT QUICKLY AND DECISIVELY — not to set up conferences and task forces, but to implement and supervise measures to prevent more deaths.
>
> SPEED up the investigative process, possibly by increasing his staff.
>
> ENSURE nothing was done which might further provoke, anger, dismay, alienation, isolation and death.

He also commented:

> I cannot, as an individual, shoulder the task of inquiry if I have in the back of my anxious mind that this country is waiting for those recommendations before acting decisively. I just cannot accept that burden.

He also urged that people charged with minor offences should not be locked up if alternatives were available that did not threaten the safely of the community. In this context he was particularly concerned about the proposals to reopen the 'black hole' cells in Brisbane which is discussed below. (*The Australian*, 20 November 1987).

who is an aborigine? At the Royal Commission a significant preliminary issue in determining which deaths should be investigated was: Who is an Aborigine? One of the deaths that Aboriginal representatives sought to include was that of a Maori who was married to an Aborigine and had lived as a member of the Aboriginal community for 15 years. Counsel assisting the Commission, Mr Geoff Eames, argued that the Commission's Terms of Reference did not extend to including a person who was not an Aborigine. The Royal Commissioner reserved his decision on this question although he implied that he could see justification in including such a person and was inclined to accept a broader definition of Aboriginality (*The Age*, 15 December 1987, 15).

protection of witnesses. Another concern raised at the Royal Commission was over the protection of witnesses. It was claimed before the Royal Commission that many witnesses were afraid to come forward for fear of repercussions concerning what they had to say. The Royal Commission has said that it was prepared to deal with any concerns over harrassment and also to hear evidence in private sessions if necessary. There were however limits on what the Royal Commission could do in this regard.

a code of practice for police. The calls by the Royal Commissioner for some immediate initiatives to be taken was partially met by a meeting of federal and State police ministers in Hobart on 27 November 1987. That meeting agreed on a draft national code of practice for police dealing with Aborigines in custody. Under the proposals in the code Aborigines will not be incarcerated for drunkenness or other minor offences unless the offender is violent or likely to continue the offence. It also provides that where an Aborigine is arrested, a member of the Aboriginal legal service or a field officer should have access to the detained or arrested person. The code also provides that Aborigines should be lodged in multi-prisoner cells, preferably with other Aborigines unless there is an identified threat from placing them together. Any Aborigine showing signs of physical or mental distress will receive medical attention within the first hour of detention where this is possible. (*The Age*, 28 November 1987, 5). The draft code is to be the subject of further consultations with representatives of the Aboriginal community and the Aboriginal legal services. The code is to be reconsidered by Police Ministers at their next meeting in May 1988.

In Western Australia, the Minister for Aboriginal Affairs, Mr Ernie Bridge, went a step further when he appointed a six member panel which was to spend approximately eight weeks examining the accumulated evidence, particularly coroner's files, to see what could be done to improve procedures and facilities in WA's prisons and police lock ups. (*The Age*, 25 November 1987, 10). The inquiry was not to pre-empt Muirhead Royal Commission but to determine what immediate steps should be taken to prevent further tragedies while the Royal Commission inquiry was proceeding.

human rights and the 'black hole'. The Queensland Minister for Corrective Services, Mr Don Neal created headlines in November 1987 when he announced that the infamous 'black hole' cells in Brisbane's Boggo Road Gaol would be reopened. The decision to reopen the calls was prompted partly by reports that Aboriginal activists were planning to disrupt Expo

88 which will be held in Brisbane between April and September 1988. Aboriginal organisations had made no secret of the fact that they intended to conduct protests during Expo and the announcement by the Minister was regarded by them as an attempt to threaten them into submission (*Canberra Times*, 14 November 1987, 3) The 'black hole' cells were so named because they are underground and have no natural light or ventilation.

The President of the Human Rights and Equal Opportunity Commission, Justice Marcus Einfeld, said in a statement that the decision showed a total ignorance of the basic principles of human rights including those embodied in the United Nations' Covenant on Civil and Political Rights. This Covenant, to which Australia is a signatory, absolutely forbids the imposition of cruel and unusual punishments. Justice Einfeld sought an assurance that the cells would not be reopened for use by any prisoners, black or white. He pointed out that the decision to reopen the cells came on the first day of the Royal Commission into Aboriginal deaths in custody and he added:

> to even contemplate using substandard facilities for Aboriginal prisoners in light of recent tragic events make a mockery of the Queensland Government's own inquiry into black deaths and demonstrates either an appalling insensitivity or complete disregard of, the problem.

Mr Neal for his part defended the decision to reopen the cells on the grounds of efficiency and the alleged existence of a plot devised by Aboriginal inmates in Boggo Road Gaol to smuggle in rifles and take over the prison at the start of Expo 88.

The Queensland Council for Civil Liberties reacted by calling for a statutory enquiry into the decision to reopen the 'black hole' detention block. Mr Matt Foley, President of the Council, said the Council would ask for an enquiry on the ground that the cells were inhuman and the fact that Mr Neal's statement had said they would be used to detain Aboriginal activists. (*Canberra Times*, 23 November 1987)

Concern over the possible reopening of the 'black hole' was short lived. In early December 1987 the new Premier of Queensland, Mr Mike Ahern, agreed to an inspection of the cells by the Human Rights and Equal Opportunity Commission. After discussions with Justice Einfeld it was announced that the cells would not be reopened.

community development in queensland. An important conference for Aboriginal and Islander people was held in Cairns from 30 November to 3 December 1987. The conference was organised by the Aboriginal Co-ordinating Council (ACC) and the Islander Co-ordinating Council (ICC). Each Co-ordinating Council is constituted by the chairperson and deputy chairperson of the community councils which operate in each of the Aboriginal and Islander trust areas in Queensland. The conference brought together over 300 Aboriginal and Islander people, mainly from trust areas as well as invited academics, business personnel, public servants and other researchers whose expertise and experience could directly benefit Aboriginal and Islander people. The conference covered a wide range of topics including:

- tourism,
- arts and crafts and cultural centres,

- the development of small businesses including community-owned enterprises,
- media for remote areas,
- hunting and fishing rights,
- law and order including community policing,
- child welfare,
- general community health care.

community policing. Peter Hennessy, a Principal Law Reform Officer at the Australian Law Reform Commission, presented a paper setting out the Commission's principal proposals for the recognition of Aboriginal customary laws in Australia. The paper focused in particular on local community justice mechanisms for Aboriginal communities and community policing. He pointed out that the Aboriginal courts that operate on trust areas in Queensland had been subjected to a number of criticisms in the past and that community representatives should think seriously about what role they wanted such courts to play. Each community has to make its own choice about whether it wants an Aboriginal Court as it is not obligatory and each community has the potential to draft the by-laws which would be enforced in these courts. The ALRC report: *The Recognition of Aboriginal Customary Laws* (ALRC 31) proposed basic requirements for such courts. These included:

- The local Aboriginal group should have the power to draw up local by-laws, including by-laws incorporating or taking into account Aboriginal customs, rules and traditions.
- Appropriate safegards needed to be established to ensure individual rights are protected.
- The by-laws should in general apply to all persons within the boundaries of the community.
- The courts should have the power to determine, within broad limits, their own procedure.
- The community should have some voice in selecting persons who will constitute the courts and appropriate training should be available.
- The courts power should include powers of mediation and conciliation.
- The courts should be given appropriate support facilities.

It is significant that the ALRC report also recommended that the Queensland Aboriginal courts should not be continued without broad local support (ALRC 31, para 818).

hunting and fishing rights. A major cause of concern in a number of Aboriginal and Islander communities in Queensland is hunting and fishing rights. A special workshop session at the conference devoted to this topic was conducted by Mary Fisher, Principal Law Reform Officer at the Australian Law Reform Commission. Particular problems arise for Aboriginal and Islander communities in North Queensland because of the zoning provisions in the Great Barrier Reef Marine Park and also the provisions in the Torres Strait Island treaty between Australia and Papua New Guinea. The Commission's report recommended that there should be specific recognition of traditional hunting and fishing rights. The proposals included that:

- As a general principle, Aboriginal traditional hunting and fish-

ing should take priority over non-traditional activities, including commercial and recreational activities, where the traditional activities are carried out for subsistence purposes.

- Aboriginals should be accorded access to lands for the purposes of hunting, fishing and gathering, whether these lands are unalienated Crown lands or are subject to leasehold or other interests.

- Areas of sea adjacent to Aboriginal lands should be preserved for traditional fishing

- There needed to be consultation with Aboriginal people before steps are taken to restrict traditional hunting and fishing

- Traditional hunting and fishing must be subject to legitimate conservation and other identifiable overriding interests. For example, in the case of a rare and threatened species it may be necessary to prohibit hunting or fishing altogether or restrict the numbers taken or the methods by which or the areas in which they are taken. (ALRC 31, para 1001)

an aboriginal treaty? The question of a treaty or compact between Aboriginal and non-Aboriginal Australians was again raised for debate during 1987. A non-Aboriginal Treaty Committee was very active during the late 1970s and early 1980s under the chairmanship of Dr 'Nugget' Coombs and the Senate Standing Committee on Constitutional and Legal Affairs published a Report on the issue entitled *Two Hundred Years Later . . . Report on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People* (1983). However no significant action was taken by Government. Now the Prime Minister, Mr Hawke, and the Minister for Aboriginal Affairs Mr Hand have suggested that the whole issue should be reconsidered. Aboriginal leaders and organisations appear to be sceptical about the idea. However a meeting of major Aboriginal organisations in Sydney in September 1987 stressed that any compact or treaty had to recognise Aboriginal sovereignty. (*Financial Review*, 22 September 1987)

One session of the conference in Cairns was devoted to the issue of an Aboriginal treaty. Papers were presented to the conference by: Mr Paul Coe, President of the Redfern Aboriginal Legal Service; Father Frank Brennan SJ, advisor to the Bishops in Queensland on Aboriginal matters and also a legal advisor to the ACC and ICC; and Mr John Ah Kitt, Director of the Northern Land Council. In his speech to the Conference Mr Coe emphasised the importances to Aboriginal people of an internationally recognised treaty and one that recognised Aboriginal sovereignty. He outlined the representations that had been made over a number of years by Aboriginal organisations to international forums, in particular the Working Party on the Rights of Indigenous Persons which operates under the umbrella of the United Nations Commission on Human Rights. Mr Coe made it clear that it was a long term struggle in which Aboriginal people were involved and that it was likely that 1988 would be just another year in that struggle. Father Brennan conceded that he was a little less ambitious than Mr Coe but he pressed the view that certain things were achievable during 1988. He pro-

posed the following agenda for a treaty or land rights compact for 1988 and beyond:

- Repeal the preamble provisions of the Aboriginal land (Lake Condah and Framlingham Forest) Act 1987 (Cth) and the Aboriginal and Torres Strait Islander heritage Protection Amendment Act 1987 (Cth) which state that the Commonwealth Government does not acknowledge prior Aboriginal ownership and occupation.

- Have the Commonwealth Parliament pass a resolution acknowledging Aboriginal history and the need for a compact.

- Set up a National Aboriginal Conference type body to negotiate the compact.

foundations for the future. On 10 December 1987 the Minister for Aboriginal Affairs, Mr Hand, made a major statement to the House of Representatives entitled Foundations for the Future. The statement outlined the Government's plans to establish the Aboriginal and Torres Strait Islander Commission (ATSIC) which would take over the responsibilities currently performed by the Department of Aboriginal Affairs, the Aboriginal Development Commission, Aboriginal Hostels Limited and the Australian Institute for Aboriginal Studies. It is proposed that the Commission commence operation on 1 July 1988. The Commission will be constituted by Commissioners appointed by the Minister and those appointed by the Aboriginal and Islander Community through a system of 28 Regional Councils. As the Minister put it in his statement:

> I believe this will be a much more effective way of providing for Aboriginal and Islander input than has ever existed. In many ways it can be seen as combining the administrative functions of my portfolio with the consultative role that was formerly carried out by the National Aboriginal Conference (NAC).

Perhaps even more significant than the establishment of the new Commission is the proposal that the preamble to the Act creating it will acknowledge that 'the Aboriginal and Torres Strait Islander peoples were the prior occupiers and original owners of this land'. However the proposed preamble continues:

> they were dispossessed of their land by subsequent European occupation and have no recognised rights over it other than those granted by the Crown.

This provision was the subject of comment by Mr John Slee, legal correspondent with the Sydney Morning Herald on 15 December 1987:

> Yet, there is a puzzle. If the Government is serious about shifting in its legislation from the historically inaccurate view of Australia's origins, why in the preamble do the Aboriginal and Torres Strait Islander Bill do not do so more clearly?
>
> Until now, the courts, no doubt reflecting white Australian's persistent unease with the truth about the nations origins, have falsified history and taken the comfortable view that Australia pre-1788 was terra nullius. That is, it was a land belonging to no one, rather than a land occupied by a million indigenes who, in the years that followed, had it taken from them.

He quotes consititutional lawyer Michael Detmold as saying that:

> the point of the conquest doctrine is that it recognises that the previous

> owners of the land maintained their rights. That makes the question of compensation inescapable in respect of any rights taken away.
>
> Thus while the preamble may have a degree of goodwill 'it is either consititutionally mistaken or speaking with a forked tongue'.

Mr Slee concludes that if what is proposed is the abandonment of the doctrine of terra nullius it is not helped by 'legislative equivocation'. (*Sydney Morning Herald* 15 December 1987).

Another significant aspect of the Foundations for the Future statement is the proposal that Commonwealth legislation should, to the extent practicable, recognise and incorporate Aboriginal customary laws within the Australian legal system. This would appear to indicate an intention on the part of the Commonwealth Government to implement, in whole or in part, aspects of the Law Reform Commission's Report on *The Recognition of Aboriginal Customary Laws.*

Since making his statement to Parliament, Mr Hand has announced his intention to boycott all bicentennial events saying that it would facilitate progress towards a compact with Aborigines. (*The Age*, 5 January 1988) The NSW Minister for Aboriginal Affairs, Mr Gabb has also said he will not be involved officially in bicentennial events.

the law of the land. In December 1987 Professor Henry Reynolds published his fifth book on Aborigines entitled *The Law of the Land* (Penguin, 1987). The book challenges the controversial view that discovery of Australia:

> had delivered to Europeans not just sovereignty over Australia but ownership of every inch of land as well; Australia was a colony of settlement not conquest; there had never been any recognition of native title; what amelioriative measures were taken did not imply any acceptance of Aboriginal land rights. (p. xii)

The book argues that a proper analysis of the historical record shows that there was real concern in the Colonial Office in the first half of the nineteenth century over the status of Aborigines and their right to have their title to land recognised. Furthermore, steps were taken to in fact recognise Aboriginal title.

> There was widespread dissatisfaction with the concept of terra nullius in the 1830's and 1840's. It simply did not accord with the realities of colonial life. Aboriginal prior ownership was 'admitted on all sides' and was clearly enunciated in official documents. It was however, an embarrassment to many colonists in the same way that it is an embarrassment to contemporary opponents of the modern land rights movement. There is the additional difficulty that the basic principles of native title were so clearly understood and so forcefully stated one hundred and fifty years ago.

The concept of terra nullius, it is argued in the book, has long been discredited and the starting point for legal argument must be acceptance of Aboriginal prior possession. As to what will happen in 1988 Professor Reynolds says there will no doubt be much debate, anger and soul searching. But he reminds us of the words of Gough Whitlam, the Prime Minister in 1973, perhaps truer today than they were then:

> Australia's treatment of her Aboriginal people will be the thing upon which the rest of the world will judge Australia and Australians — not just now but in the greater perspective of history (page 178).

independence for the torres strait islands. A meeting of community representatives on Thursday Island in January 1988 called for the independence of the Torres Strait Islands from Australia and the recognition of the sovereignty of the Islands. The call was supported by all 15 Island Councils and all major community groups in the Torres Strait. The Islanders have announced that a delegation will travel to Geneva and New York to lobby United Nations officials for independence. They will also lobby other South Pacific Nations. (*Sydney Morning Herald*, 21 January 1988).

As the *Sydney Morning Herald* pointed out on 21 January 1988, the Torres Strait Islanders 'face some formidable obstacles on the path to independence'. The Australian Constitution requires consent of both the Queensland and federal Parliaments. It would also need the support of a referendum in Queensland.

The call for independence has been flatly rejected by the Prime Minister, Mr Hawke. However, the Minister for Aboriginal Affairs, Mr Hand has visited the Torres Strait and had discussions with community leaders over their grievances. He has proposed that the Prime Minister also visit the Islands. An editorial in the *Sydney Morning Herald* commented that 'to dismiss the calls for independence lightly would be careless'. It concluded:

> More efficient provisions of services, together with serious attention to establishing a sound economic base for the islanders, may defuse much of the current discontent. But the islanders also want more recognition of their separate identity and some meaningful responsibility for their own affairs. These claims will be more difficult to satisfy, if only because they require negotiations between Federal and State governments. But unless efforts are genuinely made to remedy the past failure to recognise the islander's aspirations and grievances, their threat to secede, however fanciful will remain a serious embarrassment for Canberra.

The Australian newspaper, in an editorial of 30–31 January 1988, commented:

> The Islanders' actions are just one part of a worrying drift towards separatist notions in the nation of a time when the drift should be strongly the other way — to drawing disparate strands into a united nation.

As well as the call for independence Torres Strait Islanders have a number of other claims on foot. The Islanders have lodged a $5 billion compensation claim with the federal government for 'illegal occupation, unjustified conquest, and property and environmental damage'. As well Eddie Mabo, a Murray Islander has a case before the High Court, seeking to establish a common law claim to his land on Murray Island. This case is due for hearing early in 1988.

aborigines in the courts. In November 1987 the High Court handed down a decision relating to Aboriginal hunting and fishing rights (*Walden v Hensler* (1987) 75 ALR 173). The appellant was an Aboriginal elder of the Gungalida people whose country is in the Burketown and Doomadgee area of Queensland. While out hunting one Sunday he had shot and killed a plain turkey (Australian bustard) which he had taken home to eat. He had also taken home a turkey chick to be kept as a pet by his son. Two days latter he was visited by an officer of the Queensland National Parks

and Wildlife Serivce who seized the carcass of the turkey and the live turkey chick. Plain turkeys are fauna protected under the Fauna Conservation Act 1974–79 (Qld) but the appellant did not know that the plain turkey was a protected species nor did he know he had committed an offence. He had acted in accordance with Aboriginal law and tradition. Nevertheless he had been convicted by a magistrate who imposed a fine of $100, royalty of $260 (double the prescribed amount) and costs amounting to $559.50, a total of $919.50. The appellant had argued both before the magistrate and the Full Court of the Supreme Court of Queensland that section 22 of the Criminal Code (Qld) provided him with a defence. It states:

> Ignorance of the law does not afford any excuse for an act or omission which would otherwise consititute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.
>
> But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud.

Three members of the court (Brennan, Toohey and Gaudron JJ) found the appellant had an honest claim of right within the meaning of section 22 of the Code. However, Brennan J found further that section 22 did not apply to the offence with which the appellant had been charged under section 54 of the Act and consequently it would be necessary to affirm the conviction. However, the Court considered that section 657A of the Criminal Code was applicable. This provision allows a court to discharge an offender either absolutely or conditionally taking into account factors such as the trivial nature of the offence, the extenuating circumstances under which the offence was committed and any other matter that the court thinks it proper to consider. All members of the court agreed that an order under section 657A should be made discharging the appellant absolutely and that the appellant's costs should be limited to court costs of $30.50 in respect of proceedings in the magistrates court.

In a strongly worded judgment Justice Brennan expressed the following views:

> To deprive an Aboriginal without his knowledge of his traditional right to hunt for bush tucker for his family on his own country and then to convict and punish him for doing what Aborigines had previously been encouraged to do would be an intolerable injustice. It adds the insult of criminal conviction and punishment to the injustice of expropriation of traditional rights. It can and should be avoided by discharging the appellant absolutely under section 657A.

Justice Brennan also commented that it would not have been suprising if a question had been raised by the appellant as to whether and how it came about in law that Aboriginal people had their traditional entitlement to gather food from their own country taken away. But that question was not raised.

Justice Toohey in his judgment commented that legislative recognition of the traditional use of the land by Aborigines for hunting and gathering was by no means unknown in this country and referred to the discussion of this topic in the Law Reform Commission's Report ALRC 31 on *The Recognition of Aboriginal Customary Laws* (1986). The principal proposals in

the Report for the recognition of traditional hunting and fishing rights to Aboriginal people have been outlined above.

* * *

pre-paid consumer contracts

> All sensible people are selfish, and nature is tugging at every contract to make the terms of it fair.
>
> Ralph Waldo Emerson, *Wealth*

The Law Reform Commission of British Columbia (Canada) recently released a Report entitled *The Buyer's Lien: A New Consumer Remedy* (LRC 93, August 1987). The Report deals with the rights of a buyer of consumer goods who has pre-paid all or part of the purchase price but has not received possession of the goods, for instance when the seller of the goods becomes insolvent before delivery to the buyer and control of them is taken over by a receiver or liquidator (or a trustee in bankruptcy). The report illustrates the problems which arise with a number of examples including the following from the Vancouver Province newspaper:

> *Complaint.* Last February, I spend $358.50 on house insulation at [seller's] Lumber . . . about forty miles from Port Alice where I was living at the time. I also paid another $20.00 for delivery. It was my bad luck that the store went into receivership a couple of days later — before the insulation could be delivered. . .
>
> I was told [by the receiver] that because the goods had not been set aside for me there was nothing I could do to get the insulation or to get my money back . . .
>
> Surely there is some way that consumers can be protected in situations such as these.
>
> *Action Line's Reply.* Afraid not, according to the receiver — manager who spelled out the details for us. 'Section 23 of the Sale of Goods Act. . . provides that title in goods passes generally when the goods are specific and ascertained', said the receiver. 'In practice, we understand that this in is intended to involve the separation and marking of goods for a customer or contract' . . .'
>
> 'Our conclusion', he said, 'is that the merchandise which [the buyer] ordered was never removed from stock, in such a way as to become specific or ascertained and that the goods were also available to a subsequent purchaser who wished to take immediate delivery.
>
> We do not suggest that there appears to have been anything improper in the manner in which the seller accepted [the buyer's] orders, however, it does point out the problems involved in pre-paying an account before taking custody of the merchandise. We are sympathetic towards [the buyer's dilemma], but regret that we have no legal grounds on which to supply the goods that she claims.' He added that you would be an unsecured creditor in any bankruptcy proceedings, but said, '. . . it is most improbable that there would be any funds available to the unsecured creditors in such a bankruptcy'.
>
> Action line knows this will be absolutely no help to you, but we hope your experience will help other readers.

The Report recommends that a consumer who pre-pays for goods in this way should be entitled to some form of protection in the event of the seller's insolvency. The report puts forward the following arguments in support of a remedy for a consumer who pre-pays for goods:

- While both a consumer buyer and supplier of goods to a retail merchant both extend credit, the supplier of goods expects to make a