ABORIGINES, NATURAL RESOURCES AND THE LAW

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Introduction

Aboriginal land rights is an issue which tends to excite Australians.[1] As a legal issue it traces its roots to both the failure of the colonising British government to recognise prior Aboriginal sovereignty over the continent of Australia at the time of annexation or colonisation[2] and the failure of the introduced English common law to recognize Aboriginal land ownership at the date of colonisation.[3] As a current political issue it can be traced back to the symbolic "Aboriginal Embassy" erected by a group of Aborigines outside the Australian Parliament at Canberra in 1972.[4] Since 1972, the issue has maintained a high profile in Australian political life at both the Federal and the State levels of government although, until very recently, only the Commonwealth government had taken positive legislative steps towards recognition of Aboriginal claims for "land justice".[5]

Participation in the land rights movement has not, however, been restricted to Aborigines and governments: privately organized European Australians have also strongly supported Aboriginal land claims and in

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1. In Coe v. Commonwealth of Australia (1979) 24 A.L.R. 118 at 131, e.g. Gibbs J. (as he then was) noted that "[t]he question what rights the aboriginal people of this country have, or ought to have, in the lands of Australia is one which has become a matter of heated controversy."
2. Id. at 128, e.g. Gibbs J. states the orthodox legal view that the initial annexation of the east coast of Australia in 1770 by Captain Cook for the British Crown were acts of state whose validity cannot be challenged.
3. See Milirrpum v. Nabalco Pty Ltd (1971) 17 F.L.R 141 ("Milirrpum Case") in which it was accepted that the British Australian colonies were settled and not conquered or ceded, and that the English common law received in the colonies did not recognise communal native title of prior inhabitants of such a colony. Although this decision has been criticised (see Hookey, 'The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?' (1972) 5 *Fed L. Rev.* 85; Lester and Parker, 'Land Rights: Australian Aborigines Have Lost a Legal Battle, But . . .' (1973) 11 *Alba L Rev* 189; Hocking, 'Does Aboriginal Law Now Run in Australia?' (1979) 10 *Fed L Rev.* 161) it was apparent in Coe v. Commonwealth, supra n. 1, that of the four judges who decided the case in the High Court, Gibbs and Aickin JJ. were not prepared to review the settled colony status. Most commentators who have sought to reverse the result in the Milirrpum Case have argued that it is first necessary to find that the British colonies in Australia were conquered: see, e.g. P. Bayne, 'Makarrata: A Treaty with Aboriginal Australians' (1982) unpublished paper presented to the Australian Society of Labour Lawyers (4th Annual Conference) Canberra, July 1982.
4. For accounts of the significance of this event see: C.D. Rowley, *A Matter of Justice* (1978) Ch. 1; L. Lippman, *Generations of Resistance* (1981) 51.
5. See Aboriginal Land Rights (Northern Territory) Act 1976 (Act No. 191 of 1976).

particular have pressed for the conclusion of, in effect, a treaty between Aboriginal Australians and other Australians to remedy the injustices inflicted by the dominant European Australian society on Aborigines during nearly 200 years of European settlement.[6]

Yet, while most Australians do become excited over the land rights issue — many readily acknowledging the need to remedy the past injustice done to Aborigines, some claiming that the injustice is continuing, yet others not knowing how they should finally respond and, again, those who respond negatively, sometimes emphatically so — there has been a remarkable shift in Australian political life, in the hearts and minds of those, in all quarters of government, unions, commerce and industry and intellectual circles, who influence policy, from a neutral, if not negative, attitude to the issue a decade ago, to a positive, and at least neutral, attitude to the issue today.[7] The greatest evidence of this shift is the legislative land rights movement. Although the landmark Commonwealth legislation stood alone for six full years, important enactments, and proposed laws, in the States in recent years have consolidated the movement. In 1981, the South Australian Parliament passed the *Pitjantjatjara Land Rights Act*;[8] in 1983, the New South Wales Parliament passed its *Aboriginal Land Rights Act*;[9] and also in 1983, an *Aboriginal Land Claims Bill* was laid before the Victorian Parliament. It would appear that the recently elected Western Australian government is also committed to introducing a land rights Bill into its Parliament[10] and that, in Tasmania, a government-commissioned report on the issue is awaiting implementation.[11] In this movement, only Queensland appears to be out of step and to reject outright the land rights concept, as its legislative and administrative records in respect of the Aurukun and Mornington Island incident in 1978 so clearly attest.[12]

6 See S Harris, *"It's Coming Yet" an Aboriginal treaty within Australia between Australians* (1979) (outlines the contentions of the Aboriginal Treaty Committee), H C. Coombs, *Aboriginal Land Rights Teach-In* (1979)

7 Bipartism political support has seen the passage of land rights legislation in the Commonwealth (supra n 5) as well as in South Australia (infra n 8) and New South Wales (infra n 9) in recent times The Australian Council of Trade Unions generally supports the grant of land rights to Aborigines The Australian Mining Industry Council (AMIC), although having reservations concerning the basis on which land rights should be granted and the extent of Aboriginal resource control, has acknowledged the need for Aborigines to have a "form of secure title" to land AMIC, *Aboriginal Land Rights — The need for a national consensus*.

8 In May 1983 the Western Australian Labor Government announced an inquiry into land rights in the State to be conducted by Mr. P. Seaman Q.C.

9 See n 72 and n 76 infra

10 G. Nettheim, *Victims of the Law* (1981) provides a good legal account of events surrounding mining on Aboriginal reserved land at Aurukun See also Lippman, supra n 4, at 84-93.

11. Stanner, 'After the Dreaming' in *White Man Got No Dreaming* (1979) at 230

12 Maddock, 'Aboriginal Land Rights Traditionally and in Legislation: A Case Study' in M.C Howard (ed.), *Aboriginal Power in Australian Society* (1982) at 56 argues that Aboriginal land law should be abstracted not only from "ritual and mythology" but also from the "economic and residential aspects" of Aboriginal relations to land

In 1983, therefore, it is possible to conclude that the issue of land rights for Australian Aborigines is no longer an idea awaiting its day — indeed its day would seem to have come. Rather, the issue now is the nature and extent of the rights to be granted to Aborigines in respect of land; the basis or bases upon which Aborigines may claim land; which lands will be available for claim; the appropriate Aboriginal land-holding entity — individuals, groups or corporate structures; and, most significantly, the extent to which Aboriginal landowners may control the use of their land and natural resources.

The primary aim of this paper is to discuss the nature of the control Aborigines should have over the use of natural resources on or in their land. In so doing, some of the other issues pertaining to land rights will inevitably be raised, although for present purposes they are only of incidental concern.

Any discussion of Aboriginal land and natural resource control must, however, be predicated upon an understanding and appreciation of the policy, or philosophical, basis of land rights legislation and its implications for land and natural resource use control. The first section of the paper suggests an appropriate land rights perspective.

In the second section, three models of Aboriginal land and resource use control are constructed and the adequacy of their policy or philosophical bases is analysed.

Finally, the control exercisable by Aborigines over natural resource use under current State and Commonwealth legislation is examined and evaluated by reference to the three control models.

It will become clear that with the exception of the Commonwealth legislation, and until very recently, Aborigines have been allowed little, if any, autonomy in determining the use to which natural resources should be put, an autonomy which must necessarily accompany any legislative grant of land to Aborigines.

Developing an Appropriate Land Rights Perspective

In the oft-quoted words of the eminent anthropologist, the late Professor W.E.H. Stanner,

> No english words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word "home", warm and suggestive though it may be, does not match the Aboriginal word that may mean "camp", "hearth", "country", "everlasting home", "totem place", "life source", "spirit centre" and much else all in one.

> Our word "land" is too scarce and meagre. We can scarcely use it except with economic overtones unless we happen to be poets.[13]

It has become accepted that the traditional Aboriginal relationship with land is not merely spiritual or religious,[14] although this emphasis has been provided in much early anthropological writing and in recent judicial decision.[15] The anthropologist R.M. Berndt has, for example, elucidated the relationship further by pointing to its many faceted nature,[16] as indeed did Professor Stanner. Thus to Aborigines in their Clan structure (local descent groups, usually patrilineally defined), land had or has a religious or spiritual significance. But to Aborigines organised in the socio-economic unit, sometimes called a "Band", which did not bear any necessary relationship with the Clan structure, land was of economic and social significance: it provided the base for hunting and gathering activities and the geographical area in which one enjoyed, and performed the tasks of, day-to-day living. Berndt crystallizes these different relationships by calling land important for religious reasons, "Territory", and land important in socio-economic terms, "Country".[17]

It is trite therefore to say that the traditional Aboriginal relationship with land is complex, although clearly it is. The destruction of that relationship, through the severance of the connection between Aborigines and land, has inevitably resulted in the interrelated whole of Aboriginal society being fractured, probably irremedially so. If Aborigines had, or have, a religious relationship with their land, its severance by European Australians can only be described as irreligious. If their land has been, or is, a "life source" or "spirit centre", then Aborigines have been made lifeless and spiritless during nearly 200 years of European rule. If their land has provided, or provides, them with their food and familiar home

13. In the Milirrpum Case, supra n.3, at 270 Blackburn J. clearly analyses the Aboriginal relationship with land (on the basis of anthropological evidence put to the court) in terms of a Clan's "ritual" relationship to land. Similarly Brennan J. in In Re Toohey; Ex parte Meneling Station Pty Ltd (1983) 57 A.L.J.R. 59 at 70 describes the relationship as "religious". In Onus v. Alcoa of Australia Ltd (1981) 55 A.L.J.R. 631 at 645 Wilson J. was inclined also to characterise the relationship as "spiritual", albeit in the special circumstances of that case.
14. Berndt, 'Traditional Concepts of Aboriginal Land' in R.M. Berndt (ed.), *Aboriginal Sites, Rights and Resource Development* (1981) at 1-11.
15. Id. at 4 and 7 respectively.
16. See generally: C.D. Rowley, *The Destruction of Aboriginal Society* (1970) and *Outcasts in White Australia* (1971); J. Altman and J. Nieuwenhuysen, *The Economic Status of Australian Aborigines* (1979); L. Lippman, supra n.4, Chs. 6 and 7; Commission of Inquiry into Poverty, *Poverty in Australia* (Chairman R.F. Henderson) (1975).
17 In the Milirrpum Case supra n.3, at 267 Blackburn J., in what has become a famous phrase, acknowledged that Aborigines had a legal system at the time of colonization: "The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives . . . . If ever a system could be called 'a government of laws, and not of men', it is that shown on the evidence before me."

country, Aborigines have been made hungry and rendered homeless. This is not exaggeration; the facts speak for themselves.[18]

Accordingly, it is only just that Australian society should acknowledge the simple facts that prior to the coming of the European colonisers, Aborigines, according to the organisation of their society (or societies) and the requirements of their laws,[19] occupied the whole continent of Australia[20] and exercised sovereignty over it; in other words, that Aboriginal society was, prior to the coming of the Europeans, solely responsible for determining the rules applicable to the behaviour of their members and the use of the land occupied by them. Of course, the society of the European colonisers claimed no less a responsiblity, no less a sovereignty.

While sovereignty is an elusive concept at the best of times, and in different contexts means different things,[21] it is intended in this context to convey the meaning that it assumes in a discussion in international law concerning the "Equality of States". In this sense, as Brownlie maintains,[22] sovereignty implies that each State has both a jurisdiction, prima facie exclusive, over its territory and the permanent population living there, as well as a duty of non-intervention in the area of exclusive jurisdiction of other States. Without entering further into the realms of international law, it is not hard to concede that Aboriginal society (or societies), although not fitting very neatly if at all into the classification of a "Civilised State" in eighteenth century European international law, can nonetheless be seen, in historically accurate terms, to have exercised dominion over its territory and its members.[23] By making this concession, the absurdity of the historical British legalism which reversed the anthropological fact that the Australian continent had been the home of Aborigines since time immemorial, thus denoting Aborigines as invaders of British territory, and the urgent need to erect a new starting principle, at least in political terms, in the resolution of the continuing controversial relation-

18. Berndt, supra n.14, at 1 says. "Aborigines occupied without challenge virtually every part of the Australian continent and its adjacent islands for a still not finally estimated period, but one that is well in excess of 40,000 years."
19. See I. Brownlie, *Principles of Public International Law* 3rd ed. (1979) at 80-81.
20. Id. at 287
21 In the Milirrpum Case, supra n 3, at 266 Blackburn J seems to have accepted this reasoning when he vaguely equated the express "the command of a sovereign" with "a system of rules of conduct which is felt obligatory upon them as members of a definable group of people". Aboriginal society, he conceded, fitted the latter expression. In Coe v. Commonwealth, supra n.1, at 128 and 131, however, Gibbs J. rejected the notion that there is an aboriginal nation exercising sovereignty over Australia. He may imply that there never was such a sovereignty. Murphy J. (at 138 impliedly accepts the prior sovereignty of Aborigines over Australia and casts the real issue in terms of whether the British acquired that sovereignty by conquest or peaceful settlement.
22. As a matter of its municipal law, the U.S. has effectively treated each Indian group as a domestic dependant nation: see 41 *Am Jur.* (2d) 'Indians' at 837.
23. Supra n.21

ship between Aboriginal and European Australians, can be more readily appreciated.

Whilst it may not be possible for two sovereign States to co-exist in the same territory, at least in international law,[24] and whilst it may not be easy to discover the external manifestations of an Aboriginal "nation" at the time of British colonization,[25] an accurate perception with hindsight enables Australians in the 1980's to acknowledge that Aborigines who maintain a relationship with land in accordance with the tradition of their ancestors should be treated as the owners of that land, and further to acknowledge that the severed traditional relationships with land of other Aborigines should somehow be restored, as far as it is possible, under a changed sovereign. In the case of tradition-oriented Aborigines, the promise of land rights is an acknowledgment of a present reality; in the case of all Aborigines, the promise of land rights is an acknowledgement by Australian society that Aborigines have had their heritage confiscated without ceremony or compensation and carries with it the hope that a grant of new rights in compensation for those lost may help Aborigines in a small way to bridge the culture gap which naturally and obviously existed between Aborigines and the colonising Europeans but which was dug deeper and wider by the European colonisers and their descendants with the passage of time.

It is relatively easy, of course, to conclude that all right-thinking Australians will inexorably and inevitably come to understand the sense and significance of recognising — or *acknowledging*, as it may more accurately and preferably be expressed — the sovereignty and occupation enjoyed by Aborigines in respect of the Australian continent prior to the coming of the European colonisers so that, in the 1980's the objective of a socially plural Australia can be realised. Indeed, in what are relatively unusual preambles to Australian statutes, both the recently enacted New South Wales *Aboriginal Land Rights Act 1983* and the proposed Victorian *Aboriginal Land Claims Act 1983* specifically acknowledge that land was traditionally owned and occupied by Aborigines and is of spiritual, social, cultural and economic importance to them.[26]

It is less easy, however, to translate this conceptual basis or philosophy for land rights into effective and substantive land rights legislation. The

24. See n 190 and n 217 infra and accompanying text
25. Von Sturmer, 'Aborigines in the Uranium Industry: Towards Self-Management in the Alligator River Region?' in R.M. Berndt (ed), *Aboriginal Sites*, supra n.14, 69-116, at 84, makes the point well: "The reality is that the Aborigines ar enmeshed, some people would say helplessly, in the wider Australian polity and economy."
26. Keon-Cohen, 'Native Justice in Australia, Canada, and the U.S.A.· A Comparative Analysis' (1980) 7 *Monash U L Rev.* 250, at 305

acknowledgment of prior Aboriginal sovereignty and occupation does not deny the present sovereignty of a society owing its legitimacy, in terms of international statehood, to the British colonisers. It avoids the impossibility of a clash of sovereigns within Australian society; it accepts that the fact of colonisation has made impossible the concept of Aboriginal sovereignty alone in modern day Australia, no doubt much to the chagrin of some Aborigines.[27] However, despite the impossibility in legal terms of a dual sovereignty or sole Aboriginal sovereignty in respect of Australia, the justice of acknowledging the "moral" (for want of a better word) sovereignty of Aborigines is, as already discussed, compelling. By working towards the *de facto* sovereignty of Aborigines in Australia the aspirations of Aborigines are achievable and Australia may also finally produce a truly plural society.

This approach is supported by Mr Bryan Keon-Cohen in a careful comparative study of the position of indigenous peoples in Australia, Canada and the United States,[28] where he concludes that one obvious way of achieving native justice generally is to vest "extensive and sovereign powers in native peoples". In other words, the reality of social pluralism might be entrenched through laws — thus the concept of legal pluralism.[29] Rather than being a "distinctive step backwards", Keon-Cohen reasons, "it is a desirable step around 1984".[30] Of course, Aborigines may be prepared to take their chances in an Orwellian world, but at least a legally pluralist society would provide Aborigines with the opportunity to determine or chart their own destinies in 1983 for 1984 and beyond.

As the Keon-Cohen article makes crystal clear, the position of Australian Aborigines is not unique in the world. Their claims for justice, including the specific demands for land rights, mirror those of indigines in the United States and Canada, both countries settled or conquered by the British, as well as those of the native peoples in other colonised countries. Indeed, the position of indigenous peoples has long been of

27 Legal pluralism, as a concept, has become increasingly important in developing recognition of the rights of indigenous minorities throughout the world: see M B. Hooker, *Legal Pluralism. An Introduction to Colonial and Neo-Colonial Laws* (1975) esp. at 6-54 The concept also underlies much of the present Reference of the Australian Law Reform Commission (A.L.R.C.) on Aboriginal Customary Law. See, e.g., A.L.R.C. Research Paper No. 9, 'Separate Institutions and Rules for Aboriginal People: Pluralism, Equality and Discrimination' (1982) esp. at 49-53

28. Supra n.26 at 308. Similarly, Howard argues for a greater devolution of real power and authority to Aboriginal society: see Howard, supra n.12, at 1-11.

29. A.L R C. Reference on Aboriginal Customary Law. Research Paper No 10, 'Separate Institutions and Rules for Aboriginal Peoples — International Prescriptions and Proscriptions' (1982) provides an excellent summary of international law and treaties respecting indigenous minorities.

30. Id. at 7.

international concern.[31] While customary international law concerning indigenous minorities does not yet appear to have developed to any great degree,[32] such accords as the International Labour Organisation's Convention No. 107 concluded in 1957 are clearly intended to protect the cultural, religious and civil rights of indigenous minorities, such as Australian Aborigines. Furthermore, there now exists internationally a World Council of Indigenous Peoples which specifically champions the rights of indigenous peoples.[33]

Ultimately, it must be conceded that the conceptual bases for Aboriginal land rights and resource control are not fanciful or merely the dreams of a moral philosopher. Instead they have provided the impetus and form the substance of government policy and legislation pertaining to Aborigines in Australia today. A sketch of that policy in Australia over the past nearly 200 years drawn by the social historian Professor Geoffrey Bolton,[34] suggests that the Aboriginal-European relationship may be classified by periods of Conflict, Segregation and Assimilation, followed in the present era by what Bolton loosely calls the Recognition of Rights period. Australian government policies in Australia today, for example, accept the desirability of the Aboriginal pursuit of a distinctive culture and its preservation, and of the need for Aborigines to determine matters relating to their own affairs.[35] "Biculturalism" and "Self-Determination" are, as a result, by-words, if not buzz-words, in today's policy circles.

31. The World Council of Indigenous Minorities largely adopts the philosophy that indigenous minorities, such as Aborigines, are politically colonised. To distinguish them from other people and nations, indigenous people are often referred to as "Fourth World" people: see, e.g., N Peterson (ed), *Aboriginal Land Rights A Handbook* (1981) at 1-11.

32 Bolton, 'Aborigines in Social History: An Overview' in Berndt (ed.), *Aboriginal Sites*, supra n.14, at 59 As to the general development of Aboriginal policy in Australia, see Chartrand, 'The Status of Aboriginal Land Rights in Australia' (1981) 19 *Alba L. Rev.* 436.

33 The policy of the Fraser government until March 1983 and the apparent policy of the Hawke government since then aims at Aboriginal "self-manage-ment". This policy, expressed in the words of a former Federal Minister for Aboriginal Affairs, Mr. I. Viner, "In essence . . . requires that Aboriginals, as individuals and communities, be in a position to make the same kinds of decisions about their future as other Australians customarily make, and to accept responsibility for the results flowing from those decisions". (Ministerial Statement, 24 Nov. 1978). As to the previous government's attitude towards Aboriginal resource use control, see: Baume, 'A Government Perspective' in Berndt (ed), *Aboriginal Sites*, supra n.14, at 139-152; also Chaney, 'Comment on Aboriginal Land Rights' (1979) 2 *A M P L J* 299.

34. Which is essentially the approach under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth.). See also A.L.R.C Research Paper No. 8, "Aboriginal Customary Law: A General Regime for Recognition" (1982) at 49, fn.133. As a matter of policy this approach adopts the fiction of "recognizing" existing rights rather than creating new rights. Such an approach fails to treat the land rights issue adequately by, without regard to reality or justice, ignoring the rights of those Aborigines, whether station-hands, town fringe-dwellers or urban, whose dislocation by European civilisation is equally dramatic, if not more so, than that of tradition-oriented Aborigines

35. See Partlett, 'Benign Racial Discrimination: Equality and Aborigines' (1979) 10 *Fed L Rev.* 238. Positive discrimination may justify special social and economic programs for Aborigines by reason of their provable inferior social and economic status, but it may be difficult in the extreme to justify the wholesale return of land and resource control on such a basis.

It is in this entire context that land rights has been, and continues to be, an issue likely to excite the passions of Australians. Once it is realised that the legislative land rights movements is rooted in these philosophical or policy bases and is not merely a matter of "recognizing" Aboriginal customary law[36] or benign discrimination,[37] it is easier to comprehend the full nature of the land rights debate. For it is not sufficient in acknowledging prior Aboriginal sovereignty over Australia, to merely grant European title in land to Aborigines; it is imperative, in accordance with the implications of the sovereignty principle, that Aborigines are also granted full power to determine all matters concerning the use of their land and natural resources. To this unequivocal proposition there is, however, an important exception which reflects the continuing sovereignty of the broader community of the pluralist society; namely, the need to subordinate Aboriginal decision making to that of the government of the whole society in matters of truly national and international, contrasted with merely local or regional, concern. This exception is examined further in the next section of the paper in which three broad models of Aboriginal control of land and natural resource use are constructed and evaluated in terms of the foregoing discussion.

Three models of Aboriginal Control of Land and Natural Resource Use

Assuming an initial grant of land to Aborigines,[38] there are three broad models of Aboriginal control of land and natural resource use, whether or not Aborigines are the owners of the minerals, petroleum and water in or on the land.[39]

Under the first model, Aboriginal landowners would have the same rights as a common law holder of an estate in fee simple — that is, full freehold ownership rights — ensuring that Aborigines might use and exploit their resource as they think fit subject only to the usual common

36. That is, the vesting of land or transfer of land in fee simple to Aborigines, whether individually, in groups, or in an incorporated structure.
37. Minerals have usually been excepted from land grants to Aborigines. See, e g., the Aboriginal Land Rights (N T.) Act 1976 (Cth), s.12(2), n.247 infra and accompanying text; Cf. Aboriginal Land Rights Act, 1983 (N.S.W.) which, save for gold, silver, coal and petroleum, grants mineral and natural resource ownership in Aborigines. No legislation, however, seals with water specifically. At common law it is not usually considered part of the land. Legislation vesting water in the Crown would seem to have continued application in most jurisdictions
38. Particularly the torts of nuisance, trespass, Rylands v. Fletcher and negligence.
39. See, e.g., the discussion of the relevant Western Australian legislation, n.108 infra and accompanying text.

law restrictions[40] and any other law of general application affecting the common law use and enjoyment of the land.

This model would place Aborigines in precisely the same legal position as all other private landowners in Australia so that, for example, a use of Aboriginal land which substantially interfered with the use and enjoyment of the land of a neighbouring European would be restrainable under the common law tort of nuisance, and statutory law pertaining to the planning, use and development of land, the environmental implications of land use and mining operations (exploration and mining) on land, could have general application to Aboriginal land.

The reality of this model is that, especially in relation to statutory laws of general application, there occurs a significant transference of control over resources from the Aboriginal landowner to the government agency responsible for the administration of the appropriate law. In the case of most of the statutory laws referred to, local or State government becomes the *de facto* if not the *de jure* resource allocator. Consequently, under this model Aborigines lack any real autonomy in the determination of resource use issues.

The second control model assumes Aborigines enjoy the full common law land ownership rights (and are subject to all common law and general statutory limitations in respect of resource use) but, in response to the concern of Aborigines to protect certain values or features of their land, provides an additional mechanism whereby those values or features are, or may be, immunised against resource uses which would, or would be likely to, harm them in ways unacceptable to Aborigines. As examples, land valuable or important to Aborigines in religious terms (sacred sites), or land valuable for its traditional hunting or fishing resource, might be immunised against disruptive resource use. Thereafter, resource use might only occur with the consent of the Aboriginal landowners.

So far as the mechanism itself is concerned, land, values or features to be immunised from unwanted resource uses might be agreed in advance or, alternatively, a body (the Aboriginal landowners themselves or a specially appointed government agency) could be entrusted with the function of determining which land, values or features should be so immunised.

As with the first model, however, this model allows only a limited Aboriginal autonomy in the determination of acceptable resource uses. Only where a resource use conflicts with or disrupts an identified, or identifiable, value or feature of Aboriginal land is that use proscribed. Con-

40 This control model would not, however, exclude the operation of the tort remedies (supra at n.38) which protect the use of another person's land and only indirectly affect land use on Aboriginal land.

sequently, the control model is quite indirect with there being little capability for the control to adapt to changing or novel circumstances. Furthermore, if the immunising mechanism is not controlled or largely influenced by Aborigines any partial autonomy the model offers Aborigines over resource issues is completely negated.[41]

Of course, even if the mechanism can be given a satisfactory operation, the model is only capable of substantially advancing the principle of Aboriginal autonomy in respect of resource use if the values or features it seeks to protect are broader than the merely religious and include those of a general social, economic and cultural kind. Despite the theory, the practicality of utilizing this model for these broader purposes must be doubted. If a grant of land rights to Aborigines is intended to achieve a measure of Aboriginal sovereignty over that land, to enable Aborigines to determine for themselves whether they wish to use their resource as traditional "country" or a mine, as a cattle ranch or a gem field, as a Kentucky Fried Chicken outlet or an oil field, then it will be necessary to construct another control model.

The third model of control recognizes the failure of the other two to reflect satisfactorily what is implicit in a grant of land rights to Aborigines in acknowledgment of their prior sovereignty over and occupation of the continent. Its radical feature is the transference of absolute resource use control to Aboriginal landowners.

The consequences of this control model may be considered twofold: first, no outside interference with Aboriginal land would be permitted unless authorised by the Aboriginal landowners; secondly, Aboriginal landowners would be wholly responsible for the manner in which their resource is used.[42]

Due to the first consequence, the model may be considered a desirable and effective means of fully implementing the sovereignty acknowledgment principle, for it would eliminate non-Aboriginal determination of resource use issues. The second consequence of the model may not, however, if taken to its logical conclusion, either be acceptable on broad policy grounds or be truly a corrollary of the sovereignty acknowledgment principle.

Put another way, the desirability of granting land to Aborigines in acknowledgment of the sovereignty principle may necessitate a grant of

41. Both the Aboriginal Land Rights (N.T) Act 1976 (Cth) and the Pitjantjatjara Land Rights Act 1981 (S.A.) adopt such general language. See nn.171-173, 265 infra and accompanying text

42. The same difficulty is encountered in other areas of resource control, especially in environmental assessment law. Most Australian statutes on the latter subject require assessment where resource use will have a "significant" effect on the environment: see, e.g., Environment Planning and Assessment Act, 1979 (N.S.W) at s.112(1), Environment Protection (Impact of Proposals) Act 1974 (Cth) at s.5.

Aboriginal power to negative, absolutely, a resource use, but it may not necessarily demand Aboriginal power to authorise, positively, every form or type of resource use, whether proposed by the Aboriginal landowners or outsiders.

To take uranium mining as an example, the power of Aboriginal landowners to authorise a resource use having obvious social and environmental implications for all Australians and for world society, that is, having national and international implications, surely cannot be exclusive. It is not an inherent feature of a socially and legally pluralist society that issues of national and international concern should be the sole responsibility of any one group within that society, not being a group representative of the whole society specially charged with the responsibility. Indeed, the position must be quite the reverse, for no individual in such a society can be asked to abdicate his or her right to influence the determination of such an issue or to concede to another individual, or group, in that society, the gift of true prophecy or the wisdom of Solomon.

The obvious difficulty with creating such an exception, any exception, to the broader sovereignty acknowledgment principle, though, is defining the operational limits of the exception in a sufficiently clear and concise manner so as not to abrogate the starting principle. For if issues of 'national' and 'international' concern, as they have just been stated, are capable of a construction that will include every or nearly every apparantly mundane decision in respect of resource use, then Aborigines will in truth have little autonomy in respect of such decisions.

It is not easy to define the operational limits of the exception clearly and concisely, for the task involves a measure of the essential irreconcilability that has already been observed in the clash of two sovereigns in the one territory. Some things, however, are clear: Aborigines must have full autonomy to determine resource uses of their land; and the continuing legal sovereignty of the plural society must remain in respect of those resource use decisions which are truly of national and international significance.

In expressing the exception to autonomy in legal language it may be that a legislative draftsman can do no more than employ language as vague as that used here allowing it to crystallise into specific meaning when clouded in reality.[43] This technique may, however, have an illusory value leaving the principle of autonomy to be applied in an *ad hoc* fashion by politicians or judges.

On the other hand, it may be possible to specify classes or types of issues which are of national or international concern. Resource use hav-

43. Local Government (Aboriginal Lands) Act 1978 ss 4, 6, 12, 13, 14.

ing a significant environmental impact on the subject lands, resource use having a significant social impact on members of society living outside the subject lands, resource use having a significant effect on Australia's relationship with other States in the international sphere, are each examples of the types or classes of resource use issues which should be definable as matters of national or international concern.[44] Each indicates an area where resource use may have grave implications for other members of a pluralist society.

It may also be useful to approach this task by articulating other classes or types of issues which are *not* of national or international concern.

Through this third control model, including its imprecise exception, a large measure of Aboriginal autonomy in the determination of resource use is achievable. Resource use unwanted by Aborigines cannot be forced on them by the broader society. There are no exceptions to that principle, there is no proviso that national or State-economic interest may prevail over an Aboriginal resource use determination. To provide such an exception would be to stike fundamentally at the whole purpose of restoring to Aborigines their customary or ancient rights. Economic gain for Australia or a State, is in any event hard to measure and probably immeasurable against what stands to be lost by an affected Aboriginal community in broad cultural terms. Such an exception cannot be countenanced.

On the other hand, the model recognises the fact of colonization of Australia by Europeans and the necessity for maintaining the ultimate legal sovereignty of the plural Australian society over resource use having significant social and environmental consequences or significant implications for the conduct of Australia's external relations.

In the next section, Commonwealth and State laws securing Aboriginal control of resources will be examined and evaluated by reference to these three control models.

Aboriginal Resource Use Control under Commonwealth and State Legislation

Queensland

Under Queensland law a distinction has lately been drawn between Aborigines residing at Aurukun and Mornington Island in the far north of the State and other Queensland Aborigines. The reason for this is that the former group of Aborigines have recently been incorporated under

44. No 59 of 1971

Queensland law as Shire Councils, with 50 year leases over the land within their Shires and the usual powers of a local government authority to make by-laws in a shire.[45] The latter Aborigines largely remain on land traditionally reserved for Aboriginal use and vested in the Director of Aboriginal and Islander Affairs under the *Lands Act 1962* and subject to the provisions of the *Aborigines Act 1971*[46] and the *Torres Strait Islanders Act 1971*.[47] However, in relation to natural resource control, all Aborigines are subject to the provisions of the latter two Acts.[46] Furthermore, whether land is leased to a Shire Council or vested in a trustee for reserved Aboriginal use, the ownership of minerals is vested in the Crown.[49]

Control of mining on both Aboriginal Shire Council land and reserved land is specifically entrusted to the Director of Aboriginal and Islander Affairs.[50] Under sections 29 and 30 of the *Aborigines Act*, for example, the Director of Aboriginal and Islander Affairs, as trustee of Aboriginal lands, must approve mining operations of the land and might enter or require the applicant for mining approval to enter into such agreements as the trustee thinks fit. Aborigines, however, are powerless to influence the exercise of this power, as the decision of the Privy Council in *Corporation of the Director of Aboriginal and Islander Advancement* v. *Peinkinna*[51] indicates. This decision concerned a dispute over a mining proposal in respect of the Aurukun and Mornington Island reserves (prior to them becoming Shire Council areas). It was primarily held that in the exercise of his power the Director was not required to act as the trustee of the Aborigines who reside on a reserve on which mining is proposed.[52] In other words, the Privy Council confirmed that the Director is not accountable to those Aborigines; and they have no control themselves over resource use.

The decision also highlighted the power of the Parliament to override any legal rights Aborigines may have enjoyed. It was further considered that if Aborigines did have legal rights they were cancelled by the enactment of an Act of Parliament specially designed to approve the mining operation on the reserve.[53]

There was even a suggestion in the Privy Council advice that the reserve Aborigines may not have had standing to institute the proceedings at all,[54] although this issue was left undecided.

45 No 60 of 1971
46 Supra n 44, at s 29, n.45, at s 30, n 43, at s.30(2)
47. Supra n.43, at s 30(1); Mining Act 1968 at s.110
48. Supra n.46
49 (1978) 52 A L J R. 286
50. Id at 290
51 Id. at 291
52 Id
53. Supra n 44, at s.30
54. Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982 (No. 17 of 1982). The Act is still awaiting proclamation.

Where the Director does exercise his power, it is undoubted that he may require monetary consideration of an applicant for mining approval.[55]

Recent amendments to the *Land Act*[56], if proclaimed, will affect the legal position of Aborigines presently living on reserved lands. The *Land Act* would then specifically allow land to be granted in trust for the benefit of the Aboriginal or Islander inhabitants thereon.[57] No prospecting or mining on such lands would then be permitted unless authorised by the Governor in Council.[58] Resource control, therefore, would simply pass from the Director of Aboriginal and Islander Affairs to the Government. The only right Aborigines would have under these amendments would be to represent their views to the Government.[59]

Although powerless to control resource use on Aboriginal lands directly, Aborigines may, on occasion, be able to secure indirect resource use under the *Aboriginal Relics Preservation Act 1967*.[60] The main object of this Act is to prevent interference with Aboriginal "relics" or "sites".[61] Although a relic has a definite meaning,[62] land only gains the legal status of "site" when it is declared to be a site by the Governor in Council.[63] While the object of the Act may be emasculated by a failure to declare a "site" or by revocation of site status,[64] it would appear that it remains an offence under s.20 of the Act to interfere with a "relic". Parliamentary, rather than executive, action appears necessary to avoid this conclusion.

The potential of this Act to provide a measure of indirect resource control when at first glance it appears only to provide a criminal sanction of limited importance, has been highlighted by the recent High Court decision in *Onus* v. *Alcoa of Australia Ltd.*[65] In that case, Aboriginal plaintiffs sought an injunction to prevent the breach of a similar provision in the Victorian *Archaeological and Aboriginal Relics Preservation Act 1972*.[66] The Plaintiffs alleged that Alcoa's aluminium smelter construction at Portland,

55 Id at s.5 It is proposed apparently to make a grant of land in trust to the Aboriginal community council for the presently reserved lands Clearly such a grant is of uncertain duration and is revocable under the Land Act
56 Id at s 22
57 Id
58. No 29 of 1967
59. Id at s 20
60 Id. at s 3
61 Id at s.13. Note, however, that under s 14 the Minister for Lands, the Minister for Forests and also private landowners may object to such classification
62 Id.
63 (1978) 52 A.L J R. 286
64 Infra n 208
65. Supra n 52, at 634
66. On the standing issue, see Blackshield, 'The Alcoa decision on standing· how liberal?' (1981) 6 *L S B* 274

Victoria, would be likely to interfere with relics. As Gibbs C.J. accepted in the High Court,[67] a plaintiff who is able to prove a special interest in the matter may bring an action "to prevent the violition of a public right." In *Onus* the public had the right to expect compliance with the criminal law.

It is imperative, however, that Aborigines have standing to bring such an action. In the *Onus Case* the High Court held unanimously that the plaintiffs had standing.[68]

The effectiveness of such an indirect resource control may, however, easily be overcome by an Act of Parliament specially designed to authorise a resource use.[69]

The only special right over resources granted to Aborigines under Queensland law is the right granted to Aborigines who live in the Aurukun and Mornington Island Shires to hunt native fauna, remove forest products or quarry, but only to provide "sustenance" or to satisfy "domestic uses".[70]

Stated shortly, Queensland Aborigines have neither freehold land ownership, mineral ownership of statutory rights to forbid or otherwise deal with mining operations on land set aside for Aboriginal use. The control that does exist over resource use on such land is exercisable by a State government official who is not accountable for his actions to Aborigines. Under the alterations to the law awaiting proclamation the Queensland government would assume this responsibility in respect of reserved lands. In terms of the three control models, therefore, Queensland law fails to satisfy any model, although the relic preservation act does provide a potential immunising mechanism suggested by the second control model which, for Aborigines with standing to enforce the Act, may provide an indirect resource use control.

Tasmania

Contrary to melancholy legend there are Aboriginal Tasmanians. The famous — or, more correctly, infamous — "Black Line"[71] which induced this legend failed in fact to drag in any but a few aged and infirm Aborigines. The attempt to produce a more devastating result, though, is indicative of the European colonising attitude towards Aborigines. It

67 For example, the Aurukun Associates Agreement Act 1975 (Qld). See n.57 supra and accompanying text.

68 Supra n.43 at s.29

69 J. Roberts, *Massacres to Mining* (1981) at 16-17

70. See Tasmania. Parliament, *Report of the Aboriginal Affairs Study Group* Parl. Paper 94 of 1978, Mansell, 'Tasmania' in Peterson (ed) supra n.31, at 128-139 both of which provide a summary of historical Aboriginal polucy in Tasmania up to the present day.

71. Act No. 28 of 1976

is also testimony to the ferocity of Aboriginal resistance to colonization. Nevertheless, Aborigines who did survive the conflict with the Europeans were largely re-settled away from their traditional island country and on the smaller islands to the north-east of Tasmania, principally Cape Barren Island,[72] and have continually demanded land justice. At present, however, Tasmanian law allows little Aboriginal control of natural resource use.

Traditionally, the mutton birding industry has been of great economic importance to Aborigines on the small islands. The islands, however, in respect of Crown lands, remain subject to the *Crown Lands Act 1976*.[73] Under the Act the Minister for Lands may reserve Crown lands for any public purpose and grant a lease of the land, not exceeding 99 years, to any person to achieve that purpose.[74] While this power may be used to grant Aborigines some measure of land rights, it cannot achieve Aboriginal control of resource use.

Quite apart from whatever restrictive conditions may be attached to a lease under s.8 of the Act, a lease does not operate to exclude mining operations over the subject lands.[75] Nor does a lease carry with it exclusive control over mutton bird hunting. Licences to hunt mutton birds, and certain other birds, must be obtained from the Director of National Parks and Wildlife.[76] The Minister also has a broad discretion to revoke a lease.[77]

In 1978, a State appointed Aboriginal Affairs Study Group recommended that certain of the small islands be transferred to an Aboriginal Lands Trust comprised of Aborigines drawn from various Aboriginal orgainzations in Tasmania.[78] It proposed that the Lands Trust be able to acquire lands, but only with the consent of the Minister,[79] and that alienation of its lands should only be allowed with Parliamentary approval.[80]

In respect of mutton birding the Report concluded that Aborigines should be granted the exclusive right to take mutton birds on islands granted to the Lands Trust, and be entitled to a preference in the gran-

72. Id. at s.8
73 Id. at s 56
74. See National Parks and Wildlife Act 1970, s.35 and Wildlife Regulations 1971 (S.R. 241 of 1971) Reg 10
75. Supra n.67, at s 8(4)
76. *Aboriginal Affairs Study Group*, supra n.70, at paras. 14(1), (4)
77. Id at para. 14(5)
78. Id. at para. 14(1)
79. Id. at para 16(4), (5)
80 Peterson in Peterson (ed), supra n.31, at 9 However, it now appears that the recently elected Liberal Government in Tasmania will not pursue the land rights issue. see *The Bulletin* 10 May 1983, at 43-44.

ting of mutton bird licences on other islands.[81] It assumes, however, that laws of general application will otherwise continue to govern other resource uses.

Prior to the election of the present Tasmanian government, it was believed that a bill to implement the Report's recommendations was in the draft stages.[82] As yet, no draft bill has been made public.

Although little direct resource control is exercisable by Aborigines under Tasmanian law, the *Aboriginal Relics Act 1975*,[83] like similar relics preservation legislation in Queensland, may provide an indirect resource control mechanism by supporting an action for an injunction to prevent interference with a "relic".[84] It is unlikely, however, that this Act will be of any great assistance to Aborigines who have been re-settled in the small islands since the 1880's for only those relics (which are objects) made before 1876 gain protection under the Act.[85] Furthermore, while sites may be protected from interference, only sites declared by the Minister attract protection,[86] and then only those sites on Crown land.[87]

In short, effective evaluation of Aboriginal resource control under Tasmanian law is hampered in the same way as it is in Queensland. No control model is applicable in the absence of a freehold land grant to Aborigines. If the Report of the Committee of Inquiry were to be implemented, a desirable resource control policy would be closer to implementation in that Aborigines would have exclusive control of the important economic resource of mutton birds. It is not proposed, however, that Aborigines should exercise any form of control over other resource use. The immunization of certain Aboriginal relics from interference at least has the potential to provide an additional indirect control mechanism, albeit one of only limited usefulness, similar in concept to the second control model.

Western Australia

No Western Australian legislation grants freehold ownership in land to Aborigines individually or in groups, although by comparison with

81 No 81 of 1975

82 Id at s 2(3) (where a "relic" is defined).

83. Id. at s.2(4)

84 Id at s 7(1)

85 Id at s 7(3) A declaration may only be made in respect of private lands where the landowners consents

86. No. 24 of 1972 as amended For a general account of the Act see McDonald, 'Aboriginal Land Rights in Western Australia Relating to Mining and Petroleum Exploration Developments' (1979) 2 *A M P L J* 282

87. Id. at s 20. Land is vested in the Authority under s 27, having been reserved under s.29 of the Lands Act 1933 Mineral ownership remains with the Crown upon reservation· see Mining Act 1978

Queensland and Tasmania the potential for Aboriginal control of resource use is much greater as a result of the creation of an Aboriginal Lands Trust.

Under the *Aboriginal Affairs Planning Authority Act 1972*,[88] an Aboriginal Land Trust is set up. While land is vested in an Aboriginal Affairs Planning Authority, the Trust is responsible for the daily use and management of those lands.[89] The Lands Trust presently controls in excess of 20,000,000 hectares of land in Western Australia.[90]

The Trust controls not only the reserved lands, but is also empowered to acquire and hold other real (and personal) property for the benefit of Aborigines,[91] although its power to do so is severely curtailed by the statutory requirement of Ministerial approval for property acquisition.[92] In fact, the requirement of Ministerial approval to its actions underscores the whole operation of the Lands Trust.

The Trust generally labours under the disability of being merely an advisory body to the government in respect of its various functions. Whilst its members must be Aboriginal,[93] they are all Ministerial appointees.[94] In relation to reserved lands under its control, the Act specifically provides that the Aboriginal Affairs Planning Authority (which is the Minister of Aboriginal Affairs[95]), retains ultimate power over the use and management of such land,[96] although in relation to lands acquired by the Trust it would appear that the Trust has exclusive management powers.[97]

Whatever rights the Trust has in land vested in it and whatever powers of management the Trust has over reserved lands clearly they do not include mineral ownership or natural resource control. Although no "application" for the grant of any interest, right or licence in reserved land may be "processed" except in consultation with the Authority (that is the Minister) or "refused" without the prior consent of the Authority,[98] these requirements do not affect applications under legislation which authorizes the conduct of mining or petroleum operations on the land.[99] Once a

88 See McDonald, 'Western Australia' in Peterson (ed), supra n.31, at 224
89 Supra n 82, at s 23(b)
90 Id at s.20(1)(c)
91. Id. at s 21(2)
92. Id. at s 32(3)
93 Id at s.8
94 Id at s.24(2)
95 The powers of the Authority under s 24(2) relate only to reserved lands
96 Supra n.82, at s 30
97 Id. (but note the proviso)
98 See, e g., Associated Minerals Consolidated Ltd v Wyong Shire Council (1974) 48 A.L J R 464 where the Privy Council found that the land use consent and mining approval laws were complementary.
99. See McDonald, supra n 84, at 234.

person is authorized to conduct a mining or petroleum operation under the appropriate legislation neither the Authority or the Lands Trust has legal power to prevent or restrict the operation whether it be on reserved land or acquired land, although s.31 of the *Aboriginal Affairs Planning Authority Act* may provide a source of control over resource use.

This section makes it an offence for an unauthorised person to enter reserved land. Unless s.31(1)(c), which permits a person "acting in pursuance of a duty imposed by law", applies to authorise entry by a person entitled to carry out mining operation on reserved lands, it is arguable that such a person may first obtain an additional s.31 entry permit to enter the lands. If the two authorizations can be characterised as serving different purposes — the former facilitating the proper management of Aboriginal land, the latter providing legal authorisation to conduct mining activities — it may be possible to construe two apparently conflicting statutory provisions as having a complementary effect.[100] On the other hand, if both provisions deal with legal authorisation of entry to land, then the Mining Act provision, being later in time, may be considered to override the requirement of the *Aboriginal Affairs Planning Authority Act*.[101] Furthermore, the section appears inconsistent with the s.30 proviso excluding mining and petroleum operations from the scope of the Act.

The Lands Trust and the Authority are similarly powerless to control resource use on acquired lands, as the controversy surrounding mining operations at Noonkanbah Station in 1980 so clearly emphasizes.

The Lands Trust held a Pastoral Lease over Noonkanbah Station. Pursuant to its powers[102] the Trust had authorized an incorporated association, Nookanbah Pastoral Co. Pty. Ltd. representative of tradition-oriented Aborigines in the area, to operate the lease. A mining company, Amax Iron Ore Corporation, was authorized to explore for oil on parts of the leasehold land. Despite the protestations of both the Lands Trust and the incorporated association, which related to concern for the protection of sacred sites on the land, the mining company, under the active encouragement of the Western Australian government of then Premier Sir Charles Court, proceeded to carry out its oil drilling operations. Clearly, under the terms of the *Aboriginal Affairs Planning Authority Act*, neither the Minister for Aboriginal Affairs, the Lands Trust nor the Aborigines living at Noonkanbah had any legal authority to halt these operations. As discussed below, an attempt to prevent the operations under the *Aboriginal Heritage Act 1972*, also failed.

100. Supra n.82, at s.20(3)(c) and s.23
101. Land Act 1933, at s.30
102 S.24(7)(a)

Although reserved lands may attract an A Class, B Class or C Class status under the *Land Act 1904*,[103] such status only has significance for the proposed revocation of reserve classification under the *Land Act*. Class A reserves can only be altered by an Act of Parliament; Class B may be altered by a notice in the Government Gazette and a special report to the Parliament setting out reasons for the alteration; and Class C reserves may be revoked by discretionary Ministerial action.

The *Mining Act 1978* affords some slight additional protection for reserved lands. Mining operations may only be carried out on such lands with the approval of the Minister for Mines.[104] However, unlike approval of such operations in State Forests for which the Minister for Forests must be consulted,[105] neither the Authority, the Lands Trust nor any other body must concur in or need be consulted by the Minister for Mines when approving mining operations on reserved Aboriginal lands.

Reserved lands receive even less protection under the *Petroleum Act 1967*. It specifically authorises the declaration of reserved land as land available for exploration.[106]

The Authority and the Lands Trust lack, therefore, the legal ability to require financial compensation for resource use approval on Aboriginal land. Although s.28 of the *Aboriginal Affairs Planning Authority Act* enables the Authority to receive a rental royalty or share of profits "that may be negotiated or prescribed in relation to the use of the land or the natural resources" it is by no means clear, as McDonald has pointed out,[107] that the Authority is thereby empowered to negotiate agreements. Indeed the whole tenor of the Act militates against the existence of such a power. Instead, a royalty rate has been struck by the State government for mineral production on Aboriginal land and payments are made to the Lands Trust.[108]

As with similar legislation in Queensland and Tasmania, the *Aboriginal Heritage Act, 1972* provides a further potential Aboriginal resource control mechanism. The Act protects from interference Aboriginal sites and objects.[109] It is administered by the Trustees of the Western Australian Museum[110] and the Aboriginal Cultural Materials Committee,[111] but subject to the direction of the Minister for Cultural Affairs.[112] Under

103. S 24(6)
104. S 15(2)
105 Supra n.84, at 225
106. Id at 226
107. See s.5 and s.17
108. See s.12, s 19 and s 23
109. S.28
110 S.10; s 11; s 28(1); s.29
111 S.18(8)
112 Sup Ct. of W.A , 27 June 1979 (unreported), noted in 1979 ACLD 470.

s.18 of the Act, a person who fears that activities on land may breach the protective provisions of the Act may apply to the Museum Trustees for consent to carry out those activities. A consent relieves a person from criminal liability under the Act.[113]

Experience has shown, however, that the control may easily be emasculated. When mining operations at Noonkanbah Station were threatened, the Lands Trust, as lease holder, and the Noonkanbah Pastoral Co Pty Ltd, as representative of the tradition-oriented Aborigines who lived on the leased land, sought to obtain an injunction in the Supreme Court of Western Australia to prevent breach of the Act. They alleged that Amax Iron Ore Corporation threatened to interfere with Aboriginal relics. Amax produced a s.18 consent issued by the Museum Trustees, which consent the plaintiffs alleged had been issued by the Trustees at the direction of the Minister for Cultural Affairs and was therefore invalid.

In the Supreme Court, Brinsden J. held that the Minister was entitled to give directions to the Trustees, of either a specific or general nature, as to how they should go about their duties under the Act. Despite evidence that the Trustees were considering making a recommendation to the Minister that he should declare certain sites at Noonkanbah protected, the Court was obliged to uphold the effectiveness of the Minister's direction.[114]

The *Aboriginal Communities Act 1979* may also afford some Aboriginal communities to which the Act applies a further measure of control over entry of persons to Aboriginal land. However, it clearly is not intended that this control should be available to affect land and natural resource exploitation.[115]

The creation of the Lands Trust and the fact that reserved lands are controlled by it, and other land can be acquired by it, is a tentative adoption of the first control model. But as the Trust is subject to Ministerial control it is not possible to concede that Western Australian law effectively adopts this model. Despite the existence of the Lands Trust Aborigines still remain legally unable to control either directly or indirectly natural resource use on their land; unlike in Queensland, the State official responsible for Aboriginal Affairs is powerless to require monetary consideration for mining approval. Only to the extent that the heritage protection act may immunize some land against resource use can it be

113 Supra n.84, at 235

114 At s 5 For a general account of the Act see Beaumont, 'Aboriginal Land Rights in South Australia Relating to Mining and Petroleum Exploration Development' (1979) 2 *A M P L J.* 290

115. S.6

said that Aborigines have any such control at all. Their lands remain subject to State laws of general application.

South Australia

Prior to 1981, South Australian law did not provide individual Aborigines or groups with title to land. From 1966, however, important measures were taken to make more secure Aboriginal tenure of those lands in the State traditionally reserved for Aboriginal use.

In 1966, the Aboriginal Lands Trust of South Australia was set up by the *Aboriginal Land Trust Act 1966*.[116] The use of a Land Trust, membership of which was confined to Aborigines,[117] provided the first Australian model of corporate Aboriginal control of lands. The model has been emulated in Western Australia, Victoria, New South Wales and has also been proposed as an appropriate Aboriginal land holding vehicle in Tasmania.

Although the Act enables the Governor to vest any Crown lands in the Lands Trust, clearly the power is discretionary.[118] The Act does not oblige the Governor to do so; and no land claim mechanism is established by the Act. In short, the Governor's decision to vest Crown lands in the Trust is a policy issue, and as such would appear to be unreviewable by a court.[119] Indeed, little Crown land other than traditional Aboriginal reserves has been vested in the Trust; as Peterson notes,[120] of the total of 485,582.8 hectares of land vested in the trust at 31 March 1980, 481,992 hectares comprised nine former Aboriginal Reserves. Trust lands are managed in the main by Aboriginal communities which have a traditional association with the lands.[121]

Innovative though it was, the South Australian Lands Trust has not been without criticism. As discussed below, its perceived deficiencies lead to the enactment of special legislation for the benefit of the Pitjantjatjara Aborigines of the North West of the State. The Trust, while comprised of an all-Aboriginal membership, and not considered to be a government agency,[122] is nevertheless unable to meet to carry out its statutory functions in the absence of the State Minister for Aboriginal Affairs (or his appointee) even though the Minister is not entitled to vote at a Trust

116. S.16(1) provides that "The Governor may . . transfer any Crown lands . . . to the Trust".
117 The Governor is not compelled to exercise the power and there are no criteria set out in the Act to guide the exercise of the discretion.
118. Peterson, 'South Australia' in Peterson (ed.), supra n 31, at 116.
119. Id
120. Aboriginal Lands Trust Act 1966 at s 12, s.6(5); s 15
121 Id at s.10(3)
122 Supra n.114

meeting.[123] As an administrative matter, the Minister has appointed the Chairman of the State Aboriginal Co-Ordinating Committee as his standing representative.[124]

Consequently, while Aborigines in communities having a traditional association with land have achieved a certain measure of security of land tenure through leasehold interests granted to them by the Land Trust, clearly their interest falls far short of the common law fee simple ideal.

The Act, nevertheless, provides a greater measure of resource use control than its counterpart in other States. When first enacted, the Act made land subject to all relevant laws of general application. Thus laws relating to mining and petroleum operations applied to Trust lands. In 1973, however, the mining and petroleum laws were amended to ensure that entry to such lands could only be gained by special proclamation of the Governor.[125] As a result, whether mining operations on Trust lands should be approved is now an issue to be determined on policy grounds by the government of the day. The determination will presumably occur in the light of representations made by the Land Trust and affected Aborigines or Aboriginal communities. Although this measure of protection for Trust lands may be considered greater than that provided under the law of Western Australia, the ultimate government control over resource use emphasizes the uncertainty of resource control exercisable by the Land Trust.

The subordinate legal position of the Land Trust to the South Australian government in resource use issues became explicit when the Pitjantjatjara Aboriginal community laid claim (in political terms) to a considerable area in the North West of South Australia. In particular, the failure of the Land Trust Act to acknowledge the title of traditional owners became manifest when it was proposed that the land of the Pitjantjatjara be vested in the Trust.[126] After much negotiation, and a change of government in South Australia, the State legislature in 1981 passed the *Pitjantjatjara Land Rights Act*.[127]

This Act is significant for many reasons. Firstly, it serves to emphasize the conceptual failure of the lands trust model of land ownership and resource control to appreciate the importance of traditional or local Aboriginal land ownership.

123 Aboriginal Lands Trust Act Amendment Act 1973 at s.9 (amending s.16 of the principal Act). In approving the government may insist on a financial agreement between an applicant and the Lands Trust

124. For a general account of these events see Peterson, supra n.114, Toyne *et al.*, 'Land, law and mining: the Pitjantjatjara Struggle' (1980) 56 *Arena* 46

125. No 21 of 1981

126. Supra n 114, at 121

127. Id. at 120-121

Secondly, as Peterson rightly observes, it is the first "negotiated" land rights settlement in Australia.[128] Unlike other Australian legislation, the Act deals with specific land for the benefit of identified Aborigines, laying down the ground rules for its ownership and for the use of its resources. Of all land rights laws, it most resembles the North American treaty in respect of Indian lands settlements. As such, it provides an interesting model for the settlement of all land rights claims in Australia. It is suggested, however, that outside the special circumstances of tradition-oriented Aborigines occupying traditional lands, there may not be many occasions on which Aborigines will be able to command sufficient political clout to negotiate a satisfactory land settlement. Moreover, one should not lose sight of the fact that the Pitjantjatjara political claim was negotiated not only in an accomodating political climate but also against a background in which legal rights had already been guaranteed to a certain extent under the *Land Trust Act.*[129]

The third point of significance is the measure of Aboriginal control natural resource use implemented by the Act. It is this point which is of particular importance to the present discussion.

The Act sets up the Anangu Pitjantjatjaraku as a corporate body of which all Pitjantjara people are members[130] and provides for the vesting in it of land in fee simple,.[131] It is unclear whether the ownership of minerals is also vested. Section 22 of the Act dealing with royalty payments from resource development seems to assume that the Crown retains mineral ownership.[132] Once vested in the Anangu Pitjantjatjaraku land cannot be alienated by it,[133] or acquired compulsorily by the States.[134]

The Anangu Pitjantjataraku is basically empowered to manage and administer land vested in it,[135] although its powers are particularised to ensure that the traditional owners[136] of the land have an effective voice in decision making. For example, functions of the Anangu Pitjantjatjaraku are both to ascertain and, where practicable, give effect to the wishes and opinions of traditional owners[137] as well as protect the interest of traditional owners in relation to the management use and control of

128. Supra n 121, at s 5
129 Id at s 15
130 The Minister for Mines and Energy is placed under an obligation to pay royalties into a separate account some of which are payable to the Pitjantjatjara, some to the Minister for Aboriginal Affairs for the benefit of all Aborigines This does not seem to be consistent with Pitjantjatjara mineral ownership
131 Supra n 121, at s 17(a)
132. Id at s. 17(b)
133. Id at s 6
134. Id at s.4 defines the expression "Traditional owner".
135. Id at s 6(1)(a)
136 Id. at s 6(1)(b)
137 Id at s.7

lands.[138] These functions are reinforced by an explicit requirement that the Anangu Pitjantjatjaraku have regard to the interests of and consult with traditional owners having a particular interest in a portion of lands in respect of which there has been made an administrative development or use proposal.[139] Furthermore, a proposal cannot be implemented unless the traditional owners concerned understand the nature of the proposal, have had the opportunity to express their views to the Anangu Pitjantjatjaraku and, significantly, consent to the proposal.[140]

The Anangu Pitjantjatjaraku may do all things necessary to administer the land, for example, to lease land or grant a licence in respect of it,[141] to acquire by agreement, hold, deal in or dispose of land outside the vested lands,[142] to enter into contracts,[143] to appoint and dismiss staff,[144] and to receive and disburse moneys;[145] in other words, to carry on activities, communal or otherwise, as a natural person might, but subject always to the wishes and opinions of the traditional owners.

The Act, to achieve the large measure of autonomy it clearly intends for the Pitjantjatjara community, then proceeds to make land entry and use largely subject to the consent of the Anangu Pitjantjatjaraku. While Pitjantjatjara people have unrestricted access to lands,[146] it is an offence for any other person[147] to enter without the written permission of the Anangu Pitjantjatjaraku,[148] which permission is revocable at will.[149] A person holding a pastoral lease over Anangu Pitjantjatjaraku lands does not require permission to enter the leased lands.[150]

In relation to natural resource use, however, special rules are laid down by the Act in an apparent endeavour to balance the autonomy principle against the interests of the broader plural society to realise the benefits of natural resource exploitation. This balance is attempted by making mining operations on Anangu Pitjantjatjaraku lands subject to the consent of the Anangu Pitjantjatjaraku with provision for arbitration of a

138. Id. at s.7(a), (b) and (c) The construction of this section is complicated bu the requirement that the Anangu Pitjantjataraku be "satisfied" as to these matters. It may be possible nevertheless for a court to review compliance with this section and decide for itself whether in fact consent has been given; Cf. position under Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) infra n.247.
139 Id at s.6(1)(d) (but subject to certain restrictions there set out).
140. Id at s.6(2)(c)
141. Id. at s.6(2)(d)
142. Id. at s 6(2)(e)
143. Id. at s.6(2)(f)
144. Id. at s 18
145. Id. at s.19(8), however, excepts certain persons
146. Id at s.19(1) – s.19(6)
147. Id. at s 19(7)
148. Id. at s.19(11)
149. Id. at s.20(1)(a), (b)
150. Id. at s.20(1)

dispute between the Anangu Pitjantjatjaraku and a person wishing to mine.

As with the general entry provisions, it is an offence for a person either to carry out mining operations on the lands or enter the lands for such a purpose, without the permission of the Anangu Pitjantjatjaraku.[151] The provisions of mining or other legislation whereunder mining authorizations are issued have no effect in relation to Anangu Pitjantjatjaraku lands,[152] although they are of some continued relevance, as noted below. A person desiring to conduct mining operations on the lands must apply in writing to the Executive Board of the Anangu Pitjantjatjaraku.[153] However, before the application can be made the applicant must first have applied for a mining tenement in respect of the proposed operations and have been notified by the Minister for Mines and Energy that he approves the making of the mining application under Land Rights Act.[154] The Minister of Mines and Energy clearly acts pursuant to the relevant Mining Act and should determine the application for a mining tenement in the usual way required by that Act. If the Minister approves an application, the applicant must file with its application to the Anangu Pitjantjatjaraku, all the information submitted to the Minister in support of the application for the mining tenements[155] and such further information reasonably required by the Anangu Pitjantjatjaraku to determine the application.[156]

The Anangu Pitjantjatjaraku may then determine the application before it and are specifically empowered to grant permission unconditionally, or subject to conditions, consistent with the provisions of the Act, as it thinks fit, or refuse permission.[157]

The power to grant conditional approval would appear to support the imposition of financial conditions on approval. Indeed, various provisions of the Act imply that this is no.[158] Any payments made to the Anangu Pitjantjatjaraku must, however, be "reasonably proportioned to the disturbance to the lands, the Pitjantjatjara people, and their ways-of-life, that has resulted from or is likely to result from the grant of a relevant mining tenement".[159] Every effort has been taken to outlaw unlawful payments to the Anangu Pitjantjatjara or other persons as a

151. Id at s 20(3)(b)
152. Id at s 20(3)(a)
153 Id. at s 20(3)(c)
154. Id at s 20(4)
155. Id at s 20(6)
156 Id. at s 21(5), (6)
157 Id. at s 24(2). Note that royalties are also payable under s.22
158. Id. at ss.21, 23
159 See, e g., Re Toohey; Exp. Northern Lands Council (1981) 38 A.L R. 439, esp. Stephen J., for a contemporary statement of a court's review role

means of procuring mining approval.[160] There is, however, in general no explicit guidance provided in the Act as to how this discretionary power is to be exercised; the Act does not structure the discretion by establishing criteria relevant to its exercise.

As to the nature of other conditions which may be attached to consent, the only guidance provided by the Act is that conditions must be "consistent with the provisions of the Act". This might possibly be the subject of two interpretations: first, that a condition cannot exempt or prohibit any conduct proscribed or permitted by a section of the Act; or, secondly, that conditions must relate to the general objects and purpose of the legislation. As the second proposition is an orthodox legal proposition[161] which applies to an unconditional grant and refusal of permission as well as a conditional grant, the first proposition seems the one most appropriate to the Act. In general terms, however it appears clear that the Anangu Pitjantjatjaraku must, in exercising its mining approval power, have regard to those provisions of the Act which circumscribe its power to administer the Act, particularly sections 6(1) and 7.[162]

Where these sections do not delimit the power of the Anangu Pitjantjatjaraku, the full extent of the approval power is difficult to define. It is a very wide power, as wide as the objects and purposes of the legislation themselves, however they may be construed. There is no objects clause in the Act, so one must read the Act as a whole to determine its purpose and thus the scope of the approval power. Arguably, any factor relative to the social, economic or spiritual concerns of the traditional owners would be relevant to the exercise of the approval power given the mandate of the Act for the protection of these values.[163] On this view, not many issues would be irrelevant in the mining approval process.

Perhaps confirming the correctness of this view, the Act does not require the Anangu Pitjantjatjaraku to furnish an applicant with reasons for its decision, only of the decision itself.[164] On the other hand, it may be argued that as the Act provides an arbitration procedure to allow an aggrieved applicant to take the matter further,[165] and then structures the decision making function of the arbitrator,[166] the Anangu Pitjantjatjaraku may only consider the factors relevant to the arbitrator's decision and no others. On this view, the limit on the arbitrator's discretion would

160 Supra nn 131-133 and accompanying text
161. See s.6(1) and s 7 and the definition of "traditional owners" in s 4.
162 S.20(7)
163 S 20(8)(a)
164. S.20(15)
165. S.20(8)(a)
166. S.20(8)(b)

set the bounds of the discretionary approval power of the Anangu Pitjantjatjaraku, although, unlike the arbitrator, the Anangu Pitjantjatjaraku would not be bound to consider every s.20(15) criterion.

Whatever the correct legal analysis may be, the issue is largely academic given that the arbitration procedure is available to an aggrieved applicant as of right, that the criteria to be considered by an arbitrator traverse those suggested above, and that the arbitration is in the nature of a rehearing on the facts rather than an appeal against the Anangu Pitjantjatjaraku decision on questions of law.

The arbitration procedure may be involved by an applicant for mining approval in two circumstances: the first where the applicant is aggrieved by refusal of or the conditions attached to permission;[167] the second where the Anangu Pitjantjatjaraku fails to give notice of its decision within 120 days of the date of the application.[168] On receiving a request for arbitration proceedings the Minister of Mines and Energy is obliged to appoint an arbitrator,[169] subject to comment by the Anangu Pitjantjatjaraku on the proposed arbitrator,[170] who must be a judge of the High Court, the Federal Court or the Supreme Court of a State or Territory of Australia.[171]

In the conduct of the arbitration proceedings, the arbitrator may not only hear such evidence as is brought before him by the Anangu Pitjantjatjaraku, the applicant, the Minister of Mines and Energy and the State Minister for Aboriginal Affairs,[172] but also require all persons to appear before him as he considers appropriate to the disposition of the proceedings.[173]

The arbitrator, having heard all the evidence, may either affirm, vary or reverse the decision of the Anangu Pitjantjatjaraku or where no decision was made by the Anangu Pitjantjatjaraku, make such decision as he thinks fit.[174]

Although these provisions ensure in rehearing of the Anangu Pitjantjatjaraku decision, the arbitral function is structured so as to limit the rehearing to consideration of only certain prescribed factors. The failure of an arbitrator to so limit his or her discretion clearly would be an *ultra*

167. S 20(9)
168. S 20(10)
169. S.20(11)
170. S 20(14). This sub-section suggests that no other persons have standing to intervene in the proceedings or adduce evidence Beaumont, supra n 110, at 293 argues for a broader hearing at which Pitjantjatjara can be cross-examined by the public.
171 S.20(12)(a) *inter alia* vests in the arbitrator the powers of a Royal Commission and so the extensive compulsive power of s 10 of the Royal Commission Act 1917
172. S.20(14)(f)
173. Supra n.
174. S.20(15)(c)

vires act. The relevant factors, which are set out in section 20(15) of the Act as follows:

(a) the effect of the grant of the mining tenement upon —
  (i) the preservation and protection of Pitjantjatjara ways-of-life, culture and tradition;
  (ii) the interests, proposals, opinions and wishes of the Pitjantjatjara people in relation to the management, use and control of the lands;
  (iii) the growth and development of Pitjantjatjara social, cultural and economic structures;
  (iv) freedom of access by Pitjantjatjaras to the lands and their freedom to carry out on the lands rites, ceremonies and other activities in accordance with Pitjantjatjara traditions;
(b) the suitability of the applicant to carry out the proposed mining operations and his capacity, in carrying out those operations, to minimize disturbance to the Pitjantjatjara people and the lands;
(c) the preservation of the natural environment;
and
(d) the economic and other significance of the operations to the State and Australia.

The sub-section would appear to provide an exhaustive list of factors relevant to the arbitrator's decision so that an arbitrator is unable to consider others.

It is also apparent that the sub-section attempts to balance the social, economic and religious interests of the Pitjantjatjara people (broadly those factors set out in s.20(15)(a) and (b)) and the need to preserve the natural environment (a factor in which Pitjantjatjara interests and European interests may well coincide) against the economic and general social significance of a proposed resource development to the broader State and Australian community (the factor set out in s.20(15)(d)). It remains to examine how much these factors, and indeed the availability of the arbitration procedure itself, restricts the *prima facie* autonomy of the Pitjantjatjara people to determine resource uses.

First, that there is an arbitration procedure available at all is a significant restraint on the autonomy of the Pitjantjatjara people. It means, especially as the procedure may be invoked as of right by a dissatisfied applicant for mining approval, that the Anangu Pitjantjatjaraku know that they may be second-guessed by a European arbitrator in respect of any final decision they may reach. It means that the Anangu Pitjantjatjaraku must generally, if not specifically, observe the decision making

criteria imposed on the arbitrator to avoid there occurring any substantial discrepancy between its decision and any subsequent determination of an arbitrator. It means, therefore, that the Anangu Pitjantjatjaraku will be placed under considerable pressure in the first instance to allow mining and so encouraged to compromise applications for mining approval on traditional Aboriginal lands.

The criteria themselves reflect the compromises that must be made on the clash of two sovereigns in the same territory. It has already been suggested[175] that while Aboriginal sovereignty should be acknowledged as the basis of legislative land grants to Aborigines there will be occasions when the continuing legal sovereignty of the broader plural society should prevail; issues of international significance and certain issues of national concern were provided as examples. The Act has partially developed this view through the explicit requirement that the arbitrator have regard to "the preservation of the natural environment".[176] The further requirement, however, that the arbitrator have regard to the "economic . . . significance of the operations to the State and Australia"[177] is not so readily justifiable.

Economic matters are notoriously hard to quantify and even more difficult to weigh against social and environmental factors.[178] On the other hand, it may be possible to make a qualitative assessment of the international economic significance of a proposal to Australia. The need for Australia to engage in international trade and commerce and maintain balanced trading operations with other countries, thereby necessitating continued exploitation of natural resources, including those on Aboriginal lands, may be measured. But as a domestic concern, the economic significance of a proposal might often enable an arbitrator to conclude that the right of the wider society to a sustained resource-based economy, including employment opportunities for its members with its multiplier effect, and the general worth of a proposal to governments in taxation, royalty and other revenue devices, outweighs the wishes of the Aboriginal community and environmental and other social concerns.

Moreover, whereas the third control model only allows review of unacceptable resource use, this Act allows review of an Aboriginal decision to refuse a resource use.

175 S 20(15)(d)

176 Witness the intensity of the community and political debate over such an environmental/economic resource as South-West Tasmania.

177. S.20(15)(d)

178. Specific regulation making power over depasturing of stock, activities having adverse environmental consequences, and alcoholic liquor is contained in s 43(1), although with the exception of stock depasturing, the power can only be exercised on the recommendation of the Anangu Pitjantjatjaraku. see s.43(2)

In this context, the clear commitment of the Act to ensuring the autonomy of the Pitjantjatjara people over their land appears to conflict unnecessarily with the specific provisions of the Act respecting resource development on Pitjantjatjara lands. Economic development against the wishes of the Aboriginal people may advantage the broader society but can only derogate from the acknowledgment of the prior sovereignty of the Pitjantjatjara people over their land. Such an exception to this principle can only operate to afford European values priority over Aboriginal values.

Similarly, the requirement that the arbitrator also have regard to "the other significance of the operations to the State and Australia"[179] may significantly derogate from this principle. Although the third control model proposes continued government control over social and environmental issues of national importance, the open ended nature of this factor is obvious and the limits of the exception quite imprecise. The failure to define its terms more rigorously may result in reduced Aboriginal autonomy over their lands. This factor would at least appear to exclude from consideration issues of purely local and regional significance, although just when a local or regional issue becomes a State or national issue is a nice question.[180]

Moreover, whilst it is explicable that State legislation will seek to preserve the "State" and national interest when acknowledging prior Aboriginal sovereignty to lands within State jurisdiction, the effect of so doing is different from the Commonwealth *national* legislature's preservation of the national interest and maintaining control over issues of international significance. Put simply, issues of State interest may not always coincide with national or international interest. Consequently, while the State of South Australia may seek to justify its overseers role in respect of social and environmental consequences of resource use having national or international significance (to prevent undesirable usage), there can be no justification for other control criteria.

In summary, therefore, this South Australian Act, which otherwise largely reflects the third control model, unnecessarily deprives Aborigines of autonomy in respect of resource use by providing an arbitration mechanism which permits review of aboriginal decisions on their merits as well as establishing review criteria which have so wide an ambit as to cause legitimate Aboriginal interests to be outweighed by many

179 Usually, however, executive action is required to ensure the application of land use planning and environmental statutes on Aboriginal land Presumably such laws would only be extended at the request of the Anangu Pitjantjatjaraku.

180. No. 33 of 1965 (as amended).

economic and social concerns of the broader society including some which may truly lack a national or international character.

Of course, to the pragmatist the terms of the negotiated Act are understandable given its long political history and that it was finally negotiated with a government whose commitment to the legislation may not have been as strong as that of the government which initiated the negotiations. It may be, therefore, that the arbitration procedure was incurred as a price to be paid for substantive land rights. If this was the case, it is also understandable that the Aborigines concerned would have insisted that the person to arbitrate their decisions be a judge apparently impartial, used to weighing conflicting factors in decision making and less likely to produce a short-term political decision than a government of the day. Nevertheless, the shortcomings of the Act remain.

In other respects, however, the Act does not exclude the operation of State laws of general application so that, for example, land use planning and environmental statutes might have application to Pitjantjatjara lands.[181]

In respect of all Aboriginal land whether vested in the Anangu Pitjantjatjaraku or the Land Trust, resource use which interferes with protected sites and relics may indirectly be controlled under the *Aboriginal and Historic Relics Preservation Act 1965*.[182] Various offences are created by the Act: to trespass on a "prohibited area",[183] to interfere with a relic in an historic reserve.[184] The Act does not appear to make it an offence to interfere with a relic wherever it may be situate, only if it is on an historic reserve. Historic reserves are created by proclamation by the Governor.[185] Accordingly, protection of places of value to Aborigines is dependent on executive action. Although a board advises the Minister of Education in the administration of the Act,[186] it is comprised of persons other than Aborigines.[187] In an appropriate case,[188] it may be possible for an Aborigine to institute an action for an injunction to prevent breach of the Act. But given the administrative powers of the Minister under the Act to proclaim and revoke the status of protected areas, the Act is potentially as valueless to Aborigines as its Western Australian counterpart.[189]

181 Id at s 22(1)

182. Id. at s.23 A "relic" is defined in s.3(1); see also s.28(1).

183. Id. at s.17 (but only over Crown land. Private land may be protected if the owner consents).

184. Id at ss 5, 6(1)

185 Id at s 6(2)

186 See n 119 supra and accompanying text When approving mining under this section the government may also require a financial agreement between an applicant and the Lands Trust.

187. See n.40 supra and accompanying text.

188. Felton, 'Victoria — lands formerly reserved' in Peterson (ed), *Aboriginal Land Rights*, supra n.31, at 168-220, provides an interesting analysis of this history.

189 Act No. 8044, s.9. The Background to the 1970 settlement is explained in Moore, 'Victoria — the present' in Peterson (ed) supra n.66,, at 148-155.

Aborigines under South Australian law clearly have more autonomy over resource use issues than Aborigines in Queensland, Tasmania and Western Australia. By reference to the three control models, Pitjantjatjara Aborigines have a large measure of autonomy over land and resource use, although the exceptions to that autonomy are extremely significant.

Aborigines living on Land Trust land, however, do not enjoy the same resource control although the existing control, that mining operations must have Parliamentary approval, is significantly more protective of Aboriginal values than any control observable under the laws of the Queensland, Tasmania and Western Australia.

The relics preservation law in South Australia, however, is similar to the laws in those three States although it may be less protective of Aboriginal relics by not making interference with a relic a general offence. In terms of the second control model, this law is weak.

Victoria

Victoria provides an interesting study of the legislative land rights movement. Aborigines were rapidly displaced after the first European settlement in the Port Phillip District (then part of New South Wales) in 1835. By 1970 only two areas of land traditionally reserved for Aborigines remained so protected. As occurred elsewhere in Australia, Aborigines were first expelled from their land by the European settlers, then successively placed under the protection of the Aboriginal Protectorate, the Board for Protection of Aborigines and the Aborigines Welfare Board. In 1968, a Ministry of Aboriginal Affairs was created.[190] In 1970, an attempt was made to meet Aboriginal land claims in Victoria with the passing of the *Aboriginal Lands Act 1970*. In 1983 a further significant legislative step has been taken in Victoria with the laying before the Parliament of the *Aboriginal Land Claims Bill 1983*.

In the absence of the new measures, the *Aboriginal Land Act 1970* has the limited effect of vesting land traditionally reserved for Aborigines at Lake Tyer in the South East of the State, and at Framlington in the South West, in specially created Lands Trusts.[191] Each Lands Trust is comprised of Aborigines who resided on the former reserves.[192] But unlike the lands trust model developed in other States, a novel arrangement was struck under this legislation to benefit individual Aboriginal lands trust members. Each adult member was entitled to 1000 shares in the Trust and each infant member to 500 shares. Each member has full ownership

190. Id at s 3.
191 Id at s 12
192 Id. at s.11(1)

of the shares but may only transfer them to the Trust, another member, the Crown or a relative.[193] By structuring the lands trust in a way similar to the well known private company, the Act recognises community ownership of land as well as the personal interest of each member of the Trust in its operation and in the management of its land.

Furthermore, the trust was empowered to manage and develop its land[194] and to sell its land, although a unanimous resolution of the Trust membership is required to effect a sale.[195] And, as any private person might, a trust may control entry to its land. Apart from this freedom, all Victorian laws of general application apply to Trust lands making them subject to planning, environmental, mining and petroleum laws.

In short, the Victorian lands trust model acknowledges the land rights aspirations of a few Aborigines in Victoria who live on land with which they have had long association, rather like the Pitjantjatjara settlement in South Australia. Unlike the Pitjantjatjara settlement, however, the Victorian lands trust legislation does not provide an effective control over resource use. By contrast, the *Aboriginal Land Claims Bill 1983* proposes a dramatic reversal of this approach to the land rights issue. It explicitly acknowledges that Victoria was traditionally owned and occupied by Aborigines; that the land is of spiritual, social, cultural and economic importance to Aborigines; and that it is "fitting to acknowledge the importance which land has for Aboriginals and the need of Aboriginals for that land."[196]

The Bill proposes that any "claimant group"[197] of "Aboriginals"[198] may claim any area of public land for any of the following reasons:

(a) to satisfy its needs;
(b) to continue an association it has had with the land;
(c) to give effect to the traditional rights it has had to the land; and
(d) to compensate it for the loss of traditional rights to the land.[199]

Unlike the approach taken in N.S.W., the Bill proposes a broad definition of "public land" which is available for claim, including State forests, parks and land vested in Ministers and public authorities.[200] Thus, as in other States and under the Commonwealth legislation, the proposed

193 Id at s.11(3)
194. See the preamble to the Bill
195. Cl.2(1) defines a "Claimant group" as a group of seven or more Aboriginals
196 Cl.2(1) defines an "Aboriginal" as a person who is descended from an Aboriginal or Torres Strait Islander and who identifies as an Aboriginal or Torres Strait Islander.
197. Cl 7(1), (2)
198 Cl 2(1)
199. Cl.11.8 – 11.12
200. Cl 13(1)

legislation does not facilitate claims over land in which the fee simple is held by private as against governmental persons.

The Bill contemplates a judicial-styled "inquiry" before an Aboriginal Land Claims Tribunal leading to a recommendation by the Tribunal that a land grant should be made.[201] The Governor in Council may act on the recommendation and grant land to a claimant group,[202] subject to the claimant group having become incorporated.[203]

If a claim is successful, the Bill proposes that the land of the new incorporated claimant group should remain subject to relevant Victorian law of general application except in two important respects: first, where it is proposed that mining, petroleum and extractive operations be carried out on the land; secondly, in respect of forestry, flora and fauna resources.

Although it is proposed that exploration licences and permits may be issued under the *Mines Act 1958* and the *Petroleum Act 1958*, a person would not be entitled to enter Aboriginal land without first obtaining the consent of the claimant body, which consent may be granted on such terms and conditions and subject to the payment of such fees as the claimant body thinks fit to impose.[204]

As a general rule, however, an absolute restriction is proposed on the issue of any authority in respect of Aboriginal land under the *Mines Act*, the *Petroleum Act* and the *Extractive Industries Act 1958*: only if the claimant body consents, which it may again do subject to such terms and conditions and the payment of such fees as it thinks fit to impose, may such authorities be issued.[205]

The autonomy of the claimant body over such resource use would be subject only to a resolution of both Houses of Parliament permitting exploration or granting an authority for the conduct of mining, petroleum or extractive industries.[206]

This exception to Aboriginal resource control may usefully be compared with the South Australian exception in s.20(15) of the *Pitjantjatjara Land Rights Act 1981*. Unlike the latter, it avoids the establishment of a review procedure which may be invoked by an aggrieved developer as of right; instead, the government must be requested to override an Aboriginal decision, and where another political party controls the upper House of Parliament, it too must support the decision to override

201. Cl.13(2)
202 Cl.14(2)
203. Cl.14(1)
204. Cll 14(3),(4)
205. Cl.14(5)
206 See Marsh v. Shire of Serpentine-Jarrahdale (1966) 40 A.L.J.R. 317

Aboriginal autonomy on the matter. But by contrast with the South Australian exception, the Victorian exception does not seek to limit in any way the circumstances in which an Aboriginal decision may be overridden: simple political expediency may prevail. On the other hand, the criteria underlying exercise of the South Australian exception may be considered so broad as to support reversal of an Aboriginal resource decision on very many grounds. Ultimately, the choice of the one exception procedure rather than the other will involve a value judgment and an instinctive assessment of which in practical terms is most likely to secure maximum Aboriginal control over resource use.

Royalties paid in respect of such resource activities would be shared between the Victorian Aboriginal Authority and the claimant body, except in relation to coal.[207] This suggests that a grant of land does not include the minerals so that they would remain largely in Crown ownership.

The extent of financial compensation which Aborigines may claim when granting consent to these resource activities is unclear. On the one hand, the power to impose such terms and conditions as it thinks fit may support a monetary agreement. On the other hand, if this power is referable only to the power to require payment of fees, then the ability to exact a financial agreement in return for resource use approval may be questionable.[208] Usually, courts are reluctant to admit the power to attach a monetary condition to a licence unless the power is clearly spelt out in legislation.[209] However, in town planning law courts have often approached the issue by inquiring whether a monetary condition can be directly related to a land use consent.[210] On this view, the general consent power in cl14 would support a broad monetary condition on consent. Such a result would appear consistent with the purpose of the Bill in granting to a claimant body broad control over such resource use.[211]

Aside from these resource issues, a claimant body would also be charged with the care and control of all flora and fauna on the land granted to it,[212] including the forestry resource.[213]

The resource control envisaged by the Bill is great. Given that mining, petroleum, extractive, forestry and hunting laws are effectively excluded from operation on Aboriginal land, a claimant body, in the absence of other relevant laws of general application — such as land use plann-

207 See Commonwealth v. Colonial Combining Spinning and Weaving Co Ltd (1922) 31 C.L R. 421, Attorney-General v. Wilts United Dairies Ltd (1922) 91 L J.K.B. 897
208 See, e.g , Greek Australian Finance Corp. v Sydney C.C. (1974) 29 L.G.R A. 130 (per Holland J.)
209. See supra n.202, at 319 per Barwick C J.
210. Cl.15(1) (but note exceptions in case of protected flora and fauna)
211 Cl.15(3) (but note continued operation of fire suppression regulations).
212 Act No. 8279 as amended
213 Supra n 59
214. S.21

ing and environmental laws — has extensive authority to determine resource uses on its land. That this is the intention of the Bill is confirmed by clause 15(6) which provides that the zoning of any land which is the subject of a grant may be set aside by the Minister for Planning and the land may be re-zoned in accordance with the recommendations of the Aboriginal Land Claims Tribunal.

The enactment of a Bill with such resource controls, together with the potential operation of the *Archaeological and Aboriginal Relics Preservation Act 1972*[214] would provide Aborigines in Victoria with resource control probably as strong as any presently existing in Australia. In relation to the latter Act, its potential resource control mechanism has been emphasized by the High Court decision in *Onus* v. *Alcoa of Australia Ltd*, which has already been mentioned in the context of similar Queensland legislation.[215]

Under this Act it is an offence to interfere with a relic.[216] It is also an offence to enter an "archaeological area" without consent.[217] While the second offence may depend upon the Governor in Council exercising its power to establish an archaeological area,[218] the first does not. A "relic" has a defined meaning[219] which is not dependent on executive discretion and includes relics found on Crown and private land. Accordingly, if any person threatens to interfere wilfully with a relic, it may be possible to institute an action for an injunction to prevent the commission of a public wrong. In the *Onus* case the legitimacy of such an action was confirmed and the standing of Aboriginal plaintiffs to maintain the action was upheld.

Although a person may be licensed to excavate a relic,[220] a licence would not provide immunity from prosecution for wilful interference with the relic. A later Act of Parliament specifically or impliedly authorizing wilful interference with a relic may, however, override the protective provision of the Act.[221]

The recent Bill would go a long way towards adoption of the third control model. Aborigines may, in community groups, hold the fee simple in land and exercise substantive resource controls over it, including the ability to gain monetary compensation for any approved resource use. Unlike the South Australian *Pitjantjatjara Land Rights Act 1981*, the Bill

215 Ss.17, 28
216 S.15 Protection only applied to Crown land unless private landowner consents
217. S 2
218 S.22(4)
219 See n 63 supra and accompanying text.
220 April 1983, awaiting assent
221 See the preamble to the Act.

does not propose a questionable arbitration procedure in case of resource use disputes. Instead, the Parliament retains the power to override Aboriginal autonomy. A value judgment must be made as to which of the South Australian and the Victorian control exceptions compromises Aboriginal control of resource use the least. One senses, however, that the Victorian exception may provide fewer instances of reversal of an Aboriginal decision than the South Australian. Finally, therefore, the Aboriginal resource use control proposed for Victoria largely adopts the characteristics of the three control models.

New South Wales

New South Wales has become the first State in Australia to enact comprehensive land rights legislation. By the *Aboriginal Land Rights Act 1983*,[222] the legislature of the State has acknowledged that land in the State was traditionally owned and occupied by Aborigines, is of spiritual, social, cultural and economic importance to Aborigines and that Aborigines have a need for land.[223]

In consequence of this acknowledgment the Act proposes, firstly, to vest in Local Aboriginal Land Councils constituted under the Act,[224] all lands vested in the Aboriginal Lands Trust constituted under the former *Aborigines Act 1969*,[225] and, secondly, to transfer to a Local Aboriginal Land Council those lands, usually falling within the geographical area of the land council, which are "claimable Crown lands".[226] A Local Aboriginal Land Council may also acquire land by private treaty.[227] It is also possible for land to be vested in, transfered to or acquired by the New South Wales Aboriginal Land Council.[228] Additionally, and importantly, the Act provides that a sum equivalent to 7.5% of annual New South Wales land taxes will be paid to the State Land Council annually for a period of fifteen years, to be applied largely towards land acquisition.[229]

The vesting in or transfer of land to a land Council includes the vesting or transfer of "mineral resources or other natural resources" in the land.[230] When a Council purchases land it also acquires the title to all mineral and other natural resources in the land which were at the time

222 S 6
223. S 35
224 S 36. Basically such lands are vacant Crown lands not required for essential public purposes.
225. S.38
226 S 26(g)
227 S 28
228 S 41(2)(a), (b)
229 S 45(2)(c)(i)
230 S 45(2)(c)(ii)

of the purchase vested in the Crown.[231] Any other land acquired by the Minister of Aboriginal Affairs and vested in a Land Council also includes a vesting of such resources.[232]

There are, however, two broad exceptions to this grant of natural resource ownership: first in respect of gold, silver, coal and petroleum; and secondly, in respect of any mineral the subject of mining operations approval under the *Mining Act 1973*, or other law, at the time lands are "vested" in the local Council (or a renewal or extension thereof).[233] It would appear that the second exception only affects land "vested" and not "transferred" or "purchased" by a land Council.

The Act takes the further following broad approach to Aboriginal resource use control. First, a land council has full common law rights to use its land as it thinks fit subject to common law rules and statutory laws of general application. This follows from the command in s.41 that a land council may do all things with its property "that it could lawfully do or suffer if it were a natural person having, in the case of land, the same estate or interest in the property." As a result, Aboriginal land use may be subject to generally applicable State land use planning and environmental legislation.

In relation to minerals and natural resource use, however, the Act not only grants substantial resource ownership to land councils but also excludes from operation on Aboriginal land any legislation which "provides for a person to explore for or exploit mineral resources, or other natural resources, vested in another person." Accordingly, except in relation to gold, silver, coal and petroleum and in respect of existing mining authorities over "vested" land, the New South Wales *Mining Act 1973* has no application to mining operations conducted on Aboriginal land. The question arises, however, as to what other resources are included in the expression "natural resources" and so what other legislation is not applicable to Aboriginal land.

The expression is not defined in the Act; nor does it appear to be used explicitly in any other New South Wales legislation. Just as "minerals" at common law comprise "every inorganic substance forming part of the crust of the earth, other than the subsoil and that layer of soil sustaining vegetable life",[234] "natural resources" might be construed to include every other organic substance, including the subsoil and soil sustaining vegetable life, and vegetable life itself. In one case at least, the expression "natural

231 S 45(12)
232 A.G. Lang and M. Crommelin, *Australian Mining and Petroleum Laws* (1979) para. 407.
233 Saskatchewan Natural Resources Reference [1931] 4 D.L.R. 712
234. S.45(4)

resources" was taken to include land.[235] It seems sensible to suggest, however, that the contextual meaning of the expression will provide the most useful definition.

In Part VII of the Act, "natural resources" are spoken of in the same context as minerals. The Act in this part is also concerned to prohibit "mining operations" on Aboriginal land unless approved by a land Council.[236] "Mining operations" is itself defined to mean "prospecting, exploring or mining for mineral resources or other natural resources".[237] Consequently, "natural resources" must be limited to those resources which are recovered from land by a mining process. Of course, what activities constitute "mining" is itself a nice question.[238] It seems that mining is primarily comprised of activities which involve the recovery of materials from underground, although as Gibb J. (as he then was) has noted "the expression is one whose ordinary and natural meaning is flexible rather than fixed".[239]

As noted, the Act specifically prohibits mining operations on Aboriginal land.[240] However, a land Council may consent to mining operations on its land,[241] and may give its consent subject to such terms and conditions, including terms or conditions with respect to fees and royalties, as it thinks fit to impose.[242]

Importantly, and unlike other similar Australian Legislation, the Act provides no exception to the power of a land Council to refuse mining approval. In this regard, the Act accords completely with the third control model.

Where a Local Aboriginal Land Council proposes to consent to mining, on the other hand, its approval and any conditions thereto, must be approved by the New South Wales Land Council or the Land and Environment Court.[243] The court may only exercise its approval power on a reference from a Local or the New South Wales Land Council.[244]

235 S 45(1)(a)

236 Lang and Crommelin, supra n.232, paras 402-404

237 Imperial Chemical Industries of Australia and New Zealand Ltd v Commissioner of Taxation (1971) 46 A L.J R 35 and 679.

238. S.45(4)

239. Id The Act does not specifically address the issue of mining approval for mixed ore deposits where the Crown may be owner of one ore, e.g. gold, and the land council the owner of another, e.g. copper Either approval to mine a Crown owned mineral includes the right to incidently mine other minerals or separate approvals will be required The common law approach to this issue appears to support the former approach, although clearly a land council would retain ownership of its minerals if incidently mined see, e g Attorney-General v. Great Cobar Copper Co. 21 N S W.L R. 351.

240. S.45(5)

241 S 45(6)

242 S 45(7)

243. S.45(9)

244. See Associated Consolidated Minerals Ltd v. Wyong Shire Council (1974) 48 A.L J.R. 464 where the Privy Council drew a similar distinction

The consent or conditions of a local Council may only be refused or altered if they are "inequitable to the Local Aboriginal Land Council concerned or would be detrimental to the interests of members of other Local Aboriginal Land Councils".[245]

On the face of it, the autonomy of a local Council (or the New South Wales Council) to refuse or approve mining on its land is nearly absolute. Indeed, the autonomy appears to exceed that proposed in the third control model by failing to acknowledge the continuing legal sovereignty of the wider society particularly in respect of resource use having significant social and environmental consequences.

A close examination of the Act reveals, however, that autonomy is only absolute in respect of a refusal to consent to mining. Relevant State land use planning and environmental laws continue to have application to Aboriginal land as they relate to land use, not the provision of authority to a person to explore or exploit another's resources.[246]

The conditional consent power would appear to support a financial agreement between a land Council and a person proposing to conduct mining operations. Whereas it was suggested above[247] that the general power to impose terms and conditions and fees may not extend to the imposition of a financial condition on consent, the additional power to impose a condition relative to "royalties"[248] largely puts the issue beyond doubt.

The continuing legal sovereignty of the wider society is, significantly, retained through the provisions excluding gold, silver, coal and petroleum from Aboriginal ownership and control. Mining in respect of these resources remains subject to the *Mining Act 1973*, the *Coal Mining Act 1973* and the *Petroleum Act 1955*. Land Councils have, therefore, only those rights available under the general law to control such activities.

Given the obvious economic importance of these particular resources, it may fairly be asked how deep has been the commitment of the New South Wales legislature to the principles or purposes of the Act set forth in its Preamble. Certainly, in this important regard, the Act fails to embrace totally the third control model.

In cases of exploitation of these exceptional resources, therefore, the provisions of the *National Parks and Wildlife Act 1974*[249] may provide a further measure of resource control. As it is an offence to damage an Aboriginal relic or an Aboriginal place,[250] Aborigines may, in a suitable

245 See nn 202-205 supra and accompanying text
246 S 45(5)
247. No 80 of 1974 as amended.
248. Id. s.90(1)
249. See n.59 supra and accompanying text.
250. See n.242 supra at s.84

case, bring an action for an injunction to prevent violation of the Act.[251] Although there is executive control over the creation of an "Aboriginal place",[252] a "relic" has a fixed meaning under the Act[253] which may only be altered by legislation. Consequently, sacred sites on Aboriginal land (or elsewhere) may potentially be immunised from resource use.

In terms of the three control models, the existing law of New South Wales allows considerable Aboriginal resource control. Freehold land has been or will be vested or transferred to land Councils; substantial mineral and natural resource ownership also resides or will reside in land Councils; and broad control over mining operations on its land may be exercised by land Councils. Additionally, under the relics preservation legislation, certain Aboriginal lands may be immunised against all resource use. But any positive evaluation of the new land rights legislation must be subject to the qualification that four important natural resources are not within the control of Aboriginal landowners. In terms of the third control model, there is little justification for this derogation of Aboriginal autonomy over resource use.

Northern Territory

The Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976* provided the first substantial land rights settlement in Australia by both attempting to recognise the prior ownership and occupation of Australia by Aborigines and granting traditional Aboriginal landowners significant control over natural resource use.

Under the Act "traditional Aboriginal owners"[254] are entitled to claim "unalienated Crown lands". A land claim is heard by an Aboriginal Land Commissioner[255] who must ascertain whether there are traditional Aboriginal owners of the land claimed, report his findings to the Commonwealth Minister for Aboriginal Affairs and the responsible Minister in the Northern Territory and, where he finds there are traditional Aboriginal owners, make "recommendations" to the Commonwealth Minister as to whether a grant of land should be made to benefit the traditional owners.[256]

The functions of the Aboriginal Land Commissioner have come under

251 Id. s.5(1)

252. S 3(1) defines this expression primarily in terms of the spiritual relationship a local descent group of Aborigines has with land, that is, the Clan relationship The operation of the Act is discussed by D. Barnett (1978) 1 *A M.P L J* , also V. Rogers (1979) 2 *A M P L J*. 92.

253 S.49.

254. S.50.

255. See, In Re Toohey, Ex p Meneling Station Pty Ltd (1983) 57 A L.J R. 59

256. Id., esp. Wilson J at 66-67

considerable judicial scrutiny in recent times,[257] the upshot being that the Commissioner's function has been seen largely as fact finding and recommendatory with the policy decision to grant land to Aborigines being the responsibility of the Minister.[258] It is apparent that the proposed Victorian law has adopted this approach to determining land claims.[259]

If the Minister decides to act on the Commissioner's report, he must recommend to the Governor General that a grant of an estate in fee simple be made to a Land Trust to be held for the benefit of the traditional owners of the land.[260] Mineral ownership, however, remains with the Crown.[261]

Although traditional owners have provided the pivot to the effective operation of the legislation to this point, it soon becomes clear that, in fact, Land Councils established by the Act[262] wield significant powers once a land grant has been made. The powers and functions of a Council have provided a model for the South Australian *Pitjantjatjara Land Rights Act 1981*. First, a Land Council may assist in the preparation and advocacy of a land claim.[263]

Secondly, Land Councils are responsible for the management and use of Aboriginal land[264] subject to valid Northern Territory laws respecting the protection of sacred sites, the entry of persons on Aboriginal land, and wildlife protection.[265] Other Northern Territory law may apply to Aboriginal land to the extent that is capable of operating concurrently with the Act.[266]

Thirdly, a Land Council may control entry on Aboriginal land. Entry control powers arise both under the Act[267] and under Northern Territory law.[268] There are prescribed exceptions to the general prohibition of entry on Aboriginal land.[269]

Finally, and importantly in terms of natural resource control, a Land Council is the body which negotiates, on behalf of traditional owners, with persons desiring to use, occupy or obtain an interest in Aboriginal land.[270]

257 See n 195 supra and accompanying text
258. S 11
259 S 12(2)
260. S.21(1)
261 S 23(1)(f)
262 S.23(1)(a)
263 S.73. As to relevant Northern Territory laws see Howie, 'Northern Territory' in Peterson (ed), supra n.31, at 37-40.
264. S.74
265. S.23(1)(e); s.68
266. Supra n.258.
267. Ss.68-71
268. S.23(1)(e)
269. S 40(1)(a)
270. S 40(1)(b). Note also exceptions in case of pre-existing authorities and the Ranger Project Area: s.40(3)-(7)

No mining interest in respect of Aboriginal land may be granted unless both the Commonwealth Minister and the Land Council for the area in which land is situated have consented, in writing, to the making of the grant.[271]

To this grant of autonomy over resource use there are two broad exceptions: first, where the Governor General declares that a grant should be made in the "national interest";[272] secondly, where an applicant for mining consent is unwilling to enter into an agreement proposed by a Land Council.[273]

The first exception is not wholly a matter of executive action: either House of Parliament may disapprove the declaration.[274] It may be considered broadly to embrace the third control model. However, unlike the third model it allows the Commonwealth government to require mining in circumstances where Aborigines do not desire it. Although the government must justify its action in terms of "national interest", the actual grounds, like those specifically spelt out in the South Australian *Pitjantjatjara Land Rights Act*, may be economic and social. A case may be made for continuing legal sovereignty of the wider community where mining has an international significance, whether economic or social,[275] but the "national" criterion may allow a significant derogation of the otherwise substantial recognition of Aboriginal autonomy over Aboriginal land and resources contained in the Act. The disapproval power of the Parliament may provide some check on executive misuse of the exceptive power.

The second exception allows the Commonwealth Minister to appoint an arbitrator where a Land Council has refused or is unwilling to approve mining by reason of an applicants failure to enter into an agreement respecting mining. The arbitration procedure cannot be invoked as of right by an applicant, but it does allow the Minister to place pressure on a Land Council to agree to terms and conditions acceptable to the Minister. In practice it can serve as a severe restriction on the autonomy of a Land Council over resource use.

The autonomy principle may further be compromised by the requirement that the Commonwealth Minister approve mining.[276] This power may serve the necessary purpose of allowing government to reverse an

271 S 45
272. S 42
273. See n 172 supra and accompanying text
274 S.41(1)(a)
275 A Land Council decision to approve uranium mining, for example, might effectively be reversed by the Commonwealth Minister under this power.
276. S 41(1). Note, however, exception regarding the Ranger Project Area. See McPherson 'Aboriginal Land Rights in the Northern Territory' (1979) 2 *A M P L J.* 258 on regulation of mining in the Alligators River region.

Aboriginal approval of resource use having adverse national and international social and environmental consequences, although due to no indication in the Act of the circumstances in which the power is to be exercised it may also provide in practice a means of significantly reducing Aboriginal autonomy over resource use.[277]

Aboriginal autonomy over resource use is confirmed by the exclusion of the *Atomic Energy Act 1953* and any other Act authorising mining for minerals from operation on Aboriginal land.[278]

When approving mining a Land Council may require a financial agreement as a condition of its consent. Payment may be required from a mining applicant as the Land council thinks fit.[279]

In cases where Land Council consent to mining is not required[280] a mining interest may, nevertheless, not be granted unless the applicant therefor has entered into an agreement with a Land Council dealing, *inter alia*, with financial compensation.[281] The Commonwealth Minister may appoint an arbitrator to settle an agreement if a Land Council refuses to do so itself.[282]

A Land Council is not, however, constrained merely by the *de facto* Ministerial supervision of its functions in respect of resource control, it also placed under statutory obligations concerning the exercise of its approval powers intended to protect the interests of the actual landowners, the traditional owners. Firstly, a Land Council has the function "to ascertain and express the wishes and the opinion of Aboriginals living in the area" as to land management issues,[283] "to protect the interests of" traditional owners,[284] and "to consult with" traditional owners with respect to land use proposals.[285] While these provisions arguably do not impose obligations on a Land Council, s.48 clearly does: a Land Council cannot consent to a mining proposal unless it is satisfied that:

(a) the traditional Aboriginal owners (if any) of the land to which the proposed grant or application relates understand the nature and pur-

277 S 43(1) Barnett, 'Comment on Aboriginal Land Rights in the Northern Territory' (1979) 2 *A M P L J* 271 at 272-274 discusses the financial agreement in respect of mining in the Ranger area

278 S 40(3)-(7)

279 S 43(2) and s.44(2)

280 S.46.

281. S 23(1)(a)

282. S.23(1)(b)

283 S.23(1)

284 His Honour is reported as having concluded: "I do not consider the lands council is bound to obtain the consent of each and every traditional owner before continuing negotiations . . It seems to me that Parliament, after laying down certain guidelines, has left the responsibility for determination of these difficult and very traditional matters to the people best able to determine them, the members of the lands council": *Canberra Times* 15 March 1983.

285. Cf. the Pitjantjatjara Land Rights Act 1981 (S.A.), supra n 121 and accompanying text.

pose of the proposed grant or application, as the case may be, and, as a group, consent to it;

(b) any Aboriginal community or group that may be affected by the proposed grant or application, as the case may be, has been consulted and has had adequate opportunity to express its view to the Land Council; and

(c) in the case of a proposed grant — the terms and conditions of that grant are reasonable.

The most significant restriction on Land Council power to approve mining is the requirement that the traditional owners, "as a group" consent to mining. Whether this requires all the traditional owners to consent, so that nine consents out of ten fails to meet the requirement, is an issue not without difficulty. In a recent unreported decision Muirhead J. in the Supreme Court of the Northern Territory held that not all traditional owners must consent.[286] This holding is sensible given the extensive role played by the Land Council under the Act. If the consent of all traditional owners was intended it would have been a relatively simple task for the legislative draftsman to indicate such an intention.[287]

Apart from these restrictions, the mining approval power is not structured in any way. Only the functions clause generally circumscribes the discretion, but it also indicates that whatever factors are considered relevant by Aborigines living on the land or traditional owners are, *per se*, valid — their "wishes" and "opinions".

The Northern Territory legislature has enacted legislation complementary to the Act.[288] For present purposes, the *Aboriginal Sacred Sites Act 1978* is the most important. As with similar sites preservation laws in the States, it may support an action for an injunction to prevent interference with a sacred Aboriginal site.[289] It is an offence to enter or interfere with a sacred site.[290] Executive action is required under the Act to create a sacred site.[291] It would appear that sacred sites, under the Act, may be declared on any land.[292] Presumably a site can similarly cease to have a protected status under the Act. Unlike similar legislation in the States, Aboriginal relics do not have a fixed meaning and are protected whether they may be on Crown or private land.

286 See n 258 supra
287 See n 134 supra and accompanying text.
288 S.31
289 S 27
290 S 28

The Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976*, in terms of the three control models, has achieved significant resource use control for Aborigines in the Northern Territory. Freehold title to land may be granted to Aborigines; and resource use may be controlled by Aborigines. However the exceptions to this control are uncertain and may allow significant derogation of the autonomy of Aborigines in respect of resource use determination.

Conclusion

The introduced English common law which forms the basis of Australian law today failed to accept or adapt to the sovereignty over and occupation of the Australian continent enjoyed by Aborigines prior to European colonization of the continent. By reason of this, in 1983 a legal solution to the demands of the indigenous people of Australia for land rights can only be met by legislative reform.

Any legislative reform granting land rights to Aborigines must be in acknowledgment of the prior sovereignty over and occupation of Australia by Aborigines. It follows that Aborigines should be entitled not only to a European fee simple interest in land granted to them, but also to full autonomy over land and resource use determination, save and except in cases where their determination of a resource use would have significant social and environmental implications for the broader, plural Australian society or significant implications for Australia's relations with other countries.

There is evident in Australian legislation today a greater willingness to be guided by these principles when enacting land rights legislation. There remains, however, considerable reticence on the part of all Australian legislatures to fully implement the sovereignty acknowledgment principle where to do so would exclude State or national government control over important natural resources, especially energy resources. Whether there can be real Aboriginal autonomy over Aboriginal lands, with the benefits for Aborigines that may flow therefrom, while governments retain control of such resources, is problematical. It has been suggested in this paper that such control is unjustifiable, at least where the cost of such government control is only measureable in domestic Australian economic terms.